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The Alberta Utilities Commission Rules on Its Jurisdiction to Assess Crown Aboriginal Consultation

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Decisions Commented On:

(1) AUC Ruling on jurisdiction to determine Questions stated in Notices of Questions of Constitutional Law, October 7, 2016, and Sent to Parties Currently Registered in Proceeding 21030 Fort McMurray West 500-kV Transmission Project Proceeding 21030 Applications 21030-A001 to 21030-A015 (Appendix J); and

(2) AUC Decision 21030-D02-2017, Alberta PowerLine General Partner Ltd. Fort McMurray West 500-Kilovolt Transmission Project, February 10, 2017

Introduction

This post offers critical analysis of the first Ruling of the Alberta Utilities Commission (AUC) to grapple with the issue of whether the AUC has jurisdiction to consider the adequacy of Crown Aboriginal consultation in the course of AUC proceedings (the *Preliminary AUC Ruling*). The *Preliminary AUC Ruling* was issued on October 7, 2016. It was followed on February 10, 2017, with a ruling on the merits of the Application (the *AUC Ruling on the Merits*). Both are discussed here. The *Preliminary AUC Ruling* is attached as Appendix J to the *AUC Ruling on the Merits*.

The AUC is a quasi-judicial regulatory tribunal with power to determine all questions of law and constitutional law which arise in the course of its regulatory functions. It exercises a final approval function in relation to the construction of the Fort McMurray West 500-kV transmission line Project. The Project is generally described here. Appendix A to the current Alberta policy on Aboriginal consultation suggests that large-scale regional transmission line projects have high impact and require extensive consultation (see *The Government of Alberta's Guidelines on Consultation with First Nations on Land and Natural Resource Management*, July 28, 2014). A deep consultation requirement of this kind is consistent with the description of the Project as critical in nature. It is also consistent with the finding of the AUC, described below, that the Project would introduce industrial development which would adversely impact Aboriginal groups in way which is not easily mitigated.

The AUC has not been at the center of Alberta's policy development in relation to Aboriginal consultation. That development has tended to focus on the Alberta Energy Regulator, rather than the AUC. In this proceeding, absent guidance from Provincial policy, the AUC concluded that it had no jurisdiction in relation to Crown consultation and accommodation. The AUC therefore does not perform either of the legal functions described by the Supreme Court of Canada in *Rio Tinto Alcan Inc. v Carrier Sekani Tribal Council*, [2010] 2 SCR 650, 2010 SCC 43 (CanLII) at paras 56-57:

> [56] The legislature may choose to delegate to a tribunal the Crown's duty to consult. As noted in Haida Nation, it is open to governments to set up regulatory schemes to address the procedural requirements of consultation at different stages of the decision- making process with respect to a resource.
>
> [57] Alternatively, the legislature may choose to confine a tribunal's power to determinations of whether adequate consultation has taken place, as a condition of its statutory decision-making process.

In *Rio Tinto Alcan,* the Supreme Court provided guidance as to how Tribunals may contribute to the discharge of constitutional obligations to conduct Aboriginal consultation and accommodation in a manner consistent with the honour of the Crown.

Problems of a constitutional dimension can arise in cases like this. If the decisions in these proceedings are correct in law, then a legislature may pre-approve the need for development of a project, and then reinforce that action by shaping jurisdiction of regulatory tribunals so as to limit that jurisdiction to making a final 'public interest' determination of where the pre-approved project will be finally built. All of this can be done without any assessment by the Crown of the adequacy of its Aboriginal consultation. The result is that authority to assess the adequacy of Aboriginal consultation is deferred to minor Crown decisions (such as a permit to authorize a power line to cross a highway at a particular location) taken at the very end of a legislative and regulatory approval process, and only after construction of a project has been finally approved by a regulatory tribunal. And all of that can occur when Provincial Policy suggests that extensive, or deep, consultation with Aboriginal groups is required.

The AUC decision is therefore important because of what it reveals about the AUC's appreciation of its jurisdiction, and also for what it reveals about the operation of Alberta's Aboriginal consultation process in relation to electricity infrastructure designated as "critical transmission infrastructure."

The *Preliminary AUC Ruling* takes a narrow view of the AUC jurisdiction to contribute to Crown consultation and accommodation. The position is stated most clearly in paragraph 115 of the AUC Preliminary Ruling:

> 115. The Commission does not have jurisdiction over other Crown conduct or decisions that do not arise in the context of the applications before it. The Crown is responsible for Crown consultation and accommodation arising from the honour of the Crown.

This is reinforced by paragraph 92 of the AUC Decision on the Merits:

> 92… the Commission found that although the notices were adequate it did not have the jurisdiction to consider the issues raised.

The AUC Ruling describes the AUC as a Tribunal which is merely approving the construction, routing and siting of the proposed transmission line in accordance with a jurisdictionally narrow statutory mandate. The result is that the *Preliminary AUC Ruling* holds:

- that final AUC approval of the construction, routing, and siting of the Project does not itself trigger the duty to consult even though that approval decision may itself adversely affect First Nations' Treaty or Métis Aboriginal rights; and

- that the AUC will not assess the adequacy of Crown Aboriginal consultation.

As discussed below, the AUC decision has its root in the regulation of electricity in Alberta. Nearly a decade ago the Government of Alberta pre-approved the need for the Fort McMurray West 500-kV transmission line Project and other projects designated as "critical transmission infrastructure." It did so by controversial legislative action, described in more length later in this post. All of this was done without any apparent Aboriginal consultation. That same legislation limited the AUC's jurisdiction over that Project to determining where (not whether) the Project facilities will be constructed. The AUC approval is final approval of the construction of the Project.

The proposition advanced in this post is that both AUC Rulings illuminate systemic weaknesses in the functioning of AUC process in relation to "critical transmission infrastructure." The weaknesses were anticipated by the Supreme Court of Canada in *Rio Tinto Alcan* (at para 62): "The fear is that if a tribunal is denied the power to consider consultation issues, or if the power to rule on consultation is split between tribunals so as to prevent any one from effectively dealing with consultation arising from particular government actions, the government might effectively be able to avoid its duty to consult."

Project splitting is now recognized in environmental assessment and regulatory review law. See: *Conseil des innus de Ekuanitshit c Canada (Procureur général)*, 2013 FC 418 (CanLII) at paras 55 to 56, citing *MiningWatch Canada v. Canada (Fisheries and Oceans)*, [2010] 1 SCR 6, 2010 SCC 2 (CanLII) at para 40. It can be said that an analogous concept, denominated here as "project assessment splitting", is recognized in the Supreme Court's decision in *Rio Tinto* (at para 62). The AUC Rulings appear to be taken in a context of project approval splitting.

The AUC Receives Notices of Question of Constitutional Law

On September 2, 2016, in the course of its consideration of the Project, the AUC received Notices of Questions of Constitutional Law (NQCLs) from Métis and First Nations parties. The Attorney General of Alberta immediately responded with a request that the AUC schedule a preliminary hearing to determine its jurisdiction to consider these questions, a practice that has been seen in other situations involving the Alberta Energy Regulator. The AUC granted Alberta's request, and the *Preliminary AUC Ruling* resulted. The balance of the AUC hearing then proceeded without any participation by Alberta or the Aboriginal Consultation Office, and the final AUC Decision was issued.

The Questions of Constitutional Law presented by First Nations Parties were:

> 1. Has the Crown, through the regulatory process or otherwise, discharged its duty to consult and accommodate Sucker Creek First Nation and Beaver Lake Cree Nation with respect to adverse impacts arising from the Project on the rights guaranteed to SCFN and BLCN pursuant to Treaty, the *Natural Resources Transfer Agreement, 1930* and section 35 of the *Constitution Act, 1982*?
>
> 2. Can the Alberta Utilities Commission ("AUC") find the Project is in the public

> interest, pursuant to subsection 17(1) of the *Alberta Utilities Commission Act*, in the absence of adequate consultation with respect to adverse impacts arising from the Project on the rights guaranteed to SCFN and BLCN pursuant to Treaty, the *Natural Resources Transfer Agreement, 1930* and section 35 of the *Constitution Act, 1982*?

The Questions of Constitutional Law presented by Métis Parties were:

> 1. Do the approvals sought by Alberta PowerLine L.P. ("APL") in AUC Application No. 21030 and associated secondary applications (the "Application") unjustifiably infringe the right to meaningful consultation with Métis Communities provided for in Section 35(1) of the *Constitution Act, 1982* and contrary to the *Constitution Act, 1930*?
>
> 2. Has the Crown met the Duty to Consult…? If the answer is no, does the AUC have jurisdiction to approve a project in the face of the Crown's failure to meet its Section 35 obligation to consult and accommodate potentially impacted Aboriginal communities?

The *Preliminary AUC Ruling*

The *Preliminary AUC Ruling* takes the form of a letter from Commission Counsel. Some of the Ruling deals with whether the NQCLs comply with the notice requirements of the *Administrative Procedures and Jurisdiction Act,* RSA 2000, c A-3. The Attorney General of Alberta submitted that the NQCLs did not comply with the notice provisions, a position it has taken in previous cases involving NQCLs from Aboriginal parties. The AUC considered and dismissed that submission.

In paragraph 89, the AUC stated that it was notable that its mandate in the case related to applications for facilities that were deemed to be "critical transmission infrastructure." The AUC reconfirmed that the jurisdiction of the AUC to determine whether the Project is in the public interest is limited because the Project has been designated as critical transmission infrastructure. This is a fundamental alteration of the regulatory process for transmission infrastructure in the province. It does not apply to other transmission applications which come before the AUC for regulatory review.

The status quo is briefly described on the Alberta Energy website here:

> Under the Electric Statutes Amendment Act, 2009 (also known as Bill 50), the Government of Alberta approved the need for four critical transmission infrastructure (CTI) projects. It also gave Cabinet the authority to designate future transmission facilities as critical transmission infrastructure. The Electric Utilities Amendment Act (also known as Bill 8) removes this authority and requires all future transmission infrastructure projects to go through a full needs assessment process before the Alberta Utilities Commission. The Government of Alberta will no longer have the authority to approve the need for future critical transmission infrastructure.
> But, to be clear, what was removed by Bill 8 is a power conferred on the Lieutenant Governor in Council to designate future projects as critical transmission infrastructure. Four CTI projects remain designated as critical transmission infrastructure in the Schedule to the current *Electric Utilities Act*, SA 2003, c E-5.1. As discussed further in

this post, and as confirmed by the AUC, these do not go through a full needs assessment before the AUC.

For those who may want to examine the provenance of the legislation, Bill 50 (2009) is here. Bill 8 (2012) is here. The designation of Projects as "critical transmission infrastructure" was controversial for many reasons. See, for example, comments from the Environmental Law Centre and Bennett Jones.

At paragraphs 65 and 85, the AUC restated, and conflated, the constitutional questions put to it.

- The NCQLs are described as raising one issue regarding "the jurisdiction of the Commission to determine the adequacy of Crown consultation before making a determination on the applications before the Commission." (at para 65)

- The NCQLs are then reframed as follows: "the essential question before the Commission is whether the Commission must assess whether the Crown has discharged its duty to consult with the First Nations or the Métis Interveners about potential adverse impacts on their respective First Nations' treaty rights and asserted Métis rights before making a determination on the applications before it, in the circumstances of Proceeding 21030…" (at para 85)

The AUC makes it very clear that its ultimate decision in relation to the Project is final and binding in law. The *Preliminary AUC Ruling* states that "[p]ursuant to sections 29 and 30 of the *Alberta Utilities Commission Act*, a decision of the Commission is final, subject to appeal on permission to the Alberta Court of Appeal." (at para 72)

The *Preliminary AUC Ruling* takes a strictly limited view of its jurisdiction to consider Aboriginal consultation and accommodation when exercising its final approval mandate. In the conclusion of the *Preliminary AUC Ruling* (at para 119), the AUC finds that its legislative mandate confers "no explicit or implicit duty to assess the Crown duty to consult before making determinations on the applications before it in Proceeding 21030, where the Crown is not a participant or an applicant before the Commission." To reach this conclusion the AUC accepted submissions from Alberta, Alberta PowerLine, and AltaLink, summarized as follows (at para 29):

> neither the *Hydro and Electric Energy Act* nor the *Alberta Utilities Commission Act* grants the Commission the jurisdiction to oversee, supervise or adjudicate on Alberta's Crown consultation with the First Nations or the Métis Interveners, when considering an application brought by a private industry proponent (as opposed to a Crown agent). Alberta PowerLine added that the Commission is not a Crown decision maker under the *Government of Alberta's Guidelines on Consultation with First Nations on Land and Natural Resource Management* or the *Métis Settlements on Land and Natural Resource Management 2016* (the *Guidelines*).

The AUC supported its acceptance of these submissions by reliance on the Federal Court of Appeal decision in *Chippewas of the Thames First Nation v Enbridge Pipelines Inc.* 2015 FCA 222 (CanLII) (*Thames*), which it said "considered similar circumstances as those before the Commission and made findings on the analogous issue of an administrative tribunal's duty to assess Crown consultation before making determination on the applications before it … where

the Crown is not before the tribunal or a decision of the Crown is not before the tribunal." (at para 109)

Paragraph 115 of the *Preliminary AUC Ruling* explains why the AUC opines that its final approval of the Project is not jurisdictionally related to Crown consultation and accommodation:

> 115. The Commission does not have jurisdiction over other Crown conduct or decisions that do not arise in the context of the applications before it. The Crown is responsible for Crown consultation and accommodation arising from the honour of the Crown. Alberta has adopted a policy on consultation and *Guidelines*. The *Guidelines* apply to decisions of the Crown and Crown decision makers. Alberta PowerLine has been directed by the Aboriginal Consultation Office to consult with the First Nations on the project, but no such directive was given on consulting with the Métis Interveners. In the letters submitted on the record of the proceeding, the Aboriginal Consultation Office states that the matter of determining Crown consultation and accommodation remains with the Crown. The Commission does not accept the submissions of the First Nations that Alberta PowerLine has been delegated the duty to consult on the project before the Commission and is before the Commission as the delegate of the Crown.

The Commission went on to accept Alberta's submission "… that assessing Crown consultation would be premature." (at para 116) As support for its position, the AUC cited the Alberta Court of Appeal decision in *Métis Nation of Alberta Region 1 v Joint Review Pane,* 2012 ABCA 352 (CanLII). Prematurity was said to arise "[b]ecause the Commission and its hearing process play a valuable role in facilitating Crown consultation by providing Aboriginal groups with an opportunity to hear more about a project, raise their concerns and propose solutions, and have them addressed in a public hearing process."

Necessarily inherent in all of this is the understanding that Alberta would assess the adequacy of Crown consultation and accommodation after the final approval of the Project by the AUC. At that time, Alberta would make decisions which did, in the view of the AUC, trigger the duty to consult. These consisted of approvals of transmission facilities adjacent to or crossing a highway, approvals of transmission facilities under the *Water Act* (if any such approvals are actually required), the issuance of easements or other instruments of occupation under the *Public Lands Act* (where such instruments are actually required), and confirmation that no historical resources are affected by the Project. The Proponent's Application to the AUC (accessible by logging in to the AUC inquiry system here) describes Government approvals which may be sought after AUC approvals as follows:

- Alberta Transportation (AT) administers access and proximity to primary highways under the *Public Highways Development Act*. APL will continue to conduct consultation with AT regarding the Project and will apply mitigative measures (i.e. construction methods) where appropriate. APL will apply for approvals as required with respect to facilities located adjacent to or crossing a highway.

- Alberta Environment and Parks (AEP) is responsible for managing and protecting Alberta's waterbodies and watercourses under the *Water Act*. APL will comply with the *Water Act* and apply for any necessary approvals, prior to construction. If required, notification to AEP will be filed to comply with the applicable Codes of Practice.

- APL will apply to AEP for the land rights required under the *Public Lands Act* for Crown land.

- AEP is also responsible for the management of wildlife as a Crown resource and for the conservation of species at risk under the *Wildlife Act*. APL will comply with the *Wildlife Act*. The Project will include preconstruction environmental surveys of wildlife, vegetation, and wetlands.

- Alberta Culture and Tourism has confirmed that a Historical Resources Impact Assessment (HRIA) is required for the Project area under the *Historic Resources Act* (*HRA*). An HRIA will be completed in accordance with Schedule A of the *HRA* and clearance will be obtained before the start of construction.

Doctrinal Confusion: Delegation to the Proponent

The law of Aboriginal consultation and accommodation allows the Crown to delegate procedural aspects of the duty to consult to Project Proponents, while retaining an oversight obligation. In this case, there appears to be doctrinal confusion over whether or not Alberta delegated procedural aspects of the duty to consult to the Project Proponent. Was the Proponent before the AUC conducting procedural aspects of Aboriginal consultation as a Crown delegate, or not?

In *Haida Nation v British Columbia (Minister of Forests),* [2004] 3 SCR 511, 2004 SCC 73 (CanLII) (*Haida Nation*) at para 53, the Supreme Court of Canada stated that "[t]he Crown may delegate procedural aspects of consultation to industry proponents seeking a particular development." Alberta's consultation policies state that Alberta will delegate procedural aspects of consultation to project proponents in many cases (rather than conducting direct consultation by the Crown). See: *The Government of Alberta's Policy on Consultation with First Nations on Land and Natural Resource Management*, 2013, and *The Government of Alberta's Guidelines on Consultation with First Nations on Land and Natural Resource Management*, July 28, 2014. As noted above, Appendix A to the 2014 Policy suggests that large-scale regional transmission line projects have high impact and require extensive consultation.

It seems likely that the Proponent thought that there had been a delegation in relation to procedural aspects of consultation with First Nations. This is because the Project Proponent prepared a First Nations Consultation Plan for consideration by Alberta.

This is not the case with the Métis. The Public Involvement Plan filed with the AUC by the Proponent confirms (at para 102) that "[t]he ACO [the Aboriginal Consultation Office of the Government of Alberta] has not directed APL to consult with any Métis communities." The Proponent's public consultation plan is accessible by logging in to the AUC inquiry system here.

The AUC did not accept that the Proponent was before the Commission as the delegate of the Crown in any case. The AUC Preliminary Ruling states:

115… The Commission does not accept the submissions of the First Nations that Alberta PowerLine has been delegated the duty to consult on the project before the Commission and is before the Commission as the delegate of the Crown. The Commission notes the submissions of Alberta that the Crown has yet to make decisions under the *Public Lands Act* or under other legislation and is conducting Crown consultation prior to the issuance of such approvals.

116. The Commission accepts the submissions of Alberta that it has not made a decision on the adequacy of Crown consultation and that assessing Crown consultation would be premature. Because the Commission and its hearing process play a valuable role in facilitating Crown consultation by providing Aboriginal groups with an opportunity to hear more about a project, raise their concerns and propose solutions, and have them addressed in a public hearing process, it is possible that the concerns of the Aboriginal groups may be addressed in the current proceeding.

This must mean that, whatever 'public consultation' with Aboriginal groups may have taken place, there has been no assessment of the adequacy of that as 'Crown consultation and accommodation'.

Doctrinal Confusion: Crown Conduct/AUC Conduct

A second fundamental doctrine in Aboriginal consultation is that "there must be Crown conduct or a Crown decision that engages a potential Aboriginal right. What is required is conduct that may adversely impact on the claim or right in question." (see *Rio Tinto* at para 42).

In this case the AUC was prepared to accept that its final approval of the construction, siting and routing of the Project might adversely affect actual or asserted First Nations Treaty or asserted Métis rights; but it denied that its own approval was "crown conduct" or a "crown decision" (see AUC Preliminary Ruling at paras 117-118).

Where the executive branch of government gives a project approval that has the potential to adversely affect actual or asserted Aboriginal rights, then it seems clear that this would trigger the duty to consult. Where Parliament or a Legislature enacts legislation conferring upon a tribunal project approval authority that has the potential to adversely affect actual or asserted Aboriginal rights, then critical thought would suggest that the tribunal approval is "crown conduct" or a "crown decision" in a broad sense of "government action" or a "government decision." This prevents the executive branch of government from avoiding its constitutional obligations by conferring upon a tribunal by legislation project approval authority which might otherwise be exercised by the executive branch of government.

What did the AUC Actually Decide?

Confusion also arises from the *Preliminary AUC Ruling's* restatement of the NCQLs presented to it. The AUC conflated all of the constitutional questions into one generic question regarding its jurisdiction to assess the adequacy of Crown consultation.

It is unclear whether the *Preliminary AUC Ruling* stands for the proposition that the AUC has 'no jurisdiction' to assess the adequacy of Crown Aboriginal consultation in any case, or whether the *Ruling* states that the AUC 'declines jurisdiction' to assess the adequacy of Alberta's Aboriginal consultation in the context of the Fort McMurray West 500-kV Transmission Project Proceeding. The former interpretation is referenced in a case comment on the *Preliminary AUC Ruling* prepared by Counsel to one of the parties in the AUC Proceeding. This describes the *Preliminary AUC Ruling* as stating that the AUC "has no jurisdiction to consider or assess the adequacy of Crown consultation with Aboriginal groups that may be affected by a project under review." (see Osler LLP, Alberta Utilities Commission confirms it has no jurisdiction to assess Crown consultation). The latter interpretation is open because the *Preliminary AUC Ruling* also

states (at para 119) that the AUC "declines jurisdiction over adjudicating the adequacy of Crown consultation in the context of the current applications."

Whether there is a distinction between a ruling that the AUC has 'no jurisdiction' and a ruling that the AUC 'declines jurisdiction' in the context of a case, is a matter which courts may ultimately need to decide. Both are questions of law or jurisdiction likely capable of obtaining leave to appeal at either the Court of Appeal or Supreme Court of Canada levels (see *Calgary (City) v Resman Holdings Ltd*, 2016 ABCA 81 (CanLII); see also *Fort McKay First Nation v Alberta Energy Regulator*, 2013 ABCA 355 (CanLII)).

Reliance on Federal Court of Appeal Jurisprudence is Undermined

A further weakness in the *Preliminary AUC Ruling* can be seen in its reliance upon Federal Court of Appeal jurisprudence for the proposition that the AUC's own final approval of the Project does not itself trigger Aboriginal consultation. The *Preliminary AUC Ruling* on this point relies upon the majority decision of the Federal Court of Appeal in *Thames*, and upon the fact that Alberta was not a party to the AUC proceedings.

That Federal Court of Appeal judgment in *Thames* was appealed to the Supreme Court of Canada. The appeal before the Supreme Court was argued on November 30, 2016, and its judgment was taken on reserve. It remains on reserve as of the time this analysis is written.

During argument of the *Thames* appeal before the Supreme Court of Canada, counsel for the Attorney General of Canada conceded that the Federal Court of Appeal decision (in respect of the point relied upon by the AUC) was wrongly decided. The submissions of counsel for the Attorney General to the Supreme Court were that: "The Federal Court of Appeal decision …. was not correct in its finding that the duty to consult was not triggered here because the Crown wasn't present. The regulatory approval of the National Energy Board [NEB] is state action with the potential to affect Aboriginal rights and therefore the Attorney General agrees that the Crown's duty to consult is triggered." The arguments before the Court can be viewed in the webcast of the oral argument.

Concessions by the Attorney General do not always find favour in the Supreme Court of Canada, but a concession of this kind bodes ill for the correctness of the central reasoning in the *Preliminary AUC Ruling*.

The illness of the foreboding, and the disarray in the law of Aboriginal consultation as it applies to tribunals with final approval functions, is also evident if one compares submissions of counsel before the AUC with submissions to the Supreme Court of Canada of counsel for Enbridge in *Thames*. Counsel for Enbridge submitted that the NEB "has the power to itself conduct Crown consultation." Counsel for Enbridge was asked by Mr. Justice Moldaver what the NEB might do if it was of the opinion that an accommodation was required for Aboriginal interests, but the NEB's enabling legislation did not confer upon the NEB jurisdiction to grant the accommodation. In response counsel for Enbridge submitted that "if there were to be a case … something that required accommodation that might be beyond the Board's jurisdiction, then the Board would be, I think, in a position to not approve the project…".

Again, submissions of counsel for Project Proponents do not always find favour before the Court. But there seem to be irreconcilable differences between submissions of counsel for Enbridge, in a case relied upon by the AUC, and counsel before the AUC. The former submits

that a tribunal with final approval authority (the NEB) is conducting Crown consultation, and can decline to issue a final approval if a necessary accommodation is outside of its remedial jurisdiction. The latter submits (in relation to the AUC) the opposite.

Misinterpretation of Alberta Court of Appeal Jurisprudence Due to Lack of Appreciation of Contextual Differences

Further weakness is evident from the AUC's reliance, without appreciation of contextual differences, on *Métis Nation of Alberta Region 1 v. Joint Review Panel*, 2012 ABCA 352 (CanLII). The AUC relied on this case for the proposition that it is premature to assess the adequacy of Crown consultation in the AUC hearing. The decision of the Alberta Court of Appeal does not stand for that broad proposition.

The Court of Appeal decision was that of a single judge in chambers, sitting in relation to an interlocutory application for leave to appeal from the Energy Resources Conservation Board aspect of ongoing proceedings of a federal-provincial Joint Review Panel. The terms of reference of the Joint Review Panel specifically stated that it was not required to make any determination as to whether the Crown has met its respective duties to consult or accommodate in respect of rights recognized and affirmed by section 35 of the *Constitution Act*, 1982. The Joint Review Panel decision in issue in that case was also advisory in nature, whereas the AUC Decision on the Merits is final. The Project before the Joint Review Panel required further approvals, at both the federal and provincial levels, before becoming effective in law. The *AUC Ruling on the Merits*, in contrast, is a final approval of the construction, siting and routing of the Project. The context before the AUC, and that considered in *Métis Nation of Alberta Region 1 v. Joint Review Panel*, are entirely different.

The AUC Has No Jurisdiction to Consider Need for the Fort McMurray West 500-kV Transmission Project

Deep-seated weakness in the capacity of the AUC to assess or contribute to Crown consultation and accommodation in a manner consistent with the honour of the Crown arises from alteration in AUC public interest jurisdiction. The alteration flows from designation of the Project as critical transmission infrastructure, and corresponding limitation on the AUC public interest jurisdiction. As a result, Aboriginal parties have no opportunity to seek consultation or accommodation in relation to need for the Project. Any other party before the AUC in relation to any other project – other than critical transmission infrastructure – could raise a concern about need.

The Alberta Court of Appeal decision in *Shaw v Alberta (Utilities Commission)*, 2012 ABCA 378 (CanLII), succinctly identifies how this designation divided the responsibility for approval of the Project between Government and the AUC, and limited the jurisdiction of the AUC to determine whether the Project was in the public interest:

> [1] Prior to 2009, all proposed electrical transmission development in Alberta required two approvals from the Alberta Utilities Commission: (1) an approval of the "need" to expand or enhance the system; and (2) a permit to construct and operate the new transmission facility. In 2009, legislative amendments permitted government to designate certain transmission facilities as "critical transmission infrastructure", meaning infrastructure that is required to meet the needs of Alberta. This appeal concerns the

> effect that such a designation has on the scope of review of new transmission development by the Commission.
> [2] Specifically, we are asked to determine whether, in designating a transmission line as "critical", the legislature intended to remove, or limit the scope of, the Commission's public interest inquiry in approving that transmission line. That is the sole issue raised on appeal, a narrow question of statutory interpretation. The appellants submit, however, that the associated policy implications are extremely broad.
> [3] For the reasons that follow, I conclude that when the government designates a transmission development as critical, the legislature intended that government would assume sole responsibility for determining that the development is necessary and in the public interest. It left to the Commission only the second stage of the inquiry, to assess whether the proposed routing and siting of the transmission line and other facilities required to meet the need are in the public interest.

See also *FortisAlberta Inc v Alberta (Utilities Commission)*, 2015 ABCA 295 (CanLII) (at para 93).

When the AUC issued the Preliminary Ruling, it was fully aware of how its jurisdiction to determine whether the Project is in the public interest was limited by designation of the Project as critical transmission infrastructure. This is clear from a related Ruling in 2012 in which the AUC approved a competitive process through which the Proponent of the Fort McMurray West 500-kV Transmission Project was identified (see AUC Decision 2012-059). In that Ruling the AUC went on to note (at para 35) that critical transmission infrastructure operated as an exception to the typical situation: "[i]f the transmission facility is designated as CTI [critical transmission infrastructure], the AESO is not required to submit an application to the Commission for approval of the need for the transmission facility. That is, there is no Commission approval of the need for a CTI project as that determination has been transferred from the Commission to the Government of Alberta."

It seems that Aboriginal consultation was not considered at any time in relation to the clarification on the competitive process by which the Project would be brought before the AUC (see here and here).

No Consultation or Accommodation at the 'Strategic Decision' Level

The Government decision to predetermine that critical transmission infrastructure is necessary and in the public interest has the hallmarks of a strategic decision for which Aboriginal consultation is required.

The seminal case in Aboriginal consultation describes a strategic decision as one which "reflects the strategic planning for utilization of the resource." (see *Haida Nation* at para 76). That comment was reinforced in the Supreme Court's decision in *Rio Tinto* concerning the role of tribunals in relation to Aboriginal consultation:

> [44] Further, government action is not confined to decisions or conduct which have an immediate impact on lands and resources. A potential for adverse impact suffices. The duty to consult extends to "strategic, higher level decisions" that may have an impact on Aboriginal claims and rights (Woodward, at p. 5-41 (emphasis omitted)). Examples include the transfer of tree licences which would have permitted the cutting of old-growth forest (*Haida Nation*); the approval of a multi-year forest management plan for a large

> geographic area (*Klahoose First Nation v. Sunshine Coast Forest District (District Manager)*, 2008 BCSC 1642 (CanLII), [2009] 1 C.N.L.R. 110); the establishment of a review process for a major gas pipeline (*Dene Tha' First Nation v. Canada (Minister of Environment)*, 2006 FC 1354 (CanLII), [2007] 1 C.N.L.R. 1, aff'd 2008 FCA 20 (CanLII), 35 C.E.L.R. (3d) 1); and the conduct of a comprehensive inquiry to determine a province's infrastructure and capacity needs for electricity transmission (*An Inquiry into British Columbia's Electricity Transmission Infrastructure & Capacity Needs for the Next 30 Years, Re*, 2009 CarswellBC 3637 (B.C.U.C.)). We leave for another day the question of whether government conduct includes legislative action: see *R. v. Lefthand*, 2007 ABCA 206 (CanLII), 77 Alta. L.R. (4th) 203, at paras. 37-40.

If there had been Aboriginal consultation conducted in relation to the designation of critical transmission infrastructure, then the Attorney General and the Project Proponents would refer to that in Written Submissions filed with the AUC, and the AUC would consider that fact. None make any reference to any Aboriginal consultation connected to the controversial decision that the Project is necessary and in the public interest. One may deduce that there was no Aboriginal consultation about designation of the Fort McMurray West 500-kV Transmission Project as critical transmission infrastructure.

Perhaps that is because the decision of the executive branch of government to designate critical transmission infrastructure was ultimately clothed with legislative action. The Supreme Court of Canada has left the application of the duty to consult to legislative action for a future day. But, even assuming that enactment of legislation does not itself trigger the duty to consult, the Alberta Court of Appeal cautioned in 2010, in *Tsuu T'ina Nation v. Alberta (Environment)*, 2010 ABCA 137 (CanLII) (at para 55) that "the duty may still fall upon those assigned the task of developing the policy behind the legislation, or upon those who are charged with making recommendations concerning future policies and actions." For recent jurisprudence on the application of the duty to consult to legislative action, see generally *Courtoreille v. Canada (Aboriginal Affairs and Northern Development)*, 2014 FC 1244 (CanLII) and *Canada (Governor General In Council) v. Courtoreille*, 2016 FCA 311. See also the recent ABlawg post by Nigel Bankes, The Duty to Consult and the Legislative Process: But What About Reconciliation?. The Supreme Court of Canada has yet to definitively rule on the application of the duty to consult to legislative action.

Misplaced Reliance on AUC Contribution to Crown Decisions after Final AUC Approval

The *Preliminary AUC Ruling* (at paras 116 and 117) indicates that the AUC process will inform later Crown decisions which do trigger the duty to consult. The position appears to be broadly comparable to the unsuccessful British Columbia position in *Haida Nation*, where "the Province argued that although no consultation occurred at all at the disputed, 'strategic' stage, opportunities existed for *Haida Nation* input at a future 'operational' level." (see *Taku River Tlingit First Nation v British Columbia (Project Assessment Director)*, [2004] 3 SCR 550, 2004 SCC 74 (CanLII), at para 45).

Where the Crown seeks to take advantage of the benefits of regulatory review by a tribunal process which is not robust because of jurisdictional limitations, critical thought leads to the conclusion it must accept the burdens and weaknesses of that regulatory review. Assuming that the AUC process and final approval will inform later Crown decisions which do trigger the duty to consult, the limitations associated with assessment of the adequacy of Crown consultation at that late stage of the development process must be realized.

The *Preliminary AUC Ruling* discussed here confirms that AUC jurisdiction is confined to Project implementation and not to the need for the Project. It also confirms that the Proponent is not participating before the AUC as a delegate of the Crown, that AUC process is not Crown consultation or accommodation, and that a final AUC approval which may impact Aboriginal rights can be issued before the adequacy of Crown consultation is assessed by Alberta. Because Alberta's Aboriginal consultation process relies on Proponent consultation undertaken in the context of the AUC process, the Aboriginal consultation process is coloured by the limitation in that process.

That limitation is unlikely to be cured by consultation associated with minor government decisions such as the issuance of an easement or highway crossing approval. After the strategic planning and AUC final approval process, the Crown is effectively asking itself whether an easement or similar instrument for the footprint of a tower or other facility in a particular location, or a line crossing of a highway between two particular points, might adversely affect actual Treaty or asserted Métis rights. The result of that exercise is entirely foreseeable.

The *AUC Ruling on the Merits*

This *Ruling*:

- Reconfirms that the first stage of the typical AUC regulatory process, "the determination of whether a new transmission project is required to meet the needs of Albertans and is in the public interest, is made by the legislature" in relation to Projects defined as critical transmission infrastructure (at para 117);

- reconfirms that "the Commission found that it did not have the jurisdiction to consider the adequacy of Crown consultation with Aboriginal groups" (at para 293);

- notes that AUC procedures "do not require applicants for transmission lines to include traditional land and resource use assessments as a part of their application" (at para 874);

- recognizes "that the project, by introducing industrial development into the area, could create some impacts to traditional land and resources use sites that are not easily mitigated" (at para 880);

- proceeds to consider the impacts which the footprint of the Project may have only on traditional land and resource use exercised along, or in close proximity to, the right-of-way;

- finds that the Project Proponent "has taken reasonable steps to mitigate the project's potential impacts on their traditional land and resource use" (at para 882); and

- imposes conditions of future consultation on the Project Proponent, during Project construction, specifically limited to the exercise traditional land and resource use along the right-of-way.

The AUC did assess the adequacy of the Proponent's consultation with Aboriginal groups, but did so by characterizing this as an aspect of public consultation required by *AUC Rule 7, Applications for Power Plants, Substations, Transmission Lines, Industrial System Designations and Hydro Developments*.

Public consultation and Aboriginal consultation serve distinct purposes. The purpose of Aboriginal consultation is reconciliation of Aboriginal peoples and non-Aboriginal peoples and their respective claims, interests and ambition. In this context the AUC finds that it is not the Crown and that its legislative mandate confers no explicit or implicit duty to assess the Crown duty to consult before it finally approves the Project (see also *Dene Tha' First Nation v Canada (Minister of Environment)*, 2006 FC 1354 (CanLII) at para 62).

At most, the AUC Decisions suggest that the AUC assessed the Project's potential adverse impacts "on traditional land and resource use." But that consideration is coloured by limitation and clouded by imprecision, which leaves open the question whether such an assessment is actually capable of making a meaningful contribution to reconciliation. First, the AUC public interest jurisdiction is limited in such a way that the AUC is blinded to any consideration in relation to need for the Project. Second, the AUC jurisdiction is interpreted so narrowly that it can see only impacts in the immediate vicinity of the right-of-way. Third, when examining those impacts, it uses the phrase "traditional land and resource use". The term "traditional uses" is defined in Alberta Policy to mean the exercise of "customs or practices on the land that are not existing section 35 Treaty rights…". See *The Government of Alberta's Policy on Consultation with First Nations on Land and Natural Resource Development, 2013*. The *AUC Ruling on the Merits* refers to Treaty and Aboriginal rights, but does so for the purpose of giving standing to the Aboriginal participants. The use of the phrase 'traditional land and resource use' in the operative impact assessment function of the AUC therefore clouds whether the true extent of constitutionally protected rights was considered by the AUC. Finally, the opportunity afforded Aboriginal participants to address concerns in a public hearing process is limited. There is neither opportunity to address the need for the Project, nor any apparent opportunity to address impacts or accommodations which may occur beyond the immediate foot print of the right-of-way of the specific Project.

Conclusion

The context of these decisions involves Alberta's Aboriginal consultation process in relation to critical transmission infrastructure. It is not difficult to think that the fear identified by the Supreme Court of Canada in *Rio Tinto* has been realized in Alberta.

In *Rio Tinto* (at para 62), the Supreme Court provided a direction to governments in Canada about the mandatory nature of the duty to consult: "the duty to consult with Aboriginal groups, triggered when government decisions have the potential to adversely affect Aboriginal interests, is a constitutional duty invoking the honour of the Crown. It must be met." The word 'government' is used by the Court is this context, and the ambit of that word is capable of extending to quasi-judicial tribunals even though these may stand at arm's length from the executive branch.

Despite this caution and direction, the AUC has held:

- that the duty to consult is not triggered by the AUC final approval, even though that may itself adversely affect actual Indian Treaty or asserted Métis rights;
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- that the duty to consult is triggered only by minor government approvals issued after
    - the need for the Project is pre-approved by the Government of Alberta, and
    - the construction of the Project is finally approved by the AUC;
- that the AUC has no jurisdiction in relation to assessment of Crown consultation and accommodation, which is said to take place only in relation to minor Crown conduct taken at some point after the AUC issues its final approval of the Project;
- that the Proponent is not appearing before the AUC as a delegate of the Crown for the purposes of discharging procedural aspects of the Crown's duty to consult and accommodate.

This context gives rise to multiple questions of law or jurisdiction capable of obtaining leave to appeal at either the Court of Appeal or Supreme Court of Canada levels. As of the time of writing, it is not clear whether further appeals may be taken. But, in any event, further guidance from the Supreme Court on how tribunals with final approval authority may contribute to Aboriginal consultation and accommodation in a manner consistent with the honour of the Crown can be anticipated when the Court delivers judgment in two cases presently on appeal: *Chippewas of the Thames First Nation v Enbridge Pipelines Inc., et al.*, and Hamlet of Clyde River, et al. v Petroleum Geo-Services Inc. (PGS), et al. Whether or not appeals are taken from the AUC Rulings, the evolution of jurisprudence from the Supreme Court may leave the *Preliminary AUC Ruling* and the *AUC Ruling on the Merits* as a dead end in the progress of the constitutional common law of Aboriginal consultation and accommodation.

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