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A Revised Aboriginal Consultation Direction issued to the Alberta Energy Regulator

By: Giorilyn Bruno and Nigel Bankes

Direction and Decision Commented On: Energy Ministerial Order 105/2014 / Environment and Sustainable Resource Development Ministerial Order 53/2014; *Prosper Petroleum Ltd.*, 2014 ABAER 013

On October 31, 2014, the Minister of Energy and the Minister of Environment and Sustainable Resource Development (ESRD) by Order issued a revised *Aboriginal Consultation Direction* to the Alberta Energy Regulator (AER). The main purpose of this *Direction* is "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" in meeting its consultation obligations associated with the existing rights of Aboriginal people (*Direction* at 2). This is the second Ministerial Order issued under s. 67 of the *Responsible Energy Development Act*, SA 2012, c R-17.3 (REDA) and it repeals the previous one. In April we posted a blog commenting on the first Order (available here). This post provides an overview of the changes introduced by the new *Direction*, comments on its scope, and identifies some of the issues that have yet to be addressed.

What are the changes?

The first noticeable difference is that the new *Direction* is issued under the authority of both the Minister of Energy and the Minister for ESRD whereas the previous one was issued only by the Minister of Energy.

The requirements of the new *Direction* overall remain similar to those established by the previous Direction although worded in slightly different terms. To improve clarity, the new *Direction* groups these requirements under four subheadings: (a) Coordination, (b) Applications, (c) Decisions, and (d) Appeal and Reconsideration.

(a) Under "Coordination", the new *Direction* reiterates that the AER is required to create and maintain a consultation unit that will work with the Aboriginal Consultation Office (ACO). The *Direction* also introduces a new requirement for the AER to collaborate with the ACO in establishing operating procedures that address how these two organizations will administer and coordinate their work. Once these operating procedures are in place, the AER must follow them (*Direction* at 3). The requirement for the AER to collaborate with the ACO in establishing operating procedures is perhaps the most significant change introduced under the new *Direction*.

(b) Under "Applications", the new *Direction* confirms that the AER must require all proponents to contact the ACO before submitting an energy application to the AER. Once submitted, the AER is to provide the ACO with certain information with respect to the application. Despite a few minor revisions and omissions, there seem to be no significant changes in this requirement. It requires that a copy of or access to the application be submitted to the AER, as well as a copy of any statement of concern, submission, evidence and information filed by any aboriginal group concerning the application. The following requirements have not substantially changed but the new *Direction* introduces an exception to their application, i.e. they do not operate if the application concerns an activity that is deemed not to require consultation. This would happen in two instances: (1) the application concerns an activity that is listed under Appendix C of the *Consultation Guidelines* or (2) the application is accompanied by a pre-consultation assessment of the ACO indicating that no consultation is required. Assuming that consultation is required, the AER must ensure that proponents have included in their application information about the potential adverse impact of the proposed project on existing rights and traditional uses of aboriginal people. Also, the AER is required to advise the ACO of any changes to the application, whether alternate dispute resolution which involves aboriginal people will be used, whether a hearing will be held on the application, and whether aboriginal people will be included in the hearing process (*Direction* at 3-4).

(c) Under "Decisions", the new *Direction* restates that the AER is required to seek advice from the ACO with respect to the adequacy of consultation and mitigation actions on potential adverse impacts on aboriginal rights and traditional uses. Just as before, the AER is also required to notify the ACO and provide the ACO with a copy of its decision and related reasons concerning the outcome of an energy application at the same time it notifies the proponent. The only difference under this subheading is that the AER is no longer required to provide the ACO upon request with a copy of its draft decision before issuance (*Direction* at 4).

(d) Finally, no changes are introduced under "Appeal and Reconsideration". The AER is still required 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 aboriginal people (*Direction* at 4).

What is the scope of the new *Direction*?

In a recent decision, the AER had the chance to consider the scope of application of the previous *Aboriginal Consultation Direction* (Ministerial Order 141/2013). This decision is *Prosper Petroleum Ltd.*, 2014 ABAER 013, and it involves a regulatory appeal under Division 3 REDA and Part 3 of the AER *Rules of Practice.* The proceeding was brought by Fort McKay First Nation and Fort McKay Métis Community Association (Fort McKay) against the AER's decision to grant 24 oil sands evaluation well licences to Prosper Petroleum Ltd. (Prosper) under the *Oil and Gas Conservation Act*. Among other issues, Fort McKay claimed that Prosper had failed to consider the potential adverse effects of the project on Fort McKay's treaty and aboriginal rights in the area, and did not provide the AER with this information. Since Ministerial Order 141/2013 explicitly required project proponents to provide the AER with a detailed assessment of potential impacts of energy resource activities on aboriginal communities, Fort McKay argued that Prosper did not meet the requirements set by the Order and consequently the AER did not have the proper information before it when it issued the licences. Thus, Fort McKay asked the AER to revoke the well licences.

In reaching its decision (at paras 32-42), the AER noted that under REDA, a "specified enactment" is distinguished from an "energy resource enactment". A "specified enactment" includes the *Environmental Protection and Enhancement Act*, RSA 2000, c E-12, the *Public Lands Act,* RSA 2000, c P-40 and the *Water Act*, RSA 2000, c W-3, but does not include the *Oil and Gas Conservation Act*, RSA 2000, c O-6, the *Oil Sands Conservation Act*, RSA 2000, c O-7, or the *Pipeline Act*, RSA 2000, c P-15, which fall under the definition of an "energy resource enactment". The AER also noted that the Preamble of Ministerial Order 141/2013 at page 2 contains a statement of applicability. Based on this statement, the AER concluded that Ministerial Order 141/2013 applies to applications under specified enactments but does not apply to applications under energy resource enactments. Since the well licences were granted to Prosper under the *Oil and Gas Conservation Act,* the AER rejected Fort McKay's claim on the basis that the *Direction* does not apply to applications under energy resource enactments. The AER also rejected Fort McKay's argument that a purposive reading of the *Direction* should prevail over its narrow interpretation to ensure that the AER's decisions are consistent with Alberta's constitutional obligations to aboriginal people.

Despite the AER's decision, the scope of Ministerial Order 141/2013 remains controversial. On first reading, the *Direction* does seem to suggest that its applicability concerns applications to the AER under specified enactments rather than energy resource enactments. The *Direction* indicates as follows:

> This *Direction* applies to "applications" to the AER for "energy resource activity" "approvals" under "specified enactments", all as defined in REDA ("energy applications").

The syntax of the statement naturally leads to assume that the *Direction* applies to applications to the AER for energy resource activity approvals *under specified enactments*. In other words, the statement seems to require the AER to consider adverse impacts on existing rights of Aboriginal people for decisions under specified enactments only. The AER took that position (see para 37) and in a comment to our previous post we suggested a similar approach. However, further analysis reveals that the statement of scope is not as clear as it may seem, and it is possible to reach a different conclusion by considering some of the definitions in REDA. The statement of scope refers to REDA for the meaning of the terms "application", "energy resource activity" and "approval". These terms are each defined under s. 1(1)(a), s. 1(1)(i) and s. 1(1)(b) REDA as follows:

> "application" means an application to the Regulator for the issuance of an approval; …
>
> "energy resource activity" means
> (i) an activity that may only be carried out under an approval issued under an energy resource enactment, or
> (ii) an activity described in the regulations that is directly linked or incidental to the carrying out of an activity referred to in subclause (i) (emphasis added); …
>
> "approval" means, except where the context otherwise requires, a permit, licence, registration, authorization, disposition, certificate, allocation, declaration or other instrument or form of approval, consent or relief under an energy resource enactment or a specified enactment (emphasis added)

The above definition of "application" refers to the issuance of an approval, and the definition of "approval" refers to permits and licences issued under both energy resource enactments and specified enactments. The definition of "energy resource activity" refers to an activity that requires an approval issued under an energy resource enactment (or which is listed by regulation as linked or incidental to an activity that requires an approval under an energy resource enactment). This definition does not refer to "specified enactments" – thus, it is hard to see how one can even have an approval of an energy resource activity that is issued under a specified enactment. Given this tangle, it is far from clear that the *Direction* only applies to applications under specified enactments. Rather, it may be argued that the *Direction* applies to applications under both energy resource enactments and specified enactments (see e.g. Kirk N. Lambrecht, "Constitutional Law and the Alberta Energy Regulator" at 42-43, here).

A broad and purposive interpretation as opposed to a narrow one seems preferable for three main reasons. First, it takes into account the defined meaning of "approval" and "energy resource activity". Second, it avoids absurd consequences caused by the fact that under the existing legislation it is not possible to have an approval of an energy resource activity that is issued under a specified enactment. Last, a broad interpretation is consistent with the purpose of the *Direction*, and more generally with the goals of the *Regulatory Enhancement Project* and the Government's decision to establish the ACO. The intent of the Government with the recent reforms is to move toward a streamlined, integrated and coordinated process for energy applications, including applications that require Aboriginal consultation. The ACO was established to centralize the responsibility for assessing the adequacy of Aboriginal consultation, and the *Direction* was issued to ensure that the AER's decisions are consistent with the work of the Government of Alberta in meeting its consultation obligations associated with the existing rights of Aboriginal people. Considering these goals, it is not clear why the Minister of Energy and the Minister of ESRD would want to differentiate between the rules for applications under specified enactments and the rules for applications under energy resource enactments.

The *Prosper* decision was based on Ministerial Order 141/2013, but the Preamble of the new Order contains a statement of scope, which is exactly the same as Ministerial Order 141/2013. For this reason, the AER may once again decide to restrict the applicability of the new *Direction* to applications under specified enactments. Unfortunately, the new *Direction* preceded the AER's decision by five days and thus does not address this issue. It remains to be seen whether the Ministers will intervene again to clarify the scope of the new *Direction* in response to this decision. While that may be embarrassing for the Ministers, it would be useful to have this issue clarified once and for all.

What are the legal effects of the new *Direction*?

A further issue that remains uncertain concerns the legal effects of the new *Direction*. The recent *Prosper Petroleum Ltd.* decision raises interesting questions, which are likely to come up again in the future. May a decision of the AER be subject to judicial review (or actually form the basis for an application for leave to appeal the decision to the Alberta Court of Appeal under s. 45 of REDA) on the basis that it failed to comply with the *Direction* or to determine whether the AER committed an error of law in restricting the application of the *Direction* to specified enactments? The answer to this question depends on the nature of the *Direction*. In our post on the previous *Direction*, we discussed at length the distinction between administrative and legislative directions as well as the different legal effects they produce for the AER and third parties (for

more on this point, see page 3 here). Briefly, *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, but their infringement can only have administrative consequences as opposed to judicial ones. By contrast, *legislative* directions bind all those to whom the direction is addressed, may create substantive rights for third parties, and are legally enforceable in court. Since this type of direction must be interpreted and applied as any other law, an interested party may seek to have a direction enforced by way of prerogative relief and a decision of the agency may be subject to judicial review (or their equivalents on an appeal with leave) to determine whether it complies with the direction or whether the agency made an error in applying it. In our previous post, we concluded that it is difficult to characterize with certainty the nature of directions issued under s. 67 REDA; this remains unclear. It will be interesting to see the Court of Appeal's response in the event that Fort McKay seeks appellate review of the AER's recent decision.

What are the procedural requirements under s. 67 REDA?

There is currently no answer to the issue of whether the Ministers of Energy and ESRD are bound by some sort of procedural requirements when issuing directions to the AER under s. 67 REDA. The new *Direction* can be accessed through the Alberta Responsible Energy Policy System (AREPS) portal, here. However, just as with Ministerial Order 141/2013, it seems that the new *Direction* was not published in the Alberta Gazette. In our previous blog we have already discussed that adopting an informal procedure to issue directions to the AER may cause a direction to be ineffective in certain circumstances, and those considerations remain unaltered (for more on this issue, see page 4 here).

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