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The Replacement Ministerial Directive on Well Transfers and Outstanding Municipal Taxes

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Matter Commented On: Minister of Energy and Minerals, Ministerial Order 096/2024, Direction on Municipal Tax Requirements for Approving Licences

On August 26, 2024, Minister of Energy and Minerals Brian Jean signed Ministerial Order 096/2024 (M.O. 096/2024), a direction to the Alberta Energy Regulator (AER) pursuant to section 67 of the *Responsible Energy Development Act*, SA 2012, c R-17.3 (*REDA)*. M.O. 096/2024 replaces a previous ministerial order from March 2023, with the most significant change being that the AER is now enabled to approve transfers of oil and gas licenses out of the inventories of bankrupt companies so long as the transferee owes less than $20,000 in municipal taxes.

M.O. 096/2024 addresses the narrow problem of potentially valuable wells stuck in the inventories of defunct or bankrupt oil and gas corporations with a limited change and is a partial retreat from the general rule preventing the transfers of wells to licensees with unpaid municipal taxes above the threshold. M.O. 096/2024 accepts some pre-transfer unpaid municipal taxes will remain unpaid in the hopes that future post-transfer taxes will be paid.

Background

The problem of oil and gas companies with unpaid rural municipality taxes is one result of Alberta's failure to regulate oil and gas closure liabilities and prevent the growth of an enormous inventory of inactive and marginal producing oil and gas assets requiring closure. A fulsome discussion of the problem is in three previous posts from December 2021, April 2022, and a recent July 2024 post. What follows is a brief summary of the most relevant recent developments.

In March 2023, the Minister of Energy issued Ministerial Order 043/2023 under the authority of section 67 of *REDA*, directing the AER to address unpaid municipal taxes by oil and gas licensees by doing the following:

1. consider whether the applicant for the licence, the proposed transferor of a license, or the proposed transferee of a licence has outstanding municipal tax arrears exceeding a threshold amount;
2. obtain evidence and take reasonable steps to confirm that an applicant, transferor, or a transferee has no outstanding municipal tax arrears exceeding the threshold or has adopted a payment plan acceptable to the municipality or municipalities that are owed the

outstanding municipal taxes (the Order sets out what would constitute 'evidence and reasonable steps'); and

3. if the transferor has outstanding municipal tax arrears exceeding the threshold, the AER shall require evidence that the payment of the outstanding municipal taxes exceeding the threshold be a condition of the transferor and transferee's agreement for sale of the licence.

The threshold of municipal tax arrears was set at $20,000 (see AER Bulletin 2023-22), so transfer applications for licensee with outstanding municipal taxes greater than $20,000 were blocked unless the purchaser would agree to pay the outstanding taxes.

As described in the July 2024 post, an internal AER memo from April 2024 noted that M.O. 043/2023 caused unintended consequences, since it blocked the AER from approving transfers of oil and gas licenses from the inventories of insolvent companies owing municipal taxes over the $20,000 threshold, leading the Orphan Well Association to threaten to stop funding oil and gas insolvencies.

The New Ministerial Order Rules

M.O. 096/2024 rescinds and replaces the M.O. 043/2023. The new M.O. 096/2024 improves the formatting by adding paragraph numbers. Formatting improvements may not seem important, but they can be meaningful for improving clarity and enforceability. Drafting matters and poorly written regulations and directives can have serious consequences.

Substantively, the new ministerial order opens three exceptions to the general rule against well license transfers to or from licensees with outstanding municipal taxes over the threshold. All three exceptions apply only where the transferee (the licensee buying or accepting the well licenses) "has no municipal tax arrears in excess of the threshold" (M.O. 096/2024, at direction 5).

The first exception is where the well has been designated an orphan by the AER under section 70(2) *Oil and Gas Conservation Act*, RSA 2000, c O-6 (*OGCA*). This situation is simple, allowing wells to be transferred out of the orphan inventory where a licensee who does not owe municipal tax arrears in excess of the threshold is willing to take it. (M.O. 096/2024, dir 5(a))

The second exception is where the transferor has been deemed by the AER to be a defaulting working interest participant under section 70(2)(b) of the *OGCA* (M.O. 096/2024, dir 5(b)). This is slightly more complex situation for wells partially owned by multiple parties, or "working interest participants" (see *OGCA* (1)(1)(fff). Some working interest participants may be bankrupt or defunct, but the AER will not designate a well an orphan so long as one working interest participant remains solvent or active. These sorts of wells are fractional orphans, only partially paid for by the orphan fund although often handled by the Orphan Well Association under Working Interest Participant Agreements. This second exception allows the well licenses and shares of wells owned by bankrupt or defunct working interest to be transferred to a new licensee (in many cases, probably one of the remaining working interest participants).

The third exception is where the well is the property of a debtor subject to a bankruptcy or restructuring proceeding in which a "receiver, receiver-manager, trustee, liquidator, or monitor has been appointed" (M.O. 096/2024, dir 5(c)).

Commentary

The key requirement of M.O. 096/2024 is that the transferee "has no municipal tax arrears in excess of the threshold", a requirement intended to block transfers from defunct or bankrupt licensees to oil and gas companies that are already in the process of failing and may be accumulating closure liabilities without the ability to pay for them. This has been an issue in Alberta, as inactive and marginal wells would be transferred along a chain from failed companies to failing companies, leaving landowners and rural municipalities to deal with a chain of deadbeat licensees.

However, the new exceptions produce some risks. First, they will fail to stop the strategy of new oil and gas corporations being created specifically to absorb particular assets from bankrupt oil and gas corporations (as occurred with Manitok). Since a new corporation will not have any municipal taxes owing, M.O. 096/2024 will not block this strategy. Second, the exception is not limited to wells that were active or may be reactivated as valuable producers. This allows those overseeing bankruptcies to bundle valuable wells with wells that have liabilities exceeding their value and cannot be economically produced as a condition for sale. This leaves inactive wells on the landscape longer as opposed to passing them to the OWA which has shorter closure timelines. Stricter requirements for transferee solvency and the economic viability of transferred wells may have been beneficial. M.O. 096/2024 is limited in scope and whether these possible problems actually materialize depends on the still developing Licensee Capability Assessment and the AER's general strategy for how much security to require when assets are transferred. M.O. 096/2024 is a small matter compared to the forthcoming changes to the liability management system the Minister of Energy has said will involve shifting more costs onto the public.

Last, note that the Minister used a ministerial order under section 67 of *REDA*, rather than the odd method of sending a letter reinterpreting the previous ministerial order, as was done for the ministerial order limiting coal exploration (see Nigel Bankes's posts here and here.)

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