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A Blog with Two Titles: (1) The Current Status of Monitoring, Measurement and Verification Requirements for Carbon Capture and Storage Projects in Alberta, and (2) When Does a Ministerial Order Have to be Published?

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Documents commented on: [AER Bulletin 2023-29](#), July 27, 2023; a new edition of [AER Directive 065: Resources Applications for Oil and Gas Reservoirs](#), July 27, 2023; and Ministerial Order MO 60/2023

As the title suggests this post addresses two matters. First it refers to some recent developments in Monitoring, Measurement and Verification (MMV) requirements for carbon capture and storage projects (CCS) in Alberta, and in particular the allocation (and now, it seems, a reallocation) of the regulatory responsibility for these requirements as between the recently rebranded Ministry of Energy and Minerals (MEM) and the Alberta Energy Regulator (AER). Second, it addresses the more general question of when ministerial orders have to be published. While these matters appear to be unrelated they are in fact joined at the hip, as I hope to demonstrate.

The first issue is important since, as discussed in previous posts (see [here](#), [here](#) and [here](#)), MEM has been moving ahead with the idea of developing a series of sequestration hubs, and to that end has entered into as many as 25 evaluation agreements with possible hub developers. MEM has posted some information about these proposals on its website [here](#), but has yet to release a copy of these agreements.

The second issue is important because it speaks to the values of transparency and open government, not just in the context of the regulation of CCS projects but more generally. My conclusion on this issue is that the current rules on the publication of ministerial orders are arbitrary and misleading and should be reformed. Perhaps this is a matter that might be considered by the Alberta Law Reform Institute.

We find the principal rules for acquiring Crown pore space rights for CCS projects in Part 9 of the *Mines and Minerals Act*, [RSA 2000, c M- 17 \[MMA\]](#) (see earlier post [here](#)), which establishes a two-stage tenure scheme for CCS activities: an evaluation permit and a sequestration lease. These requirements are further elaborated in the Carbon Sequestration Tenure Regulation, [Alta Reg 68/2011 \[CSTR\]](#), (see earlier post [here](#) on the adoption of the regulation).

The regulation of CCS projects however largely falls to the Alberta Energy Regulator (AER) under the terms of the *Oil and Gas Conservation Act*, [RSA 2000, c 0-6](#) and its provisions dealing with well licences and scheme approvals. The AER also has numerous relevant Directives. Although the AER has never developed a stand-alone CCS Directive, a number of its Directives are relevant for CCS operations and in some cases the AER has amended a Directive to specifically address

CCS activities. A case in point is [Directive 65](#) which was amended in October 2022 (see [AER Bulletin 2022-32](#)) to deal expressly with the regulatory requirements for CCS projects, and then again most recently on [July 27, 2023](#) specifically to deal with the MMV requirements for CCS projects.

I said above that the regulatory rules for CCS projects are largely the responsibility of the AER, but when the Department of Energy (now MEM) developed the CCS amendments to the *MMA* and adopted the Carbon Sequestration Tenure Regulation, it introduced an anomaly insofar as both the statute and the regulation suggested that the Department and not the AER would assume significant responsibility for MMV matters. For example, both ss 115 and 116 of the *MMA* require the “lessee of an agreement” to

- (a) submit a monitoring, measurement and verification plan for approval;
- (b) comply with the monitoring, measurement and verification plan that has been approved;
- (c) provide reports with respect to the lessee’s compliance with the monitoring, measurement and verification plan;

Various provisions of the Carbon Sequestration Tenure Regulation make it clear that it is the Minister that is responsible for approving an MMV plan and not the AER: see CSTR, ss 7, 11 & 15.

I have been critical of that decision in the past both as an individual and as a member of the steering committee for the Government of Alberta’s [Regulatory Framework Assessment](#) for CCS (2013) on the basis that the *MMA* should be concerned with the GoA’s property and revenue interests but that regulatory issues should be under the supervision of the AER.

In principle, therefore, I should welcome the new version of Directive 065 insofar as [Bulletin 2023-29](#) announcing the new edition at the end of July indicates that it was necessary because, “[o]n April 25, 2023, the Government of Alberta delegated to the AER the oversight of monitoring, measurement, and verification (MMV) plans, closure plans, and closure certificates for carbon capture, utilization, and storage activities in the province.”

I confess that I was not aware of this particular change until it was drawn to my attention by a representative of the AER at the end of August. That led me to wonder how I could have missed it. Surely such an important delegation of responsibility would have to be recorded in the Gazette or otherwise published. And since, even in retirement, I still subscribe to the GoA’s daily news summary which typically includes reference to new Orders in Council, I wondered if I had just missed what I assumed would be the relevant OiC or Gazette entry.

So I inquired further of my contact at the AER to see if they could provide me with the document that gave effect to the delegation. The prompt answer I received surprised me. It suggested that the delegation had been effected by Ministerial Order, MO 060/2023 but that my contact had been unable to find the MO on the GoA’s website. Neither have I. Accordingly, I have made inquiries both of the Minister’s office as well as contacts within MER. These inquiries have not yet met with a reply.

Meanwhile, I'll say a few words about the relevant rules for the publication of ministerial orders, as well as the rules on delegation.

Let's start with the rules on publishing Ministerial Orders. The first thing to note is that the category of "Ministerial Order" is elusive and that's because it encompasses instances in which a statute might say that the "Minister may, by order" do such and so, as well as instances (far more common) in which a statute simply authorizes a minister to make a decision or exercise a power.

An example of the former is s 67 of the *Responsible Energy Development Act*, [SA 2012, c R-17.3](#), which provides that the Minister may by order give direction to the Alberta Energy Regulator (AER). The Minister has used this power surprisingly frequently in the last few years – largely for damage control purposes associated with the revocation of the coal policy and to respond to deadbeat oil and gas operators that fail to pay municipal taxes. So far as I know, these orders have always been published. See, for example, Ministerial Order 043/2023 ([unpaid municipal taxes](#)), Ministerial Order, 093/2021([coal](#)), Ministerial Order 002/2022 ([coal](#)).

An example of the latter form of order is s 20 of the Carbon Sequestration Tenure Regulation, [Alta Reg 68/2011](#), which provides that "[a] lessee shall pay into the Post-closure Stewardship Fund a fee per tonne of captured carbon dioxide injected into the location of a carbon sequestration lease at the rate established by the Minister." (Emphasis added.) We know from the Department's [annual reports](#) that the Minister has exercised this authority, but the decision or order has never been published. Or consider s 7 of the *Government Organization Act*, [RSA 2000, c G-10](#) which allows a Minister to establish such advisory committees, boards, or councils that the Minister consider necessary or desirable. This was the authority that Premier Smith relied upon to establish the Advisory Council on Alberta's Energy Future (the Yager Commission) but the Ministerial Order constituting the Council ([MO 02/2023](#), January 25, 2023 was only released on August 11, 2023 in response to a freedom of information and privacy request from Nathan Pike.

I think that I have said enough to confirm that some MOs are published and others are not, and that it is difficult to establish whether there is rhyme or reason to the decision to publish. So, what does the law say about when a ministerial order must be published?

The relevant rules are provided by the *Interpretation Act*, [RSA 2000, c I-8](#) and the *Regulations Act*, [RSA 2000, c R-14](#). In brief, the *Regulations Act* requires that a ministerial order must be published if it is a regulation "that is of a legislative nature". A regulation that is not published "is not valid as against a person who has not had actual notice of it." (*Regulations Act* at s 3(5)). A more detailed analysis follows.

Section 1(1)(c) of the *Interpretation Act* 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,

but does not include an order of a court made in the course of an action or an order made by a public officer or administrative tribunal in a dispute between 2 or more persons;

On the face of it this definition would capture all sorts of ministerial orders including, for example, the Minister's orders setting the sequestration levy for Shell's Quest project or the Premier's order establishing the Yager Inquiry. But there's a snag. The *Regulations Act* only applies to a subset of regulations, namely *regulations that are of a legislative nature*.

“regulation” means a regulation as defined in the *Interpretation Act* that is of a legislative nature. (at s 1(1)(f))

While many ministerial orders will meet the first part of the definition, when will a ministerial order be of “a legislative nature”? To answer that we need to get into the jargon of administrative law and the distinction between administrative decisions and legislative decisions. We most often come across this distinction in the context of the rules of natural justice and fairness. The rules of natural justice and procedural fairness apply to administrative decisions; they do not apply to legislative decisions: *Att Gen of Can v Inuit Tapirisat et al*, [1980 CanLII 21](#) (SCC), [1980] 2 SCR 735. It may also be relevant to the applicable standard of review, although that is increasingly contested post-*Vavilov*: see, *Innovative Medicines Canada v Canada (Attorney General)*, [2022 FCA 210 \(CanLII\)](#). But in this case, the legislature is using the distinction to determine which regulations/orders must be published: ministerial orders that are of a legislative nature must be published, ministerial orders that are of an administrative nature need not be published.

There are literally hundreds of court cases dealing with the distinction between administrative and legislative decisions. This tells us that the distinction is frequently contested (see, most recently for example, *Shelburne Elver Limited v. Canada (Fisheries, Oceans and Coast Guard)*, [2023 FC 1166 \(CanLII\)](#)), and that there is no bright line rule that is easy to apply. That said, the cases frequently quote with approval this characterization of the distinction from a leading administrative law text:

The decision which is challenged here is a legislative decision. A legislative act differs from an administrative act and that difference is discussed in *De Smith Judicial Review of Administrative Action* (S.A. De Smith & J.M. Evans, 4th ed. (London, England: Stevens, 1980)) at page 71 as follows:

A distinction often made between legislative and administrative acts is that between the general and the particular. A legislative act is the creation and promulgation of a general rule of conduct without reference to particular cases; an administrative act cannot be exactly defined, but it includes the adoption of a policy, the making and issue of a specific direction, and the application of a general rule to a particular case in accordance with the requirements of policy or expediency or administrative practice. ...

Ecology Action Centre Society v Canada (Attorney General), [2004 FC 1087 \(CanLII\)](#), at para 50. See also *Michaels v Red Deer College*, [1974 ALTASCAD 2 \(CanLII\)](#), at para 17, applying the distinction in the context of the *Regulations Act*.

If we apply this test to the examples that we have been working with throughout this post, I think that one could easily make the case that a ministerial order that establishes a sequestration levy for a *particular* company or project (Shell's Quest Project) and not a *generally applicable* levy for all sequestration projects is an administrative decision and not a legislative decision. Similarly, a decision to establish an expert advisory panel will likely be an administrative and not a legislative decision.

This distinction may explain why neither of these decisions was published. It does offer rhyme and reason, but it also suggests to me that the *Regulations Act* adopts an inappropriate test for determining whether or not an MO should be published since the distinction serves to protect from publication important decisions that are of significant public interest. I think that a more appropriate rule would be a rule that required publication of all regulations including ministerial orders unless legitimate confidentiality or privacy concerns militated against publication. One of my biggest concerns with the current rule is that in some cases the public has no way of knowing that a ministerial order has been made at all; a challenge that must be met before trying to get a copy of the MO in question. Accordingly, I also recommend that all ministries and departments, including the office of the premier, should be required to publish a monthly list of all ministerial orders with a brief title and abstract and that such lists should be made available on the [Open Government Program](#) portal. The current practice of including on that portal an apparently arbitrary selection of ministerial orders makes a joke of "open government".

Which brings me back full circle to the matter of the delegation of authority for MMV activities for CCS projects from the MEM to the AER. How do I know that such a delegation order has been made? I only know that because the AER refers to the delegation of authority in AER Bulletin 2023-29. How do I know that that the delegation took the form of a ministerial order with the designation MO 060/2023? I only know that because an AER official provided me with that information in response to my specific request for the source of the delegation. How do I know what MO 060/2023 provides for? I don't. I don't know because MO 060/2023 has not been published. And because I don't have a copy of the MO, I don't know what authority the Minister relied upon for the delegation. It's also hard to tell whether the MO should have been published; that is to say, whether the delegation decision is an administrative decision or a legislative decision. But since the result is a delegation that has implications for all who may be applying for approval for CCS projects, it sure looks like a legislative decision, and it certainly meets my public interest test (above) for when something *ought* to be published.

As for the authority for the delegation, I suspect (but don't know for sure) that it might be s 9(1) of the *Government Organization Act*, which provides that "[a] Minister may in writing delegate to any person any power, duty or function conferred or imposed on the Minister by this Act or any other enactment." I think that we can be fairly sure that the delegation in this case was in writing, but we don't know the details of the delegation. Has the Minister transferred all MMV responsibilities to the AER or just some of them? Has the Minister also transferred related responsibilities for issuing project closure certificates? We don't know because the Order has not been published. And nobody should have to start a FOIP proceeding to get a copy of the Order.

If the government of Alberta wants public support and regulatory certainty for CCS technology and projects, it needs to stop hiding the ball. It needs to publish MO 060/2023 and the form of the evaluation permit that has been issued for the 25 hub projects. And more generally the GoA should consider amending the *Regulations Act* to provide that all ministerial orders should be published, whether in the Gazette or on an official website - absent legitimate confidentiality or privacy concerns.

Thanks to Sean Dunn for providing me with a copy of the FOIP return for the Yager Commission and for drawing my attention to the Michaels decision.

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