

October 26, 2021

Alberta Court of Appeal Rules on Role of Honour of the Crown and Reconciliation in AUC Rate Applications

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Case Commented On: *AltaLink Management Ltd v Alberta (Utilities Commission)*, [2021 ABCA 342 \(CanLII\)](#)

The overarching mandate of the [Alberta Utilities Commission](#) (AUC or the Commission) is to ensure just and reasonable electricity rates for consumers, and much of the work they do is geared towards deciding whether the costs that businesses involved in the electricity sector have incurred or are set to incur can be passed down to ratepayers. *AltaLink Management Ltd v Alberta (Utilities Commission)*, [2021 ABCA 342 \(CanLII\)](#), a recent decision from the Alberta Court of Appeal (ABCA) adds a new dimension to what is usually a strictly fact-based economic calculation when the applicant is an Indigenous-owned company or partnership. The Court charts new territory by making it clear that the AUC's decisions in such cases must uphold the honour of the Crown and be made in a manner consistent with the principle of Reconciliation.

AltaLink's Decision to Expand the Transmission System in Southern Alberta & Ownership Interests of the Piikani Nation and Blood Tribe

AltaLink Ltd. (AltaLink) owns most of the electricity transmission system in Alberta—these are the large power lines on steel towers that transmit electricity generated at power plants to local distribution systems where power is sent into homes, businesses, and facilities. New transmission lines are often needed to connect communities as well as to add more wind and solar resources to the generation mix, since those projects are land-intensive and tend to be built in rural areas, far from where the electricity will be consumed. In the mid-2000s, AltaLink determined that it would need to build additional transmission lines in the southern part of the province to accommodate new wind facilities. It then informed the Alberta Electric System Operator (AESO), which oversees transmission planning in the province. The AESO then asked the Alberta Energy and Utilities Board, now the Alberta Utilities Commission, for a needs assessment of the requested transmission expansion.

After the AUC approved the requested expansion in May 2005, AltaLink determined that one of the new lines would need to go from Pincher Creek to Lethbridge and that the most direct and least disruptive route would take that line through two First Nation reserves, those of the Blood Tribe and the Piikani Nation. In the past, energy projects on Indigenous reserve land would receive permission for a project like this from the chief and council, usually via an Impact and Benefit Agreement or similar formal agreement. In this case, both the Blood and Piikani leadership approved the project, and both approvals contained the following provision (for succinctness, just the Blood Tribe version is set out here): “AltaLink hereby grants to the Blood Tribe an irrevocable

option ... to require AltaLink to transfer ownership of the Blood Line from AltaLink to the New Limited Partnership and to allow the Blood Tribe to acquire at least 30% and up to 51% of the initial limited partnership units issued” in AltaLink’s newly-formed limited partnership to build the line (at para 25).

By October 2010, the line going through the reserves was operational, and the Blood and Piikani subsequently exercised their rights to assume a 51% ownership interest in the line crossing their reserves, forming their own limited partnerships to do so. The AUC approved the transfer of assets from AltaLink to the Blood and Piikani-owned partnerships, but in doing so, realized that there would be some associated incremental costs to ratepayers, specifically in the form of yearly auditing costs. Some of AltaLink’s costs associated with building and maintaining the transmission system are passed on to ratepayers in the form of connection tariffs, so the question before the Commission was whether the costs to PiikaniLink Management Ltd. and KainaiLink Management Ltd. (the partnerships formed by the Piikani and Blood to assume their ownership interests in the line) could also be passed on in the same manner. After all, the costs being incurred by the Piikani and Blood partnerships are the same types of costs that AltaLink typically rolls into its tariffs.

The AUC Disallows Inclusion of PiikaniLink and KainaiLink Expenses from Transmission Tariffs

In determining whether a transmission company’s costs can be included in tariffs, the AUC uses a “no harm” test that weighs the benefits to the public associated with the additional costs against the harm of increasing costs to ratepayers. In their application to include the costs, the Piikani Nation and Blood Tribe argued that the benefits included “(1) access to the First Nations workforce; (2) strengthening AltaLink’s relationship with other First Nations in Canada and the United States; and (3) support for the alignment of interests between AltaLink and the First Nations to enhance the long-term safe and reliable operation of utility assets on their reserve land” (at para 37).

But the AUC refused to approve the costs, leaving them to be borne by the Piikani and Blood. The Commission reasoned that the no-harm test was forward-looking and that the past benefits of siting the line on the shortest route and the intangible benefits listed by the Piikani and Blood did not offset ongoing costs being passed on to ratepayers. Final decisions of the AUC can be appealed directly to the Alberta Court of Appeal, and the Piikani and Blood appealed to that court once they had exhausted their remedies before the regulator. The Court of Appeal agreed to review on the questions of whether the AUC erred by applying the forward-looking requirement to the no-harm test, and whether it failed to consider that acknowledging these benefits would also be consistent with upholding the honour of the Crown and acknowledging the imperative of reconciliation.

The Court of Appeal Finds the AUC Failed to Consider All Factors in Whether Inclusion of Costs was in the Public Interest

The Court of Appeal found the forward-looking view of the no-harm test was not mandated anywhere in the relevant provisions of the *Public Utilities Act*, [RSA 2000, c P-45](#), the *Electric Utilities Act*, [SA 2003, c E-5.1](#), or the *Alberta Utilities Commission Act*, [SA 2007, c A-37.2](#), but, ordinarily, using it might lead to the correct result. In this case, however, it led to the wrong result.

The court stated that the AUC should have found that the additional expenses incurred by PiikaniLink and KainaiLink were justified under the no harm test because they represented cost savings to the public (since going through the reserves was the shortest and least impactful route) but also because, more extraordinarily, the creation of Indigenous businesses and economic opportunities on-reserve is also within the public interest.

From there, things get even more extraordinary (though many will welcome this decision as a step to making the extraordinary ordinary in future AUC practices and decisions). In its opinion, the court goes on to say that the determination of the public interest requires a review of *all* relevant factors, including the duty to uphold the honour of the Crown and, when Indigenous-owned projects are at issue, the Commission should also adhere to the goal of reconciliation, specifically in rebuilding the relationship “between Indigenous peoples and the Crown following historical and continuing injustices by the Crown against Indigenous people” (at para 113). To guide the AUC on how to do this, Justice Kevin Feehan suggested in his concurring opinion that the Commission could consider non-binding sources of domestic and international law and policy, including the [United Nations Declaration on the Rights of Indigenous Peoples](#) (UNDRIP), citing it as a “useful tool” to help the AUC form a better understanding of what reconciliation is and how it can be best served instances (at para 123). In this regard, this ABCA decision is noteworthy as a helpful consideration of the role of UNDRIP in Canada’s body of domestic law. (For more context and analysis of different lines of cases, see this [post](#) by my colleague, Nigel Bankes.)

Given the potential for Indigenous-owned energy projects in Alberta—not just transmission lines but also wind and solar facilities that can power communities and provide an economic boost when excess power is sold to the grid—this decision is a significant positive development. As a Court of Appeals decision, it is binding law in Alberta and will help to ensure the rights and interests of Indigenous energy project proponents are meaningfully integrated into transmission system decisions. Past reliance on Impact and Benefit Agreements to accomplish this has been problematic for several reasons, including the confidential nature of these agreements and the difficulties for Indigenous communities in enforcing them. However, following this guidance from the court may present challenges (or at least growing pains) for the AUC down the road.

A Powerful Decision with Some Unanswered Questions

As noted previously, the no-harm test is meant to ensure that costs passed on to ratepayers are balanced by benefits to the public, but in listing the benefits provided by “projects that increase the likelihood of economic activity on reserves,” the court doesn’t make clear what evidence could be used to provide proof that a particular project will do this (at para 59). In fact, much of what the court cites in support of intangible benefits in this case is general information such as the high rate of unemployment on reserves (though no statistics are given for the Piikani or Blood reserves, nor is any evidence cited that PiikaniLink and BloodLink are providing specific economic benefits to their respective communities) and broad statements of approval for Indigenous efforts to “participate in mainstream commercial activities” (at para 64).

This is not to say the court’s ultimate holding in this case was wrong; to this author it seems exactly right. This decision is an important step forward in providing clarity on how the AUC, as a government regulator, can consider Indigenous energy projects and their associated costs in a way

that upholds the honour of the Crown and promotes reconciliation. Justice Feehan’s concurrence also provides sorely needed guidance on how the AUC should take direction from UNDRIP. On one hand, the court’s reasoning in this case could be read as a sweeping directive to the AUC to always find that the public interest weighs in favour of passing the costs associated with Indigenous-owned projects to public electricity rates. This isn’t consistent with the AUC’s usual highly specific and data-driven assessment of costs under the no-harm test and could conflict with its statutory mandate to ensure just and reasonable rates in the province. The AUC’s concern may be that if a sudden boom in Indigenous-owned projects leads to steep increases in electricity bills, they may see some push-back from members of the public or even the provincial government on the kinds of categorical evidence the court seems to approve in this decision. The AUC may also find itself concerned that courts’ acceptance of general information and statistics to support specific projects could also potentially lead to overbuilding of infrastructure.

On the other hand, the AUC must consider the honour of the Crown and reconciliation in the context of Indigenous-owned energy projects, and this case gives the regulator direction on how to do this. How this guidance from the court can be effectively implemented by the AUC is something that will certainly evolve as more Indigenous projects are considered by the regulator, particularly with respect to what evidence is required and how much weight to give these dimensions. So, while questions remain about how the AUC will be able to effectively comply with the court’s guidance in this case, the decision is a significant development in this area of energy law, particularly in the current context that includes implementation of UNDRIP and the recommendations of the Truth and Reconciliation Commission.

This post may be cited as: Kristen van de Biezenbos, “Alberta Court of Appeal Rules on Role of Honour of the Crown and Reconciliation in AUC Rate Applications” (October 26, 2021), online: ABlawg, http://ablawg.ca/wp-content/uploads/2021/10/Blog_KVDB_AUC_Reconciliation.pdf

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