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The First Ministerial Direction to the Alberta Energy Regulator: The Aboriginal Consultation Direction

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Direction commented on: Ministerial Order 141/2013, *The Aboriginal Consultation Direction*

On November 26, 2013, the Minister of Energy issued Ministerial Order 141/2013, the *Aboriginal Consultation Direction*. The *Direction* was issued to ensure that "the AER considers and makes decisions in respect of energy applications in a manner that is consistent with the work of the Government of Alberta" (*Direction* at 2) in meeting its consultation obligations associated with the existing rights of Aboriginal people. The *Direction* gives eight specific directions to the Alberta Energy Regulator (AER) and sets up a process on Aboriginal consultation that the AER must follow. This post comments on the content of the *Direction*, its implications, and identifies some of the issues that are unclear under the current legislation.

1. Background

Following the Regulatory Enhancement Project that was launched in 2010, the Government of Alberta started developing a new regulatory framework for upstream oil and gas. Two elements of that framework are relevant for the purposes of this discussion.

First, the *Responsible Energy Development Act*, SA 2012, c R-17.3 (*REDA*) prescribes that the AER does not have the jurisdiction to assess the adequacy of Crown consultation (s 21 *REDA*). The new regulatory framework assigns this function to the Aboriginal Consultation Office (ACO), a new office established under the Aboriginal Relations Department. The ACO is also responsible for all other aspects of First Nations consultation, including pre-consultation assessment, management and execution of the consultation process. The ACO was established in November 2013 but according to its website (April 16, 2014) it is still not fully established.

Second, the executive has the power to issue mandatory directions to the AER under s 67 of *REDA*. Each of the Minister of Energy and the Minister of Environment and Sustainable Resource Development may by order give directions to the AER to provide priorities or guidelines to the AER that the AER must use in carrying out its "powers, duties and functions" (*REDA* s 67(1)(a)) and to ensure that "the work" of the AER is "consistent with" "the programs, policies and work" of the Government (*REDA* s 67(1) (b)). The powers of the ministers are disjunctive and any reference in the provision to a minister is to be read as a reference to any of those ministers (s 6.1.1 of the *Designation and Transfer of Responsibility Regulation*, Alta Reg 80/2012). The AER must comply with the directions given under this section "within the time

period set out in the order" (*REDA* s 67(2)). The *Aboriginal Consultation Direction* is the first such direction to be issued under this section. The *Direction* was issued in November 2013 but it has not been published in the Alberta Gazette and, so far as we can tell, it has not even been put up on the AER's website. It is available on the website of the Department of Energy but only (and inexplicably) under the heading "Travel Reports" (here).This is hardly an auspicious beginning for these new forms of direction.

2. The Purpose and Content of the Direction

The *Aboriginal Consultation Direction* recognizes that the AER has a responsibility, within its statutory authority under *REDA*, to consider potential adverse impacts of energy applications on existing rights of Aboriginal people arising under Part II of the *Constitution Act, 1982* (at 2). The *Direction* also recognizes that the Government of Alberta retains the responsibility to assess the adequacy of Crown consultation in respect of energy applications (at 3). Consequently, the *Direction* sets out a process that the AER must follow (i) to ensure that the AER acts consistently with decisions made by the Government under the *Alberta's First Nations Consultation Policy on Land Management and Resource Development* and *Consultation Guidelines*; and (ii) to facilitate timely, efficient, and effective information exchange between the AER and the ACO on energy applications that require aboriginal consultation (at 2-3).

The *Aboriginal Consultation Direction* gives the following eight directions to the AER (at 3-5).

Direction number 1 requires the AER to establish a consultation unit that will work with the ACO.

Direction number 2 requires that if a proponent provides information to the AER about a proposed energy project *before* submitting an energy application, the AER must direct the proponent to contact the ACO. Subsequently, the AER must immediately provide certain information to the ACO, including the proponent's name, any project details of which the AER is aware, and a list of anticipated energy applications.

Direction number 3 requires that if a proponent files an energy application with the AER, the AER must provide the ACO with the following information: (i) a copy of the application, (ii) any project details of which the AER is aware and not previously submitted to the ACO, (iii) a list of the anticipated energy applications, (iv) a copy of any statement of concern filed by a First Nation or other Aboriginal group concerning the application, (v) a copy of any submission filed by a First Nation or other Aboriginal group under the *Rules of Practice* (Alta Reg 99/2013) and (vi) copies of any evidence and information submitted by a First Nation or other Aboriginal group, or generally available.

Direction number 4 requires the AER to have the proponent include in its application the following information: (i) the potential impacts of the proposed project on existing rights of Aboriginal people, (ii) the potential impacts of the proposed project on traditional uses, and (iii) a copy of any consultation information or advice issued by the ACO concerning the application. The AER must inform the ACO of any changes proposed to the energy project. Also, the AER must inform the ACO of the process that the AER will follow in considering the application, including whether the AER will hold a hearing or ADR, and must advise the ACO as to whether it will include First Nations or other Aboriginal groups in the process.

Direction number 5 requires that before making a decision on an energy application, the AER must seek advice from the ACO as to whether consultation was adequate, adequate pending the outcome of the AER's process, or not required.

Direction number 6 prescribes that if the ACO determines consultation to be adequate or adequate pending the outcome of the process, the AER must seek advice on actions that may reduce the potential impacts on existing rights or on traditional uses of Aboriginal people. In addition, the AER must provide the ACO with its draft approval before issuance if the ACO requests so.

Direction number 7 requires the AER to notify the ACO of its decision on an energy application, and any reasons related to making that decision, at the same time in which the AER notifies the proponent.

Direction number 8 requires the AER to provide the ACO with a copy of any application for regulatory appeal, reconsideration, or leave to appeal to the Court of Appeal filed by a First Nation or any other Aboriginal group.

3. Commentary

(a) The Legal Effect of the Direction: Legislative or Administrative Act?

The power of the minister to give mandatory directions to the AER was justified as a way to provide guidance and ensure consistent application of policies between the executive and the AER (see Hansard debate on s. 67 *REDA*, here). However, executive directions are a complex area of law and in particular there is an important debate on the legal effect of directions and their equivalents. The case law suggests that the nature or legal effect of the *Aboriginal Consultation Direction* turns on whether the *Direction* is an *administrative* direction or a *legislative* direction. The characterization of the *Direction* turns in part on the language of s 67 *REDA* but also in part on the language of the *Direction* itself (i.e. a conclusion about the characterization of one direction under this section may not be conclusive with respect to other directions).

Administrative directions are used to dictate administrative policy within the ranks of government departments. If they are drafted in imperative terms they may be binding on those to whom the direction is addressed. However, the case law has consistently concluded that an infringement of an administrative direction can only have administrative consequences (see e.g. *Maple Lodge Farms v Government of Canada*, [1982] 2 SCR 2; *Peet v Canada (Attorney General)*, [1994] 3 FC 128). By contrast, directions that have the nature of delegated legislation or regulation have the force of law. *Legislative* directions bind all those to whom the direction is addressed, may create substantive rights for third parties, and are legally enforceable in court. Also, since they must be interpreted and applied as any other law, an interested party may seek to have a direction enforced by way of prerogative relief, including mandamus or certiorari, if the public officer or agency fails to comply with the ministerial direction. Similarly, a decision of the agency may be subject to judicial review (or in the case of the AER form the basis for an application for leave to appeal the decision to the Alberta Court of Appeal under s 45 *REDA*) to determine whether or not it complied with the direction or whether the agency committed an error in law in applying the direction. The case law has attributed legislative effects to directions or guidelines primarily by analyzing whether the provision authorizing the direction requires a procedure similar to the creation of legislative acts and regulations. For instance, courts have

inferred that the legislature intended to allow the creation of delegated legislation if the authorizing provision subjects the issuance of the direction to formal requirements, such as enactment by Order in Council and approval of the Lieutenant Governor in Council (see e.g. *Friends of the Oldman River Society v Canada (Minister of Transport)* [1992] 1 SCR 3 discussing the old federal environmental assessment guidelines order).

Analyzing s 67 *REDA*, it seems that there is nothing in the provision indicating that the Legislature intended to confer on the Minister anything more than a merely administrative function. The general power to create regulations under the *Responsible Energy Development Act* is assigned to the Lieutenant Governor in Council (ss 78-80 *REDA*). This may indicate that the legislature did not intend to assign a similar function to an *individual* minister under s 67 *REDA*. Furthermore, s 67 *REDA* does not specifically require a formal procedure similar to the enactment of regulations. In particular, s 67 *REDA* does not require directions to be approved by the Lieutenant Governor in Council and does not require publication in the Alberta Gazette. Based on this interpretation, the *Aboriginal Consultation Direction* does not have the nature of delegated legislation and does not confer legally enforceable rights on third parties.

On the other hand, s 67 *REDA* requires directions to be issued by way of "order". The *Interpretation Act*, RSA 2000, c I-8 defines a "regulation" as "a regulation, *order*, rule, form, tariff of costs or fees, proclamation, bylaw or resolution enacted (i) in the execution of a power conferred by or under the authority of an Act, or (ii) by or under the authority of the Lieutenant Governor in Council" (s 1(1)(c), emphasis added). Since an order falls under this definition of regulation, it might be argued that s 67 *REDA* allows delegated legislation. However, the case law seems to focus on whether the provision authorizing the direction requires a procedure similar to the creation of legislative acts and regulations. Consequently, it may be difficult to conclude that s 67 *REDA* allows delegated legislation given the absence of explicit procedural requirements under this provision.

(b) Lack of Clarity on the Procedural Requirements

The existence of the *Aboriginal Consultation Direction* has taken many by surprise and, as noted above, with good reason. The *Direction* has not been published in the Alberta Gazette and does not yet appear on the AER's website. It is published on the website of the Department of Energy but under the heading "Travel Reports" (here). This form of publication certainly raises concerns on the transparency of the process. But could the efficacy of the *Direction* be challenged on the ground that it was not formally published?

If we assume (*contra* the tentative conclusion of the last subsection) that the Minister is allowed to issue an order of a legislative nature under s 67 *REDA*, the Minister has to comply with the procedure prescribed under section 3 of the *Regulations Act*, RSA 2000, c R-14 (see the combined effect of s 1(1)(f) *Regulations Act* and 1(1)(c) *Interpretation Act*). An order of a legislative nature that is not filed with the Registrar has no effect, and an unpublished order is not effective against a person unless that person has had actual notice of the order (*Regulations Act* s 3(5)). By contrast, a ministerial order issued that is of an administrative nature presumably does not need to be filed or published in the Alberta Gazette.

The relevant case law again draws attention to the differences between an instrument of a legislative nature and an instrument of an administrative nature. The Ontario Court of Appeal in *Rose v R* (1960 CarswellOnt 89, [1960] OR 147, 22 DLR (2d) 633) addressed the issue of whether an order in council was of a legislative nature and thus subject to the *Ontario*

Regulations Act (RSO 1950, c. 337). The Court emphasized that "[i]n coming to a conclusion as to the nature of the act performed, not only must one look at the substance rather than the form but indeed in the inquiry upon which one must embark, all the surrounding circumstances must be looked at and by that I include the nature of the body enacting the order in question, the subject matter of the order, the rights and responsibilities, if any, altered or changed by that order" (para 31).

The subject matter of the *Aboriginal Consultation Direction* and the fact that it seems to be directed at specific individuals, i.e. the AER, rather than more generally suggests that the minister was merely issuing directions to an agency for which the minister is responsible. For instance, some of the requirements attempt to organize and coordinate some of the AER's work with the ACO (see direction numbers 1-4). Others of the requirements seem mainly concerned with procedural aspects and ensuring that the ACO is kept informed of the AER's decisions (see direction numbers 4, 7 and 8). However, when considering other requirements generally applicable to the public and concerned with setting standards of conduct, it may be difficult to conclude that the *Direction* is purely of an administrative nature. For instance, the *Direction* requires a proponent to contact the ACO before submitting an energy application (direction number 2) and to include in the application certain documents and information (direction number 4). Since these requirements seek to alter the rights and responsibilities of the public, it is arguable that the *Direction* is of a legislative nature.

But even if one concludes that the *Direction* did not have to be formally promulgated to be effective, transparency and accountability are particularly important when the government decides to intervene in the functions of a body that was created by the legislature at arm's length to the executive. Therefore, regardless of their nature, ministerial directions should be published on the website of the AER (see post by Nigel Bankes, here, commenting on the AER's policy in deciding what to publish on its website). In addition, transparency and accountability require the information to be easily retrievable and not buried within bureaucracy, as in this case, under "Travel Reports". The executive directions given to the Ontario Energy Board (here) or to the BC Utilities Commission (here) offer pointed examples of transparent information. Not only are these directions published on the agency's website, but they are easily accessible to the public.

c) The Relationship Between the AER and the ACO

The *Aboriginal Consultation Direction* requires the AER to seek advice from the ACO as to whether consultation was adequate, adequate pending the outcome of the AER's process, or not required (direction number 5). In addition, if the ACO determines consultation to be adequate or adequate pending the outcome of the process, the AER must seek advice on actions that may reduce the potential impacts on existing rights or on traditional uses of Aboriginal people before granting an approval of an energy application (direction number 6). Assuming that the AER seeks advice from the ACO, is the AER also required to implement the advice received? Or does the AER maintain some level of discretion over the final decision? The *Direction* only requires the AER to seek advice from the ACO and does not go so far as to mandatorily require the AER to implement the advice received. However, s 21 *REDA* explicitly states that the AER does not have the jurisdiction to assess the adequacy of Crown consultation. It is the ACO's responsibility to ensure that the duty to consult is adequately reflected in the regulatory approval process. In addition, the government's duty to consult may also include the need to accommodate Aboriginal concerns (see *Haida Nation v British Columbia (Minister of Forests),* 2004 SCC 73). The standard of sufficient accommodation remains vague but it may entail adjusting plans and projects to minimize impacts. As a result, it seems that the ACO has been accorded oversight of

the portion of the AER's decision that is concerned with assessing the adequacy of Crown consultation, including any necessary mitigation and accommodation measures. Furthermore, it must be emphasized that in many cases the AER's decision on a project approval is subject to the approval of the Lieutenant Governor in Council and subject to such terms and conditions as may be prescribed: see, for example, *Oil Sands Conservation Act*, RSA 2000, c. O-7, ss. 10 and 11. It does not seem unreasonable to think that the details of the relationship between the ACO, the AER and the Lieutenant Governor in Council may require further clarification.

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