Coal Law and Policy

An ebook collection
of ABlawg posts about coal policy

Volume 1: 2020-2024

January 9, 2025

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Coal Law and Policy in Alberta: A Collection of ABlawg Posts, 2020 - 2024

Introduction

In May 2020 the Government of Alberta decided to revoke a long-standing policy with respect to coal developments on the eastern slopes of the Rockies. That decision led to a public outcry as a result of which the Government back-pedalled. In a series of steps the government essentially restored the historic policy and imposed a moratorium on new coal developments - other than those that were considered to be "advanced projects". The interpretation of what qualifies as an "advanced project" is contentious and is currently (January 2025) before Alberta's Court of Appeal: *Municipal District of Ranchland No. 66 v Alberta Energy Regulator*, 2024 ABCA 274 (CanLII). And while many consider coal mining to be a sunset industry, announcements from the Government of Alberta in December 2024 (the Coal Industry Modernization Initiative) suggest that the Government is still committed to encouraging new coal projects in the province.

ABlawg has followed these developments for the last four-plus years, and given those recent announcements it seems appropriate to collects these posts together in the form of this ebook. The posts are organized chronologically. They cover many different areas of law including water law, regulation, property, royalty issues, environmental issues (of course) including species at risk issues, expropriation and compensation, federalism and access to information

Thanks to Kyrra Rauch, ABlawg student editor for production assistance including stitching the pdfs together and preparation of a table of contents.

Nigel Bankes

January 9, 2025

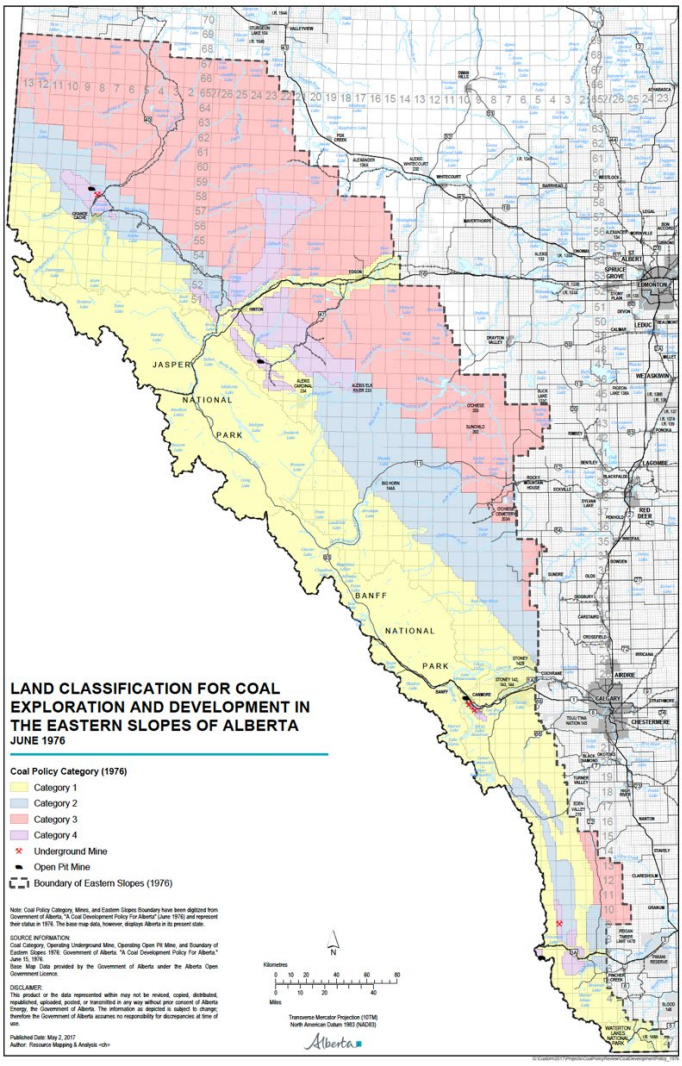
December 4, 2020

Water for Coal Developments: Where Will It Come From?

By: Nigel Bankes and Cheryl Bradley

Matters Commented On: A Coal Development Policy for Alberta (1976, rescinded June 1, 2020); Oldman River Basin Water Allocation Order, Alta Reg 319/2003

The Government of Alberta (GoA) is hell-bent on facilitating the development of new coal mines in the Province. To that end, it purported to rescind the long-standing Coal Development Policy (CDP) of 1976 effective June 1, 2020. The CDP prevented development of coal resources in Category I lands on the eastern slopes of the Rockies and only permitted the development of new underground mines (rather than open-pit mines) in Category II lands (see Figure 1, below, also available here).



Many civil society groups have objected to the rescission of the CDP on both substantive and procedural grounds: see here for the positions of the Canadian Parks and Wilderness Society (CPAWS) and here for the Alberta Wilderness Association (AWA). The Narwhal's coverage of this issue is available here: Ainslie Cruickshank, "Alberta's renewed bet on coal: what Kenney's policy shift means for mining, parks and at-risk species" (28 July 2020).

An application for judicial review of the decision to rescind the CDP is pending: *Blades et al v Alberta*.

Meanwhile, several new coal mining projects are at various stages of review. These projects include Riversdale/Benga's Grassy Mountain Project currently under review by a joint review panel of the Impact Assessment Agency of Canada and the Alberta Energy Regulator (AER), Montem's Tent Mountain Mine, Atrum's Elan and Isolation Mines, and the Cabin Ridge Coal Project Ltd. (for further details see Oldman Watershed Council, Coal Mining in the Oldman Watershed, July 30, 2020).

These mines will all require approvals under the *Coal Conservation Act*, RSA 2000, c C-17 and other regulatory statutes, but they will also require something else – water. And water in the South Saskatchewan River Basin (SSRB) – and especially within the Oldman River Basin – is in short supply. Indeed, the SSRB (with the exception of the Red Deer Basin) has long been considered to be over-allocated in terms of licensed appropriations and accordingly it (outside the Red Deer Basin) has been closed to new licence applications since 2007 (with some exceptions discussed below). In closing the basin, the GoA was giving effect to the terms of the approved Water Management Plan for the South Saskatchewan River Basin (SSRB WMP). The WMP stated the rationale for this decision as follows (at 7):

> It has been determined during preparation of this plan that the limits for water allocations have been reached or exceeded in the Bow, Oldman and South Saskatchewan River sub basins and flow regimes have been altered by water diversions. This has created risks for both water users and the aquatic environment. In drier years lower priority licences are not able to receive their total allocation. Existing diversions have also adversely affected the aquatic environment including the riparian vegetation, in the Bow, Oldman and South Saskatchewan River sub basins. Increased withdrawals of water within existing licences further degrade aquatic ecosystem health. Issuing more licences compounds these adverse aquatic effects and increases risk to existing licences.

The GoA gave effect to the closure through the adoption of the Bow, Oldman and South Saskatchewan River Basin Water Allocation Order, Alta Reg 171/2007 (BOSS Allocation Order) under the terms of section 35 of the *Water Act*, RSA 2000, c W-3. This is a ministerial order rather than a cabinet order and, as has previously been noted (Nigel Bankes, "Basin Closing Orders and Crown Reservations: Two Tools to Protect Instream Flows?" (2012), 23 J Envtl L & Prac 17), section 35 is a discretionary provision and the ministerial order is subject to amendment on equally discretionary grounds. That said, unless and until amended, the Basin is closed to new allocations except in accordance with the terms of the BOSS Allocation Order. The Department of Environment and Parks has given effect to this by rejecting new applications

that cannot bring themselves within one of the exceptions established by the Order. The Environmental Appeal Board has confirmed that practice: see Intervenor Decision: *Municipality of Crowsnest Pass v Director, Southern Region, Environmental Management, Alberta Environment* (23 September 2009), Appeal No. 08-016-ID1 (AEAB) and ABlawg post here (note that this decision predates the 2010 amendment of the Oldman Allocation Order discussed below). The GoA has recently reaffirmed this position in its Water Allocation Policy for Closed River Basins in the South Saskatchewan River Basin Directive (September 2016) which provides that "This Directive affirms the government's expectation since the approval of the Plan by Cabinet in April 2006 that applications for any new water withdrawals from the closed sub-basins will not be considered unless the applications fit within the specific exceptions in the Regulation" (at 1).

As a result, any party that cannot fit within one of the exceptions can only obtain an allocation of water by acquiring water rights from an existing licensee by way of an approved "water transfer" (essentially, a water market). This has proven to be a difficult and time-consuming process but the Review of the Implementation of the Approved Water Management Plan for the South Saskatchewan River Basin (2018) confirms (at 7) that there had been 210 approved transfers (as of 2017) in the closed part of the basin since 2007. This suggests that the water market, while time consuming, is in fact functioning as it was intended to: it permits water to be transferred to those who value it most while ensuring that transfers cause no harm to existing users and "will not cause a significant adverse effect on the aquatic environment" (*Water Act,* s 82(3)(c)).

The Exceptions

The BOSS Allocation Order establishes four exceptions to the general closing of the Basin and it *continues* one additional exception created by the terms of an earlier ministerial Order, the Oldman River Basin Water Allocation Order, Alta Reg 319/2003 (Oldman Allocation Order). The four exceptions under the BOSS Allocation Order (ss 4 – 9) are for: (1) licences for First Nation projects, (2) licences for water conservation objectives (WCOs), (3) licences for storage projects provided that the project is "for the protection of the aquatic environment and for improving the availability of water to existing licence holders and registrants", and (4) licences for any purpose, provided that the application was complete at the time the Order was filed. The priorities for licences issued under the BOSS Allocation Order are as follows: the Order filing date for First Nation licences; that date + 1 day for a WCO licence; and, in accordance with the *Act*, for storage licences or pending applications (i.e. date and time of completed application). The priority date is important insofar as Alberta operates "a first in time first in right" system in which senior rights holders can call for junior appropriators to cease diverting water in low flow years (although in practice the parties may also agree to "share the shortage").

It is clear that a licence for a coal project would *not* fit within any of these exceptions unless it was an existing application (which seems unlikely). However, section 10 of the BOSS Allocation Order also grandparents the contents of the earlier Oldman Allocation Order. This earlier Order reserves 11,000 acre-feet of water for "use within the region" for projects that divert water from the Oldman Reservoir, the Oldman River upstream of the Piikani Reserve, the Castle and Crowsnest Rivers, and their tributaries. The "region" is defined as:

> That portion of Alberta that lies within the area described by the boundaries of the Municipal District of Pincher Creek, the Municipality of Crowsnest Pass and the Municipal District of Ranchland No. 66, as those boundaries may be amended from time to time.
>
> For the purposes of clarification, the Region includes land within any municipality that is within the outside boundaries of the Municipal District of Pincher Creek, the Municipality of Crowsnest Pass or the Municipal District of Ranchland No. 66, including, for example, the Town of Pincher Creek.

All of the above-listed coal projects are within this area.

Section 3 of the Oldman Allocation Order provides that an allocation may only be made for one of seven purposes (municipal, commercial, recreation, community water supply, agriculture, irrigation and industrial purposes). Allocations for industrial purposes must not exceed 150 acre-feet, and allocations for uses other than irrigation must not exceed 1,500 acre-feet. The bulk of the 11,000 acre-feet reservation is therefore for irrigation purposes. It bears noting that the original version of this Order (in force until 2010) reserved the *entire* 11,000 acre-feet for irrigation. The priority date for any licence issued with respect to this 11,000 acre-feet is the date that the Order is filed (s 4). While that date is clearly 2003 for any irrigation licence issued under the authority of the Order, it is less clear that this should be the effective date for a licence issued for other purposes, since that only became possible when the Order was amended. It is possible therefore that an industrial licence could only obtain a 2010 priority – the date that the Order was amended to allow for licences for industrial purposes. The Department however takes the view that all licences issued under the Order should receive a 2003 priority.

The Oldman Allocation Order therefore offers mining projects collectively (and along with any other proposed industrial uses) the opportunity to acquire a share of this 150 acre-feet *notwithstanding that the Basin is generally closed*. But these volumes are clearly not sufficient for even one of these mining operations. For example, in an early Notice of Application issued by the AER for the Benga Mine in October 2017, the AER described the Benga *Water Act* applications as follows:

> Benga has filed under the provisions of the *Water Act* and of the *Oldman River Basin Water Allocation Order* (the Order) for the diversion of 185 022 cubic metres (m^3; 150 acre-feet) of water per year reserved for industrial purposes under the Order. Benga proposes to divert surface runoff and seepage, which will be collected within the mine fence line area and stored in a reservoir located in the southwest quarter of Section 24, Township 8, Range 4, West of the 5th Meridian (SW-24-008-04W5M). Surface runoff and seepage water not diverted and collected would normally flow to Blairmore Creek and Gold Creek.
>
> Benga has filed an application to permanently transfer 123 348 m^3 of water under a licence issued to divert water from the Crowsnest River in NE-02-008-05-W5M to surface runoff/seepage collection and diversion at SW-24-008-04-W5M. The allocation

> of water to be transferred was licensed to Devon Canada Corporation with priority number 1961-12-14-02. The purpose of the transferred water will remain industrial.
>
> Benga has filed an application to temporarily transfer 250 400 m^3 of water (203 acre-feet) under a licence issued to divert water from York Creek at NW-34-007-04-W5M to surface runoff/seepage collection and diversion at SW-24-008-04-W5M. The allocation of water to be transferred was licensed to the Municipality of Crowsnest Pass with priority number 1910-09-19-01 for a total allocation of 308 370 m^3 (250 ac-ft). The purpose of water use will be changed from municipal (urban water supply for Blairmore) to industrial (coal washing and mine operations). (at 2–3, emphasis added)

This is quite a list! We appreciate that it may have been amended since, but this is perhaps the proponent's "wish list" for water.

Proposed Amendment to the Oldman Allocation Order

The GoA is apparently proposing to amend the Oldman Allocation Order to make it easier for industrial users (e.g. future possible coal mines) to access more of the 11,000 acre-feet. The GoA's presentation deck for the proposal indicates that Alberta Environment and Parks proposes "updating" the Order to "[b]etter reflect current needs and improve economic opportunity in the area" and to "[r]emove artificial barriers to water sourcing options" (at 6). In addition, the Department considers that there are limited opportunities for large scale irrigation above the reservoir. The deck also acknowledges that since the Order was put in place in 1991, "[f]isheries needs and instream requirements have emerged, with two particular species of concern in the upper Oldman: Westslope cutthroat trout and bull trout, with active or pending recovery plans under *Species at Risk Act*" (at 10). In fact there are final Recovery Plans in place for both Westslope cutthroat trout (see here) and bull trout (see here) and both Plans include significant critical habitat designations within the Upper Oldman Basin, although both Plans contemplate the need for further work on the identification and designation of critical habitat, and the formal designation of critical habitat for bull trout is pending. (On the relationship between the federal *Species at Risk Act*, SC 2002, c 29 (*SARA*) and provincial water rights see: Nigel Bankes, "Protecting listed aquatic species under the federal *Species at Risk Act:* the implications for provincial water management and provincial water rights" (2012), 24 J Envtl L & Prac 19).

The proposal has two elements. First, the amendment would set aside 2,200 acre-feet for environmental needs and aquatic species (at 13). It is not clear what form this set-aside would take or what priority would be accorded to this set-aside or how it would provide for the flows required for critical habitat purposes. Second, the GoA would remove use restrictions from the remaining 8,800 acre-feet, thus allowing the Director to issue licences for any of the current listed purposes (at 13). This would allow the Director to allocate all of this amount (to the extent that it has not already been licensed or otherwise allocated) for industrial purposes, including coal purposes (subject to consideration of the matters and factors listed in table 2 of the SSRB WMP (at 15), and subject to the duty of any licensee not to destroy critical habitat under sections 58 and 61 of *SARA*).

This development raises a number of procedural and substantive concerns. First, it draws attention to the problems associated with using Crown reservations under section 35 of the *Water Act* to close water basins . This is because of the Minister's broad discretionary powers under this section:

> 35(1) The Minister may by order reserve water that is not currently allocated under a licence or registration or specified in a preliminary certificate
>
> (a) in order to determine how the water should be used, or
>
> (b) for any other purpose.
>
> (2) When making an order under subsection (1), the Minister may
>
> (a) include terms and conditions,
>
> (b) …, and
>
> (c) specify
>
> (i) the purposes for which,
>
> (ii) how,
>
> (iii) to whom, and
>
> (iv) the time period within which,
>
> an allocation of the reserved water may be made by the Director.
>
> (3) The Director may
>
> (a) retain the water reserved in the water body in accordance with the terms and conditions of an order made under subsection (1),
>
> (b) issue a licence for the temporary diversion of the reserved water, unless prohibited by an order made under subsection (1),
>
> (c) if an order under subsection (1) allows, issue a licence for the diversion of the reserved water and in accordance with an order made under subsection (1), and
>
> (d) refuse to accept an application for a licence for the reserved water unless the refusal is contrary to an order made under subsection (1).
>
> …
>
> (6) If the Minister
>
> (a) repeals an order made under subsection (1), or

(b) amends an order made under subsection (1) so that part of the reserved water is no longer reserved,

any of the reserved water that has not been allocated under a licence or does not remain reserved must be dealt with in accordance with this Act unless otherwise provided for in an order by the Minister.

Not only does the section not establish any conditions precedent for the repeal of or an amendment of an order, there is also no link between this power and the terms of an approved water management plan. Furthermore, there is no express requirement for notice and no requirement for reasons. This is extraordinary authority to confer on a Minister, especially when one considers that Crown reservations may, at least in the case of the BOSS Allocation Order if not the original Oldman Order, be used to implement the terms of a plan that has been approved at the cabinet level. Because it is such a broad discretionary power it provides an opportunity for lobbyists to secure favours and perhaps to secure an allocation of water outside the market. (For the lobbyist registration for Benga Mining referencing acquisition of water rights see here.) This not only raises questions of fairness but may also prejudice the orderly development of a market in water rights in the South Saskatchewan Basin.

As noted above, there is currently a functioning market in water rights in southern Alberta. It is not the most liquid market and it has high transaction costs but it will be unfortunate for the future development of that market if potential participants perceive that they have an alternative means of securing water rights – *i.e.* lobbying. And those who have participated in good faith in the market, including municipalities who have had to secure additional water rights at the expense of their rate payers, will have a legitimate sense of grievance if they see others acquiring water rights through the back door. New markets work best when the rules remain stable and governments avoid changes that afford a preference to particular players. This government has applied that learning to the nascent electricity market in Alberta; it should apply the same learning to the even more recent and more fragile water market in Alberta.

Markets provide an efficient way of allocating scarce resources but it is also important to pay attention to the ground rules in order to ensure that the market does not impair the maintenance of ecological values and instream flow requirements. The principal vehicle for this in Alberta is the stipulation of water conservation objectives (WCOs) for particular bodies of water (and, in a few cases, supporting that by instream flow licences issued under s 51(2) of the *Water Act*).

The existing WCOs for the Oldman River above and below the Oldman reservoir were established by an Order of the Director in 2007 pursuant to the terms of the SSRB WMP. They establish a very low minimum flow requirement (45% of natural flow) – well below the instream flows based on *A Desktop Method for Establishing Environmental Flows (Instream Flow Needs) in Alberta Rivers and Streams* published by the GoA in 2011. Rivers and streams that are critical habitat for Westslope cutthroat trout and bull trout need more comprehensive assessment to define instream flow requirements based on habitat suitability criteria.

The question for present purposes is whether the proposed amendment to the Oldman Allocation Order will serve to establish adequate environmental flows for the Oldman River and its

headwater tributaries in the region, and indeed adequate flows for bull trout and Westslope cutthroat trout recovery planning. The answer must be that we do not know, since the information available to date does not allow us to make that assessment. In order to make such an assessment, we would need an instream flow assessment for the tributaries of the Oldman River above the reservoir and some sense of how the Minister proposes to give effect to the allocation of 2,200 acre-feet for aquatic environmental needs. At a minimum, we would need to know how this allocation would be distributed between the headwater streams. We would also need to assess this against the finalized recovery plans for bull trout and Westslope cutthroat trout. It is premature to issue any new licences for industrial purposes without engaging in this analysis.

The form of the allocation for aquatic environmental needs is also important. Only the issuance of instream flow water licences offers security against further political interference that favours the government's chosen industrial sectors at the expense of other sectors and ecological values.

We noted above that the Minister has broad authority with respect to Crown reservations. But no statutory authority is unlimited and all statutory decisions for which there is no appeal may be assessed against a reasonableness standard: *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 (CanLII). Reasonableness demands not only that the decision should be internally consistent but also that it be justified in light of any relevant legal and factual considerations. In the present case these considerations must include not only the SSRB WMP but also the implications of any decision for the implementation of the recovery plans for the two threatened species of trout.

In sum, there are important questions that need to be answered *before* the Minister takes any further steps towards amending the Oldman Water Allocation Order. These questions address both economic and environmental values. On the economic side, the Minister needs to address how the proposed amendment will affect the evolution of the water market in southern Alberta as well the perceptions of unfairness associated with a two-track system for acquiring water rights. On the environmental side of things, the Minister needs to demonstrate how the proposed amendment restores and protects environmental flows in the Oldman Basin, especially flows in the mainstem and headwater tributaries above the Oldman Dam. The Minister will also owe a duty to consult First Nations (especially the Piikani) who may be affected by this decision, but we have not explored the implications of that duty in this comment (but see *Tsuu T'ina Nation v Alberta (Environment)*, 2010 ABCA 137 (CanLII) and the ABlawg comment on that decision here).

Finally, the Province needs a statutory scheme for effecting basin closing orders that establishes clear rules for how basin closing orders are to be established or amended. These rules need to provide for adequate public consultation based on appropriate scientific studies. The current approach based on Crown reservations under section 35 of the *Water Act* is much too discretionary.

Thanks to Martin Olszynski, Shaun Fluker, David Mayhood and Katie Morrison for helpful discussion and comments on an earlier draft.

This post may be cited as: Nigel Bankes and Cheryl Bradley, "Water for Coal Developments: Where Will It Come From?" (December 4, 2020), online: ABlawg, http://ablawg.ca/wp-content/uploads/2020/12/Blog_NB_CB_Coal_Water.pdf

February 8, 2021

Coal Law and Policy in Alberta, Part One: the Coal Policy and Its Legal Status

By: Nigel Bankes

Issue Commented On: Revocation of the *Coal Development Policy for Alberta* (1976); Department of Energy, Information Letter 2020-23 "Rescission of *A Coal Development Policy for Alberta* and new leasing rules for Crown coal leases" (15 May 2020)

I don't need to tell anybody living in Alberta that there has been a lot of talk recently about coal. Most of that talk has been directed at the Government of Alberta's decision, to revoke a policy adopted in 1976 known as the *Coal Development Policy for Alberta* (CDP or Policy).

Once it became widely known, the decision to revoke the policy attracted the attention of civil society and of the media. Interest in the decision is growing and many local governments including Lethbridge, High River, Nanton, Longview, Canmore, Edson, Okotoks, Airdrie and Turner Valley have weighed in on the issue. So too have the Kainai-Blood Tribe and the Siksika First Nation. A significant number of these governments have adopted resolutions either questioning the decision to revoke the coal policy or simply demanding that the Government of Alberta reinstate the policy. Much of the commentary focuses on the environmental and health costs associated with coal mining as well as the conflict between coal mining and other visions for the future of the eastern slopes of the Rockies (e.g. Sharon J Riley, "An Alberta County drafted big tourism plans. Then came the coal leases", *The Narwhal* (6 February 2021))

There are many sources of information on the revocation decision including:

- Alberta Wilderness Association (AWA), "Coal production has adverse impacts on both land and water ecosystems"
- Canadian Parks and Wilderness Association (CPAWS), Southern Alberta Chapter
- Robson Fletcher, "Answers to questions about Alberta's coal policy that, at this point, you're too afraid to ask", *CBC* (21 January 2021)
- Richard Quinlan, "The Risks of Surface Mining", Opinion, *Lethbridge Herald* (22 July 2020)
- Southern Alberta Group for the Environment (SAGE), The Rockies and Coal Mining
- And for a column strongly supporting a limited number of new coal projects see Lisa Sygutek, councillor for the Municipality of Crowsnest Pass, "Albertans need education, not rhetoric, on coal mining", Opinion, *Edmonton Journal* (26 January 2021)
- And for a site that contains useful links to comments opposing new mines see Dave Cournoyer "Who opposes Kenney's decision to allow open-pit coal mining in Alberta's Rockies? Basically everybody." (5 February 2021)

The purpose of this post, and what I hope will be a series of follow-up posts, is to clarify the legal issues involved. To this point, ABlawg has not commented significantly on the decision although we have addressed one specific issue associated with the water requirements of proposed coal projects in Alberta: see "Water for Coal Developments: Where Will It Come From?"

More generally we can say that there is very little legal literature on coal developments in Alberta beyond an excellent, but now dated, contribution from Doug Rae in the Alberta Law Review nearly forty years ago: "The Legal Framework for Coal Development in Alberta" (1982) 20 Alta L Rev 117.

This post begins the series by addressing a set of questions related to the adoption of the CDP and the legal effect of that policy.

I will refer to the 1976 CDP in the past tense while recognizing that there are ongoing judicial review proceedings aimed at overturning the revocation decision (for one such application see: *Blades et al v Alberta*).

What Did the *Coal Development Policy* of 1976 Provide For?

As the name suggests, the CDP was a policy of the then government of the day, the Lougheed government. It was not a "no-coal" policy, but neither was it an "anything-goes" policy. The Policy makes for interesting reading 45 years after its adoption. The Policy contains no reference to greenhouse gas emissions or climate change and indeed, it praises the environmental virtues of Alberta's coals on the basis of their "uniformly low sulphur content" making those coals "a clean, low-polluting source of thermal energy" (at 1).

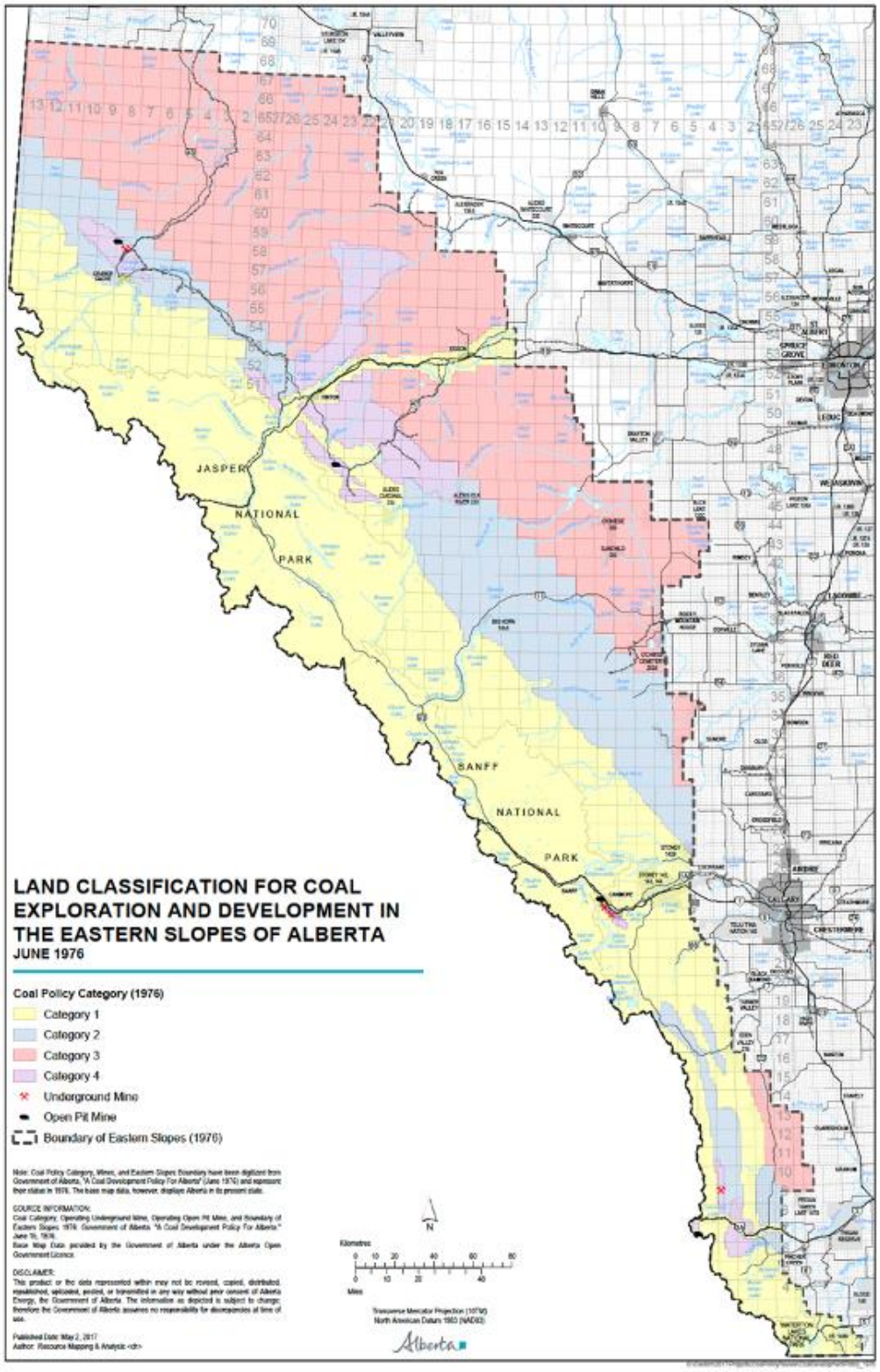
But as well as being an industrial development policy for Alberta, the Policy was also (and this remains significant for the purposes of the current policy debate) an early and relatively crude form of landscape-level planning with respect to a single resource: coal. The Policy recognized, given the value of the eastern slopes as the source of clean water and recreational values, that some activities should simply be excluded from further consideration, notwithstanding any potential economic benefits. Hence, the Policy established a four-fold classification of lands for coal exploration and development. Category 1 lands were lands in which no exploration or commercial development would be permitted. This category includes National Parks, present or proposed Provincial Parks, Wilderness Areas and some other lands of special significance (at 14). Category 2 lands were said to be lands

> in which limited exploration is desirable and may be permitted under strict control but in which *commercial development by surface mining will not normally be considered at the present time*. … Underground mining or in-situ operations may be permitted in areas within this category where the surface effects of the operation are deemed to be environmentally acceptable." (at 15, emphasis added)

Categories 3 and 4 both contemplated access exploration and potential development, not only by underground mining or in-situ operations, but also by strip mining where appropriate. But as a

matter of actual practice, the only lands for which coal leases continued to be issued in the ordinary course were for Category 4 lands.

Here is a visual representation of the four categories.



Because the government recognized that the adoption of the CDP affected existing coal lease holders, the government afforded lessees the opportunity to surrender their interests in return for compensation on the basis of exploration costs incurred. In the cases of lessees of Category 2 and 3 lands, the CDP also allowed lessees to "continue to hold them on payment of normal rentals, recognizing the restrictions on development" (at 19).

On a go-forward basis, the CDP contemplated that "new coal leases will be granted only in areas where a reasonable likelihood exists that commercial mining operations will be permitted in the foreseeable future" (at 20). This carried the implication that unless a coal prospect in Category 2 lands could be exploited by underground mining, the Department would not consider granting a lease within the Category 2 areas. The Department gave effect to this leasing policy through a series of Information Letters. For example, IL 2014-07: "Public Offering of Crown Coal Rights in Alberta" re-stated the Department's practice with respect to issuing new coal leases. It advised that: "Alberta Energy will continue to issue coal leases through the public offering process for lands classified as Category 4 in *A Coal Development Policy for Alberta* (1976). … *All applications for Crown coal rights in Category 2 and 3 will continue to be held as applications*." (at 1, emphasis added). This leasing rule remained in effect until the adoption of IL 2020-23, "Rescission of *A Coal Development Policy for Alberta* and new leasing rules for Crown coal leases" on May 15, 2020.

What Is the Legal Effect of a Policy Such as the *Coal Development Policy* of 1976?

The *Coal Development Policy* was, as its name implies, just a policy, albeit an exceptionally important policy. It was neither a statute nor a regulation. But while this means that the CDP was not itself law, it does not follow from that conclusion that the CDP had no legal or other normative effect. In particular, and as the quotation from IL 2014-07 above demonstrates, the CDP clearly had *internal* legal effect within the Department of Energy and the effect of the CDP was also clearly communicated to and understood by potential developers.

The CDP also acquired enhanced legal status in the southern part of Alberta as part of the development of the South Saskatchewan Regional Plan (SSRP), which covers that part of the province south of the Red Deer River. The SSRP (adopted in 2014) was developed as part of implementing Alberta's Land-Use Framework (2008) and the *Alberta Land Stewardship Act* SA 2009, c A-26.8 (*ALSA*). The Land-Use Framework was adopted to address concerns that "rapid growth in population and economic activity is placing unprecedented pressure on Alberta's landscapes" and that this required "developing and implementing a land-use system that will effectively balance competing economic, environmental and social demands" (at 6). A particularly important part of the Framework was its emphasis on the cumulative effects of environmental disturbance on the landscape and the limitations associated with project-based assessments. This was recognized by the adoption of a strategy on cumulative effects which proposed that: "[c]umulative effects management will be used at the regional level to manage the impacts of development on land, water and air" (at 19).

Those involved in developing the SSRP recognized that some land use plans and policies including the CDP already existed within the region. Accordingly, the SSRP contemplated that these policies and plans, including the zonal categories established by the CDP, would have to be

reviewed "to confirm whether these land classifications specific to coal exploration and development should remain in place or be adjusted" (at 61). The SSRP went on to indicate that it was the government's

> intent for the SSRP and implementation strategies of the regional plan or future associated subregional or issue-specific plans within the region to supersede the coal categories for the purposes of land use decisions about where coal exploration and development can and cannot occur in the planning region." (at 61)

It does not seem unreasonable to read this as confirmation that the CDP would remain in place unless and until more finely grained direction could be developed as part of these subsequent implementation activities. In sum, the CDP was effectively incorporated by reference into the SSRP, except to the extent that subsequent implementation activities would supersede that. This makes sense. The Framework and *ALSA* represent a "whole of government" approach to landscape level planning that was intended to replace sector-specific approaches under the control of particular line departments like the Department of Energy.

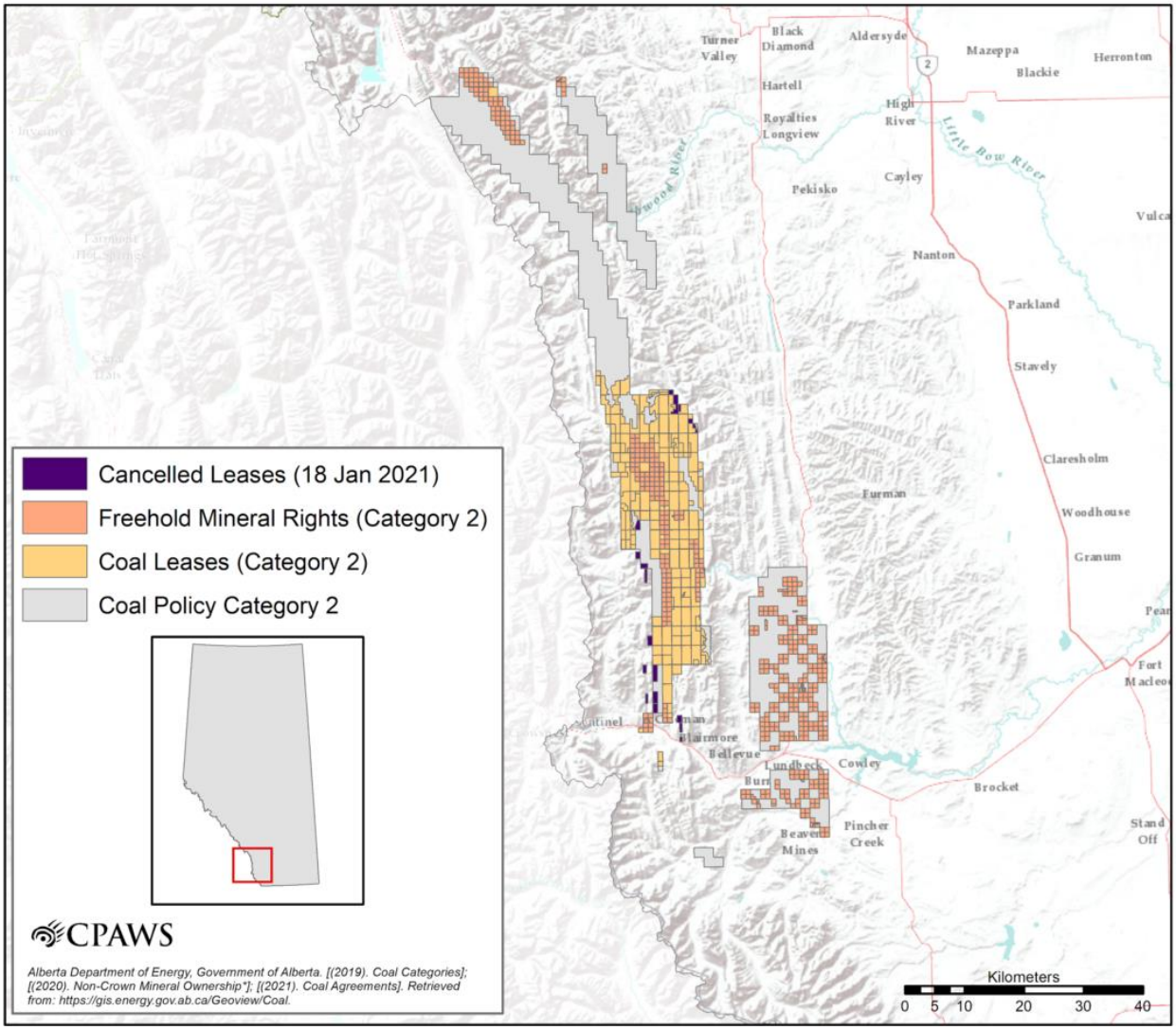
This reading is confirmed by the terms of the Livingstone-Porcupine Hills Land Footprint Management Plan (LFMP). Adopted in 2018, this is a sub-regional plan within the SSRP. The LFMP reiterates the need for updating the coal categories but emphasized that any such update should take "an integrated approach and specify where surface exploration and development can or cannot occur based upon the best and most recent biodiversity sensitivity data available" (at 23).

Revocation of the *Coal Development Policy*

On May 15, 2020 the Department of Energy issued IL 2020-23, informing those on the relevant mailing list that the CDP would be rescinded effective June 1. The letter advised that "[t]he coal categories are no longer required for Alberta to effectively manage Crown coal leases, or the location of exploration and development activities, because of decades of improved policy, planning, and regulatory processes" (at 1). The letter, and the accompanying Coal Information Bulletin 2020-02, also contained information on the resumption of leasing activities for lands within Categories 2 and 3. These two documents contemplated that any party that had applied for a coal lease for any of these lands since CDP was put in place would have a right of first refusal to acquire those lands. Following that, the Department anticipated opening all lands (except Category 1 lands) to rounds of public offering - in much the same way as the Department regularly offers oil and gas rights. IL 2020-23 continues the prohibition on coal exploration and development activities in Category 1 lands in order to "maintain watershed, biodiversity, recreation and tourism values along the Eastern Slopes."

In accordance with the decision to reinstitute public lease sales (Coal and Mineral Development Information Bulletin 2020-03 and IL 2020-43), the Department completed one sale on December 15, 2020 but subsequently (January 18, 2021) cancelled leases of Category 2 lands within that offering. It also suspended plans for additional lease sales within Category 2 lands (IL 2021-03). However, as CPAWS ("Too Little Too Late") and other organizations were quick to point out,

the cancellation decision affected only a small portion of Category 2 lands (0.2%) that had already been leased:



Map credit CPAWS/Department of Energy

It follows from this that the leases that we see now on Category 2 lands are leases that were either never surrendered following adoption of the CDP, *or they were leases that were granted post June 1, 2020 to applicants who had filed for leases prior to the announcement of the revocation of the CDP*. These applications might have been filed at any time between 1976 and May 15, 2020. The Moroskat Affidavit filed by the province in the Blades judicial review matter indicates that the province was holding "506 coal lease applications (652,000 hectares) province-wide" some months before recission was finalized.

It would be useful to have a breakdown of just when these applications were filed, especially in light of revelations (Andrew Nikiforuk, "Months Before Albertans Were Told, Australian Miners Knew Plans to Axe Coal Policy", *The Tyee* (29 January 2021)) that the Government of Alberta had discussed revocation of the CDP with the coal industry sometime before May 15, 2020 –

even though there had been no consultations with civil society or other levels of government on this decision.

This is where matters stand as of February 6, 2021. The Minister of Energy has indicated that a new coal policy may be forthcoming shortly (Janet French & Audrey Neveu, "New Alberta coal policy coming next week, energy minister says" *CBC News* (5 February 2021)).

My colleagues and I are working on further posts in which we hope to address additional legal questions such as: (1) the rules for acquiring coal rights and the royalty regime for coal, (2) the regulation of coal projects by the AER, (3) the claim that we don't need the CDP because of intervening regulatory developments, (4) the federal role in regulating coal projects, (5) the application of the *Species at Risk Act*, SC 2002, c 29 to lands covered by the CDP, (6) the status of the Grassy Mountain Coal Project (a proposed mine on Category 4 lands, with a decision pending on an environmental assessment by a joint (federal/provincial) review panel operating under the *Canadian Environmental Assessment Act, 2012*, SC 2012, c 19, s 52), and (7) the status of the Coalspur expansion projects.

This post may be cited as: Nigel Bankes, "Coal Law and Policy in Alberta, Part One: the Coal Policy and Its Legal Status" (February 8, 2021), online: ABlawg, http://ablawg.ca/wp-content/uploads/2021/02/Blog_NB_Coal_Policy_Part1.pdf

February 9, 2021

What Are the Implications of Reinstating the 1976 *Coal Development Policy*?

By: Nigel Bankes

Matters Commented On: Alberta Energy Press Release, "Alberta's 1976 Coal Policy Reinstated" (February 8, 2021); Information Letter 2021-07 "Coal Policy Reinstatement" (8 February 2021) and attached Ministerial Order 054/2021

On February 8, 2021, Minister of Energy, Sonya Savage announced via press conference that, effective immediately, the 1976 *Coal Development Policy* (CDP) would be reinstated. The formal press release noted that "[t]his includes reinstating the four coal categories, which dictated where and how coal leasing, exploration and development could occur." In addition, the release stipulated that "[a]ll future coal exploration approvals on Category 2 lands will be prohibited pending widespread consultations on a new coal policy."

But these decisions alone will not restore the status quo as it stood prior to June 1, 2020 when the UCP government revoked the CDP without consultation. This makes the claim of reinstatement hollow - for at least two reasons.

First, since revocation of the CDP the province has issued a large number of new leases on Category 2 lands to companies that applied for leases between 1976 and revocation of the Policy on June 1, 2020. I don't know in total how many such leases were granted but the government's affidavit filed in the Blades judicial review application indicated that, as of early 2020, the Department had on file "506 coal lease applications (652,000 hectares) province-wide." The province has not cancelled any of these leases. The only leases that have been cancelled were the few additional leases the Department issued as a result of a sale on December 15, 2020 (cancelled January 18, 2021).

Under section 8(1)(c) of the *Mines and Minerals Act*, RSA 2000, c M-17 (*MMA*) the Minister has the authority to cancel a lease if she

> … is of the opinion that any or any further exploration for or development of the mineral to which the agreement relates within that location or part of it is not in the public interest, subject to the payment of compensation determined in accordance with the regulations for the lessee's interest under the agreement;

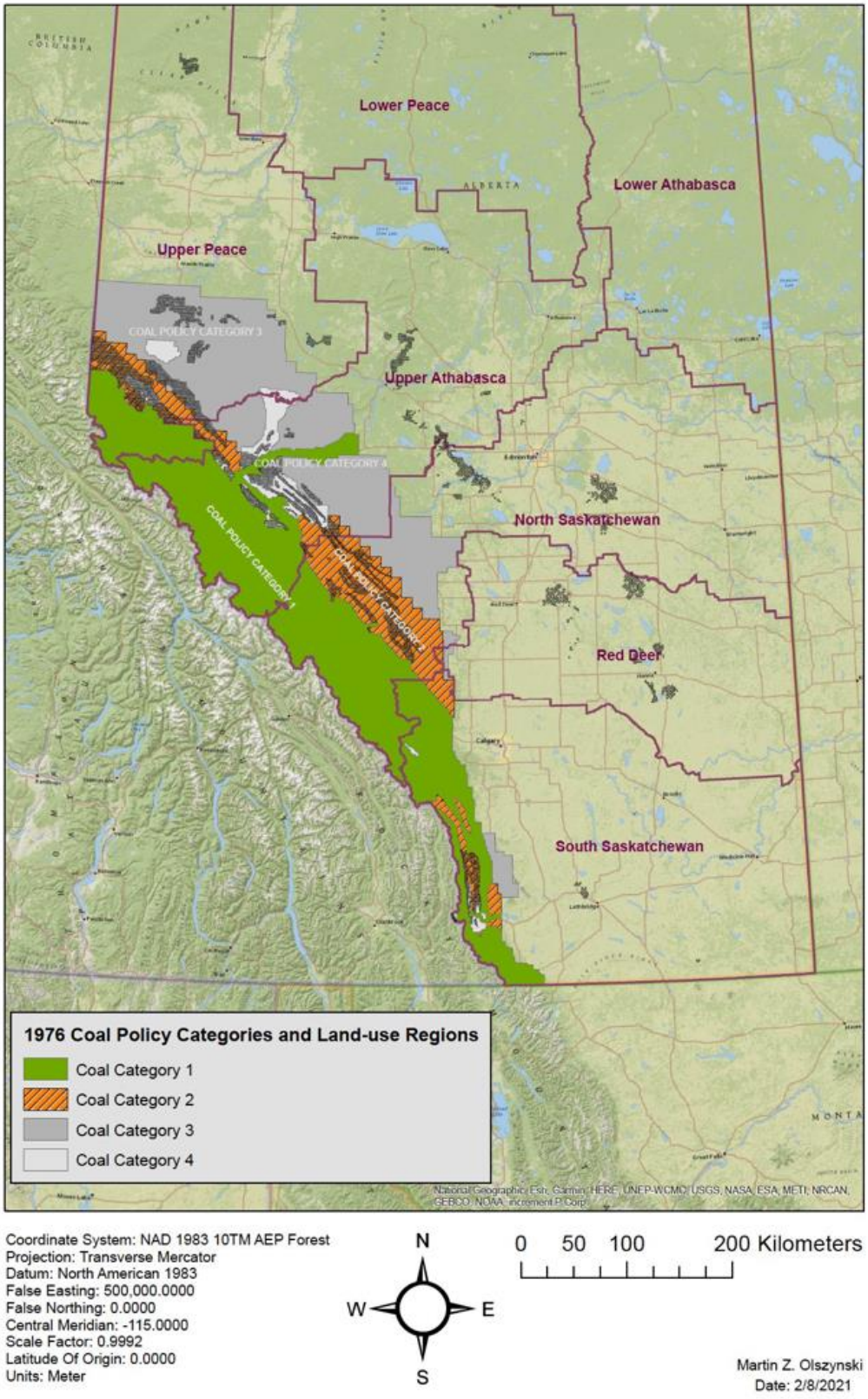
The term "agreement" under the *MMA* includes a coal lease. The regulation providing for compensation is the *Mineral Rights Compensation Regulation*, Alta Reg 317/2003.

Second, in her remarks, the Minister made it clear that while she had issued a direction to the Alberta Energy Regulator (AER) not to process new application for the approval of exploration programs, this direction did *not* apply to exploration programs that had already been approved. Exploration programs are approved by the AER under Part 8 of the *MMA* and the delegation of

authority to the AER under the terms of the *Specified Enactments (Jurisdiction) Regulation*, Alta Reg 201/2013. Readers can assess how many coal exploration programs have been approved in the intervening period by searching the AER's website on the "publication of decision" page using the term "coal exploration."

While section 108.4(1) of the *MMA* gives the Minister or the AER the authority to issue a stop work order in relation to exploration activities, it appears that this authority may only be exercised for cause (e.g. breach of a term or condition of approval). In other words, it is a narrower power than the Minister's power under section 8 of the *MMA* referenced above, which can be exercised if the Minister believes that continued exploration is not in the public interest. Exploration programs may authorize a variety of exploration activities over more than one year: see Manual 008, Oil Sands and Coal Exploration Application Guide, issued in 2014 and Manual 020 Coal Development, issued in August 2020.

Minister Savage also indicated that she would be commencing consultations with respect to the development of a new provincial coal policy. While the announcement of new consultations is hardly a surprise in response to outcry from civil society and municipal governments as to the total absence of consultation back in the spring, it is less than clear what the consultations will focus on – or the legislative framework for that consultation. In practical terms, the only part of the CDP that remained operational were the land use categories. Since the CDP of 1976, Alberta has adopted a comprehensive Land-use Framework (2008) (Framework) and the associated *Alberta Land Stewardship Act*, SA 2009, c A-26.8 (*ALSA*). In other words, we now have a vehicle for making landscape-level land use planning decisions and a legislative framework for making those decisions legally binding. The problem is that the Government of Alberta has not made effective use of this regional planning process in the context of coal mining activities. The Framework contemplated seven regional planning regions, of which no fewer than five (as the map below illustrates) engage in some way with CDP's land use categories: Upper Peace, Upper Athabasca, North Saskatchewan and South Saskatchewan.



Map credit Martin Z Olszynski

Of these five planning regions, only *one* has a finalized plan. This is the South Saskatchewan Regional Plan (SSRP). But as an earlier post noted, while the SSRP acknowledged the existence of the CDP and its land use categories, the SSRP effectively punted down the road any detailed assessment of whether lands within Category 2 or 3 should be available for strip mining or not.

At the same time, there is no doubt that the government *could* have used the SSRP to decide if and where strip mining might be a possible land use within the planning region and to prohibit it in others. There is also no doubt that it could have done so in a legally binding manner. This much is apparent from the part of the SSRP headed "Regulatory Details" (at 163). This part of the SSRP is intended to be legally binding. Of particular interest are Parts 3 and 6 of the Regulatory Details - dealing respectively with Conservation Areas and Recreation and Parks. In each case the Plan adopts highly prescriptive language along the following lines:

> … a decision-maker shall not, with respect to [prescribed lands] … grant or renew any of the following statutory consents:
> (a) an approval under the *Coal Conservation Act*;
> (b) an approval under the *Oil and Gas Conservation Act*;
> (c) an approval under the *Oil Sands Conservation Act*;
> (d) a licence under the *Pipeline Act*;
> (e) a disposition under the *Public Lands Act*. (at 169, 177)

One might also add, depending upon the circumstances, a disposition or agreement under the *Mines and Minerals Act*.

In short, we have a provincial land use planning framework, and we have the means to make legally binding decisions about land use. Furthermore, section 5 of the *ALSA requires* public consultation as part of making or amending a regional plan. It seems odd that Minister Savage made no reference to the *ALSA* and the Framework when promising consultations. Is this the framework within which the new coal policy consultations will take place? If not, why not?

It should be noted that there is also the matter of consultations with First Nations. Major land use decisions such as those embedded in the revocation of the CDP trigger a constitutional duty to consult with Indigenous communities whose rights may be affected. Minister Savage also needs to address this important and distinct element of the duty to consult as the government re-examines how and if coal mining is part of our shared future,

Finally, a brief word about the Grassy Mountain Coal Project. This is a proposed mine on Category 4 lands, with a decision pending on an environmental assessment by a joint (federal/provincial) review panel operating under the *Canadian Environmental Assessment Act, 2012*, SC 2012, c 19, s 52. As a project on Category 4 lands, revocation of the CDP will have no effect on this project. But what about Minister Savage's comments ruling out any project that involved "mountain top removal"? Do those comments apply to the Grassy Mountain Project? While some of her remarks might support the inference of a general prohibition on "mountain top removal", the Department's Information Letter (which includes the new direction to the AER) makes it clear that that is not the case. The Direction (para 1(d)) quite specifically states

that the confirmation required that a project not involve mountain top removal only applies to a project on Category 2 lands.

In sum, Minister Savage claims that the 1976 Policy has been reinstated, but a lot of activity has occurred between June 1, 2020 and February 8, 2021, and none of that has been rolled back. This is not reinstatement; it is *reinstatement-minus what has happened since June 1*.

This post may be cited as: Nigel Bankes, "What Are the Implications of Reinstating the 1976 *Coal Development Policy*?" (February 9, 2021), online: ABlawg, http://ablawg.ca/wp-content/uploads/2021/02/Blog_NB_Implications_Reinstating_CDP.pdf

February 11, 2021

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.

This post may be cited as: Nigel Bankes, "Coal Law and Policy in Alberta, Part Two: The Rules for Acquiring Coal Rights and the Royalty Regime" (February 11, 2021), online: ABlawg, http://ablawg.ca/wp-content/uploads/2021/02/Blog_NB_Coal_Policy_Part2.pdf

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February 15, 2021

Coal Law and Policy in Alberta, Part Three: Was the Public Rationale for Rescinding the Coal Policy Ever Convincing?

By: Nigel Bankes

Matter Commented On: Information Letter 2020-23, "Rescission of *A Coal Development Policy for Alberta* and new leasing rules for Crown coal leases" (15 May 2020)

While Minister Savage announced the temporary reinstatement of the 1976 Coal Development Policy (CDP) on February 8, 2021, it still seems worth examining the public justification offered by the Government of Alberta for rescinding the CDP. The principal justification advanced was that the CDP was obsolete in light of developments in law and regulation. One version of this justification was posted on the coal policy guidelines page of the Department of Energy's web page. The text is no longer available online, but it read as follows:

> The Coal Policy was originally published in 1976, before modern regulatory processes existed. The scope of the policy was wide-ranging and included, among other items, a land use classification system…. When these categories were created, land use planning hadn't yet been completed, supporting infrastructure was lacking and there were environmental concerns that the existing regulatory processes weren't equipped to address.
>
> With the various regulatory, policy and planning advancements over the past 45 years, the Coal Policy became obsolete.
>
> …
>
> All coal development projects will continue to be considered through the existing rigorous Alberta Energy Regulator review process. This review is based on each project's merits, including its economic, social and environmental impacts.
>
> The original intention of the Coal Policy was to ensure that there were appropriate regulatory and environmental protection measures in place before new coal projects were authorized—this objective is being met by today's modern regulatory, land use planning and leasing systems.

The introductory paragraphs of the information letter revoking the CDP convey a similar message (Information Letter 2020-23, "Rescission of *A Coal Development Policy for Alberta* and new leasing rules for Crown coal leases" (15 May 2020)).

It is undoubtedly the case that there have been some significant changes in the legislative landscape in the province since 1976. The CDP usefully listed (at i) the key statutory tools for regulating coal development that were in force back in 1976 in Alberta:

> The Clean Air Act, The Clean Water Act, The Coal Conservation Act, The Coal Mines Safety Act, The Forests Act, 1971, The Forest and Prairie Protection Act, The Freehold Mineral Taxation Act, The Land Surface Conservation and Reclamation Act, The Mines and Minerals Act, The Public Highways Act, The Public Lands Act, The Surface Rights Act, and The Water Resources Act.

The most significant changes in the legislative landscape since 1976 are probably threefold. *First*, Alberta's keystone environmental statute is now the *Environmental Protection and Enhancement Act*, RSA 2000, c E-12 (*EPEA*). This statute occupies the field that used to be occupied by the *Clean Air Act, The Clean Water Act*, and the *Land Surface Conservation and Reclamation Act*. It also provides for project-based environmental assessments. A *second* key development was the adoption of a Land-use Framework (2008) and the associated *Alberta Land Stewardship Act*, SA 2009, c A-26.8 (*ALSA*). The Land-use Framework was adopted to address concerns that "rapid growth in population and economic activity is placing unprecedented pressure on Alberta's landscape" (at 6). The Framework recognized that this required "developing and implementing a land-use system that will effectively balance competing economic, environmental and social demands" (*ibid*). The *ALSA* paved the way for the adoption of landscape level land use planning and as such, it does have the *potential* to make obsolete the land use categories of the CDP. A particularly important part of the Framework was its emphasis on the cumulative effects of environmental disturbance on the landscape and the limitations associated with project-based assessments. This was recognized by the adoption of a strategy on cumulative effects which proposed that: "[c]umulative effects management will be used at the regional level to manage the impacts of development on land, water and air" (at 19; see also *ALSA* s 1(2)(d)). But much depends upon the speed with which the plans are developed, the details of those plans, and the legal status of the resulting plans. I will explore each of those issues below.

The *third* important regulatory development has been the emergence of the Alberta Energy Regulator (AER) (as the successor to the Energy Resources Conservation Board (ERCB) and the Energy and Utilities Board (EUB)) as a single-window regulator of the energy sector.

Another significant change, not directly incorporated in legislation but developed through numerous court decisions, has been the identification and elaboration of the Crown's constitutional duty to consult and accommodate Indigenous communities whose rights (or asserted rights) may be affected by government decisions.

It is difficult to establish an appropriate metric for comparing all of these different legislative regimes and their effective implementation over time. Confidence in the AER as the province's key energy regulator is perhaps at an all-time low. Critics point not only to the well documented ethical lapses at the highest levels of governance within the organization (see here), but also to the failure of the AER and its predecessors to develop a robust mechanism to ensure timely

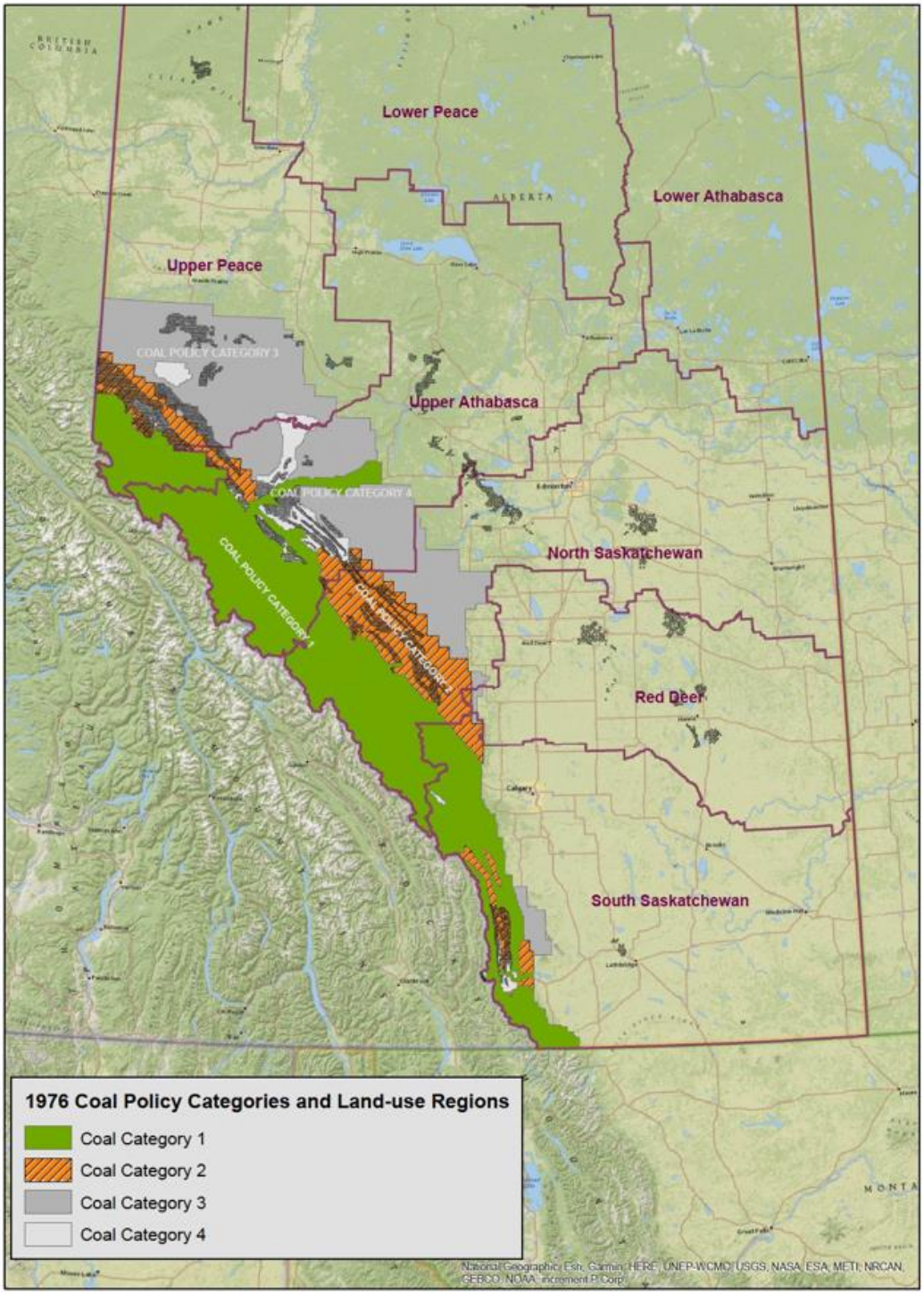
fulfilment by industry of its abandonment and reclamation obligations (see the most recent ABlawg post addressing these issues).

But more pertinent for present purposes, and easier to assess, is the claim that we don't need the CDP's land use classification because it has now been superseded by modern land use planning. Inferentially if not expressly, this must be a claim that we can rely on the Land-use Framework, *ALSA* and the plans adopted under *ALSA*. As noted above, this requires us to assess whether the necessary plans have been put in place, the terms of those plans, and the legal effect of those plans.

Did Rescission of the CDP Create a Gap in Land Use Planning?

The Framework contemplated the development of plans for seven land use planning regions: Upper Athabasca, Lower Athabasca, Upper Pease, Lower Peace, North Saskatchewan, Red Deer and South Saskatchewan. As can be seen from the map below, lands within Categories 2 and 3 are included within no less than five of these planning regions, Upper Peace, Upper Athabasca, North Saskatchewan, Red Deer, and South Saskatchewan.

Map showing the seven planning regions, the four coal categories and existing leases



Map credit Martin Z Olszynski

It follows from this that the government's claim that modern land use planning has superseded the coal categories can only be true if plans had been completed for each of these five regions.

But that is far from being the case. In fact, only *one* of these five regional plans has been completed, the South Saskatchewan Regional Plan (SSRP).

But the *existence* of a plan is just the first step in the inquiry as to whether the new plan or plans provide clear guidance as to whether coal mining, and in particular strip mining for coal, should be a potentially permissible use of particular areas. In the case of the SSRP this is clearly *not* the case. As the first post in this series noted, the SSRP acknowledged the existence of the CDP and its land use categories and effectively punted down the road any detailed assessment of whether lands within Category 2 or 3 should be available for strip mining or not. The SSRP noted that the zonal categories established by the CDP would have to be reviewed "to confirm whether these land classifications specific to coal exploration and development should remain in place or be adjusted" (at 61). The SSRP went on to indicate that it was the government's

> intent for the SSRP and implementation strategies of the regional plan or future associated subregional or issue-specific plans within the region to supersede the coal categories for the purposes of land use decisions about where coal exploration and development can and cannot occur in the planning region. (at 61)

Much the same is also true of the sub-regional planning processes within the region such as the Livingstone-Porcupine Hills Land Footprint Management Plan (2018). This Plan develops important management thresholds in the form of disturbance limits on motorized access and spatial human footprint targets (at 8 – 11) but when it comes to coal, it too passes the buck:

> As part of reviewing and incorporating the Integrated Resource Plans, the Government of Alberta will integrate a review of the coal categories for the South Saskatchewan Region (SSRP p. 61). New direction, consistent with footprint planning outcomes, will supersede the coal categories and may extend to all large-scale industrial surface disturbances, including coal. This new direction should be consistent with an integrated approach. It will specify where surface exploration and development can and cannot occur based on the best and most recent biodiversity sensitivity data. (at 23)

In sum, the SSRP and the subsequent sub-regional plan, did *not* render the land use categories of the CDP obsolete. Instead it contemplated a further process to make these determinations and it also contemplated the continuance of the CDP's categories until that process was completed. *That process has not been completed and thus, even within the area of the one relevant completed plan, the SSRP, it is plainly impossible to assert that the ALSA plans have superseded the CDP's classification scheme.* The same is even more obviously the case for those areas covered by the coal categories for which no regional plans have been completed.

There is no doubt that the government *could* have used the SSRP or the sub-regional planning processes to decide if and where strip mining might be a permissible land use within the planning region and to prohibit it in others, and equally it could have done so in a legally binding manner. This much is apparent from the part of the SSRP headed "Regulatory Details." This part of the SSRP is intended to be legally binding. Of particular interest are Parts 3, 6 and 6.1 of the Regulatory Details dealing respectively with Conservation Areas, Recreation and Parks and

Landscape Management. I have quoted these provisions in my earlier post "What Are the Implications of Reinstating the 1976 Coal Development Policy?" and will not repeat them here.

Did the Government Know that the Rescission of the CLP Would Create a Gap in Land Use Planning?

It is equally clear that the Government of Alberta was perfectly aware of the gap that would ensue between the protection conferred by the CDP and the protection that *might* be conferred by a *completed* regional plan under the *ALSA*. This clarity emerges from an affidavit that the GOA filed in the judicial review application commenced by a group of ranchers against the original decision to revoke the CDP, *Blades et al v Alberta*. A briefing memorandum to the Minister included in the affidavit advised that immediate rescission of the CDP carried some risk:

- Despite existing land use policies, there is a risk that rescission could result in policy gaps because several Integrated Resource Plans that remain active within the Eastern Slopes rely on the coal categories to establish baseline conditions (mostly in the South Saskatchewan Region, but also a portion of the Upper Athabasca Region).
    - The full extent of the policy gap risk will not be quantified until Alberta Energy completes its review of the coal categories with input from Environment and Parks. This work is expected to be complete in summer 2020. (Briefing Memorandum at 2)

Notwithstanding the concerns articulated with respect to this option, immediate rescission was the option Minister Savage adopted.

If this were not clear enough, the briefing memorandum also included an option, described as the *status quo* option, which was to rescind the Coal Policy "concurrently with the completion of the applicable regional plans" (Briefing Memorandum at 4). The memorandum notes that this would be "consistent with the commitment" in the SSRP (see the above references to the language of the SSRP) and that this option would provide "an opportunity for government to confirm what its management intent is for the province's coal-bearing areas, including those that have not allowed coal leasing, exploration or development historically, in the context of balancing regional goals and inclusive of site-specific analysis and public input." It also recognized that this would be a more inclusive approach:

> Other 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.

In sum, the Minister of Energy must have understood that the CDP was not completely obsolete, that other policies and instruments depended upon the coal criteria, and that revocation of the CDP prior to the completion of planning in the other four areas and re-visiting the SSRP would create gaps.

This same memorandum makes it clear, however, that the Government was not solely concerned with obsolescence. Instead, its further intention was to make the province more attractive for

investment in coal exploration and development. For example, the memorandum argued that rescinding the separate land classification for coal would "increase equity among all industrial users who compete for access to Alberta's working landscape" and would also "increase the province's attractiveness as an investment destination for coal by expanding and unifying the land base that is available for coal leasing, exploration, and development" (at 1). And finally, it would get rid of the ambiguities in the CDP surrounding when development on Category 2 and 3 lands might exceptionally be permitted, and henceforward all "proposed Alberta coal projects will be reviewed based on merit …" (*ibid*). The benefits associated with rescission included enhanced lease rental payments (estimated at $2.3 million per year) and anticipated positive support from "the coal industry, as rescission is something the industry has been advocating for years" (*ibid*).

Conclusion

Alberta's resources and environmental laws have certainly changed between 1976 and the current time. It would be remarkable if they had not (for a more general overview of changes in Alberta's environmental laws see Nigel Bankes, Sharon Mascher & Martin Olszynski "Can Environmental Laws Fulfill Their Promise? Stories from Canada" (2014) 6:9 *Sustainability* 6024). But one feature of the 1976 Coal Policy did endure, for all its ambiguity, and that was the concept of the coal categories that effected a basic level of land use planning on the eastern slopes. Thus, while one can conclude that much of the CDP had been superseded by subsequent statutory reforms and policy, this is unequivocally not the case for the land use elements of the CDP. Whatever the aspirational goals of the Land-use Framework and *ALSA* may have been, it is clear that they have yet to deliver the level of guidance that the CDP has provided for more than forty years with respect to the acceptability of coal exploration and mine development on the eastern slopes.

The government could not have reasonably concluded that the CDP had been completely superseded or rendered obsolete. *The government's own briefing papers make this abundantly clear*. The government went ahead and rescinded the CDP in order to encourage investment in coal exploration and development, all the while knowing that the ground rules necessary for ensuring healthy functioning ecosystems at the landscape level were not in place. This is a shaky foundation on which to build the respectful consultation framework that the Department of Energy now promises.

This post may be cited as: Nigel Bankes, "Coal Law and Policy in Alberta, Part Three: Was the Public Rationale for Rescinding the Coal Policy Ever Convincing?" (February 15, 2021), online: ABlawg, http://ablawg.ca/wp-content/uploads/2021/02/Blog_NB_Coal_Policy_Part3.pdf

March 8, 2021

Does the Water Licence for a Coal Mine Capture its Impact on the Water Resource? Examining Benga Mining Limited's Proposed Grassy Mountain Mine in the Headwaters of the Oldman River Basin

By: Chris Hopkinson

Matters Commented On: Grassy Mountain Mine Project Water Diversion Licence Application by Benga Mining Limited (Riversdale Resources (16 October 2017)); Oldman River Basin Water Allocation Order, Alta Reg 319/2003

An earlier ABlawg post examined the general implications of proposals to re-open the *Oldman River Basin Water Allocation Order*, Alta Reg 319/2003 (WAO) so as to allow a greater proportion of the 11,000 acre-feet (AF) reserved by that Order to be used for industrial purposes, such as coal mining (see details on the proposals here). The Order as currently framed limits this to 150 AF. This post examines why this proposed change is such an important issue by considering in detail the water issues associated with one proposed mine in the upper Oldman Basin, namely the Grassy Mountain Mine proposed by Benga Mining Limited (BML). The post examines the Grassy Mountain Mine Project Water Diversion Licence (WDL) Application by BML (Riversdale Resources (16 October 2017)) to explore the viability of their proposed water use in the context of competing water demands and the WAO. The examination draws from materials shared and discussed as part of the Grassy Mountain Coal Project Joint Review Panel Public Hearing (*Agreement to Establish a Joint Review Panel for the Grassy Mountain Coal Project Between The Minister of the Environment, Canada and The Alberta Energy Regulator, Alberta*, OC 262/2018; documents available here). The analysis presented below first considers the disclosed WDL water uses associated with the Coal Processing Plant (CPP) and evaporative loss from the Raw Water Pond (RWP). It then moves to elements of water loss from the mine site that are either omitted from the WDL or expected to exceed the pre-mine background levels. Finally, potential implications of proposed water uses within the context of low frequency high impact drought periods are considered.

The overall conclusions are that BML's water licence application likely understates its actual impact to the regional water resource, and that the overall hydrological effects of increased mining activity in the upper Oldman basin will reduce water availability for all users downstream, thus leading to an increased risk of water-related conflict during times of drought.

Background

The Oldman River Basin (ORB) has a dry climate where annual evaporative demand can exceed precipitation. This is particularly true in downstream regions of the basin, where irrigation water is critical in sustaining Alberta's agricultural sector and food security (J Byrne at al, "Current and future water issues in the Oldman River Basin of Alberta, Canada" (2006) 53:10 Water Science

& Technology 327; Stewart B Rood & Jenny W Vandersteen, "Relaxing the Principle of Prior Appropriation: Stored Water and Sharing the Shortage in Alberta, Canada" (2010) 24 Water Resources Management 1605). Consequently, annual runoff from snowmelt and rainfall in Eastern Slopes areas like Crowsnest Pass is a critical component of the overall supply into the Oldman Reservoir and on to downstream users where the basin is closed to new allocations.

Coal mining operations are water intensive, and precise consumptive estimates can be difficult to obtain. Global average estimates for each clean metric tonne (CMT) of coal produced range from ~250 L (Claire M Côte et al, "Systems modelling for effective mine water management" (2010) 25:12 Environmental Modelling & Software 1664) to over 650 L (Ian Overton, "Aren't we in a drought? The Australian black coal industry uses enough water for over 5 million people", *The Conversation* (3 May 2020)), and even as high as ~3000 L/CMT for thermal coal mines in China (Erik Olsson, *Water use in the Chinese coal industry* (Independent Thesis, Uppsala University, 2015)). Much water is recycled on-site and the consumptive fresh water needs are highly variable. Estimates of open pit mine fresh water consumption range from ~200 L to > 400 L/CMT for Australian examples (Côte et al, 2010). For the Murray River metallurgical coal mine (Taggart Engineering, *Preliminary Design of Coal Washing Plant of Murray River Coalmine of HD International Mining Industry Co., Ltd in Northeast BC, Canada* (August 2013)) in a cool humid part of the Canadian Rockies in NE BC, the proposed consumptive clean water use for coal processing alone is ~270 L/CMT (assuming a "raw" to "clean" conversion of RMT = 1.8 x CMT). Actual water uses tend to be divided amongst the CPP, dust mitigation, workforce supply and sanitation, irrigation/reclamation, vehicle/machinery washing, and other facilities; while primary outputs are discharges to the environment as stream flow following treatment, evaporative losses to the atmosphere and water exported in coal that leaves the site (Overton, 2020).

As a starting point to this exploration, we note that during questions about the mine water requirements for the CPP and the WDL application during the Grassy Mountain Coal Project Joint Review Panel Public Hearing, it was confirmed that: "…Benga believes that the amount of water that's been applied for is -- is and will be sufficient for the -- for the project." (Grassy Mountain Hearing Transcript Volume 20 (20 November 2020) at 4167).

Water Diversion License Components

From Section C of the Grassy Mountain Coal Project Description, it was estimated that the mine operations would need up to ~975 ML/yr (1 ML = 1 Megalitre = 1,000 m^3) for the CPP, roadway dust mitigation and potable supply and sanitation. Of this, 297 ML was assumed to be consumptive or lost from the site from two primary sources: i) 237 ML as moisture content in exported coal; and ii) 60 ML lost as evaporation in roadway dust suppression. The single largest component of water use was estimated to be coal washing at ~200 L/CMT (given as 110 L/RMT). This coal washing estimate is consistent with the lowest volume estimates from other mines (Côte et al, 2010; Olsson, 2015; Overton, 2020), though for Grassy Mountain this use was designated non-consumptive; i.e. returned to the natural hydrology of the site.

A little over a year later, the Grassy Mountain Coal Mine WDL application was submitted, with a total request for 558,772 m^3 (~559 ML) from two local licence transfers from Crowsnest Pass

MD and Devon Canada Corporation, plus one new industrial allocation request of 150 AF (185 ML) or the total industrial allocation available under the Oldman WAO. This combined request is ~416 ML lower than the estimated mine requirement in the earlier Project Description document. The break down of water requirements also differs, with: i) 57 L/RMT (up to a maximum of 478 ML in year 12) requested for the CPP as "make up" water to replace water lost as moisture in exported coal and water that leaves the CPP in reject material; ii) wash down "make up" water of 2 ML/yr for cleaning purposes; iii) evaporation from the Raw Water Pond (RWP) that supplies the CPP of 25.8 ML/yr; and iv) a contingency or hold back of 10% the maximum available allocation. Including the 10% contingency, these estimated annual project water uses exceed 500 ML for 11 out of the 23 years of proposed mine operation, with year 12 showing the highest coal production at 4,614,500 CMT and water use at 556.63 ML, or ~2 ML short of the maximum allocation.

To put this into context, the 57 L (or 0.000057 ML) WDL estimate of water use to clean each tonne of "raw" coal during peak production, is less than 10 flushes of a standard toilet. The apparent discrepancy between the estimated project water needs in 2016 (~975 ML, Riversdale Resources, August 2016) and the allocation request in 2017 (~559 ML, Riversdale Resources, 2017) for an output of ~4.5 million CMT during years of peak production was attributed to additional water conservation measures proposed in the interim (Grassy Mountain Hearing Transcript Volume 20). However, such a large drop in anticipated water needs for comparable coal outputs does warrant further investigation.

First, notable absences from the 2017 WDL application are: i) dust mitigation; ii) workforce water supply and sanitation; and iii) irrigation/reclamation. For items i) and ii), 60 ML and 15.5 ML were respectively proposed in the 2016 project description but no value for irrigation or greening of the site during annual reclamation activities was found. From the reclamation plan, the total area to be reclaimed is 1463 Ha, which suggests an average rate of reclamation exceeding 500,000 m^2 /yr (reported estimate varies from 0 to 2,070,000 m^2/yr). Irrigation estimates for mine site reclamation in the cooler and more humid environment of NE BC (Taggart Engineering, 2013) suggest ~1.0 L/m^2d, so using a conservative estimate of 60 days of irrigation in a single year, this results in an average 30 ML/yr water requirement. Combined, therefore, three anticipated water needs that are absent from the WDL application could amount to >**105 ML/yr**. While the exact water requirements and sources for these water balance components vary by year and are uncertain, all three are important such that the mine cannot operate without them. Moreover, 60 ML/yr for dust suppression and 30 ML/yr for reclamation could be below actual needs given water may need to be applied multiple times on some days due to the high Chinook winds and dry summers characteristic of the Crowsnest area.

Second, the water allocation requested for coal washing is exclusively directed towards water leaving the site within cleaned coal and reject material, indicating that all wash water will be recycled with only a single point of loss from the Raw Water Pond (RWP) as evaporation. This indicates a highly efficient coal processing procedure that uses less water than is typical across other coal mines around the world (Côte et al, 2010; Olsson, 2015; Overton, 2020). The single source of evaporation loss from the RWP is estimated to be 25.8 ML/yr. However, based on BML's own hydrological study data (SRK Consulting, *Grassy Mountain Surface Hydrology Baseline and Effects Assessment* (August 2016) at 14-15) this volume of loss may be

underestimated. The local baseline hydrology assessment concluded that lake water evaporation at the site is 0.74 m/yr (expressed as a vertical "depth" of water loss). For the RWP open water area of ~0.15 km^2 (from site plan drawings), then, the annual volumetric loss (depth x area) is 111 ML, or ~**82 ML/yr** greater than the WDL application estimate. Indeed, to arrive at 25.8 ML/yr would suggest the pond is either mostly empty most of the time, or evaporative losses are expected to be below the natural watershed land surface evapotranspiration levels, which according to BML's in house hydrological assessment is 0.26 m/yr (SRK Consultants, 2016 at 15), which – while implausibly low for open water – produces an estimate of ~39 ML/yr or 13 ML/yr greater than the value in the WDL application. Consequently, it is unclear how BML arrived at such a low estimate of water use for the CPP as a whole and for the RWP in particular.

A final note on the RWP is that before coal production commences (year zero), the WDL application shows that it will be losing evaporated water at the same rate as in all other years. Notwithstanding that this estimate of evaporative loss appears to be low, this indicates the RWP is full or filling during this time, which is consistent with the need for the RWP to be active in coal production from year one onwards. The planned capacity of the RWP is 1,200 ML (Riversdale Resources, June 2016), or more than two times the total allocation requested. Assuming RWP filling commences in year zero, and all surplus water available in the allocation is used, then even without any contingency, it will take 5 years to reach capacity. With the 10% contingency unused, it will take >13 years to fill, and if a realistic estimate of evaporative loss is used, then at the proposed rate of CPP productivity, it may not fill before the mine ceases to operate. It is unlikely that the RWP must be at maximum capacity in order to be functional and given the apparent reduction in CPP water needs since the project description in 2016, it is possible the WDL application in 2017 assumes a lower RWP capacity and size than the originally proposed 1,200 ML. However, given the water needs that appear unaccounted for or underestimated in the WDL, it is hard to imagine a scenario where the RWP could reach operational capacity if the only water used to fill it is obtained exclusively within the limits imposed by the WDL.

Accepting the high coal wash efficiency implied in the WDL application and confirmed at the public hearing, then, it appears certain elements of mine water use might be unaccounted for in the water license application and at least one element may be underestimated. Ignoring the problem of filling the RWP at project onset, the net result could be an under-estimation of annual water needs in the 150 ML to 200 ML range. If an additional ~150 ML were required to sustain mine operations at the CMT production rate predicted, then the Grassy Mountain mine water use would exceed the requested total allocation from year 2 to end of mine life. This assessment does not take into account maintenance of instream flow needs, the differential between the pre- and post-mine land surface hydrology, or the impact of extreme events like droughts or floods.

While impossible to know, perhaps BML suspected there could be a discrepancy between their needs and accessible water licenses. After submitting the WDL application to AER, BML was named as the client on a Consultant Lobbyist Registration (CL-10972-06 - Notice of Change), which was active from September 2018 to December 2020 (extended December 2019) to lobby (amongst others) senior staff and elected officials with Alberta Environment and Parks (AEP) on the subject of the "Water Act and water licences in southwest Alberta." On November 20th, 2020, AEP presented an information briefing to the three Municipal Districts impacted by the

Oldman WAO (Pincher Creek, Ranchland, Crowsnest Pass), with a proposal to change several elements of the WAO including the removal of some restrictions on new allocations (see Nigel Bankes and Cheryl Bradley's post on the briefing here). For example, AEP's proposal would remove the limit on industrial allocations from the 150 AF currently available from the total 11,000 AF reserve, and pool the industrial allocation category with all other uses (including irrigation and community supply) and increase this pool to 8,800 AF. If such a change went ahead, this would enable BML to apply for a new or increased allocation. Though recall, BML acknowledged at the public hearing (also on November 20th, 2020) that "Benga believes that the amount of water that's been applied for is and will be sufficient for the project." As such, it is assumed BML does believe that the water license they have applied for of 559 ML/yr will be sufficient for all needs for which a license is required.

Landcover Change

In addition to the question of whether all mine-related water uses are captured within the WDL, there is a likelihood that changes in landcover associated with mine development will alter the natural water and energy balance of the site. For example, it is known that a forest-covered landscape tends to lose more water to the atmosphere as evapotranspiration than a comparable environment that is not forest covered (Kathleen A Farley, Esteban G Jobba & Robert B Jackson, "Effects of afforestation on water yield: a global synthesis with implications for policy" (2005) 11 Global Change Biology 1565). Open pit mines have also been observed to generate a localised summertime "heat island" effect relative to surrounding forests (Slavomir Labant et al "Utilization of Geodetic Methods Results in Small Open-Pit Mine Conditions: A Case Study from Slovakia" (2020) 10:6 Minerals 489), which is expected to elevate evaporative losses. Changes in runoff and evaporative demand are acknowledged in BML's hydrological assessment (at 21-22), where the proportion of precipitation that contributes to downstream runoff (runoff coefficient) is presented for undisturbed and reclaimed areas as 0.51, for waste rock and fill areas as 0.60 and bedrock areas in the pit as 0.8. While a value of 1.0 was used for open water (which incorrectly implies all precipitation over open water becomes runoff), the report acknowledges that evaporation must be calculated separately for these areas.

The relative areas of undisturbed, reclaimed, waste rock, fill, bedrock and open water vary over the life of the mine, and are reported in the Conservation and Reclamation Plan. It is also reported that pre-disturbance open water areas amount to 0.1 Ha (~1,000 m^2), while the total area of surface water ponds and ditches is 74.6 Ha (~746,000 m^2), with 18.4 Ha (~184,000 m^2) remaining as a post closure lake (Riversdale Resources, June 2016). It is beyond the scope of this post to perform a full water balance assessment but to illustrate one important change that results from the mine activity, the pre mine water loss can be compared to that during mine operations for those land covers converted to open water.

From BML's open water evaporation depth of 0.74 m/yr and the background or pre mine landcover evapotranspiration depth of 0.26 m/yr (SRK Consultants, 2016), then for the total area of land converted to open water of ~745,000 m^2, the increase in evaporative loss approximates ~358 ML. Removing the "Raw Water Pond" (examined above) and the "End Pit Lake" (~184,000 m^2, Riversdale Resources, June 2016) that forms near the end of mine life, the net increase in annual evaporative loss over ponds and ditches relative to the pre mine condition

becomes ~**197 ML/yr**. Again, this estimate is open to different forms of calculation based on the data or method adopted, and there will be some offsetting associated with more rapid runoff over impermeable landcovers. However, the point is that potential losses of water from mine-related water management structures are not trivial, will be higher in warm and dry years when water resources are otherwise stressed, and have the potential to represent a significant fraction of the annual WDL allocation, yet represent a loss of water from the natural background that is not factored into the WDL.

Downstream

Regarding the question of water volumes passed to the downstream environment, three areas of concern are: i) the potential for enhanced flood flows from site-level surface drainage; ii) maintaining sufficient instream flow to support aquatic ecosystem functions at all times; iii) maintaining sufficient flow to support downstream or more senior licence holders during times of drought. It is out of scope here to explore the possible role of site-level drainage on flood flows, and it is expected that BML and other potential mine operators in the Eastern Slopes would design and operate their sites to mitigate the downstream transfer of flood waters. However, the floods of 2013 on the Bow, Oldman and Elk rivers serve as reminders of the erosive and inundation destruction propagated from extreme rain on snowmelt events (John W Pomeroy, Ronald E Stewart & Paul H Whitfield, "The 2013 flood event in the South Saskatchewan and Elk River basins: Causes, assessment and damages" (2015) 41:(1-2) Can Water Resources J 1). For example, flood flows from Cougar Creek watershed (44 km^2) upstream of Canmore, which is slightly smaller in size but similar orientation and elevation range to the Blairmore (51 km^2) and Gold (62 km^2) Creek watersheds on either side of Grassy Mountain, resulted in the loss of bankside houses and the complete destruction of a section of the four-lane Trans-Canada Highway ("Canmore's Cougar Creek flood aftermath visible 100 days later" *CBC News* (28 September 2013)).

In the South Saskatchewan River Basin, large-scale water use projects must carry out a scientific assessment of Instream Flow Needs (IFN), which may be used as the basis for a Water Conservation Objective (WCO) as part of project approval (Government of Alberta, "A desk-top method for establishing environmental flows in Alberta rivers and streams" (1 April 2011)). These IFN are intended to represent the minimum flow requirements or flow regime that are needed to protect the aquatic habitat and functioning of the downstream riverine environment. From the public hearing, it was confirmed that an obligation of BML's surface water allocation will be to maintain flow levels on Blairmore and Gold Creeks that are deemed safe for fish habitat maintenance. The implication of this requirement is that BML must use a portion of its water allocation to meet these IFN requirements during times when flows fall to critical levels. The threshold flow volume for Gold Creek was not available but for Blairmore it is 0.07 m^3/s (~6 ML/day) from August to April and 0.19 m^3/s (16.4 ML/day) from May to July. To meet the Crowsnest River WCO, there is a minimal obligation for the mine to return at least 500 m^3/day (0.5 ML/day) via either Blairmore or Gold Creeks during low flow conditions. The Gold Creek obligation may be larger than Blairmore but on a daily basis, if flow augmentation is required on Blairmore to meet the WCO, then the mine will already be meeting its Crowsnest obligation of 500 m^3/day.

Aside from natural flow variations, one reason for low flows on Blairmore discussed at the hearing was if saturated backfill zones (excavated areas where waste material and water are deposited and treated) shut down and treated water could not be returned to the Creek. Should such a shut down occur, it could be for an extended period of days to weeks, with a worst case of 50 days postulated at the hearing (Grassy Mountain Hearing Transcript Volume 20). It is somewhat speculative to say, but if one assumes a situation where the summertime flow on the creek needs to be augmented, on average, by 50% to reach the minimum 0.19 m^3/s flow requirement, then 50 days of such augmentation approximates **410 ML** or 73% of the annual WDL allocation. As this is return flow, it is not automatically taken from the allocation budget but if sufficiently clean treated water cannot be accessed for the IFN obligation, then water may need to be diverted from the RWP makeup or other sources, and this would then limit water availability for mine operations. For example, in year 12, the unused portion of the allocation (including 10% continency) is 51 ML, which is a small quantity relative to the potential IFN liability on Blairmore if flows need to be augmented for an extended period. Such a scenario could place the habitat protection IFN obligations in conflict with the operational, employment and economic needs of the mine.

A rationale for such WCO obligations is the understanding that surface and groundwater resources are highly connected in this Eastern Slopes headwater region of the ORB where up to 90% of the riverine water resource originates (Oldman Watershed Council, 2020). It was acknowledged in BML's hydrological assessment and at the hearing that, over time, groundwater drawdown from the mine excavation is expected to impact the flow on surrounding creeks. It was further explained that water pumped out of the mine will be used to augment the flow on Gold Creek via sedimentation ponds. The process of removing water from the mine and then adding to creek flow would appear to constitute an operational water use, as this diversion of water is a requirement of raw product extraction, as well as meeting WCO obligations under the WDL application. It appears, then, the mine could be proposing to use some of the immense groundwater resource on site as an integral part of operations. It might be argued, perhaps, that such water use represents a "disposal" of groundwater instead of a "diversion", but this would be inaccurate on natural water balance grounds, given these operational movements of water create many opportunities for evaporative loss or changes in water quality that otherwise would not occur. Furthermore, if water from the excavation were intended to be used for, for example, dust suppression and/or reclamation irrigation, then such use must be appropriately licensed, particularly as these uses will incur high rates of evaporative loss; losses that will be transferred downstream in the ORB.

The quantities of groundwater that might be used operationally, if any, are unknown but drawing groundwater down by up to 300 m (Grassy Mountain Hearing Transcript, Volume 17) at the deepest part of an excavation of up to 6.3 km^2 at end of mine could amount to many millions m^3 or many thousands ML/yr in water volume. Such volumes could be orders of magnitude greater than the amount requested in the WDL application. Focussing on expected largely consumptive uses, however, estimates of potential annual site-level open water evaporative (**~197 ML**) and irrigation (**~30 ML**) demands have been provided above, and BML provided their own estimates for dust suppression (**60 ML**) and potable water use (**15.5 ML**). To this, we can also add a possible WDL under-estimation of RWP evaporative loss (**~82 ML**). The exact requirement for flow augmentation on Gold Creek is unknown but using a 50% flow for 50 day worst case

estimate on Blairmore as a benchmark (**~410 ML**), it appears the overall IFN liability for both creeks relative to the WDL application could be high and has the potential to exceed the WDL limit of 559 ML under extreme circumstances. So, ignoring the fact that the volume of water extracted from the mine pit would far exceed the WDL limit, and accepting BML's high water use efficiency estimates for coal washing, there is a reasonable probability that during some years the actual water uses, losses and obligations at the mine site could be at least double the 559 ML requested.

Drought

Thus far, this post has primarily addressed typical or average conditions, but it is clear that water budget components like evaporative loss, dust mitigation, instream baseflow levels and, therefore, overall mine operation water requirements will increase during prolonged dry spells. Droughts are a reality in the arid Prairies of Southern Alberta, and can be exacerbated by the extreme Chinook winds characteristic of the region. Droughts occur as a result of dry hot summers, as well as following winters of low snowpack in the Eastern Slopes. Regional Climate Model projections suggest a high probability of severe drought periods of increasing frequency across the Canadian Prairies during future decades (Barry Bonsal et al, "Historical and Projected Changes to the Stages and Other Characteristics of Severe Canadian Prairie Droughts" (2020) 12:12 Water 3370). This, transposed on top of existing trends of increasing temperature (Jiang et al, "Historical and potential changes of precipitation and temperature of Alberta subjected to climate change impact: 1900–2100" (2017) 127 Theoretical & Applied Climatology 725), declining low-flow water supplies and increasing concerns over water quality on the Oldman River during the last century (Byrne at al, 2006). For downstream irrigators and communities, droughts result in reduced crop yields and certain water use bans that can have serious economic consequences and societal inconveniences (e.g. during 2001 to 2002, see Alberta Water Portal Society "Drought in 21st Century Alberta" (17 December 2004)). Historically, Irrigation Districts have worked together to voluntarily curtail their first in time first in right (FITFIR) priority access to water during drought periods, and have agreed to share the loss of access to water equitably amongst other users such as MDs, communities and landowners that may have more junior licences (Rood & Vandersteen, 2010). If such a voluntary system of curtailment fails, then the government can use authority under section 32 of the *Water Act*, RSA 2000, c W-3 to enforce water use reductions by junior licensees.

To date, industrial water allocations, such as the remaining 150 AF allocation requested by BML, have not been a significant source of controversy or conflict because so little of the overall Oldman WAO reserve (11,000 AF) was available for such use. Moving forward, however, if BML secures access to this industrial allocation, there are three plausible scenarios where the historical voluntary arrangement of sharing the water deficit during drought by downstream senior licence holders (i.e. primarily irrigators and communities) may become fragile:

i) BML, realising their water needs may exceed their current WDL application, seek out and apply for new or transferred water licenses, thus increasing their dominant role as a single license holder in headwater water resource management;

ii) BML do not request a new allocation but access surface or groundwater for mine operations outside of a water permit, thus raising concerns over the efficacy of Alberta's water licensing system;

iii) The proposed change to the Oldman Water Allocation Order goes ahead and an additional ~7,000 AF is opened up to potential mine-related industrial allocations upstream of the Oldman Dam, thus dramatically altering the historical apportionment of water resource use in the ORB headwaters.

Given the total area of coal leases in the Eastern Slopes of the ORB is more than ten times greater than BML's alone (see Alberta Wilderness Association, 2021), it is plausible that if they all became operational they may require the entire ~7,000 AF available for new allocations under the proposed WAO changes. Unless all water uses are transparently documented and appropriately licensed by headwater industrial licence holders, there is reason to expect that senior licence holders might be less inclined to share the deficit. This has the potential, therefore, to create a scenario where government intervention could be required to mitigate an environmental disaster, where historically voluntary solutions have been identified.

Typically, everyone suffers during a drought but for mines employing a large workforce, an economic obligation to meet annual production targets, as well as WCO obligations to mitigate drought flows within the confines of a 10% WDL contingency, the potential for conflict is high. Consequently, allowing new water-intensive industrial water allocations in the ORB headwaters, elevates the potential for drought-related conflict amongst both different water licence holders and also the internal competing corporate and socio-environmental obligations of a single large licence holder, like BML.

Conclusion

The largely unresolved question for now is just how much of the mining activity-induced water loss over and above the natural background (operational or incidental) must be captured in the water budget of the WDL? It is a reasonable expectation that any loss of water that results from a new land use project must be captured in that project's licence application. However, in the case of Grassy Mountain Mine, the observations and calculations presented above suggest that BML's WDL request of 559 ML/yr does not account for all water uses or losses that are likely to occur over the site during all years, and the true impact on the regional water resource is likely to exceed the amount communicated by the requested WDL allocation. If the proposed Grassy Mountain Mine's potential under-representation of total water demands is an indicator of what to expect from possible future Eastern Slopes' mines, then the impact of mining in this region is expected to place a new stress on the already stressed water resources of the Oldman River Basin. And, this stress will be most acute during times of drought, when the potential for conflict between on-site water demands and between water license holders will be elevated relative to the present situation.

The case study presented here has not had the benefit of access to all the data, tools, time and resources at BML's disposal. Consequently, some water budget estimates presented above are open to interpretation or alternative methods of estimation. However, they are sufficiently compelling to urge the Grassy Mountain Coal Project Joint Review Panel to conduct an

independent review of BML's Water Diversion License application to verify that the budget items are accurate and comprehensive in the context of all water needs of the mine and the requirements of the existing *Oldman River Basin Water Allocation Order*, Alta Reg 319/2003. Finally, Alberta Environment and Parks are urged to conduct a thorough science-based assessment and stakeholder consultation on the viability of the proposal to amend the Oldman Water Allocation Order to allow increased industrial allocations (i.e. mines) in the already water stressed Oldman River basin.

Acknowledgements

Nigel Bankes for valuable discussion on an early draft of this post. Staff members with Alberta Environment and Parks for informative discussion on the Oldman Water Allocation Order and the proposed changes. The ABlawg editorial team for helpful edits and suggestions.

This post may be cited as: Chris Hopkinson, "Does the Water Licence for a Coal Mine Capture its Impact on the Water Resource? Examining Benga Mining Limited's Proposed Grassy Mountain Mine in the Headwaters of the Oldman River Basin" (March 8, 2021), online: ABlawg, http://ablawg.ca/wp-content/uploads/2021/03/Blog_CH_Grassy_Mountain_Water.pdf

March 9, 2021

Coal Law and Policy, Part Four: The Regulation of Coal Exploration

By: Drew Yewchuk & Nigel Bankes

Matter Commented On: Information Letter 2021-07 "Coal Policy Reinstatement" (February 8, 2021) and attached Ministerial Order 054/2021

This is the fourth instalment in ABlawg's series on coal law: for the background, 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, and Part Three: Was the Public Rationale for Rescinding the Coal Policy Ever Convincing?

This post covers the *regulation* of coal exploration programs. On February 8, 2021 the Minister of Energy ordered the Alberta Energy Regulator (AER) not to "issue any new approvals for coal on Category 2 Lands" using the Minister's authority to issue directions to the AER under section 67 of the *Responsible Energy Development Act*, SA 2012, c R-17.3. This did not cancel ongoing coal exploration programs and hence the importance of considering at least some elements of the regulation of these activities.

The Legal Framework

Coal exploration programs on public lands are reviewed and approved under the *Public Lands Act*, RSA 2000, c P-40 (*PLA*) section 20 and the Code of Practice for Exploration Operations. This Code is incorporated into the *Conservation and Reclamation Regulation*, Alta Reg 115/1993, a regulation under the *Environmental Protection Enhancement Act*, RSA 2000, c E-12. Coal exploration programs on private lands only require notice under the *Environmental Protection Enhancement Act*, but they do not require an approval under the *PLA* since they do not involve public lands.

Section 20 of the *Public Lands Act* provides that:

> **20(1)** No person shall enter on and occupy public land for any purpose unless
>
> (a) the director has authorized that person to enter on and occupy the public land for a stated period for the purpose of
>
> (i) conducting appraisals, inspections, analyses, inventories or other investigations of the natural resources or underground formations that might exist on the land,

The AER has issued two manuals dealing with coal exploration and mining: Manual 008, Oil Sands and Coal Exploration Application Guide, issued in 2014, and Manual 020 Coal Development, issued in August 2020. The AER withdrew its earlier and very dated Directive 61:

How to Apply for Government Approval of Coal Projects in Alberta (1983) in April 2020 (see AER Bulletin 2020-07) shortly before the Minister announced the revocation of the 1976 Coal Policy on May 15th.

If the coal exploration program requires a person to "drill holes to a depth in excess of 150 metres or develop an adit, tunnel, shaft or other excavation" the program also requires an approval under section 10 of the *Coal Conservation Act*, RSA 2000, c C-17 and must provide the information prescribed by the *Coal Conservation Rules*, Alta Reg 270/1981. These Rules apply to exploration activities with respect to both Crown coal rights and private (freehold) coal rights.

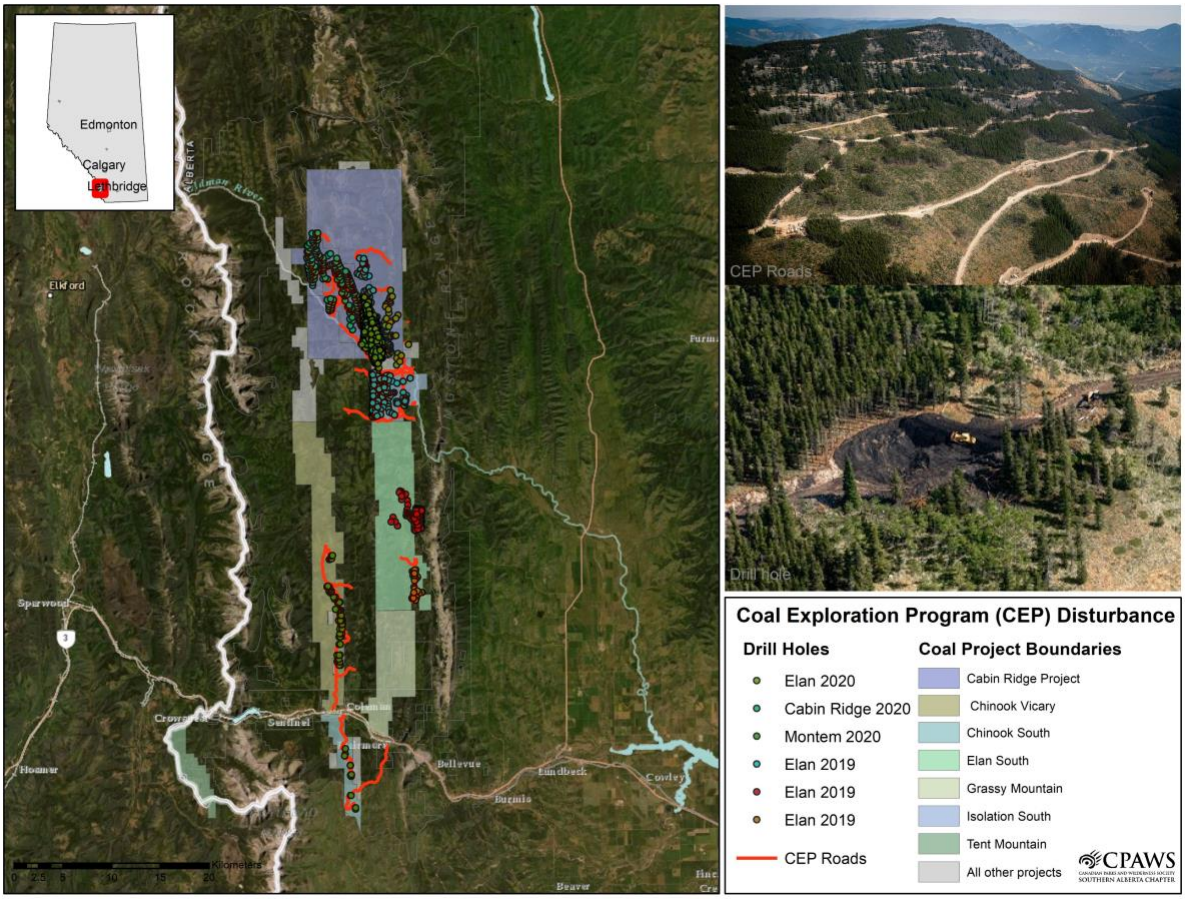
All of these approvals fall within the jurisdiction of the AER since all of these Acts and regulations are either "specified enactments" or "energy resource enactments" under the *Responsible Energy Development Act*, SA 2012, c R-17.3, ss 1(1)(j), (s). (For the purposes of AER jurisdiction, there is no distinction between metallurgical coal and thermal coal.)

There is one surprisingly tricky aspect of this regulatory scheme and that relates to the non-application of Part 8 "Exploration" of the *Mines and Minerals Act*, RSA 2000, c M-17 (MMA). A lay reader, and even a reader with a legal background might reasonably anticipate that a Part of the MMA that proclaims that it applies to "Exploration" would apply to coal exploration. But in fact this Part of the Act is made inapplicable to coal exploration by section 2(c) of the *Metallic and Industrial Minerals Exploration Regulation*, Alta Reg 213/1998 (MIME Regulation) which exempts "any operation conducted to determine or evaluate the presence, extent, nature or quality of coal, oil sands, a surface material or water" from the application of Part 8 of the *Mines and Minerals Act* and thereby the *Exploration Regulation*, Alta Reg 284/2006 (see section 1.1(2)(a)). What makes this so strange is that the MIME Regulation, by incorporating a definition from the *Metallic and Industrial Minerals Tenure Regulation*, Alta Reg 145/2005, excludes coal from the "metallic and industrial minerals" that are the subject of the MIME Regulation. So we have the bizarre situation that the MIME Regulation does *not* apply to coal - except for the purpose of excluding Part 8 of the *Mines and Minerals Act* and the other regulations made under that Part from applying to coal exploration. This makes the entire coal regulatory regime extraordinarily opaque, complicated and difficult to unravel. And ultimately there is something very odd about the fact that a principal vehicle for regulating most preliminary coal exploration in Alberta is section 20 of the *Public Lands Act* and not regulation under the *Mines and Minerals Act.*

The Physical Aspect of Coal Exploration Programs

The purpose of coal exploration is to determine the quantity, location, and quality of coal. Some generalizations can be made based on a review of recent approvals. Coal exploration programs in Alberta's eastern slopes consist of drilling large numbers of core samples (somewhere in the 50-100 range), most of them in the 150m depth range and then a handful of cores much deeper (in the 350m depth). Coal exploration also involves bulk-sampling programs, requiring large test pits (in the range of 4m deep x 1m wide x 20m long) in order to dig up sufficient coal to run carbonization tests. Coal exploration programs also allow the construction of the access roads necessary to move equipment to the worksites. Some sense of the activities involved, and the associated landscape disturbance, can be gained by examining the maps and images below.

These images (captured from a CPAWS twitter feed available here) show the density of exploration drill holes (the black dots) on a number of coal projects in the Crowsnest area) as well as a exploration roads (the red lines).



Exemptions from the Abandonment of Drillholes

Another special approval some coal companies have obtained is an exemption from the requirement to abandon drillholes (in the technical sense of cementing the drillhole closed). These approvals have been granted under section 21(4) of the *Coal Conservation Rules*, on the grounds that the coal discovered is recoverable by modern surface mining methods – in other words, that cementing it shut would be pointless because the company will return to mine the entire area up in the next few years anyways. Presumably the AER is collecting sufficient security to ensure abandonment, and will compel these companies to properly abandon these drillholes at some point if their planned mines are not constructed.

Conclusion

The detailed assessment of the damage to the landscape and environment, including the aquatic environment, caused by coal exploration programs is principally a question for engineers and

scientists and not for lawyers – but it is well understood that exploration involves significant drilling, digging, surface disturbance, and water use. Coal exploration does not consist of going for a hike and poking the dirt with a stick or a banging a few rocks with a geologist's hammer. What this post suggests is that the regulatory scheme governing coal exploration in Alberta is complex and byzantine, and needs to be comprehensively and transparently assessed to ensure its fitness for purpose if coal exploration is to be allowed to continue on the eastern slopes of the Rockies. Such a review should be included as part of any consultation with respect to the future of coal exploration and development on the eastern slopes along with the landscape level dimensions referenced in previous posts here and here.

This post may be cited as: Drew Yewchuk & Nigel Bankes, "Coal Law and Policy, Part Four: The Regulation of Coal Exploration" (March 9, 2021), online: ABlawg, http://ablawg.ca/wp-content/uploads/2021/03/Blog_DY_NB_Coal_Policy_Part4.pdf

March 24, 2021

Coal Law and Policy Part Five: What is the Role of the Federal Government in Relation to Alberta Coal Mines?

By: Drew Yewchuk

Legislation Commented On: *Impact Assessment Act,* SC 2019, c 28, s 1; *Species at Risk Act,* SC 2002, c 29; *Coal Mining Effluent Regulations* (forthcoming)

This is another installment in the continuing ABlawg series on the law and policy framework for coal projects in Alberta. This installment focuses on three statutes or regulations by which the federal government exercises authority over possible coal mining in Alberta's eastern slopes: the *Impact Assessment Act*, the *Species at Risk Act*, and the forthcoming *Coal Mining Effluent Regulations* (a regulation under the *Fisheries Act*).

It should be noted these three enactments are not exhaustive of federal powers that apply to coal mining. The federal government may be involved in other ways, including through the general protection for fish habitat under the *Fisheries Act*, limitation of greenhouse gas emissions from industrial projects, constitutional obligations to Indigenous peoples, or water allocation disputes between provinces.

The *Impact Assessment Act*

Under the *Impact Assessment Act*, SC 2019, c 28, s 1 (*IAA*), the federal government conducts an impact assessment for "designated projects", which are projects listed in Schedule A of the *Physical Activities Regulations*, SOR/2019-285 ("Project List") (see here for a general discussion of the *IAA*, and see here for a discussion of the project list). A new coal mine with a coal production capacity of 5,000 t/day or more is a designated project, as is an expansion to a coal mine that would "result in an increase in the area of mining operations of 50% or more and the total coal production capacity would be 5 000 t/day or more after the expansion" (see Project List sections 18(a), 19(a)). The Minister of the Environment also has discretion to designate a new coal mine or coal mine expansion below those thresholds as a "designated project" and require a federal assessment (*IAA*, s 9).

Some proposed coal mines are below the Project List thresholds. For instance, the Tent Mountain Mine plans to produce 4,925 t/day and is therefore not currently slated for a federal impact assessment, though the Minister may still decide to designate it. Phase I of the Vista Coal mine, near Hinton, Alberta, was not initially designated for a federal assessment, but when Vista Coal applied for a phase II expansion the entire project was designated, partially out of the Minister's concern that the phase I/phase II process was "an exercise in project-splitting for the purpose of avoiding a federal assessment." The project developer is challenging that decision in court. One instance where the federal Minister can be expected to designate mines falling below the 5000 t/day limit is where the project appears to be designed to deliberately avoid a federal assessment.

For each designated project, the Impact Assessment Agency of Canada must decide whether an impact assessment is required. This involves taking into account certain factors including "the possibility that the carrying out of the designated project may cause adverse effects within federal jurisdiction or adverse direct or incidental effects; and any adverse impact that the designated project may have on the rights of the Indigenous peoples of Canada recognized and affirmed by section 35 of the *Constitution Act, 1982*" (see the *IAA*, s 16(2) for the full list of factors). This is typically referred to as the "screening decision." In the context of large coal mines, where the federal assessment is triggered, the process is often done in tandem with the provincial process by the AER through a Joint Review Panel, as is the case for the Grassy Mountain Coal Project, although that project is being reviewed under the previous federal statute, the *Canadian Environmental Assessment Act, 2012*, SC 2012, c 19, s 52 (*CEAA 2012*). Both the *IAA* and its predecessor had substantially similar provisions for federal-provincial coordination for review panels (see *IAA*, s 39). Where an assessment is conducted by a review panel, the panel holds a public hearing, writes a final assessment report that sets out predicted impacts and their significance, as well as recommended mitigation measures and approval conditions, and sends the report to the Minister. The final decision on whether the project is in the public interest and should be approved or rejected lies with the Minister or the Governor in Council (*IAA*, ss 60-65).

The *IAA* also allows the Minister of the Environment to establish a committee — or authorize the Impact Assessment Agency — to conduct a regional assessment or strategic assessment (*IAA*, ss 92-95). In months or years to come, the federal Minister will need to decide whether or not they intend to use these powers in relation to metallurgical coal in Alberta, and post that decision publicly, after a formal request is submitted; at least one group is preparing such a request (*IAA*, s 97, and *the Information and Management of Time Limits Regulations*, SOR/2019-283, s 9).

Previous regional and strategic assessments give some clues as to what a regional or strategic assessment relating to Albertan metallurgical coal would look like. A regional assessment assesses the effects of existing or future physical activities carried out in a particular region. Only one regional assessment has been started under the *IAA* so far, for Ontario's Ring of Fire Area, where the process is ongoing and has faced delays due to COVID-19. Another regional assessment was started under *CEAA 2012* and completed under the *IAA* for Offshore Oil and Gas Exploratory Drilling East of Newfoundland and Labrador. That assessment is facing a legal challenge from environmental groups on the basis that the assessment was deficient and did not comply with the *IAA*. It should be noted that the idea of regional assessments pre-exists *CEAA 2012*, and there have been regional or strategic assessments done outside of *CEAA 2012* and the *IAA*. In relation to Alberta's metallurgical coal, a regional assessment could mean the federal Minister of the Environment would get the Impact Assessment Agency involved in the process of replacing Alberta's 1976 Coal Policy, or assess coal mining in the Rocky Mountains in both Alberta and B.C.

The *Impact Assessment Act* describes strategic assessments as follows:

> 95 (1) The Minister may establish a committee — or authorize the Agency — to conduct an assessment of

> (a) any Government of Canada policy, plan or program — proposed or existing — that is relevant to conducting impact assessments; or
> (b) any issue that is relevant to conducting impact assessments of designated projects or of a class of designated projects.

The strategic assessment process has been used twice before. Once for a strategic assessment of climate change, and the second for a strategic assessment of thermal coal mining (that assessment is still early in the process, preparing their terms of reference). A strategic assessment of metallurgical coal development would likely be very similar to the planned strategic assessment for thermal coal, meant to consider the risks and benefits of metallurgical coal development and consider the future of new metallurgical coal mine projects across Canada.

If a regional or strategic assessment takes place it would be taken into account in decisions on whether to designate projects (*IAA*, s 9(1)), whether to conduct full impact assessments for designated projects (*IAA*, s 16(2)(e)), and in the impact assessment process itself (*IAA*, s 22(1)(p)). Depending on the outcomes of the resulting report, a regional or strategic assessment can encourage or discourage future project applications.

It should also be noted that the constitutionality of the *Impact Assessment Act* is being challenged by the Alberta government (see Martin Olszynski and Nigel Bankes's post on constitutional dimensions here). The first opinion will come from the Alberta Court of Appeal, though it is almost certainly then headed to the Supreme Court of Canada.

The *Species at Risk Act*

One of the purposes of the *Species at Risk Act*, SC 2002, c 29 (*SARA*) is to protect the habitat of endangered or threatened species as a key part of species conservation. To summarize this function of *SARA*, after a species is listed under *SARA* as endangered, threatened or extirpated (a process that can take years), the minister responsible for the species must issue a draft recovery strategy on the *SARA* registry within one year for endangered species, and within two years for threatened or extirpated species. A final version must then be issued 90 days (*SARA*, ss 42(1), 43). The recovery strategy must include an identification and description of critical habitat for a listed species. (*SARA*, s 41(1)) This identification triggers several legal outcomes.

Where the critical habitat is located on federal land or in water subject to federal jurisdiction, but is not within national park or other federal protected area, or otherwise sufficiently protected by other federal legislation, the responsible minister must issue a critical habitat order that designates the critical habitat identified in a recovery strategy and gives legal protection to that habitat by prohibiting any person from destroying any portion of it. (*SARA*, s 57, 58) If the species is not on land or water in federal jurisdiction (and is not a migratory bird subject to the *Migratory Birds Convention Act, 1994*, SC 1994, c 22), *SARA* offers no real protection for habitat unless the federal government exercises its safety net power (*SARA*, s 61) or issues an emergency order (*SARA*, s 80). *SARA's* limited application is why provinces were meant to enact their own provincial versions of species at risk legislation.

SARA only permits the destruction of critical habitat that is the subject of a section 58 critical

habitat order where a person has a license to do so issued by the responsible minister under section 73 in accordance with the stringent conditions set out in the section:

> **Powers of competent minister**
> **73 (1)** The competent minister may enter into an agreement with a person, or issue a permit to a person, authorizing the person to engage in an activity affecting a listed wildlife species, any part of its critical habitat or the residences of its individuals.
>
> **Purpose**
> **(2)** The agreement may be entered into, or the permit issued, only if the competent minister is of the opinion that
> **(a)** the activity is scientific research relating to the conservation of the species and conducted by qualified persons;
> **(b)** the activity benefits the species or is required to enhance its chance of survival in the wild; or
> **(c)** affecting the species is incidental to the carrying out of the activity.
>
> **Pre-conditions**
> **(3)** The agreement may be entered into, or the permit issued, only if the competent minister is of the opinion that
> **(a)** all reasonable alternatives to the activity that would reduce the impact on the species have been considered and the best solution has been adopted;
> **(b)** all feasible measures will be taken to minimize the impact of the activity on the species or its critical habitat or the residences of its individuals; and
> **(c)** the activity will not jeopardize the survival or recovery of the species.

SARA should have a significant impact on potential coal development because numerous endangered or threatened species listed under *SARA* are found in the eastern slopes where proposed coal development would take place. Rather than attempt to put together an extensive list, I will use the example of three species of trout and two species of pine trees.

The critical habitat for the Alberta population of Westslope Cutthroat Trout is protected by a section 58 critical habitat order covering a number of watercourses threatened by proposed coal mines in the eastern slopes (a result of judicial review applications to compel compliance with *SARA*). For the other four species, documents that should have been issued under *SARA* have not been issued with no explanation, a clear breach of *SARA*. Critical habitat for the Athabasca Rainbow Trout and the Bull Trout was identified in the recovery strategies for the two species and they should have received critical habitat orders by March 9, 2021, but as of the date of writing, their critical habitat orders have yet to be issued.

The Whitebark Pine is an endangered species of pine tree in the eastern slopes. It is also one of the few species that has been the subject of a *SARA* prosecution. In 2018, the Lake Louise Ski Resort pled guilty under *SARA* for cutting down Whitebark Pine without a permit (*SARA* applied because the trees were inside Banff National Park – which also resulted in a fine under the *Canada National Parks Act*, SC 2000, c 32) and was sentenced to a fine of $1.6 million under *SARA*. The Whitebark Pine received a draft recovery strategy in October 2017 and should have

had a final recovery strategy in January 2018, but no final recovery strategy has been issued. The second pine tree is the Limber Pine, which the Committee on the Status of Endangered Wildlife in Canada recommended for listing as endangered in 2014. Environment and Climate Change Canada was planning to list the Limber Pine in 2018, but then never did. The two pine tree species are not subject to *SARA* protections on provincial lands, but do factor into the assessment of environmental affects under the *IAA* process.

SARA protections interlock with the *IAA* process. Any activity that may result in the destruction of any part of the critical habitat can only be undertaken where "all reasonable alternatives to the activity that would reduce the impact on the species' critical habitat have been considered and the best solution has been adopted; and all feasible measures will be taken to minimize the impact of the activity on the species' critical habitat" (*SARA*, s 77). During an impact assessment for a project that will affect a listed species at risk or its critical habitat identified in a recovery strategy, the competent minister must be informed of the project, and if the project is built, measures consistent with *SARA* recovery strategies must be taken to to avoid or lessen those effects and to monitor them (*SARA*, s 79). The impacts of a proposed project on species at risk is often a key issue at environmental impact assessment hearings.

The usefulness of *SARA* is greatly reduced by the federal government's failures to meet statutory timelines for issuing documents required under *SARA*, slowing the recovery process and leaving endangered and threatened species without the legal protections offered by *SARA*. The federal government's long and unexplained delays in meeting their obligations under *SARA* leaves open the possibility that projects will go forwards without *SARA* protections in place.

The *Coal Mining Effluent Regulations* Under the *Fisheries Act*

The *Coal Mining Effluent Regulations* have not been enacted. They are a proposed regulation under the *Fisheries Act*, RSC 1985, c F-14 to control the release of deleterious substances into water. They would set limits for contaminants (including selenium, nitrate, and acidity) in water released from coal mining operations. The government has been preparing the *Coal Mining Effluent Regulations* since at least 2016 with government holding consultations held in 2017.

Environment and Climate Change Canada initially planned to have the regulations published in 2018, but they have were delayed and have not yet been published in the Canada Gazette. It is not difficult to determine what happened – industry took issue with the proposed regulations and Environment and Climate Change Canada has chosen not to finalize them until they reach a compromise with industry. Slides from coal industry meetings, lobbying registrations, and Coal Association of Canada board meeting minutes are pretty clear about their organized opposition to the new regulations. The April 2020 Board Meeting minutes of the Coal Association of Canada makes the point well:

> Coal Mining Effluent Regulations: Environment and Climate Change Canada (ECCC) provided an update on effluent regulations in February, 2020 and the CAC/Guy Gilron of Borealis Environmental Consulting have collected feedback from all producers and developers. Final written submissions are being prepared and to be sent to ECCC in May. Meetings have been held with all the coal producing provinces asking for letters

> advocating for the delay in the publishing of the regulations. President will be meeting with ECCC ADM J. Moffet and CMER managers seeking a commitment for technical meetings between the CAC and a delay in gazetting the regulations due to COVID…

So it seems the *Coal Mining Effluent Regulations* will arrive as soon as the government finishes consulting with the Coal Association of Canada. When the regulations come into force is important because of the phase-in rules for the regulations: the current plan is for mines that enter commercial operation within 3 years of the CMER to count as "existing mines" subject to higher release limits. For instance, an "existing mine" will be permitted to release double the selenium that a "new mine" will be permitted to (Grassy Mountain Hearing Transcript Vol 22, at 4759-60). This odd proposed phase-in process drew the attention of the Joint Review Panel at the hearing for the Grassy Mountain Coal Project when the Panel realized the Grassy Mountain Coal Project, which has not yet been approved or built, will be an "existing mine" for the terms of the *Coal Mining Effluent Regulations* (at 4800-801). It seems lobbyists for the coal industry have managed to get a lot of coalmines that clearly do not exist – potentially all the planned Albertan coal mines – categorized as "existing mines" by delaying the finalization of the regulations for five years. Whatever their general feelings on red tape, Albertans might have appreciated a little more red tape protecting their water.

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This post may be cited as: Drew Yewchuk, "Coal Law and Policy Part Five: What is the Role of the Federal Government in Relation to Alberta Coal Mines?" (March 24, 2021), online: ABlawg, http://ablawg.ca/wp-content/uploads/2021/03/Blog_DY_Coal_Policy_Part5.pdf

April 7, 2021

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

By: Aimee Huntington, Niall Fink & Peter Shyba

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

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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

April 21, 2021

Coal Law and Policy Part Six: Coal Consultation Terms of Reference

By: Nigel Bankes

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

May 3, 2021

Coal Development Consultation Terms of Reference Revisited

By: Arlene Kwasniak

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.

This post may be cited as: Arlene Kwasniak, "Coal Development Consultation Terms of Reference Revisited" (May 3, 2021), online: ABlawg, http://ablawg.ca/wp-content/uploads/2021/05/Blog_AK_ToR_Revisited.pdf

July 19, 2021

Justice for the Westslope Cutthroat Trout at Grassy Mountain

By: Shaun Fluker

Decision Commented On: *Report of the Joint Review Panel: Benga Mining Limited Grassy Mountain Coal Project*, 2021 ABAER 010

On June 17, 2021, the Alberta Energy Regulator (AER) denied an application by Benga Mining Limited under the *Coal Conservation Act*, RSA 2000, c C-17, for approvals to construct, operate and reclaim an open-pit metallurgical coal mine (along with associated processing, transportation and related infrastructure) on the montane and subalpine lands of Grassy Mountain in the Crowsnest Pass region of southwestern Alberta. The application was considered by a federal-provincial joint review panel governed by terms of reference established under the *Responsible Energy Development Act*, SA 2012, c R-17.3, and the *Canadian Environmental Assessment Act, 2012*, SC 2012, c 19, s 52 (*CEAA 2012*), terms which instructed the panel to exercise AER decision-making authority under the *Coal Conservation Act* and assess the environmental, economic, and social impacts of the project under various provincial statutes and *CEAA 2012* (the federal registry for the environmental impact assessment is here). The panel's decision consists of a whopping 3072 paragraphs (631 pages not including appendices). This comment focuses on the AER portion of this decision, and in particular just one aspect of this decision: the confrontation between coal development and preservation of the threatened Alberta population of westslope cutthroat trout (WSCT) along the eastern slopes of the Rocky Mountains. This comment is not reviewing the *CEAA 2012* findings and recommendations because, as the panel indicates at paragraph 3066, without the provincial authorizations the project cannot proceed.

The Mine is Not in the Public Interest

An overview of the AER's public interest determination is set out at paragraphs 3005 to 3051, very near the end of the panel's decision. Readers looking for a summary of highlights in the panel's findings should go here. These paragraphs summarily describe the concerns with the project raised by many of the hearing participants and Benga's response to these concerns. Benga's overall position was that the mine project would be in the public interest because of its positive economic impacts and that the adverse environmental impacts would not be significant after taking into account their mitigation measures (at para 3014). Generally speaking, the panel found that Benga had overstated the positive contributions of the mine and had made overly optimistic assumptions in relation to the effectiveness of its proposed mitigation measures to ameliorate adverse environmental impacts. In several parts of the decision, the panel observes that Benga failed to implement a precautionary approach to assessing environmental impacts and developing its mitigation plans. However, the panel gives particular attention to the impacts of the mine project on WSCT:

> Overall, we conclude that the project is likely to result in significant adverse environmental effects on westslope cutthroat trout and surface water quality, and these negative impacts outweigh the low to moderate positive economic impacts of the project. Accordingly, we find that the project is not in the public interest. In making this determination, we understand that this means that the expected employment, related spending, and economic benefits for the region will not be realized. However, even if the positive economic impacts are as great as predicted by Benga, the character and severity of the environmental impacts are such that we must reach the conclusion that approval of the Coal Conservation Act applications are not in the public interest.
>
> While we found the project is likely to result in additional significant adverse effects beyond those on surface water quality and westslope cutthroat trout and their habitat, we find that these effects, in and of themselves, would not have been sufficient to determine that the project is not in the public interest. It is the nature and magnitude of effects on surface water quality and westslope cutthroat trout and their habitat that drive our public interest determination. (at paras 3048—3049, emphasis added)

These paragraphs reveal to me that the AER denied this application because the coal mine would destroy critical habitat for WSCT. A truly exceptional regulatory outcome which shows that, contrary to what I wrote in the Conversation a couple years ago, energy development does not always win when pitted against protecting threatened species. One might even suggest this is Alberta's snail darter moment, a rare instance where a threatened species prevails over a major resource development project.

Coal Versus Trout

The seeds for this confrontation between coal and WSCT were initially sown back in the Fall of 2015 when the trajectories of the proposed Grassy Mountain mine and the designation of critical habitat for WSCT were formally put into motion. Benga submitted its environmental impact assessment for the coal mine to the AER and the Canadian Environmental Assessment Agency on November 10, 2015, and a revised version of the assessment was submitted on August 12, 2016 (the decision provides a helpful summary of noteworthy dates in the entire assessment and hearing process in Appendix 1 at pages 633—634). This initial (as revised in 2016) assessment identified the WSCT as the primary assessment component for the impact of the mine on aquatic species, and both the Gold Creek and Blairmore Creek watersheds were identified in the assessment as areas affected by the proposed mine. The initial assessment acknowledged that Gold Creek and its tributaries were then identified as critical habitat for WSCT as a threatened species (at pages E-105— E-118 of the 2016 assessment), and noted " . . . the potential for the direct removal of portions of specific upper headwater tributaries of both Blairmore Creek and Gold Creek." (at page E-114 of the 2016 assessment) A visual map of the mine footprint – showing how the project straddles the Blairmore and Gold Creek watercourses is located at page 19 of the AER decision.

Just weeks after Benga filed its initial environmental impact assessment for the coal mine in November 2015, on December 2, 2015 the federal Minister of Fisheries and Oceans issued a

critical habitat protection order designating Gold Creek and its tributaries at Grassy Mountain as critical habitat for WSCT under the *Species at Risk Act*, SC 2002, c 29 (*SARA*). As I described in Habitat Protection for the Westslope Cutthroat Trout in Alberta, this Order engaged section 58(1) of *SARA* which states no person shall destroy any part of critical habitat for WSCT as a listed threatened aquatic species under *SARA*. While section 73 of *SARA* does provide the federal Minister with authority to permit a person to engage in an activity that destroys critical habitat for a threatened species, the exercise of such authority by the Minister is subject to strict conditions including that (1) the impact on the species is incidental to the activity in question and (2) the impact does not jeopardize the survival or recovery of the species.

Thus, it was inevitable that the impact on Gold Creek and WSCT was going to be a primary issue in the assessment and decision-making process for the Grassy Mountain project. Over the course of several years after Benga's initial submission of its impact assessment in 2015 and leading all the way up to the public hearing itself in the Fall of 2020, the panel and the federal department of Fisheries and Oceans (DFO) directed requests to Benga for further information on impacts to WSCT and Benga's mitigation plans for those impacts – including more specifics on Benga's proposal to offset the unavoidable destruction to portions of Gold Creek. Meanwhile, DFO also continued to update and expand the identification of critical habitat for WSCT, working together with Alberta Environment (a collaboration which David Mayhood and I critically review in Environmental Stewardship of Public Lands? The Decline of Westslope Cutthroat Trout Along the Eastern Slopes of the Rocky Mountains in Alberta), all of which culminated in the publication of a revised Recovery Strategy – Action Plan for WSCT in December 2019 and an expanded description of critical habitat in Gold Creek (AER decision at para 1173).

In its submission to the panel at the public hearing in November 2020, DFO filed a report which stated that the WSCT population in Gold Creek is one of only 10 remaining populations in Alberta considered to be viable in the long term and that any negative impacts to the population would jeopardize the survival or recovery of the species (see here). In its final written submission to the panel, DFO stated that based on information currently available for the mine project that DFO would be unable to issue permits under *SARA* to allow the project to proceed. This submission was long overdue, and one is left to wonder why it took DFO so long to establish what was really the only tenable position of the department given the necessary destruction of critical habitat for WSCT. Nonetheless, better late than never. The same cannot be said for Alberta Environment, which made no submissions to the panel. The absence of Alberta Environment submissions on the significant adverse impacts of the Grassy Mountain mine on WSCT – a species which is also listed as threatened under the *Wildlife Act*, RSA 2000, c W-10 and the subject of a published provincial recovery strategy – makes a complete mockery of any suggestion that Alberta has effective endangered species policy. We already know the province does not have effective legislation – see Endangered species under Alberta's Wildlife Act: Effective legal protection?

Mine Impacts on WSCT

Many of the participants (ENGOs, coalitions, and individuals) gave submissions to the panel on the impacts to WSCT during the hearing. The AER decision describes these submissions in detail, alongside what is set out in Benga's impact assessment, and the panel sets out its conclusions on

the potential impacts of the mine on WSCT between paragraphs 1165 and 1354. What follows is a more specific breakdown of what is set out in these paragraphs.

In paragraphs 1177 to 1194 the panel (1) describes the differing assessments on the quality of Gold Creek habitat and fluctuations in population numbers given by Benga and other hearing participants; (2) finds that Gold Creek is important habitat for the survival and recovery of WSCT in Alberta; and (3) finds there is uncertainty in the population estimates for WSCT, but that the overall trend in numbers is downward.

In paragraphs 1195 to 1203 the panel explains how Benga's environmental impact assessment described the direct and indirect effects of the mine project on WSCT, and the panel also summarizes DFO's response to this assessment including its view " . . . that the significance framework Benga applied to those effect pathways, while appropriate in a more typical setting, fails to reflect the sensitivity of isolated populations of WSCT with unique genetic pools that are critical to the species survival and recovery as a whole." (at para 1202)

In paragraphs 1204 to 1215 the panel (1) describes Benga's assessment of project impacts to WSCT habitat in the Gold and Blairmore Creek watersheds; (2) the panel notes that DFO released an expanded description of WSCT critical habitat in Gold Creek in the 2019 revised Recovery Strategy-Action Plan; and (3) in a key set of paragraphs in the decision the panel set out DFO concerns with the impacts to critical habitat and Benga's methodology in the assessment:

> DFO expressed concern that alteration and destruction of habitat in the Gold Creek and Blairmore Creek watersheds would compromise the survival and recovery of WSCT. DFO stated that authorizing the destruction of the critical habitat in the Gold Creek watershed would require robust scientific evidence that such destruction would not jeopardize the survival or recovery of the species. DFO stated that Benga's riparian quality classification system resulted in residual effects only for some medium- and high-quality habitat, and Benga's methodology for quantifying impacts did not acknowledge the ecological context and sensitivity of an isolated population of a species at risk with poor resiliency.
>
> DFO stated that, as of the hearing, Benga had not characterized the full extent of critical habitat losses due to the project to reflect the updated 2019 Recovery Strategy-Action Plan. DFO confirmed that the predicted losses of critical habitat that Benga calculated in 2016 were considerably lower than the impacts that would be calculated using the updated 2019 Recovery Strategy-Action Plan. DFO suggested to Benga that an updated calculation of impacts on critical habitat was required to fully understand the impacts on WSCT habitat, as well as to assess proposed mitigation and offsetting measures. DFO recommended Benga undertake a detailed analysis of the ability of the riparian areas to support the features, functions, and attributes of critical habitat for Gold Creek, as well as Blairmore Creek, given its potential to support recovery objectives in the 2019 Recovery Strategy-Action Plan. Benga confirmed that it had not updated its estimates of project impacts on WSCT critical habitat since the 2019 Recovery Strategy-Action Plan was released. (at paras 1210, 1212)

In paragraphs 1216 to 1226 the panel finds that Benga's impact assessment on the mine's effect to instream flow levels in Gold Creek was inadequate because Benga underestimated the potential

for decrease in flow (other hearing participants specifically noted this was a particular concern during the winter months when the decrease in flow might result in dry sections of the watercourse (see para 1224)) and also that Benga did not adequately take into account uncertainties in its modelling.

In paragraphs 1227 to 1247 the panel (1) describes the potential effects of calcium carbonite in contact water runoff from the mine, and in particular the potential for the development of calcite in Gold Creek which would harden the stream bed and destroy WSCT critical habitat; and (2) references the extensive discussion of the potential for selenium contamination into Gold Creek set out earlier in the decision (described separately below in this comment).

In paragraphs 1248 to 1255 the panel (1) describes Benga's methodology to assessing the impact of the mine on water temperature in Gold Creek; (2) describes the submissions of DFO and other hearing participants which questioned Benga's methodology, and (3) concludes that Benga failed to adequately assess the potential impact of the mine on water temperature, particularly given the narrow tolerance of WSCT to these changes (at para 1255).

In paragraphs 1256 to 1267 the panel describes the potential impact of the mine on sediment transport and WSCT food supply in Gold Creek, and after setting out Benga's assessment and the response by DFO, the panel concludes the loss of some upstream tributaries to the mine footprint creates uncertainty on the extent of changes to sediment supply and associated food productivity for WSCT: "[T]he loss of riparian and tributary habitats is likely to result in a reduction in overall productivity in both Gold and Blairmore Creeks and residual adverse impacts on WSCT." (at para 1267)

In paragraphs 1268 to 1273 the panel (1) describes the potential impacts of mine blasting on WSCT; (2) notes Benga's position that after taking into account mitigation measures the blasting would have "no detectable changes in WSCT relative abundance" (at para 1270); (3) sets out DFO's view that Benga's proposed monitoring and mitigation of blasting effects was inadequate for a threatened fish population; and (4) concludes "Benga did not develop site-specific mitigation measures or present a monitoring plan that would address the risks posed to WSCT populations, which introduces uncertainty and poses a risk to WSCT populations in Gold and Blairmore Creeks." (at para 1273)

The AER decision also extensively discusses the potential impacts of the mine on surface water quality in nearby watercourses, including Gold Creek. This portion of the decision is found at paragraphs 841 to 1164, and what follows is a brief summary of these findings as they relate to WSCT.

The most significant potential impact of the mine on WSCT would be selenium contamination deposited into the Gold Creek and Blairmore Creek watersheds from runoff water and groundwater in the mine and its associated infrastructure (e.g., waste rock disposal areas). The panel describes Benga's water management plan at paragraphs 849 to 854, with diagrams to visually explain the mitigating function of surge ponds, sediment ponds, and saturation zones. The impact of selenium runoff in the Elk Valley on the collapse of WSCT populations led the panel to observe crucially that "[t]he Elk Valley serves as a cautionary example regarding what could occur when sources of

selenium and calcite formation are not controlled. It affirms the importance of preventing problems before they arise, rather than relying on adaptive management after contamination problems have taken hold." (at para 848)

Benga's assessment of selenium impacts and its proposed mitigation measures were questioned extensively by nearly all other hearing participants who asserted that Benga was underestimating the impacts of selenium on WSCT and overestimating the efficacy of its proposed mitigation measures. The panel findings on selenium impacts are summarized at paragraphs 1146 to 1153:

> Throughout this chapter, we identify a large number of uncertainties that arise from Benga's analysis of surface water quality. At many points in the analysis of the pathway of effects by which contaminants from the project could impact surface water quality, Benga made optimistic assumptions that were not well supported by evidence and submitted that it would effectively adopt an "adaptive management" approach, which involved proceeding with the project and determining later whether its assumptions were correct. If they were not, Benga did not have well-developed backup plans in hand.
>
> If Benga's assumptions turned out to be incorrect, it might have been too late to avoid surface water quality impacts that, as was demonstrated in the nearby Elk Valley, could prove challenging and expensive to resolve. This does not represent a conservative approach appropriate to the sensitivity of the project location and the threatened status of one of the main receptors, westslope cutthroat trout.
>
> Throughout the many sections of this chapter, we identify several optimistic and non-conservative assumptions made by Benga that undermined our confidence in the results it presented. We summarize some of our main findings below.
>
> The current project as proposed is unlikely to capture the 95 or 98 percent of selenium-rich contact water coming from the waste rock dumps that would be needed to achieve modelled selenium concentrations in the effluent and receiving streams. Applying a more realistic capture efficiency rate, as part of a conservative approach, would result in significantly higher concentrations of selenium in the effluent, and in both Blairmore and Gold Creeks, in the absence of further mitigation.
>
> Benga overestimated the effectiveness of its primary mitigation approach to managing selenium: saturated backfill zones. These structures are unlikely to achieve the extremely high performance level (removal of 99 per cent of influent selenium concentrations, or the production of effluent with selenium concentrations below 15 µg/L) that would be needed to achieve Benga's modelled selenium concentrations in the effluent and receiving streams. Benga did not demonstrate that the saturated backfill zones can achieve the necessary high level of effectiveness, at the scale of this project. Even a modest reduction in effectiveness from Benga's assertions would yield a large increase in selenium in saturated backfill zone effluent. And even if the saturated backfill zone did work as effectively as Benga suggested, modelled selenium concentrations in Blairmore Creek would eventually exceed Benga's proposed site- specific objective.

> Benga did not adequately describe or assess the alternative, additional selenium mitigation measures it would pursue if it turns out that the saturated backfill zones are not as effective as needed. Benga provided almost no substantive information on alternative treatment measures, and only intends to implement them "if needed" based on monitoring results, which introduces the possibility that there could be an unacceptable time lag between discovery of a contamination problem and construction of an alternative treatment approach. The strategy of "putting all one's eggs in one basket," when the basket (in this case, saturated backfill zones) is unproven, does not give us confidence that significant adverse environmental impacts can be avoided even if additional mitigation measures were later put in place.
>
> …
>
> We conclude the project is likely to cause significant, adverse effects to surface water quality. (at paras 1146— 1153)

WSCT and Habitat Offsets

In light of the evidence confirming the likelihood of significant adverse impacts to WSCT and its critical habitat in Gold Creek, the only way for this mine to be constructed and operated lawfully under *SARA* was for DFO to authorize the mine under section 73 of *SARA* which would require that any impact from the mine not jeopardize the survival or recovery of the species. Given the evidence of DFO that the WSCT population in Gold Creek is one of only 10 remaining populations in Alberta considered to be viable in the long term, that any negative impacts to the population would jeopardize the survival or recovery of the species, and the submissions made to the panel on the impacts of the mine on WSCT critical habitat in Gold Creek, it is difficult to envision a scenario in which this project would meet the requirements of section 73. The implementation of *SARA* and critical habitat protection in the face of a major development project such as this one is increasingly leading to a discussion about offsetting harm to critical habitat with measures that create or restore habitat elsewhere, in an attempt to address the requirements of section 73 (for a recent comment regarding offsets and impact to the critical habitat for a SARA listed species – boreal caribou in Alberta - see Canada and Alberta Agree to More Pie-In-The-Sky on Woodland Caribou).

Unfortunately, the role of offsets under *SARA* and how they can be implemented remains a significant unknown, despite the fact that the legislation has been in force for more than 15 years. Federal officials published a draft version of policy guidance for public comment approximately 5 years ago and since then have apparently did little or nothing with the draft. The Faculty's Public Interest Law Clinic was retained in 2016 to assist two groups with making submissions to Environment and Climate Change Canada on the proposed policy; Drew Yewchuk and I published that submission in Comments on the Proposed Species at Risk Act Permitting Policy. The essence of this submission was that authorizing harm to critical habitat in exchange for an offsetting plan was at best an unproven promise with a host of troublesome issues (several of which were apparent in this case), and we expressed the view that an offsetting policy that would authorize harm to critical habitat with a section 73 permit is fundamentally inconsistent with the overall purpose of *SARA* which is to protect threatened species from further losses and facilitate their recovery to

sustainable population numbers. While offsets are an important component of environmental policy more generally when implemented in accordance with the mitigation hierarchy – see here for an introductory webinar on biodiversity offsets and also see David W. Poulton, "Biodiversity and Conservation Offsets: A Guide for Albertans" (Canadian Institute of Resources Law, 2015) at page 5 – in my view they have no place under *SARA* for authorizing harm to a listed species because by the time a species is listed as threatened or endangered under *SARA* the days for trade-offs and mitigation measures are long gone.

Benga's proposed offsets included the enhancement of in situ habitat within the Gold and Blairmore creek watersheds, as well as genetic research on these WSCT populations (at paras 1275— 1278). Other hearing participants questioned some of Benga's assumptions underlying its offsets plan (e.g., whether overwintering habitat was a limiting factor for population numbers – at para 1281). In particular, DFO was of the view that the plan "did not provide confidence" it would offset the mine impacts on WSCT (at para 1279) and "did not demonstrate how the proposed offsetting would meet the population and distribution objectives for WSCT (as stated in the 2019 Recovery Strategy-Action Plan) and not jeopardize the survival and recovery of this species." (at para 1289)

A key discussion on offsets in the decision, one which may have implications going forward on the use of an offsets plan to address unavoidable harm to designated critical habitat for an endangered or threatened species listed under *SARA*, is found generally at paragraphs 1290 to 1302. In particular, the time gap between harm to critical habitat and the later implementation of an offset was identified by DFO as a problem for any approval of this project under *SARA*:

> We note that DFO has clearly indicated that offsetting measures should be constructed and proven effective prior to project impacts occurring on WSCT habitat. This will support a determination that the survival and recovery of WSCT will not be jeopardized. DFO has stated that this is a precondition that must be met prior to issuing a permit under section 73 of *SARA*, which we understand is a requirement for the project to proceed. We also note that Benga has rejected this approach as untenable. Given the sensitivity of the species and habitat in question, we understand DFO's position on this matter. However, we cannot base our decisions on what DFO or its minister may or may not decide in future regulatory applications. For our purposes, we must be persuaded on a balance of probabilities that Benga's proposed offsetting plan is technically feasible and likely to be effective. We are not persuaded this is the case. (at para 1301, emphasis added)

One of the most significant limitations for the effectiveness of offsets is that critical habitat is, by definition, rare and non-fungible. It would not be habitat *critical* to the survival and recovery of the species otherwise. Accordingly, a requirement that the offset be proven effective prior to project impacts is very important towards ensuring the use of offsets does not undermine the overall purpose of *SARA*.

Conclusion

Once the WSCT was listed under *SARA* and its recovery strategy initially published in 2014, the impact of the proposed Grassy Mountain mine on WSCT was always going to be a primary issue

in the assessment and decision-making process for this project. Indeed, my criticism here is the fact that the destruction of critical habitat for a threatened species listed under *SARA* – harm which would necessarily have to occur for this mine project to be constructed - did not seem to register with much significance in the regulatory review until very late in the process. Simply put, if we are serious about our intentions to halt the demise of species whose survival is threatened because of human activity, then the usual fare of mitigation proposals or adaptive management to address project impacts must give way to a regulatory approach that places higher significance on the need to protect critical habitat. This decision is a noteworthy and positive step in that direction, and represents justice for the WSCT at Grassy Mountain.

This post may be cited as: Shaun Fluker, "Justice for the Westslope Cutthroat Trout at Grassy Mountain" (July 19, 2021), online: ABlawg, http://ablawg.ca/wp-content/uploads/2021/07/Blog_SCF_Grassy_Mountain_July2021.pdf

September 27, 2021

Procedural Fairness When Challenging Timeline Extensions for Freedom of Information Requests

By: Drew Yewchuk

Decision Commented On: *Blades v Alberta (Information and Privacy Commissioner)*, 2021 ABQB 725 (CanLII)

The recent decision in *Blades v Alberta (Information and Privacy Commissioner)*, 2021 ABQB 725 (CanLII) (*Blades*) relates to two issues ABlawg has previously covered. First, the challenges of getting government records in a timely manner using the *Freedom of Information and Protection of Privacy Act*, RSA 2000, c F-25 (*FOIP*). Prior posts on *FOIP* have discussed the challenges with the information request process, and the challenges presented by the review process at the Office of the Information and Privacy Commissioner. Second, the Alberta government's decision to revoke the 1976 *Coal Development Policy for Alberta*. See the list of coal-related ABlawg posts listed at the top of this post. Looking past those specifics, *Blades* is a judicial review decision about an administrative body's obligation of procedural fairness and the right to be heard by the administrative decision-maker.

Background to the FOIP Request

The 1976 *Coal Development Policy* was revoked on May 15, 2020, and then reinstated on February 8, 2021 pending the report of the Coal Policy Committee. The Coal Policy Committee accepted submissions from the public until September 19, 2021. According to their terms of reference, the Coal Policy Committee is preparing two reports: one summarizing the perspectives and advice of Albertans about coal development to be submitted on October 15, 2021, and a second report with their recommendations to the Minister on November 15, 2021. Their terms of reference do not specify when those reports will be shared with the public.

On July 3, 2020, a coalition of ranchers who take an interest in the coal issue (the Applicants) sent a *FOIP* request to Alberta Energy asking for:

> Alberta Energy's records that discuss the rescission or change of the coal policy (1976 Coal Policy) or exceptions to the coal policy, including: any briefing materials (briefing notes, internal memos, reviews, reports), and correspondence (emails, letters). To be clear, we are also requesting third party records.
>
> Time period: January 1, 2020 to June 1, 2020 (*Blades*, at para 72, except for the time period, which is not set out in Justice Janice Ashcroft's decision, but was in the certified record.)

The Applicant's intention was to use the records to prepare for their first judicial review relating to the initial Coal Policy rescission, and to prepare their submissions to the Coal Policy Committee - which meant they needed to receive the records before September 19, 2021 (*Blades* at paras 21-37).

A public body receiving a *FOIP* request has an initial 30 days to reply under section 11 of *FOIP*, but may extend that period as described in section 14 of *FOIP*. One complicating factor in *Blades* was Ministerial Order SA:009/2020, a COVID-related order that temporarily extended the timelines for responding to *FOIP* requests – I will mostly skip discussion of the COVID-related Ministerial Order except where necessary for accuracy.

Alberta Energy extended their time limit to reply by 90 days as allowed by the temporary COVID-related Ministerial Order (*Blades* at paras 13-14). Then Alberta Energy sought permission from the Information and Privacy Commissioner (The Commissioner) to extend their timeline by 612 days, but the Commissioner granted an extension of only 270 days, set to end October 14, 2021 (*Blades* at paras 52, 70).

Alberta Energy based their request for the 612-day extension on a number of factors, some of which the Commissioner accepted, and others which the Commissioner rejected in determining a 270-day extension was appropriate. The two key factors the Commissioner accepted were the large number of records at 6,539 pages, and the need to consult with third parties who had information in the records (*Blades* at para 57).

The *Blades* decision addresses three different issues: a preliminary evidentiary issue, a procedural fairness issue, and a challenge to the substantive merit of the decision.

The Preliminary Evidentiary Issue: The Use of Affidavits in a Judicial Review

The preliminary evidentiary issue related to whether the applicant should be allowed to rely on an affidavit in the judicial review. The general rule for a judicial review is that the record before the administrative decision-maker becomes the record before the Court, because the Court is only reviewing the decision of the administrative body and not considering the issue anew. The Court typically allows new evidence only where the evidence relates to an allegation of a breach of procedural fairness that would not appear in the record before the administrative decision-maker, or the record produced by the administrative decision-maker is too deficient for the Court to review the decision. (See *Alberta's Free Roaming Horses Society v Alberta*, 2019 ABQB 714 (CanLII) at paras 22-26, and *Alberta Liquor Store Association v Alberta (Gaming and Liquor Commission)*, 2006 ABQB 904 (CanLII) at paras 38-45.)

The affidavit in *Blades* contained evidence about the rescission of the Coal Policy and the Coal Policy Committee's submission deadline. Justice Ashcroft declined to admit the affidavit on the basis that it would not further the Applicant's arguments because if there was a breach of procedural fairness, that would invalidate the Commissioner's decision, and the Applicant had no need to prove a fairer procedure would have changed the outcome (*Blades* at paras 21-23).

The Procedural Fairness Issue

The Applicant was afforded no procedure in the process of the Commissioner making the decision to give Alberta Energy permission to extend the timeline by 270 days. The Applicant had no opportunity to make any submissions to the Commissioner, and only learned of the timeline extension after the decision was made. This is the regular practice of the Commissioner with regard to section 14 timeline extensions under *FOIP*. More than a dozen *FOIP* requests I have filed have had their timelines extended, and I have never been given the opportunity to make submissions.

Justice Ashcroft considered the five factors affecting the content of the duty of fairness from *Baker v Canada (Minister of Citizenship and Immigration)*, 1999 CanLII 699, [1999] 2 SCR 817 at paras 21-22. For the first factor, Justice Ashcroft determined the nature of the decision pointed towards a lower degree of procedural fairness because an extension "should not generally be viewed as a decision to refuse an applicant's access to the record(s) requested" and "neither erodes nor amends the substantive content of the records to be disclosed", and that the process complied with the requirements of section 14 of the *FOIP Act* and the Commissioner's Practice Note on request for time extensions under section 14 (*Blades* at paras 31-32). Respectfully, these are considerations for *Baker* factors two, three, and five. The first *Baker* factor refers to "the closeness of the administrative process to the judicial process" (*Suresh v Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1 (CanLII) at paras 115-116). When considering the nature of the statutory scheme, Justice Ashcroft notes other sections of the *FOIP Act* explicitly give applicants a right to be heard, and infers the legislature favoured speed and efficiency during the timeline extension stage of the *FOIP* process and did not require the Commissioner to seek submissions from applicants, again supporting a lower degree of procedural fairness (*Blades* at paras 34-36). Justice Ashcroft's finding in relation to the third factor, the importance of the decision to the individuals affected reads:

> The records elicited through the FOIP Request may have been relevant to both the then ongoing judicial review centered around the rescission of the 1976 Coal Mining Policy, and later, the submissions of the Applicants before the Coal Policy Committee, which deadline was apparently September 15, 2021. However, I cannot interpret the extension, even within this more time sensitive context, as equivalent to the denial of the records, or denial of a substantive right. (at para 37)

Strangely, the information from the affidavits Justice Ashcroft declined to admit is mentioned in relation to the third factor. For the fourth factor, Justice Ashcroft refers back to the process outlined in the *FOIP Act* (*Blades* at para 38). Respectfully, that is properly considered under *Baker* factor two. The doctrine of legitimate expectations is separate from statutory guarantees of procedure. For the final factor, the administrative body's choice of procedure, Justice Ashcroft notes that the Commissioner has made a consistent practice of not taking submissions from persons filing *FOIP* requests (*Blades* at para 39).

Justice Ashcroft concludes that the applicants were not owed an opportunity to make any submissions to the Commissioner before the Commissioner decided to give Alberta Energy permission to extend the timeline by 270 days. However, Justice Ashcroft says that "If the

extension is so long that the substantive right of access to records is infringed, this can be addressed under the analysis of reasonableness" (at paras 41, 45).

The Merits of the Decision: Reasonableness Review

The standard of review was not disputed, as *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 (CanLII) settled that the decision is to be reviewed for reasonableness (*Blades* at paras 46-47).

At this point, *Blades* becomes a little confusing. On the issue of what factors the Commissioner is permitted to consider in granting a timeline extension, Justice Ashcroft found the Commissioner was restricted in their considerations to only those factors enumerated in section 14(1), saying: "Both the purposes outlined in s. 2 of the *FOIP Act* and the wording of s. 14 lead to the conclusion, at least in terms of whether extensions can be *granted,* that the factors enumerated under s. 14(1) are both mandatory and exhaustive" (*Blades* at para 61), but Justice Ashcroft also found the Commissioner may be permitted to consider factors beyond those listed in section 14: "I decline to foreclose an interpretation of s. 14 which would allow the Commissioner to exercise discretion to refuse to grant an extension on the basis of particular information the Commissioner has at the time of considering the extension" (*Blades* at para 63). I will discuss the question of whether *FOIP* section 14(1) is exhaustive below.

Justice Ashcroft concluded that the Commissioner's decision to allow the 270-day extension was reasonable as it displayed "coherent internal reasoning and was made within the legal and factual context." Justice Ashcroft dismissed the application for judicial review (*Blades* at para 80-81).

Commentary

First, I suggest the confusion in the *Blades* decision about whether the Commissioner can consider factors beyond those listed in section 14(1) when making decisions about timeline extensions is the result of an unnoticed distinction between two different types of things that might be called 'factors': 'conditions' and 'considerations'. 'Conditions' determine whether a discretionary power can be used at all, and 'considerations' are used in making the discretionary decision about whether to exercise the statutory power. The *Blades* decision uses the word 'factors' to refer to both. When the COVID-related Ministerial Order is not in effect, Section 14 reads:

> **Extending time limit for responding**
>
> 14(1) The head of a public body may extend the time for responding to a request for up to 30 days or, with the Commissioner's permission, for a longer period if
>
> (a) the applicant does not give enough detail to enable the public body to identify a requested record,
>
> (b) a large number of records are requested or must be searched and responding within the period set out in section 11 would unreasonably interfere with the operations of the public body,

(c) more time is needed to consult with a third party or another public body before deciding whether to grant access to a record, or

(d) a third party asks for a review under section 65(2) or 77(3).

I suggest that section 14(1) is an exhaustive list of four conditions, at least one of which must be met, before a *FOIP* timeline can be extended, but section 14(1) lists no considerations at all – the Commissioner's considerations are limited only by the general purpose of the *FOIP Act*.

The distinction between a condition and a consideration exists elsewhere in the *FOIP Act* – to properly apply any of the discretionary exemptions, the public body must determine information in the record meets one of the *conditions* described in the exemption, and then take account of appropriate *considerations* to when exercising their discretion to exempt the information from disclosure. For an example of a list of statutory considerations, see section 17(5) of the *FOIP Act*:

17 …

(5) In determining under subsections (1) and (4) whether a disclosure of personal information constitutes an unreasonable invasion of a third party's personal privacy, the head of a public body must consider all the relevant circumstances, including whether

(a) the disclosure is desirable for the purpose of subjecting the activities of the Government of Alberta or a public body to public scrutiny,

(b) the disclosure is likely to promote public health and safety or the protection of the environment,

(c) the personal information is relevant to a fair determination of the applicant's rights,

(d) the disclosure will assist in researching or validating the claims, disputes or grievances of aboriginal people,

(e) the third party will be exposed unfairly to financial or other harm,

(f) the personal information has been supplied in confidence,

(g) the personal information is likely to be inaccurate or unreliable,

(h) the disclosure may unfairly damage the reputation of any person referred to in the record requested by the applicant, and

(i) the personal information was originally provided by the applicant.

Second, there is an unrecognized issue in the decision about what the enormous number 6,539 is actually referring to. There is an important difference between the number of records that need to

be searched through, and the number of records that need to be processed and released to the applicant. I do not believe the 6,539 number refers to the pages of records that will be processed and released. During the January 1, 2020 to June 1, 2020 time period of the request there are about 105 business days. To have 6,539 relevant records would require Alberta Energy to have accumulated about 62 pages of relevant pages of records each workday. I believe the 6,539 pages are pages that need to be searched through, and they will likely require no more than a moment's glance to determine they are not relevant to the request or are duplicates. These pages will not need review by any third parties, and they will not be released to the applicant. Where the pages are part of a large document of several hundred pages, a review of the index can be all it takes to determine the pages are not relevant, so that handling hundreds of pages can sometimes take 2 minutes. It has been my experience that *FOIP* offices are not clear about what they mean when they say 'relevant records' and the difference is often enormous – a search through thousands of records will reveal only a couple hundred that need to be released. If I am correct – the rationale for the decisions of the Commissioner will be undermined by the ambiguity about what the 6,539 pages refer to.

Third, in assessing the reasonableness of the extension, one should consider the length of time it took the records to actually be created. The request was for records produced over the course of five months (a total of 152 days). Counting all the timeline extensions, the public body took more than 450 days to prepare the record for release (assuming the public body does release the records on October 14, 2021). It does not seem reasonable to me for a public body to take three times longer to release records than it does to create them. It seems the Alberta government dedicates more time to keeping its decisions secret than it does to making its decisions.

Fourth, it is difficult to square how Justice Ashcroft both recognizes the importance of timely access to the information, and the risk of government delay frustrating the goals of accountability and openness, writing "[t]he purposes of the *FOIP Act* and the importance of disclosure to the meaningful participation of citizens in a democracy cannot be minimized" (*Blades* at paras 65-67) with Justice Ashcroft's finding that she cannot view the timeline extension "even within this more time sensitive context [referring to the Coal Policy Committee deadline], as equivalent to the denial of the records, or denial of a substantive right" (at para 37). *Blades* tries to have it both ways – the timely release of records under *FOIP* is described as incredibly important, but also not important enough for an applicant to have even basic procedural rights.

Conclusion

The *Blades* decision creates an odd catch-22 situation. The finding that the Commissioner may be permitted to consider a request filer's need to have records by a certain date fits strangely with the finding that there is no procedural opportunity for a request filer to get that information before the Commissioner during the administrative process, or before the court in an affidavit on judicial review. This suggests that there are things permitted by the *FOIP Act* that cannot procedurally occur. The door exists, but it is permanently locked.

Blades shows the continuing weakness of the *FOIP Act*, and the difficulty of challenging an administrative decision reviewed for reasonableness when you have no procedural opportunity to make any submissions. *Blades* approves of an administrative procedure that makes it virtually

impossible for an applicant to challenge the assertions of a public body seeking timeline extensions under the *FOIP Act*. If a solution to the problem of long delay does not materialize, the *FOIP Act* will be increasingly relegated to use only for historical research, rather than to hold current governments to account through the democratic system.

This post may be cited as: Drew Yewchuk, "Procedural Fairness When Challenging Timeline Extensions for Freedom of Information Requests" (September 27, 2021), online: ABlawg, http://ablawg.ca/wp-content/uploads/2021/09/Blog_DY_Blades_OIPC.pdf

March 15, 2022

Coal Law and Policy Part Eight: The Results of the Coal Consultation and the Return to the *Alberta Land Stewardship Act*

By: Drew Yewchuk

Reports and Ministerial Order Commented On: Engaging Albertans About Coal, Final Report: Recommendations for the Management of Coal Resources in Alberta, Ministerial Order 002/2022

On March 4, 2022, the Alberta government released the two reports of the Coal Policy Consultation Committee (the Committee), as well as a ministerial order from the Minister of Energy implementing part of the Committee's recommendations. This post continues ABlawg's coverage of coal law and policy issues. ABlawg's last post on this topic, "Coal Development Consultation Terms of Reference Revisited", contains links to our previous posts.

This post summarizes key points of the Committee's reports and reviews the actions government has taken so far in response to the reports.

The Committee Reports

After the public outcry and court challenge about the sudden rescinding of the 1976 Coal Policy for Alberta, the Committee was struck on March 29, 2021 to consult with Albertans and provide the Alberta government advice for future policy decisions. The Committee's two reports are not law, regulations, or official government policy. The first report describes the Committee's engagement with Albertans, and the second report is intended as advice to the Minister of Energy in making future policy decisions about coal.

Both reports are thorough and cover a wide scope of issues. The Committee managed to carry out a respectable consultation process, despite the general challenges of establishing an ad hoc process and the special challenges of doing so during COVID-19.

The Committee's Engagement Report describes how the Committee consulted Albertans, and lists those who were consulted (at 13-15). The report provides the results of several surveys (at 15-18), a summary of engagement with Indigenous communities and organizations (at 19-23), and a summary of the different positions on coal the committee heard (at 24-46).

The key recommendation of the Committee's Recommendations Report is that coal development activity should not be permitted until the 1976 Coal Policy is replaced with legally binding regional or subregional plans completed under the *Alberta Land Stewardship Act*, SA 2009, c A-26.8 (*ALSA*). The eight recommendations are:

1. Modernize Alberta's coal policy.
2. Meaningfully involve Alberta's Indigenous communities in the land use planning process.
3. Articulate land use guidance for coal exploration and development through planning under the Alberta Land Stewardship Act to provide certainty and bind the Crown.
4. Undertake a review of Alberta's coal tenure and royalty regimes.
5. Address the issue of freehold coal mineral rights.
6. Assess proposed new coal projects with rigorous net benefit tests that include extensive public consultation.
7. Resolve uncertainties regarding responsibility for reclamation liabilities relating to coal exploration and development activities.
8. Address reclamation liabilities for legacy coal mines.

The Recommendation Report includes a history of the coal policy and the tangle of land use laws, plans, and policies that have since been created in Alberta (at 13-17). It ends with:

> The most recent policy documents have articulated a common expectation that regional plans (and associated plans) created under the Alberta Land Stewardship Act will reconcile this dispersed guidance in a unified way. Yet in 2021, only one of the four land use regions covering the Eastern Slopes has a regional plan; and even in that case, considerable work remains outstanding. (at 17)

This history is important. Alberta's land-use policies are an awful tangle of unenforceable aspirational statements and unfulfilled promises of future protections that leaves Ministers far too much discretion to remove land protections without explanation. *ALSA* was meant to fix that by planning for the future, co-ordinating land use, and accounting for the cumulative effects of developments. The neglect of *ALSA* is a giant failure. Alberta's recent attempts at land use planning have been undertaken only where there was a threat the federal government would need to bring in an Emergency Protection Order under section 80 of the *Species at Risk Act*, SC 2002, c 29.

The Committee's key recommendation that the modernization of Alberta's coal policy be made under *ALSA* is a reasonable position. Decisions on land use relating to coal are squarely within the purpose of *ALSA*. Alberta's coal policy situation is now where we should have been more than two years ago when the government initially started to consider replacing the 1976 Coal Policy. Frustratingly, records obtained through FOIP requests strongly suggest that bureaucrats at Alberta Energy recommended the government 'conduct a coal categories review project' and use *ALSA* to replace the 1976 Coal Policy back in January of 2020 – the records do not explain why this advice was not followed because of the heavy redactions in the FOIP records.

The Government's Response

Ministerial Order 002/2022 from the Minister of Energy is the beginning of the government acting on the coal policy committee's recommendations. It uses the Minister's power to give directions to the Alberta Energy Regulator (AER) under section 67 of the *Responsible Energy Development Act*, SA 2012, c R-17.3. It continues the suspension of applications for coal exploration of

development throughout the eastern slopes, except for on lands subject to "an advanced coal project or an active approval for a coal mine."

The definition of an 'advanced coal project' is generous: "an 'advanced coal project' is a project for which the proponent has submitted a project summary to the AER for the purposes of determining whether an environmental impact assessment is required." (Ministerial Order 002/2022 at section 6). This reflects the recommendations of the coal policy committee (Recommendations Report at 7 & 40). On this definition, Tent Mountain counts as 'advanced'. But the project is not at all imminent, and years of work are likely to be necessary before a federal impact assessment hearing will be held for the project. Tent Mountain is still in the very early stages of the process under the federal *Impact Assessment Act*, SC 2019, c 28, s 1.

The suspension of activity under Ministerial Order 002/2022 lasts "until such time as written notice is given by the Minister of Energy and/or Minister of Environment and Parks." While this drafting could have more clearly stated that the suspension would run until a new plan under *ALSA* exists for each area covered by the 1976 Coal Policy, this drafting is probably for expediency as the government's statements indicate their intention is to make plans under *ALSA.* This approach to drafting is another example of how Alberta's land use policies got so convoluted. To properly understand the Ministerial Order, you need to refer to the Committee Recommendations Report, and the Ministerial Order *could* be rescinded any time, if the government of the day is willing to pay the political price for doing so. Instead of a clear promise of an *ALSA* plan we get a vague recognition that Albertans expect the Ministerial Order to be in force until "sufficient land use clarity has been provided through a planning activity".

Pursuant to the Ministerial Order, Alberta Energy released Information Letter 2022-09 stating that it would not accept any new coal lease applications in the Eastern Slopes until further notice. The Alberta Energy Regulator, in turn, published Bulletin 2022-04 and six Reconsideration and Suspension Letters (Application Numbers 1936029 through 1936034) to coal development companies informing them their exploration permits would continue to be suspended. Although the Ministerial Order is clear that abandonment and reclamation activity can take place, it is not clear whether the suspensions mean the timelines for the exploration approvals are paused and therefore abandonment and reclamation does not need to be done until after the suspension ends, or if the timelines continue to run despite the exploration activity being suspended, meaning that the abandonment and reclamation will need to take place as scheduled.

Commentary

The engagement report noted the concerns the Committee heard about the AER's current approach of not collecting security for the remediation of damage caused by coal exploration activities. This issue does not re-appear in the recommendation report. Hopefully the AER has taken some steps to ensure funds are available for the remediation of coal exploration work done in the Eastern slopes. On a related note, the AER is still investigating a contravention of approval conditions by one coal company that occurred in August 2020 (search Reference No. 2020-040 here). The AER has declined to share any information on this contravention while the investigation is ongoing, so the public has no way of knowing if remediation work is necessary in relation to that possible contravention.

Conclusion

There is a lesson in this for any government willing to learn it. Skipping over consultation processes when changing policy is often counterproductive, as it leads to litigation and political resistance that reverses the initial decision and restarts the process, producing more delay, more uncertainty, and more waste.

This is not the end of the dispute over coal policy in Alberta. Questions about whether and where coal development will take place in the eastern slopes will now be decided under the land planning process under *ALSA* in coming years. The 10-year review of the South Saskatchewan Regional Plan under *ALSA* must start by September 2024, but the government has not provided more clarity on when public consultation on *ALSA* plans will start.

CORRECTION of March 17, 2022

I wrote in the blog that the issue of security for remediation of coal exploration does not appear in the Recommendation Report - it was brought to my attention that this is incorrect. Page 43 of the Recommendation Report has the recommended action:

> "8.2 Review the adequacy of regulation and enforcement of reclamation requirements for exploration activities and consider the use of reclamation bonding for exploration activities."

I regret the error.

This post may be cited as: Drew Yewchuk, "Coal Law and Policy Part Eight: The Results of the Coal Consultation and the Return to the *Alberta Land Stewardship Act*" (March 15, 2022), online: ABlawg, http://ablawg.ca/wp-content/uploads/2022/03/Blog_DY_Coal_Law_Policy_Eight.pdf

May 2, 2022

Procedural Fairness When Challenging Timeline Extensions for Freedom of Information Requests

By: Drew Yewchuk

Decision Commented On: *Re Energy*, Order F2022-20, 2022 CanLII 29391 (AB OIPC)

Office of the Information and Privacy Commissioner (OIPC) Order F2022-20 shows how easy it is for public bodies to drag the *Freedom of Information and Protection of Privacy Act*, RSA 2000, c F-25 (*FOIP*) process out to prevent timely transparency, even where there is little or no plausible justification for the public body to withhold records.

F2022-20 relates to the same *FOIP* request as *Blades v Alberta (Information and Privacy Commissioner)*, 2021 ABQB 725 (CanLII) (*Blades*), a decision I wrote about here. The request in question is an attempt to get government records explaining the Alberta government's decision to revoke the 1976 *Coal Development Policy for Alberta*.

The Coal Policy Context and Purpose of the *FOIP* Request

As most ABlawg readers will know by now, Alberta's 1976 *Coal Development Policy* was revoked on May 15, 2020. The 1976 *Coal Development Policy* was reinstated on February 8, 2021, pending the reports of the Coal Policy Committee, which were released on March 4, 2022 (see my blog here for a summary of their contents).

On July 3, 2020, a coalition of ranchers who take an interest in the coal issue (the Applicants) sent a *FOIP* request to Alberta Energy asking for:

> Alberta Energy's records that discuss the rescission or change of the coal policy (1976 Coal Policy) or exceptions to the coal policy, including: any briefing materials (briefing notes, internal memos, reviews, reports), and correspondence (emails, letters). To be clear, we are also requesting third party records.
>
> Time period: January 1, 2020 to June 1, 2020
> (F2022-20 at para 1)

The Applicant's intention was to use the records in two earlier processes that have since been completed. First, to prepare for their judicial review relating to the initial Coal Policy rescission, and second, to prepare their submissions to the Coal Policy Committee - which meant they needed to receive the records before the committee completed their consultation on September 19, 2021 (*Blades* at paras 21-37).

The Applicants (and the public) have already been denied the substantive right to timely access to government records that *FOIP* was meant to create. The records ought to have been released in late 2020, and they have yet to be released. The records at issue are now more than a year old and show the decision-making for a decision that has already been made, announced, cancelled, and (at least temporarily) reversed. The Applicants did all they could to enforce their rights under *FOIP*. The Applicants retained counsel and vigorously pursued their rights – a judicial review and the OIPC process are not a small amount of work. Whatever happens next, Alberta Energy's strategy has bought itself two years of secrecy.

The *FOIP* Processing Time

Alberta Energy extended its time limit to reply to the request by 90 days as allowed by the temporary COVID-related Ministerial Order (*Blades* at paras 13-14). Then Alberta Energy sought permission from the OIPC to extend its time limit by 612 days, but the Commissioner granted an extension of only 270 days, set to end October 14, 2021 (*Blades* at paras 52, 70). That decision to extend the time limit was the subject of the judicial review in *Blades*. On October 13, 2021, Alberta Energy sought permission from the OIPC to extend the time limit again, but the OIPC refused (F2022-20 at para 4).

Alberta Energy released a first package of 30 pages of records, and the Applicant filed a complaint to the OIPC about the redactions to those pages (F2022-20 at para 5-7). The Public Body later released a package of 169 pages, but 116 of those pages were fully redacted and only 53 partially released. This second release is mentioned in F2022-20 (at para 8) but is not subject to OIPC review yet (I only know the number of pages in the second release because the Applicant showed me the records).

The Shrinking Record and the Missing Consultations

F2022-20, like most OIPC decisions, was not written by the Information and Privacy Commissioner, but by an adjudicator appointed by the Commissioner.

The Adjudicator noted that Alberta Energy had not properly fulfilled its duty under section 14(4)(c) to inform the Applicant of their right to complain to the commissioner about a time extension, as Alberta Energy had described only a general right to seek a review from the OIPC (at paras 12-15). The Adjudicator then discusses the much more important reduction in the number of responsive records. When Alberta Energy obtained the 270-day extension from the OIPC, and when Alberta Energy defended the reasonableness of that extension at Queen's Bench in *Blades*, Alberta Energy claimed to have 6539 pages; when Alberta Energy filed its initial submissions in F2022-20, they said they had 2,700 pages (at para 17), and when Alberta Energy filed its rebuttal submission they claimed to have around 2180 pages (at paras 18-20).

The Adjudicator crafts an interesting remedy for this case of shrinking records:

> In addition, if the Public Body ultimately includes less than 6539 pages of records in response to the access request, I require it to provide an affidavit to the Applicant and this office that explains the discrepancies between the number of records it cited in its request

> for permission to extend and the number it ultimately included in its response. (F2022-20 at para 31)

The Adjudicator also noticed other apparent irregularities around Alberta Energy's claims of time-consuming third-party consultations:

> I note that the Public Body received permission to extend the time for responding to the access request in part so that it could carry out consultations. There is no evidence before me that it has actually carried out any consultations, as its submissions do not refer to having done so. (at para 23)

The Adjudicator notes that third-party consultations in the sense of a back-and-forth discussion on what to release are not a necessary step under *FOIP* in any case, and time extensions cannot be taken to carry out such a consultation (at paras 24-26).

Exceptions to Disclosure

Exceptions to disclosure allow a public body to withhold information on records that would otherwise be subject to disclosure on *FOIP*. Alberta Energy withheld information under sections 21, 22, 24, and 25 of *FOIP*.

Section 21(1)(a)(iii) gives a public body discretion to withhold information where the information "could reasonably be expected to harm the Government of Alberta's relationship with an aboriginal body that exercises government functions" (at para 33). Section 21 is a discretionary exception, so the public body has the burden of showing "why there is a reasonable likelihood that its intergovernmental relations with any aboriginal bodies set out in section 21(1)(a)(iii) will be harmed by disclosure of the information" (para 35). Alberta Energy argued the information was inaccurate and might confuse first nations about their rights. The adjudicator did not find this likely and ordered the records released (at paras 37-40).

Section 22 is a mandatory exception to disclosure that requires a public body to withhold information that would reveal cabinet confidences. The Adjudicator determined that "[e]ven accepting that the severed information may refer to general topics that may have been discussed by Cabinet at some point, the information does not reveal anything of the substance of such deliberations" (at para 45). The adjudicator ordered Alberta Energy to release the information.

Section 24 gives a public body discretion to withhold information that reveals advice from officials. Alberta Energy applied it to records that showed work planned to be done, lists of tasks to be done, the timelines and deliverables of the Coal Category Review project, a list of the potential risks relating to the Coal Category Review project, and planned deliverables and milestones of the Coal Categories Review Project. Alberta Energy's strategy was to add the words "the information that [or which] advises decision makers of" before each type of information to make it grammatically sound like advice within the scope of section 24 (at paras 55-75). The Adjudicator did not accept this strategy and ordered Alberta Energy to release the information.

Section 25 gives a public body discretion to withhold information that would be harmful to the economic or other interests of a public body if it were released. The public body must show a reasonable expectation of harm (at paras 76-78). A portion of Alberta Energy's justification for applying this section is worth quoting:

> Section 25(1)(c)(i) was applied to information on these pages as its disclosure could reasonably be expected to harm the economic interest of the Public Body and the GOA by confusing investors about Alberta's ultimate intentions regarding resource development. In addition, it could reasonably be expected to undermine good will towards the Public Body from individuals critical of resource development.
>
> Further, disclosure could contribute to financial loss to the GOA by potentially discouraging companies from investing in GOA resource development as it reveals that some stakeholders are not supportive of responsible resource development investment in the Province. (at para 79)

These submissions are not compelling. Bearing in mind the Coal Committee's findings, it is doubtful that anyone who is critical of resource development has any goodwill left towards Alberta Energy. Similarly, no reasonable investor in 2022 could possibly fail to realize some Albertans are not supportive of coal development. As somewhat of an aside, Alberta Energy is apparently maintaining the department's practice of using the jargon of 'responsible resource development' that implies any opponent of development as irresponsible. If Alberta energy were even slightly concerned about goodwill from those opposed to development, they would stop doing that. The Adjudicator noted that both the SCC and the OIPC have rejected 'misinterpretation' arguments in the access to information context (at paras 83-84) and rejected Alberta Energy's submissions (at para 86-89).

Alberta Energy also withheld information as 'nonresponsive.' 'Nonresponsive' works as an exception to disclosure implied by *FOIP* because a public body does not need to provide records that the Applicant did not request. The public body must show the information is not reasonably related to the request (at para 94). The Applicant argued:

> Non-responsive redactions should never cut apart entire sentences or paragraphs. Entire sentences and paragraphs are necessary to contextualize what is being given access to.
>
> For example, if one sentence in an email discusses the Coal Policy, the remainder of the paragraph is necessary to contextualize that one sentence. Cutting away entire paragraphs on the basis of 'Non Responsive' removes context necessary to understand the material that is responsive.
>
> At most, 'Non Responsive' redactions should only occur to content that is completely out of context of the records that are responsive. (at para 95)

The adjudicator agreed that "information that lends context to, or sheds light on, obviously responsive information is also responsive, particularly when that information forms part of the

same sentence, paragraph, or record" (at para 96). The Adjudicator reviewed the information withheld, found it was all responsive, and ordered Alberta Energy to release it (at paras 98-103).

As a result, the Adjudicator ordered Alberta Energy to release the 30-page record without redactions and to provide the applicant with the rest of the requested records (at para 105-107).

Commentary

First, the time between the complaint being filed and the OIPC decision shows the OIPC expedited this complaint because it had already been the subject of a judicial review and was seriously delayed. The OIPC currently takes more than a year to hear standard complaints about exceptions to disclosure.

Second, a short victory lap. I foresaw Alberta Energy's failure to find 6,539 relevant pages of records in my first post on *Blades*:

> I do not believe the 6,539 number refers to the pages of records that will be processed and released. During the January 1, 2020 to June 1, 2020 time period of the request there are about 105 business days. To have 6,539 relevant records would require Alberta Energy to have accumulated about 62 pages of relevant pages of records each workday. I believe the 6,539 pages are pages that need to be searched through, and they will likely require no more than a moment's glance to determine they are not relevant to the request or are duplicates. These pages will not need review by any third parties, and they will not be released to the applicant. Where the pages are part of a large document of several hundred pages, a review of the index can be all it takes to determine the pages are not relevant, so that handling hundreds of pages can sometimes take 2 minutes. It has been my experience that *FOIP* offices are not clear about what they mean when they say 'relevant records' and the difference is often enormous – a search through thousands of records will reveal only a couple hundred that need to be released. If I am correct – the rationale for the decisions of the Commissioner will be undermined by the ambiguity about what the 6,539 pages refer to.

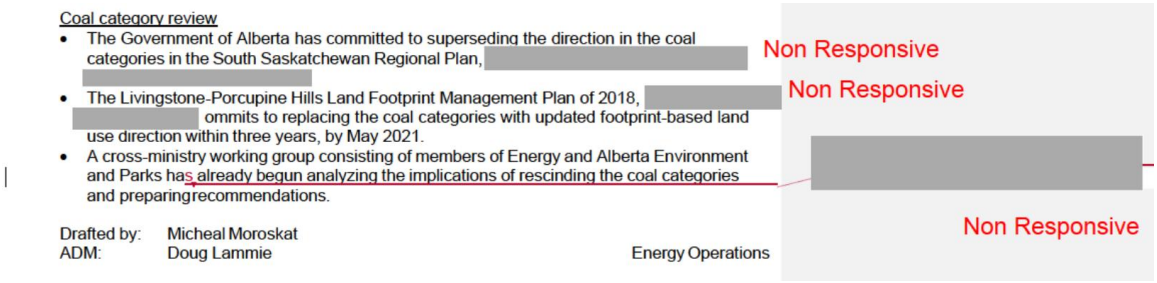
Alberta Energy will not find 6,539 pages unless they send the Applicant copies of dictionaries and phone books and try to argue those are somehow relevant to the request. I look forward to reading its affidavit explaining why they misled the OIPC and the Queen's Bench Justice.

Third, why is Alberta Energy working so hard to keep these records from the public? It appears to be because the records are almost definitely going to show the government's decision-making was incoherent. Alberta Energy knew rescinding the 1976 Coal Policy would leave policy gaps and was not justifiable. It misrepresented its internal reasoning to the public in its initial statements about why it rescinded the policy, essentially what Nigel Bankes argued had happened in a February 15, 2021 post:

> The government could not have reasonably concluded that the [1976 Coal Policy] had been completely superseded or rendered obsolete. *The government's own briefing papers make this abundantly clear*. The government went ahead and rescinded the [1976 Coal Policy]

> in order to encourage investment in coal exploration and development, all the while knowing that the ground rules necessary for ensuring healthy functioning ecosystems at the landscape level were not in place.

Fourth, I am of the view that Alberta Energy was aware they were not correctly applying the exceptions to disclosure in *FOIP*. Alberta Energy's arguments are given short shrift by the Adjudicator, and F2022-20 does not deal with any questions of how to interpret exceptions to disclosure in *FOIP* because Alberta Energy's justifications for its redactions are either incoherent or clearly contradicted by past OIPC decisions. I have seen the records in question. Here is one section from page 3 of the records showing how Alberta Energy used "non-responsive":



No one could seriously believe the ends of those sentences do not reasonably relate to the rescission of the coal policy. When I started filing *FOIP* requests around 2017, I never saw "non-responsive" redactions used to cut apart sentences, but in the last year or so, most records come back covered in them, despite the OIPC never having sanctioned this bizarre approach. The approach is not consistent with *FOIP* at all, as *FOIP* requires applicants to request 'records' and not answers to particular questions (*FOIP*, section 7(2)). If a record contains information responsive to the request, the applicant gets the entire record. That is how *FOIP* has been understood to work for decades. The "non-responsive" redactions are also totally unprincipled, as an applicant can file a request specifically asking for the "non-responsive" information in order to make the information "responsive", but that produces more delay.

I strongly suspect Alberta Energy's absurd use of the exceptions to disclosure is not due to incompetence but strategy. Even if Alberta Energy complies with the adjudicator's order and releases the records in May, Alberta Energy will have delayed the release of embarrassing records by seven months by using unfounded redactions and dragging this through an OIPC review. If the media's attention to coal has waned over those seven months, Alberta Energy can avoid the uncomfortable attention that transparency and democracy would have brought. The OIPC can order the records released, but lacks any authority to penalize a public body for applying exceptions to disclosure on flimsy or clearly incorrect grounds. The only penalty a public body gets for misusing the exceptions to disclosure in *FOIP* is scorn from the public. In effect, this critical blog post is almost the entire penalty Alberta Energy will face.

Conclusion

This OIPC decision is about as good as an OIPC decision can be. It shows the OIPC is trying to hold government to account, despite the serious delays due to underfunding and understaffing at

the OIPC. But it also demonstrates the limited power of the OIPC since the decision does not stop future public bodies from adopting the exact same strategies to delay *FOIP* requests.

Another important decision for the OIPC is coming soon: Jill Clayton, the current information commissioner, has opted not to seek a third term, and the Alberta Government will need to appoint a new information commissioner by the end of July 2022. Hopefully, Alberta will get another commissioner dedicated to the public's right to government transparency. Considering how troubled *FOIP* is even with a dedicated commissioner, the appointment of a commissioner not interested in government transparency would likely turn *FOIP* into a completely lost cause.

This post may be cited as: Drew Yewchuk, "Procedural Fairness When Challenging Timeline Extensions for Freedom of Information Requests" (May 2, 2022), online: ABlawg, http://ablawg.ca/wp-content/uploads/2022/05/Blog_DY_OIPC_F202220_Coal_Policy.pdf

October 13, 2023

The AER Does Not Have the Jurisdiction to Consider New Coal Applications for the Grassy Mountain Coal Deposit

By: Nigel Bankes

Matter commented on: Applications by Northback Holdings Corporation for a Coal Exploration Program on the Grassy Mountain Coal Deposit, including Application Number 1948547, Deep Drilling Permit

On September 5, 2023, Northback Holdings Corporation filed an application with the Alberta Energy Regulator (AER) for a Deep Drilling Permit in support of a coal exploration program on the Grassy Mountain coal deposit. This deposit is located north of Blairmore, Alberta on a combination of Crown coal lands and Northback's privately owned land. Northback proposes to commence its exploration program as soon as possible. Northback's applications have triggered an outpouring of opposition from the coalition of interests that fought the original Grassy Mountain coal project: see here (CPAWS) and here (Corb Lund). There has also been considerable media coverage of this latest development: see here (Bob Weber) and here (Andrew Nikiforuk). My purpose in writing this post is to make the case that (1) Northback was not entitled to make these applications to the AER, and (2) the AER has no business considering the merits of these applications because Northback's new applications are subject to the general "no new coal rule" contained in a 2022 Ministerial Order directed at the AER (details below). Others have also made this case, including Canadian Parks and Wilderness Society (Southern Alberta Chapter) (CPAWS-SAB) and the Timberwolf Wilderness Society, but it still seems useful to summarize the arguments.

This is not new territory for ABlawg. Readers will recall that we launched an extended coal law and policy series in 2021when the Minister of Energy first revoked the Lougheed coal development policy of 1976.

Benga's Grassy Mountain Coal Project

Northback is the successor corporation to Benga Mining. Benga Mining was the proponent for the original Grassy Mountain Coal Project. Benga submitted an environmental impact assessment (EIA) application for the Grassy Mountain Coal Project to the AER and the Canadian Environmental Assessment Agency (the Agency) on November 10, 2015, and submitted an updated EIA application on August 15, 2016. Benga sought various approvals under provincial and federal laws, including approvals under the *Coal Conservation Act*, RSA 2000, c C-17 (*CCA*).

The *CCA* application was considered by a Joint Review Panel (JRP) of the AER and the Agency. Acting as the AER, the JRP had to assess whether the project was in the public interest under the terms of s 8.1 of the *CCA* and s 3 of the *Responsible Energy Development Act General Regulation*,

Alta Reg 90/2013. The JRP concluded that the project was not in the public interest and accordingly it denied Benga's applications under the *CCA*: JRP Report at para 3050, June 17, 2021.

In reaching that assessment, the JRP concluded *inter alia* that:

- the project is likely to result in significant adverse environmental effects on surface water quality (at para 3039), and
- the project is likely to have significant adverse environmental effects on westslope cutthroat trout [listed as threatened under both provincial and federal legislation] and their aquatic habitat. (at para 3041)

The JRP was also extremely critical of Benga's application material, noting that it systematically underestimated the negative environmental impacts of its project (at para 3038) and at the same time, systematically overestimated both its ability to mitigate those impacts and the positive economic benefits of the project (at para 3046).

It is important to emphasise that the JRP, acting as the AER, is the *final* decision maker for applications under the *CCA*. The AER does not make a recommendation to a minister or to cabinet for a project governed by the *CCA.* It makes the final decision, and the decision of the AER was to "deny Benga's applications 1844520 and 1902073 under the *Coal Conservation Act*" (at para 3050). At that point, therefore, the project that Benga had initiated with its 2015 EIA application was dead. Benga attempted to revive the project by seeking permission to appeal the AER's decision to the Alberta Court of Appeal, but that court denied permission: *Benga Mining Limited v Alberta Energy Regulator*, 2022 ABCA 30 (CanLII). Benga's further application for leave to appeal to the Supreme Court of Canada was also denied: *Benga Mining Limited v Alberta Energy Regulator, et al*, 2022 CanLII 88683 (SCC). Benga still has an outstanding application in the Federal Court (File no. T-1270-21) in relation to the federal side of the JRP, but that application is of no consequence for the validity of the AER's decision that terminated Benga's project.

Northback's Current Applications

In the ordinary course of things, Benga (whether acting as Benga or under the name of Northback) would be able to start again and file new applications with the AER under the *CCA* and any other relevant provincial and federal legislation. And this I suppose is what Northback thought it was doing in August and September of this year when it purported to apply to the AER for a deep drilling permit in support of a coal exploration program on its private and Crown coal leases associated with the Grassy Mountain coal deposit.

But the ordinary course of things changed on March 2, 2022 when then Minister of Energy, Sonya Savage, issued Ministerial Order (MO/002/2022) (the MO) to the AER under the terms of s 67 of the *Responsible Energy Development Act*, SA 2012, R-17.3 (*REDA*). Minister Savage issued this MO as part of the government's determination to walk back its decision the previous year to revoke the Lougheed Coal Development Policy (the revocation decision) and open up new areas of the eastern slopes of the Rockies to coal exploration and mining. Civil society pushed back vigorously against the revocation decision; the government heard those concerns and reinstated the 1976

Policy. The government implemented that reinstatement in part through the MO. And in at least one respect, the MO was actually more restrictive than the 1976 Policy - specifically with respect to what are referred to in that Policy as the Category 4 lands. Category 4 lands are lands on which the 1976 Policy considered that coal exploration could generally be permitted "under appropriate control". Most of the footprint of the original Grassy Mountain project fell within Category 4 (see JRP Report at paras 2097 – 2102).

So far as relevant to the category 4 lands, the MO provides that:

> … AND WHEREAS, Albertans expect coal exploration and development in the Eastern Slopes (as defined in the 1976 Coal Policy and depicted in Annex 1) to remain suspended until such time as sufficient land use clarity has been provided through a planning activity.
>
> THEREFORE, pursuant to s. 67 of REDA, and to the land use categories in the 1976 Coal Policy, the Minister of Energy hereby directs the AER to take steps to ensure that:
>
> [paragraphs 1 and 2 are omitted, and deal with Category 1 and 2 lands]
>
> 3) With the exception of lands subject to an advanced coal project or an active approval for a coal mine, all approvals (as defined by REDA) for coal exploration or development on Category 3 and 4 lands in the Eastern Slopes shall be suspended and no new applications will be accepted until such time as written notice is given by the Minister of Energy and/or Minister of Environment and Parks.
>
> 4) Nothing in this direction restricts abandonment and reclamation or security and safety activities at active coal mines or related to coal exploration.
>
> 5) For the purposes of this Directive, an 'active approval for a coal mine' is a licence under the Coal Conservation Act.
>
> 6) For the purposes of this Directive, an 'advanced coal project' is a project for which the proponent has submitted a project summary to the AER for the purposes of determining whether an environmental impact assessment is required.

In sum, the new general rule, even for Category 4 lands, is no new applications for coal mining exploration or development.

The effect of the MO is to require the AER "to ensure" that it will not accept any new applications for approvals for coal exploration or development activities on category 3 or 4 lands unless an applicant could establish that the lands in question are "subject to an advanced coal project or an active approval for a coal mine" or "until such time as written notice is given by the Minister of Energy and/or Minister of Environment and Parks." The MO defines each of the relevant terms: advanced coal project (see para 6) and active approval (see para 5).

It is obvious that neither Benga nor Northback has an active approval, since Benga's application for a licence to operate a coal mine under the *CCA* was definitively rejected by the AER acting as

part of the JRP. But in my view, it is equally obvious that Northback cannot bring itself within the definition of an advanced coal project. To repeat the definition from above, an advanced coal project for the purposes of the Directive is "a project for which the proponent has submitted a project summary to the AER for the purposes of determining whether an environmental impact assessment is required."

I am prepared to assume that Benga submitted such a summary to the AER sometime before 2015. After all, we know that Benga actually submitted an EIA application to the AER in November 2015. That EIA application was filed to support Benga's *CCA* and other regulatory applications that were considered by the JRP. As already stated, the AER, acting through the JRP, rejected those applications. Accordingly, there is no live project for which the AER has a project summary for the purposes of determining whether an EIA is required. And if there is no such live project, then Northback cannot bring itself within any of the exceptions contained within the MO. Northback undoubtedly still has coal rights to both Crown and private lands, but the MO as drafted no longer allows Northback to make any applications for coal exploration or development activities and the AER has a legal duty to ensure that it does not accept any such applications.

But given that these applications are currently filed within the AER's integrated application system, where does this leave us? First, it seems obvious in hindsight that in order to fulfil its duty "to ensure" under the MO, the AER ought to have put in place a screening process for all future coal applications, including applications for Category 4 lands, so as "to ensure" that it did not accept new applications unless and until it was satisfied that the applications could be brought within one of the two exceptions to the general rule that the AER must not accept new coal applications.

Second, having failed to do that, and having registered Northback's applications, the AER still has a duty not to further process those applications, nor to consider the merits of those applications, until it has concluded that those applications were properly filed. The AER cannot reach that conclusion since there is no live project for which the AER has a project summary for determining whether an EIA might be required. The AER did have such a summary for a project which subsequently proceeded through the review and decision-making process. But that project was definitively rejected by the AER itself. There is no basis on which the AER can now turn around and assert that a project that it has already rejected is still a live and advanced project entitled to the benefit of the grandparenting exceptions in the MO. The only projects that are (wrongly) before the AER are the applications for a coal exploration program and for deep drilling permits – and these applications do not fall within the exceptions articulated in the MO. Accordingly the AER has no jurisdiction to consider the merits of these applications.

What is the AER's Position?

The AER has yet to make a formal decision with respect to Northback's applications, but comments provided to the media by an AER spokesperson give rise to concerns that the AER has already prejudged the matter. There are at least two such comments. First, in response to an inquiry from Bob Weber, Teresa Broughton, an AER spokesperson, suggested that:

> "The (regulator) can accept and process applications for matters related to coal mining if they are considered to be an 'advanced coal project,'" she wrote in an email. "Whether this project is an 'advanced coal project' is something that will be considered as part of the (regulator's) full technical review of the application."

This is problematic because it ignores the terms of the MO that instruct the AER not to accept applications for category 4 lands unless they fall within an exception. The AER has no business engaging in a technical review of an ineligible application, and it needs to make that determination before it engages in a technical review.

The same spokesperson provided additional observations to The Tyee:

> "Northback previously submitted a project summary and an Environmental Impact Assessment Report (EIA report)," explained Broughton. "While that project summary and EIA was submitted for its previous coal mine applications (Benga Grassy Mountain), that project summary and EIA can be used for any future applications for coal development."

This commentary is even more problematic since it suggests that the AER (or at least Ms. Broughton) has already formed the opinion that Northback's applications fall within the advanced coal project exception - even though the AER has yet to issue a reasoned decision on the point. The impression of prejudgment of this important matter is further reinforced by comments provided to the media by Brian Jean, Minister of Energy and Minerals who is reported to have told CityNews "that an environmental impact assessment for the Grassy Mountain Project was filed several years before the restriction was put into place, which qualified it as an advanced coal project." While the Minister's comments cannot bind the AER (it is the AER who must interpret the MO) it is unfortunate that the Minister made these comments since this can only add to concerns of prejudgment in this case.

This post may be cited as: Nigel Bankes, "The AER Does Not Have the Jurisdiction to Consider New Coal Applications for the Grassy Mountain Coal Deposit" (13 October 2023), online: ABlawg, http://ablawg.ca/wp-content/uploads/2023/10/Blog_NB_Grassy_Mountain_Application.pdf

February 22, 2024

Taking Stock of The Grassy Mountain Litigation as of February 2024

By: Nigel Bankes

Cases commented on: (1) *Benga Mining Limited v Alberta Energy Regulator*, 2022 ABCA 30 (CanLII), (January 8, 2022); (2) *Benga Mining Limited v Alberta Energy Regulator, et al*, 2022 CanLII 88683 (SCC), (September 29, 2022); (3) *Stoney Nakoda Nations v His Majesty the King In Right of Alberta As Represented by the Minister of Aboriginal Relations (Aboriginal Consultation Office)*, 2023 ABKB 700 (CanLII), (December 4, 2023); and (4) *Benga Mining Limited v Canada (Environment and Climate Change)*, 2024 FC 231 (CanLII), (February 12, 2024).

This post is a public service announcement to update all of those concerned about coal mining in Alberta, and specifically for those concerned about the status of the rejected Grassy Mountain coal project and ongoing litigation concerning that project. This is old territory for ABlawg. Readers will recall that we launched an extended coal law and policy series in 2021 when the Minister of Energy first revoked the Lougheed coal development policy of 1976.

Background and Legislative Context

Benga Mining was the original proponent of the Grassy Mountain Coal Project. Its successor corporation is now Northback Holdings Corporation, but I will generally refer to Benga. Benga submitted an environmental impact assessment (EIA) application for the Grassy Mountain Coal Project to the Alberta Energy Regulator (AER) and the Canadian Environmental Assessment Agency (the Agency) on November 10, 2015, and submitted an updated EIA application on August 15, 2016. Benga sought various approvals under provincial and federal laws, including approvals under the *Coal Conservation Act*, RSA 2000, c C-17 (*CCA*) and under the *Canadian Environmental Assessment Act*, 2012, SC 2012, c 19, s 52 (*CEAA 2012*). While *CEAA 2012* has now been repealed and replaced by the federal *Impact Assessment Act*, SC 2019, c 28 (*IAA*) *CEAA 2012* was the relevant law at the time and so it continues to be the governing federal law for the purposes of any ongoing litigation related to the project.

The Project was reviewed by a Joint Review Panel (JRP) of the AER and the Agency. Accordingly, the JRP had to fulfill responsibilities under both provincial and federal laws.

Acting as the AER, the JRP had to decide whether the project was in the public interest under the terms of s 8.1 of the *CCA* and s 3 of the *Responsible Energy Development Act General Regulation*, Alta Reg 90/2013. The decision of the AER on such a matter is final. This is not a case in which the AER makes a recommendation to a minister or to Cabinet. And in this case, the JRP concluded that the project was not in the public interest and accordingly it denied Benga's

applications under the *CCA* (JRP Report at para 3050). For an ABlawg post on the JRP decision see Shaun Fluker, "Justice for the Westslope Cutthroat Trout at Grassy Mountain".

Acting as the Agency, the JRP had to prepare a report for the Minister of the Environment (now the Minister for Environment and Climate Change) assessing whether or not the project would cause significant adverse environmental effects, and, if so, whether or not such adverse effects might be outweighed by the positive economic impacts of the Project. The Minister was then required to decide, under subsection 52(1) of *CEAA 2012, and* after taking into account any mitigation measures the Minister considered appropriate, whether the Project was likely to cause significant adverse environmental effects. If so, the Minister was required under subsection 52(2) of *CEAA 2012* to refer the matter to the Governor in Council (Cabinet) for a decision under subsection 52(4) whether such effects were "justified in the circumstances." Finally, section 54 then required the Minister to issue a decision statement, informing the proponent of the section 52 decisions by the Minister and Cabinet. The decision-making tree is evidently much more convoluted and staged on the federal side than on the provincial side.

The JRP Report concluded that the Project was likely to cause significant adverse environmental effects not outweighed by the positive economic impacts of the Project. Upon receipt of the JRP Report, the Agency issued a news release, stating that:

> … prior to the Government of Canada's decision on the Project, the Agency would consult with Indigenous groups on the JRP Report. *The News Release stated that the Agency would also invite the public and Indigenous groups to comment on potential conditions related to possible mitigation measures and follow-up program requirements that Benga would need to fulfil if the Project was ultimately allowed to proceed*. Finally, the Agency stated that the Minister would consider the results of these consultations before issuing a decision statement and any potential legally-binding conditions. (*Benga Mining Limited v Canada (Environment and Climate Change)*, 2024 FC 231 (CanLII) at para 19, emphasis added) (FC Decision)

It is convenient to borrow from Justice Richard F. Southcott's summary in the most recent Federal Court decision to describe the next stages in the federal process:

> On August 6, 2021, the Minister issued a decision statement under section 54 of *CEAA 2012*, communicating the decisions of the Minister and Cabinet [Decision Statement]. The Decision Statement advised that the Minister had determined under section 52(1) of *CEAA 2012* that, after considering the JRP Report and the implementation of mitigation measures the Minister considered appropriate, the Project was likely to cause significant adverse environmental effects referred to in subsection 5(1) and 5(2) of the *CEAA, 2012* [Minister's Decision]. The Decision Statement also advised that Cabinet had decided under section 52(4) of *CEAA 2012* that the significant adverse effects were not justified in the circumstances [the Cabinet Decision] [collectively, the Decisions]. (FC Decision at para 23)

Hence the JRP process concluded in its provincial aspect on June 17, 2021 and in its federal aspect on August 6, 2021. It bears mentioning that the federal Minister had effectively denied Benga's

request not to make a decision on the JRP Report pending the outcome of Benga's appeal in the Alberta courts (discussed below).

Benga felt aggrieved by the JRP (AER) decision and the disposition of the matter by the federal cabinet and commenced litigation with a view to having these negative decisions overturned. Two First Nations, the Stoney Nakoda and Piikani First Nations, also sought to challenge the decisions and claimed an interest in the matter by virtue of impact and benefit agreements that each Nation had with Benga – which would have no value without a project.

It is important to emphasise that in order to be able to build and operate the mine, Benga and/or the First Nations need to overturn both the provincial decision (the AER decision) and the federal decision (ultimately the decision of Cabinet). Accordingly, there are two separate streams to the litigation that we need to follow: the litigation against the provincial decision and the litigation against the federal decision. And unfortunately, things are yet more complicated because the provincial stream has two branches. The objective of this post is to unravel this complexity for a general reader.

Benga led off with one branch of the provincial stream. Accordingly, this post follows that lead and first traces Benga's litigation in the provincial superior courts before examining the federal stream and the most recent Benga decision, which Justice Southcott of the Federal Court handed down on February 12, 2024.

The Proceedings in the Alberta Court of Appeal

Benga and the First Nations began in the Court of Appeal because the key provincial decision was that of the AER, and the *Responsible Energy Development Act*, SA 2012, c R-17.3, (*REDA*) appears to channel judicial supervision of the AER to the Court of Appeal.

Section 45 of *REDA* indicates that an appeal of an AER decision is a two-step process. Section 5 of the *Responsible Energy Development Act General Regulation*, further prescribes that an aggrieved party must take the first step within one month of the impugned decision.

The first step is an application to the Court of Appeal (a single judge sitting alone) for permission to appeal. The appeal must be confined to questions of law or jurisdiction. In other words, an applicant doesn't get to say that it disagrees with the JRP decision, and it can't ask the Court of Appeal to redo the JRP's process and make its own decision. Instead, an applicant has to show that the JRP made an error of law or exceeded its jurisdiction. On an application for permission to appeal the applicant typically has to show the importance of the issues at stake and whether the appeal has arguable merit. For further discussion see an earlier ABlawg post by Shaun Fluker and Drew Yewchuk, "Seeking Leave to Appeal a Statutory Tribunal Decision: What Principles Apply?"

Justice Bernette Ho, in extensive reasons, declined to grant permission to appeal. This is not the place to review that decision in detail but in some cases Justice Ho concluded that the applicants had not been able to show that a particular ground had arguable merit and in others that the applicants had not been able to convince her that the point raised was an issue of law rather than a

pure question of fact or expert judgment, or a mixed question of fact or law. In sum, the claims of the Benga and the First Nations fell at the first hurdle.

All three parties sought leave to appeal that dismissal to the Supreme Court of Canada. The Supreme Court of Canada denied that application. Consistent with its ordinary practice, there are no reasons for that decision.

Round one to the environment.

The Proceedings in Alberta's Court of King's Bench

One might be forgiven for thinking that that was the end of the provincial stream. It was certainly the end of one branch of that provincial stream, but Benga and the two First Nations had also commenced an application for judicial review of the AER's decision. It bears mentioning that the two Nations also sought judicial review of the decisions of the provincial Aboriginal Consultation Office (ACO). All such application are commenced in the Court of King's Bench, and the applications are heard as of right (that is to say there is no need to apply for permission to seek judicial review).

This parallel judicial process seems to fly in the face of the terms of *REDA* which, as noted above, channels judicial supervision of the AER to the Court of Appeal. The reasoning that might allow such a parallel process goes something like this: It is true that *REDA* affords aggrieved parties the opportunity to appeal an AER decision, but that appeal right is limited to points of law and jurisdiction. An aggrieved party also has a constitutional right (protected by s 96 of the *Constitution Act, 1867*) to the judicial review of any administrative decision, and that extends other possible grounds of review relating, for example, to mixed questions of fact or law which by necessary implication are necessarily excluded from the *REDA* appeal process (see *Crevier v AG (Québec) et al*, 1981 CanLII 30 (SCC), [1981] 2 SCR 220, and *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 (CanLII)).

In response to these applications for judicial review, the AER brought a pre-emptive motion asking the Court of King's Bench to dismiss the judicial review applications on the basis that, at least so far as the application relate to the AER (rather than the ACO), they are doomed to failure on the basis of section 56 of *REDA*.

Section 56 of *REDA* is what is termed a privative clause. It is specifically designed to protect an administrative decision maker from judicial review. The section uses a lot of technical words, but a general reader should be able to understand the gist of the provision:

> … every decision of the Regulator or a person carrying out the powers, duties and functions of the Regulator is final and shall not be questioned or reviewed in any court by application for judicial review or otherwise, and no order shall be made or process entered or proceedings taken in any court, by way of injunction, certiorari, mandamus, declaratory judgment, prohibition, quo warranto, application to quash or set aside or otherwise, to question, review, prohibit or restrain the Regulator or any of the Regulator's proceedings.

The issue before the Court of King's Bench therefore was the question of whether s 56 of *REDA* should be read to conclusively decide the issue, or whether it should be read in such a way as to allow for the types of review (mixed questions of fact and law) that the Court of Appeal is precluded from hearing. In other words, Benga et al would say: "we accept that s 56 precludes us from seeking judicial review of the AER decision in the Court of King's Bench on a question of law or jurisdiction, but we still have a constitutional right to judicial review when a decision maker makes unreasonable findings of fact or makes errors that involved mixed questions of fact and law, in the Court of King's Bench."

Justice Allison Kuntz gave her answer to that question on December 4, 2023. She concluded that sections 45 and 56 of *REDA* read together precluded an application for judicial review, and as a result granted the AER's motion to dismiss:

> The statutory right of appeal at s. 45 of *REDA* provided Northback, Stoney Nakoda, and Piikani with sufficient opportunity to have the AER Decision reviewed. I find that their right to seek leave to appeal under s. 45 of *REDA* together with the privative clause at s. 56 of *REDA* is sufficient to bar further judicial review. Therefore, the applications for judicial review of Northback, Stoney Nakoda, and Piikani are dismissed. (*Stoney Nakoda Nations v His Majesty the King In Right of Alberta As Represented by the Minister of Aboriginal Relations (Aboriginal Consultation Office)*, 2023 ABKB 700 (CanLII) at para 40)

Round two to the environment.

In the Federal Court decision, discussed in the next section of this post, counsel for Benga/Northback confirmed that his client had commenced an appeal of Justice Kuntz's decision (FC decision at para 49). Furthermore, "Counsel for the First Nation Applicants have further explained that the applications for judicial review before the ABKB remain as against Alberta's Aboriginal Consultation Office, although they have been placed in abeyance pending the appeal of the dismissal of the applications against the AER." (*Ibid* at para 49)

Benga therefore is still hanging by a thread in the judicial review branch of the proceedings challenging the AER's decision.

The Proceedings in the Federal Court

Both Benga and the two First Nations also brought an application for judicial review of the federal decisions leading to a rejection of the project. In essence, Benga argued that the JRP Report was flawed because the JRP ignored relevant material evidence, misapprehended the evidence before it, and failed to consider the rules of evidence (much the same arguments that Benga had raised before the Alberta Court of Appeal), and that if the JRP was flawed then that Report could not serve as a basis for the decisions made by the Minister and Cabinet.

Justice Southcott comprehensively rejected all of Benga's grounds for judicial review referenced in the last paragraph.

But Benga and the Nations also raised procedural fairness arguments. In addition, the Nations also raised a constitutional duty to consult argument. Once again, Justice Southcott dismissed all of Benga's arguments, but he did accept one of the arguments advanced by the Nations to the effect that that "procedural fairness entitled them to an opportunity to make submissions on the analysis of mitigation measures, including in particular the effect of their Impact Benefit Agreements, before the Decisions were made" (FC Decision at para 145). The Nations buttressed this claim with reference to a "legitimate expectation" created by the terms of the federal press release issued at the time of the JRP Report and referenced above. For an earlier ABlawg post on the doctrine of legitimate expectations see Aimee Huntington, Niall Fink & Peter Shyba, "Stakeholders Expected Consultation on the Coal Policy Rescission: Was There a Legal Duty?"

Justice Southcott found this legitimate expectations argument compelling: "On its face, the News Release appears to include a clear, [un]ambiguous and unqualified representation that, '[p]rior to the Government of Canada's decision on the project, the [Agency] will consult with Indigenous groups on the Joint Review Panel's report.'" (at para 175). This was not only compelling but determinative:

> In my view, once the News Release gave rise to a legitimate expectation that such procedure would be followed, that procedure was required by the duty of fairness …, and the First Nation Applicants were entitled to take advantage of the opportunity afforded by that procedure, to advance their arguments based on economic opportunities and the Impact Benefit Agreements in an effort to influence the outcome of the Decisions. (at para 186)

Since Justice Southcott's assessment of the evidence was that the First Nations "were not afforded the consultation opportunity that the News Release represented they would receive", Canada had breached its duty of procedural fairness (at para 193).

That conclusion made it unnecessary for the Court to consider the constitutional arguments of the Nations with respect to the duty to consult and accommodate (at paras 194 – 199).

It is important to emphasise that the legitimate expectations argument is purely a *procedural* argument: it cannot create an expectation of a particular result or outcome. The Federal Court is most certainly *not* saying that the Nations have a legitimate expectation that the project should be allowed to proceed in order that the Nations can receive the benefits that their impact and benefit agreements promise. All that the argument affords the Nations is the opportunity to make submissions to show how a decision adverse to the project will affect them and therefore as to why the federal government should approve the project, notwithstanding the project's significant adverse environmental impacts.

As for remedies Justice Southcott concluded as follows:

> I accept the Applicants' position on remedies and will therefore issue an order giving effect to the relief they request as a result of the identified breach of procedural fairness. The Minister's Decision will be set aside and the matter referred back to the Minister for redetermination following the required consultation. As the Minister's Decision is a precondition to the Cabinet Decision in the statutory process applicable under *CEAA 2012*,

> the Cabinet Decision will also be set aside, to be redetermined following redetermination of the Minister's Decision.
>
> In connection with the required process, in my view the comments of the Federal Court of Appeal in *Tsleil-Waututh Nation* are potentially applicable to the case at hand. In that matter, the Court's conclusions included the finding that Canada did not fulfil its duty to consult with and, if necessary, accommodate the Indigenous applicants (see para 767). Noting the specific focus of the Indigenous applicants' concerns, the Court commented that the corrected consultation process may therefore be brief and efficient while still ensuring it was meaningful (at para 772).
>
> I see no reason why the required re-visitation of the federal decision-making process in the case at hand cannot be similarly efficient. That requirement does not involve reconstituting the JRP or revisiting its processes, but rather performing the post-Report consultation contemplated by the News Release. I also trust that, to the extent consistent with the parties' rights and interests, the parties and their counsel will work together to achieve efficiency in the planning and scheduling of the required consultation. (FC Decision at paras 204-206)

Round three, therefore, is a limited procedural victory for the Nations.

Practical Implications

It is of course possible that both the federal government and Benga/Northback will appeal this latest decision. But in the meantime, what can we say?

First, the Federal Court has comprehensively rejected all of the claims challenging the JRP Report and the subsequent federal decisions that were advanced in Benga's name.

Second, the Court has quashed the federal decisions rejecting the project, but only on the basis of the procedural fairness/legitimate expectations argument of the Nations.

Third, the Court has indicated that the federal government can cure the breach of procedural fairness by engaging with the Nations as it committed to do in its initial press release. In my opinion, the federal government should also use this opportunity to make sure that it fulfills its constitutional consultation and honour of the Crown obligations at the same time, even though the Federal Court did not specifically address these issues.

Fourth, the Court anticipates that this can be done in a focused and relatively expeditious manner and that it certainly does not require re-opening the JRP proceedings – only the federal process *post-receipt* of the JRP Report has been impugned. There is still therefore a solid foundation for any ultimate decision.

Fifth, both Benga and the Nations have to live with the reality that this project will not move forward unless Benga and its allies can overturn *both* the federal and provincial decisions rejecting

the Grassy Mountain metallurgical coal project. Limited success in the Federal Court for the Nations on a procedural point does not move the needle significantly in favour of Benga.

Sixth, the judicial review applications in the Court of King's Bench have been dismissed but there is a still a live appeal. While I think that Justice Kuntz may have been too quick to dismiss Benga's application I do think that any application by Benga on questions of fact or mixed question of fact and law is doomed to failure. The JRP Report is well written and well-reasoned and Justice Southcott's decision in the Federal Court supports that assessment.

Seventh, while this Federal Court decision might have quashed the federal rejection of the project, the AER's rejection of the project still stands. And until that changes the project is not resting or pining for the Norwegian fjords, it is legally dead. It is an ex-project.

Benga's (now Northback's) Applications for New Drilling Permits of the Grassy Site

Which brings me to one final side bar that I mention so that readers will have as complete a picture as possible of where things stand. On September 5, 2023, Northback Holdings Corporation (the successor corporation to Benga) filed an application with the AER for a Deep Drilling Permit in support of a coal exploration program on the Grassy Mountain coal deposit. While I (see here) and many others have argued that the AER should never even have accepted this application, the good news for now is that the AER, for reasons that have not been disclosed, has yet to rule, one way or another on this application.

Thanks to Drew Yewchuk for helpful comments on an earlier draft of this post.

This post may be cited as: Nigel Bankes, "Taking Stock of The Grassy Mountain Litigation as of February 2024" (22 February 2024), online: ABlawg, http://ablawg.ca/wp-content/uploads/2024/02/Blog_NB_Grassy_Mountain_Update.pdf

April 24, 2024

Albertan Waits: One Thousand and Three Hundred Delays

By: Drew Yewchuk

Case Commented on: *Alberta Energy v Alberta (IPC)*, 2024 ABKB 198 (CanLII)

Alberta Energy v Alberta (IPC), 2024 ABKB 198 (CanLII) is another decision relating to attempts to use the *Freedom of Information and Protection of Privacy Act*, RSA 2000, c F-25 (*FOIP*) to obtain records from Alberta Energy about their May 2020 decision to rescind the Coal Development Policy for Alberta (1976). Nigel Bankes described the initial rescission of the policy here and the reinstatement in February 2021 here.

The circumstances in *Alberta Energy v Alberta (IPC)* are an outrageous example of how Alberta's elected officials exploit weaknesses in *FOIP* to conceal how government decision-making works to keep Albertans misinformed or disinformed.

Background

This is the third ABlawg post relating to the *FOIP* request filed on July 3, 2020, by a coalition of ranchers (the Applicants) with Alberta Energy, requesting:

> Alberta Energy's records that discuss the rescission or change of the coal policy (1976 Coal Policy) or exceptions to the coal policy, including: any briefing materials (briefing notes, internal memos, reviews, reports), and correspondence (emails, letters). To be clear, we are also requesting third party records.
>
> Time period: January 1, 2020 to June 1, 2020

The first post covered the September 2021 judicial review decision *Blades v Alberta (Information and Privacy Commissioner)*, 2021 ABQB 725 (CanLII) (*Blades*), in which the applicants challenged the decision of the Office of the Information and Privacy Commissioner (OIPC) to grant Alberta Energy an extension of 270 days to process their records request. Justice Janice R. Ashcroft found that the OIPC's decision to grant the extension was reasonable and that the OIPC was not required to take submissions from the Applicants prior to granting the extension. Justice Ashcroft relied, in part, on Alberta Energy's claim that there were 6,539 records at issue in finding that the extension was reasonable (at paras 53-54, and 80).

The second post covered the April 2022 OIPC decision in *Re Energy*, Order F2022-20, 2022 CanLII 29391 (AB OIPC), which addressed Alberta Energy's first release of only 30 heavily redacted pages. The OIPC adjudicator rejected all of Alberta Energy's applications of *FOIP* exceptions to disclosure information on the 30-page release. The OIPC adjudicator also addressed

Alberta Energy's revised estimate of only 2,180 pages of records rather than the original estimate of 6,539 pages of records. The OIPC adjudicator ordered Alberta Energy to provide an affidavit explaining the discrepancy if 6,539 pages of records could not be found (at para 31).

In *Alberta Energy v Alberta (Information and Privacy Commissioner)*, 2023 ABKB 268 (CanLII) (not covered by ABlawg), the Applicants unsuccessfully opposed the judicial sealing order the OIPC had requested for the unredacted copy of the records that OIPC had submitted to the court.

Summary of the Decision

Alberta Energy v Alberta (IPC), 2024 ABKB 198 (CanLII) is a judicial review of F2022-20. Justice Kent Teskey began by noting "that the Public Body required 15 months to release less than 1 percent of the records responsive to the request." (at para 3). Justice Teskey accepted that the records were of broad importance but noted "broad public importance is not a prerequisite to obtaining government records under FOIPP" (at para 6), and that the Supreme Court of Canada has affirmed that "access to information legislation is quasi-constitutional" (at para 7).

Justice Teskey applied the standard of review of reasonableness to all issues (at paras 10-12), and provided a good summary of the burden of proof in OIPC proceedings: (1) there is a presumption of access, and the public body has the obligation to show their decision to deny access to the records was reasonable, (2) the public body must provide evidence to ground its arguments for the denial of access, and (3) "the public body must justify each denial on its own merits" – redactions must be justified line by line (at paras 15-20).

Justice Teskey was critical of Alberta Energy's arguments against the Adjudicator's findings on exceptions to disclosure, writing that Alberta Energy's argument were mostly "mere assertions" unconnected to the OIPC decision or the evidence (at paras 25-27). He rejected Alberta Energy's arguments that exceptions to disclosure should be interpreted more broadly, as this was contrary to the legislative intent of a presumption of access with narrow and limited exceptions (at paras 29-32). He also rejected Alberta Energy's arguments about 'non-responsive' records and expressly declined to "remit the records back to the Public Body" so Alberta Energy could "claim other statutory exceptions," as he would "not allow this Public Body the opportunity to compound the inordinate delay they have created" (at paras 33-35). On the Commissioner's rejection of Alberta Energy's claim of Cabinet confidence, he found the OIPC commissioner was both reasonable and correct "that there is a distinction between information that was provided to Cabinet and information that would disclose the deliberations of Cabinet" and that evidence was required to show that the two could not be separated (at paras 36-40).

Alberta Energy argued that it had been procedurally unfair for the Commissioner to have accepted and considered the Applicants' submission relating to the claimed number of records shrinking from 6,539 to 2,100. The Commissioner had allowed this irregular submission, however, because Alberta Energy had first included the new estimate in their final rebuttal submission. In other words, the Applicants could not have possibly addressed the issue any sooner (at paras 41-48). Justice Teskey rejected this procedural fairness argument, finding it "difficult to understand" how Alberta Energy could claim an unfair process when it had "provided final submissions that were inconsistent on their face and chose not to correct them" (at para 55).

Justice Teskey also rejected a range of arguments from Alberta Energy that the Commissioner either lacked the authority or acted unreasonably in ordering them to produce an affidavit explaining the reduced record size (at paras 56-70). Justice Teskey noted that Alberta Energy had not explained how it was harmed by the order to produce the affidavit and had made no effort to explain the shrinking record (at para 71). He concluded:

> Like the Adjudicator, I am concerned about the seemingly casual attitude that Alberta Energy adopted in representing the number of records before the Commissioner. It was reasonable for the Adjudicator to demand sworn evidence on this issue where previous representations had become concerningly inconsistent.
>
> The fact that the Public Body has not elected to clarify the record before this Court reveals the lack of any fundamental unfairness arising from this process. I view this argument as a collateral attack on the decision and reject it.
> (at paras 72-73)

Last, Justice Teskey addressed the Applicant's argument that the court should decline judicial review because of Alberta Energy's "substantial and continuing delays in producing the records" (at para 74). He noted that freedom of information must be timely to be meaningful and that judicial reviews can compound delays and defeat the timeliness intended by the legislature (at paras 75-78). He criticized the extensive delays caused by Alberta Energy and was clear that the purposes of *FOIP* had been defeated by Alberta Energy's conduct:

> Every Albertan is entitled to a broad right of access to the records of their government. This is an essential pillar of a functional democracy. *FOIPP* contemplates a regime that is prompt, accessible and fair.
> …
> It is difficult not to look at the history of this matter and see the critical rights imbued by access to information as being largely illusory.
> (at para 79 and 81)

Justice Teskey warned public bodies to expect the Court to refuse to grant judicial review remedies where public bodies have failed to comply with their obligations under *FOIP* (at para 82) and dismissed Alberta Energy's application in its entirety.

Commentary

First, a practical note for lawyers practicing in administrative law: this case was argued prior to the release of *Yatar v TD Insurance Meloche Monnex*, 2024 SCC 8 (CanLII), discussed here. Paragraphs 74 – 82 therefore do not address the distinction between a court's discretion to hear a judicial review and a court's discretion to grant remedies on judicial review. While the court could have given the parties the opportunities to make new submissions based on *Yatar*, Justice Teskey's decision not to do so is rational given that inordinate delay was a key issue and the outcome did not turn on the question. However, lawyers citing paragraphs 74 – 82 of this decision should read paragraphs 49 – 54 of *Yatar* carefully.

Second, it is notable how quickly Justice Teskey's dismissed Alberta Energy's 'arguments' about the exceptions to disclosure. Justice Teskey's rapid and total dismissal of Alberta Energy's claims reinforces my view that Alberta Energy filed and argued this case simply to further delay its ultimate release of all the requested records.

Third, quotes from the Minister of Energy and Minerals, Brian Jean, suggest he misunderstands what is happening:

> We have released thousands of documents … My understanding is we have and we've released all that we are required to by law. And of course there are opportunities to restrict some of the documents based upon the best legal advice and that's of course what we've taken and there is an appeal process for that. And of course, if they want to appeal that, that's fine and they can do so.

The Minister gets everything wrong. Alberta Energy has processed 1,353 pages (a processing rate of around one page per day since the *FOIP* request was filed) and released heavily redacted copies of just 622 pages. Given that Alberta Energy relied on interpretations of the exceptions to disclosure that the OIPC and the court have now rejected, almost none of those pages have been processed or released correctly. The Minister's statement also appears to misunderstand that Alberta Energy lost the case (and lost badly), so there is absolutely no reason the Applicants would be using an appeal process.

Last, as Justice Teskey wrote, "[r]eceiving records years after a request may often be a pyrrhic victory and one that does little to contribute to the need for public accountability for government actions" (at para 76). Is this decision a pyrrhic victory for the Applicants and for access to information in Alberta? The decision is well written and will provide a helpful precedent for Albertans arguing for access under *FOIP*. Further, there are rumours that the OIPC now requires more detail from public bodies on their estimates of the size of records when seeking extensions (although no official statement has been made, and there is no sign the OIPC will allow applicants to make submissions on extension decisions.)

But these small improvements are not even close to enough. If *FOIP*'s timelines had been followed, the requested records should have been available for use during an application for judicial review (now withdrawn) of the May 2020 decision to rescind the coal policy, the coal policy consultation (now finished), and the 2023 election. Justice Teskey's decision is a strong statement of judicial disapproval, but is unlikely to prevent this from happening again.

Access to information legislation is "an essential pillar of a functional democracy" with a quasi-constitutional importance (at paras 7 and 79). But as recently made plain in media reports, access to information has failed in Alberta, *FOIP* is too weak, and Alberta needs law reform to improve the public's access to government held information and government decision making. Without a working system for the publicity for government processes, Albertans endure the effects of a hobbled democracy: a government filled with people who make policy decisions with lobbyists in secret, provide public relations spin and invented cover stories to the public, and then leave for jobs consulting and lobbying for the industries they were meant to regulate for the public good.

This post may be cited as: Drew Yewchuk, “Albertan Waits: One Thousand and Three Hundred Delays” (24 April 2024), online: ABlawg, http://ablawg.ca/wp-content/uploads/2024/04/Blog_DY_Albertan_Waits.pdf

August 28, 2024

Taking Stock of the Grassy Mountain Litigation, Part 2, August 2024

By: Nigel Bankes

Cases and decisions commented on: (1) AER Panel Decision on Stay Motion Filed by the Municipal District of Ranchland No. 66 (Stay Application) August 9, 2024, and (2) *Municipal District of Ranchland No. 66 v Alberta Energy Regulator*, 2024 ABCA 274 (CanLII) (PTA Application) August 22, 2024

This ABlawg post is an update to a post from earlier this year: "Taking Stock of The Grassy Mountain Litigation as of February 2024". In that post, I traced the litigation commenced by Benga and its corporate successor Northback following the June 2021 report and decision of the Joint Review Panel to reject the Grassy Mountain Project exercising authority as the Alberta Energy Regulator (AER). That litigation involved cases in the Federal Court and Alberta's Court of Appeal and Court of King's Bench. The Alberta Court of Appeal litigation came to an end in 2022 when the Supreme Court of Canada denied a further leave to appeal. The Federal Court cases are still ongoing, as is the King's Bench matter, as well as allied litigation brought by First Nations in both Federal Court and in King's Bench. I refer the reader to my February 2024 post for details on these case as well as the necessary links and references.

Since then, however, an additional front has opened in the battle for Grassy Mountain with the decision of the AER to allow Benga/Northback to file applications with the AER for new drilling permits on the Grassy Mountain site. My October 2023 post noted that development as well as my argument that "The AER Does Not Have the Jurisdiction to Consider New Coal Applications for the Grassy Mountain Coal Deposit". But on the same day as that last update post (February 22, 2024) the AER issued a decision under the signature of Sean Sexton, Executive Vice President Law, and General Counsel of the AER "[o]n behalf of the Executive Leadership Team" of the AER. This unusual letter decision was addressed to Mr. Alex Bolton as the AER's Chief Hearing Commissioner. The decision confirmed that the AER had decided to accept Northback's applications for filing on the basis that the applications were covered by the "advanced project" exception in Ministerial Order 002/2022 (for discussion of that Order and the "advanced project" exception see the October 2023 and February 2024 posts referenced above.) In doing so, the AER accorded significant weight to a November 16, 2023 letter to the AER from Minister of Energy, Brian Jean purporting to clarify the terms of the Ministerial Order to the effect that "[t]he Minister's Letter provides that once a project summary has been submitted and a project is considered an advanced coal project, it remains as such regardless of previous application outcomes." (at 1). That same February decision directed Mr. Bolton to arrange for an oral public hearing on Northback's applications, reasoning as follows:

> Coal development in the Eastern Slopes of Alberta has engaged significant interest from surrounding municipalities, Indigenous and local communities, and many other Albertans.

> The Minister's Letter emphasizes the importance of Indigenous and community engagement in the AER's regulatory processes. A public hearing will allow for the most informed and transparent technical review of the applications. (at 2)

The AER subsequently issued a Notice of Hearing (ID 444) on April 10, 2024 inviting statements of intent to participate and a series of decisions on June 5, 2024 ruling on those applications. In some limited cases the hearing panel has granted full participation rights, including the right of cross examination, but in many other cases the hearing panel has granted only limited participation rights that allow for little more than the opportunity to make a written or oral statement to the hearing panel.

The Municipal District of Ranchland No 66 (the MD) is one of the parties that has been granted full participation rights and the MD also elected to seek the permission of the Court of Appeal to appeal the AER's decision of February 22, 2024 to accept for filing Northback's new applications. In that application the MD noted that the existence of the Minister's November 16 letter had not been disclosed to parties, including the MD, before the AER published its decision (PTA Application at para 8). On June 17, 2024 the MD subsequently brought a motion before the hearing panel to stay the hearing pending the Court of Appeal's decision on the permission application.

The AER hearing panel issued its decision on the stay application on August 9, 2024 and the Court of Appeal issued its decision on the permission to appeal application on August 22, 2024.

The Stay Application

The hearing panel denied the MD's application to stay the hearing. As is customary, the hearing panel applied the three part test for a stay adapted from the Supreme Court of Canada's decision in *RJR-MacDonald Inc v Canada (Attorney General)*, 1994 CanLII 117 (SCC) (*RJR-MacDonald*) with the onus on the applicant for the stay to demonstrate that it meets each element of the test: (1) serious issue to be tried, (2) irreparable harm if the stay is not granted, and (3) balance of convenience. The panel concluded that while the MD had satisfied the first element of the test it had not provided evidence of irreparable harm. Specifically, the panel concluded that:

> First, the harms Ranchlands (*sic*) submits it will suffer if the proceeding is not stayed and it is successful on appeal are time, resources, and money. These amount to administrative inconvenience and harms that can be quantified in monetary terms, neither of which constitutes irreparable harm.
>
> …
>
> Second, the alleged harms are, at least in part, speculative. Ranchland states that it is likely that numerous experts will be retained to provide evidence and reports in relation to the potential negative effects of Northback's coal exploration programs but does not provide any detail. We are not satisfied that this rises to the level of clear, non-speculative evidence of irreparable harm that is required.

> Finally …. The questions in Ranchland's application for permission to appeal go to whether the AER erred in accepting the Applications, not whether this hearing process is fair. If Ranchland is successful this proceeding may become moot, but in the meantime, nothing prevents Ranchland from arguing its position before this panel, adducing whatever evidence it deems necessary to support its position, and participating fully in the hearing. (References omitted) (at 9-10)

Given its conclusions on irreparable harm it was not necessary for the panel to consider the balance of convenience.

The Permission to Appeal Application

The Court of Appeal (per Justice Kevin Feth) granted, in large part, the MD's application for permission to appeal the AER's decision of February 22, 2024 – precisely six months to the day of that decision. The MD raised five possible grounds of appeal:

a) improperly delegating the decision to the Minister or fettered its discretion in making the decision;
b) failing to consider relevant issues, facts, and arguments;
c) finding that the Minister's letter constitutes "written notice" to terminate the suspension of applications pursuant to s 3 of the Ministerial Order or "guidelines" for the receipt of applications as contemplated by s 67 of the *Responsible Energy Development Act*, SA 2012, c R-17.3;
d) relying on improper or irrelevant evidence by giving "significant weight" to the Minister's opinion as expressed in his letter; and,
e) finding that the term "advanced coal project" includes projects which have been rejected by the AER. (at para 14)

A ground of appeal must raise a question of law or jurisdiction (see *REDA* at s 45) which must then be evaluated against four criteria widely applied by the Court in permission to appeal applications:

a) whether the applicant has demonstrated a question of law or jurisdiction of general importance, rather than of interest only to the immediate parties;
b) whether the issue is significant to the underlying administrative proceeding, or is merely interlocutory or collateral, or may not affect the ultimate outcome of the proceeding;
c) whether the appeal raises a serious, arguable point of law; this factor considers the standard of review to be applied and is balanced with the importance of the issue; and,
d) whether an appeal will unduly hinder the underlying proceedings.

(For a discussion and critique of the origins of these criteria see Fluker and Yewchuk, "Seeking Leave to Appeal a Statutory Tribunal Decision: What Principles Apply?")

In this case Justice Feth paid particular attention to Northback's argument that the MD's application was interlocutory or collateral and would simply serve to delay the proceedings. In rejecting that contention Justice Feth reasoned as follows:

> The AER's process of "accepting" an application usually involves a review for technical requirements of the application and nothing more. The Ministerial Order creates a unique gatekeeping function by which the AER must decide whether an exception to the general suspension of the Regulator's acceptance of Category 4 applications is engaged. That suspension effectively creates a moratorium on coal exploration and development on Category 3 and 4 lands, except for those subject to an "advanced coal project".
>
> I conclude that determining whether an application should enter the regulatory process is not truly interlocutory or collateral because a refusal brings finality to the coal exploration and development application. Nothing in the record suggests that the moratorium will be of short duration. To the contrary, the regulatory history suggests that curtailing coal exploration and development is the norm, with only limited exceptions.
>
> …. the history of the Grassy Mountain project and the number of interested parties submitting Statements of Concern (122) with the Regulator in response to Northback's applications suggest that a lengthy and complicated hearing process is likely. The Municipal District's appeal, if successful, may be dispositive of the applications in their entirety and probably avoid substantial expense and the consumption of limited regulatory resources.
>
> I find that the proposed appeal has potentially dispositive consequences and is not premature. (at paras 23 – 26)

Justice Feth then turned to the specific grounds of appeal. On the first ground, Justice Feth concluded that there was no evidence of improper delegation but did accept that "the AER's decision appears to offer no independent analysis of whether Grassy Mountain met this definition in arriving at its decision to accept Northback's applications." (at para 36) In particular, the AER's decision "did not explain why a project it previously rejected continues to be an *advanced* coal project or why a rejected project continues to be a 'project' under the Ministerial Order at all." (*ibid*) That raised an issue of fettering and one that "concerns more than the immediate parties and has a wider impact than the current AER decision because four advanced coal projects are identified in the Minister's letter …" (at para 37).

It seems from Justice Feth's judgment that the MD effectively reframed its second ground of appeal as one of procedural fairness. This was undoubtedly a sound approach since as originally framed ("failing to consider relevant issues, facts, and arguments") it was likely not raising a question of law or jurisdiction. But in the end, even as reframed, Justice Feth considered that the applicant had failed to particularize its procedural fairness concerns and accordingly leave was denied on this second ground of appeal. (at paras 40-43)

Justice Feth dealt with third and fourth grounds together and effectively reformulated them as a charge that the AER had used the Minister's letter to impermissibly expand, narrow or otherwise influence the interpretation of a Ministerial Order. (at para 54) That, said Justice Feth, raises a question of law of "general importance to the use and interpretation of Ministerial Orders more generally, both under *REDA* and otherwise." (at para 58) Justice Feth framed the question as "Did

the AER err by relying on the Minister's letter in interpreting the Ministerial Order?" (at para 67(b))

Justice Feth also granted leave on the fifth ground, namely the proper interpretation of the term "advanced coal project" – while apparently leaving to the appeal panel the applicable standard of review.

In sum Justice Feth has granted the MD permission to appeal on three questions:

a) Did the AER improperly fetter its authority in accepting Northback's applications?
b) Did the AER err by relying on the Minister's letter in interpreting the Ministerial Order?
c) Did the AER err in its interpretation of the term "advanced coal project" in the Ministerial Order?

Going Forward

Having decided not to grant the MD's application for a stay, the following day the AER hearing panel went ahead and issued a hearing order (August 13, 2024) and schedule for proceeding 444. The schedule looks like this:

Filing	**Due Date**
Submissions from Northback	September 4, 2024
Submissions from Full Participants	October 2, 2024
Reply submissions from Northback	October 23, 2024
Submissions from Limited Participants (Optional)	November 6, 2024
Northback Reply to Limited Participants (Optional)	November 18, 2024
Deadline for Motions	November 18, 2024
Hearing Commences – Oral presentations from Limited Participants	December 3 & 4, 2024
Hearing continues	January 14 – 31, 2025

Justice Feth's subsequent decision to give permission to appeal the AER's decision to accept Northback's application for filing does not itself suspend the AER's proceeding 444, but s 45(5) of *REDA* does provide as follows:

> (5) A decision of the Regulator takes effect at the time prescribed by the decision, and its operation is not suspended by any appeal to the Court of Appeal or by any further appeal, but the Regulator may suspend the operation of the decision or part of it, when appealed from, on any terms or conditions that the Regulator determines until the decision of the Court of Appeal is rendered, the time for appeal to the Supreme Court of Canada has expired or any appeal is abandoned.

The hearing panel did refer to this section in its decision on the MD's stay application earlier in the month, but now that leave has been granted the MD may see reason to ask the panel to reconsider its decision, especially in light of Justice Feth's comments at para 25 to the effect that

"The Municipal District's appeal, if successful, may be dispositive of the applications in their entirety and probably avoid substantial expense and the consumption of limited regulatory resources." In addition, or in the alternative, s 14.48 of the Rules of Court (*Alberta Rules of Court*, Alta Reg 124/2010), would allow the MD to make the same application to the Court of Appeal itself:

> An application to stay proceedings or enforcement of a decision pending appeal may be made
> (a) to the judge who made that decision, or
> (b) to a single appeal judge, whether or not the application was made to the judge who made the decision, and whether or not that application was granted or dismissed.

Another possibility would be to reframe the application to the AER as an application for an adjournment of Proceeding 444. This seems more appropriate. A stay is the appropriate application when a party such as Northback already has its permit; the stay order is designed to prevent that party from exercising its rights under the permit pending the outcome of the appeal or other proceeding. But in this this case Northback has no permit and it will not be in a position to carry out any activities on the ground unless and until the AER completes its proceedings and rules (if it does) in favour of Northback. All that Northback has right now is a live application and even that claim is tenuous given Justice Feth's decision to grant permission to appeal.

In such a case therefore the better application is an application for an adjournment pending the outcome of the appeal. Such an application engages the pragmatic exercise of discretion by the hearing panel rather than the *RJR McDonald* three-part rule. AER Proceeding 417 offers a pertinent example. The proceeding is an ongoing application involving Pieridae and Mr. Judd. In that case the AER's hearing panel (Decision of January 16, 2024) granted Judd's application (at least in part) for an adjournment on the grounds that:

> … it is in the interests of all parties to conduct this hearing only once. Given that the Alberta Court of Appeal granted permission to Mr. Judd to appeal our procedural decision from May 19, 2023, and no one is in a position to know the outcome of the Court's deliberations, prudence dictates that we adjourn this matter until such time as the Court's decision is known, and a new hearing date selected that permits all the issues in play to be fairly adjudicated.

For the subsequent Court of Appeal decisions on the permission to appeal application see 2023 ABCA 296 and on the merits 2024 ABCA 154.

That seems like a prudent course of action in this case too, either on the basis of an application by an interested party such as the MD or by the hearing panel of its own motion. Failure to adjourn creates the risk the Court of Appeal will issue a decision on the merits of the MD's appeal to the effect that the AER should never have accepted Northback's applications thus making the entire AER hearing panel proceedings a nullity.

This post may be cited as: Nigel Bankes, "Taking Stock of the Grassy Mountain Litigation, Part 2, August 2024" (28 Aug 2024), online: ABlawg, http://ablawg.ca/wp-content/uploads/2024/08/Blog_NB_Grassy_Mountain_Part2.pdf

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October 8, 2024

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.

This post may be cited as: Nigel Bankes, "Court of Appeal Grants Permission to Appeal Another AER Coal Decision" (8 Oct 2024), online: ABlawg, http://ablawg.ca/wp-content/uploads/2024/10/Blog_NB_AER_Coal.pdf

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