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Reconciliation and the Crown's duty to consider Indigenous groups' economic interests

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On October 15, 2021, the Alberta Court of Appeal released its decision in *AltaLink Management Ltd v. Alberta (Utilities Commission)* (the AltaLink decision). This decision addresses the duty of the Crown and administrative tribunals to take into account Indigenous groups' economic interests when making decisions. The AltaLink decision will have particular significance for public-interest determinations regarding electric utilities, but it carries importance more broadly for government decision-makers and administrative tribunals with public-interest mandates across Canada.

The AltaLink decision is all the more significant for its timing. It comes in the midst of ongoing litigation before provincial and federal courts that touches on the Crown's duty to consider and promote Indigenous economic interests.

As we discussed in a previous Update, the Federal Court's July 2021 decision in *Ermineskin Cree Nation v. Canada (Environment and Climate Change)* (the Ermineskin decision)[1] quashed the decision of the federal Minister of Environment and Climate Change Canada (the Minister) to designate mining activities under the federal *Impact Assessment Act* without consulting on how the decision would negatively impact the Ermineskin Cree Nation's economic interests. The Ermineskin decision explicitly recognized the Crown's duty to consult with Indigenous groups on their economic interests that are derived from, or closely related to, Aboriginal and treaty rights.

The Government of Canada has now appealed the Ermineskin decision, asserting that the Federal Court failed "to correctly interpret and apply the jurisprudence regarding economic interests and Aboriginal and Treaty rights in assessing the duty to consult" and that the Minister's designation should be restored.[2]

These same considerations will also be at play in proceedings recently commenced in the Alberta Court of Appeal and Federal Court to challenge decisions made by the Alberta Energy Regulator (the AER) and the federal Minister to deny the Grassy Mountain metallurgical (steelmaking) coal project.

This update provides a summary of the AltaLink decision, with particular focus on what it says about the honour of the Crown and reconciliation in the context of Indigenous economic interests.

The AltaLink decision

Background

The AltaLink decision arose from the appeal by AltaLink Management Ltd. (AltaLink) of a decision by Alberta's electric utilities regulator, the Alberta Utilities Commission (the Commission). The Commission approved the transfer of electrical transmission lines from AltaLink to limited partnerships controlled by Piikani Nation (PiikaniLink LP) and Blood Tribe (KainaiLink LP), but found the transfers would result in additional costs to ratepayers, and refused to allow PiikaniLink LP and KainaiLink LP to recoup these costs through their rates.[3]

AltaLink had routed the transmission lines across Piikani Nation and Blood Tribe reserve lands (the most direct and economical route option) in 2010 in exchange for Piikani Nation and Blood Tribe's opportunity to obtain ownership interests and participate in the transmission industry. In 2012 and 2014, Blood Tribe and Piikani Nation exercised their options to purchase a 51% interest in the transmission lines located on the reserves, and the transfers were to be effected through limited partnership agreements between AltaLink as general partner and Piikani Nation and Blood Tribe's corporate entities. AltaLink applied to the Commission in 2017 for approval of the transfers.

Applying its "no harm" test, the Commission approved the transfer, but only on the condition that related auditor and Commission hearing costs not be passed on to PiikaniLink LP's and KainaiLink LP's ratepayers. The Commission refused to consider in its decision-making the estimated $32 million saved by routing the transmission lines through the reserve lands. It also refused to consider intangible benefits arising from the partnership between AltaLink and the First Nations — namely, access to the First Nations workforce, strengthening AltaLink's relationship with other First Nations in Canada and the United States and 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. The Commission found it did not have enough evidence that these benefits would materialize[4] and concluded that auditing and hearing costs were not offset, but could be mitigated through the approval condition that they not be passed on to ratepayers.[5]

As general partner of PiikaniLink LP and KainaiLink LP, AltaLink appealed the Commission's decision. It argued that the Commission should have considered the money ratepayers saved by routing the transmission line through the reserve lands as a benefit to the public, and should have considered its constitutional obligations flowing from the honour of the Crown in exercising its public-interest mandate. It argued further that the Commission had an obligation to consider reconciliation as part of the public interest, and should have considered its international legal commitments under the United Nations Declaration on the Rights of Indigenous Peoples.

Alberta Court of Appeal: economic development on reserve is in the public interest

Justices Watson and Wakeling wrote the majority reasons in the AltaLink decision, finding that the Commission was wrong to ignore the cost savings arising from the transmission lines being routed across the Piikani Nation and the Blood Tribe reserves. On this basis, the majority ordered that PiikaniLink LP and KainaiLink LP be allowed to recover the incremental costs of audits and hearings through their rates.

Although Justices Watson and Wakeling did not directly address whether the Commission erred by not considering the honour of the Crown and reconciliation, they did comment on how Indigenous participation in economic opportunities serves the public interest.

In particular, the majority commented that projects that increase the likelihood of economic activity and provide job opportunities on a reserve should be encouraged and are in the public interest.[6] Justices Watson and Wakeling found that on-reserve job opportunities promote pursuit of educational opportunities among reserve residents, and jobs and education are central to improving the quality of reserve life — with benefits to reserve communities, to Canada as a whole and to future generations.[7] They likened the untapped labour source in Indigenous communities to the movement of large numbers of women into the workforce triggered by World War II, remarking that a "diverse workforce benefits society."

Consideration of the honour of the Crown and reconciliation

Justice Feehan wrote concurring reasons in which he agreed wholly with the majority's decision. However, Justice Feehan went further to address questions regarding the Commission's duties to Indigenous peoples and their governance entities appearing before it.

Justice Feehan defined the honour of the Crown as the guiding principle that servants of the Crown must conduct themselves with honour whenever they engage with Indigenous peoples. This principle extends to the Commission in deciding questions of law and constitutional issues, and in making public-interest decisions. Justice Feehan explained that, in the case at hand, the Commission had a duty to consider the honour of the Crown in its decision-making process and to do what was necessary to uphold the honour of the Crown, understanding that the Crown's obligations must be interpreted generously and purposively, and will vary as necessary with context and circumstance.

Justice Feehan's discussion of the principle of reconciliation is perhaps even more impactful. Reconciliation, as Justice Feehan described it, is a "distinct concept that exists separately from the honour of the Crown and includes both legal and social dimensions." Not only is it a foundational objective of section 35 of the *Constitution Act, 1982*, but it is also part of the broader public interest and applies to cases impacting Indigenous peoples outside the constitutional context. As such, an administrative tribunal with a broad public-interest mandate, such as the Commission, must address reconciliation as a social concept of rebuilding the relationship between Indigenous peoples and the Crown, which specifically includes Indigenous interests in participating freely in the economy and having sufficient resources to self-govern effectively. This means that the economic interests of Indigenous groups must be taken into account in making a public-interest determination to foster reconciliation.

The Crown's duty to consult

Although the Government of Canada has consistently promoted reconciliation with Indigenous communities, the government has made it clear that it rejects the view that this includes a requirement that the Crown consider Indigenous communities' economic interests in statutory decision-making and constitutionally mandated consultation. The Government has appealed the Ermineskin decision, asserting, among other things, that the Federal Court there failed to correctly interpret and apply the law regarding economic interests and Aboriginal and treaty rights in assessing the duty to consult. This position is reinforced by a recent Consultation Report issued by the Impact Assessment Agency of Canada (the Agency),

in which the Agency advised the Minister that a decision preventing a project from proceeding would not engage the Crown's duty to consult, even where the Crown has knowledge of agreements between the proponent and affected Indigenous groups.[8] Accordingly, the Government of Canada's position appears to be that the economic impacts to Indigenous communities resulting from Crown decisions are outside the scope of reconciliation and do not trigger any Crown consultation duties whatsoever.

Implications

Both the majority and concurring reasons in the AltaLink decision are significant to the Crown and administrative tribunals, and carry important implications for litigation currently before federal and provincial courts. Similar concerns are certain to be engaged in the coming months as the Government of Canada pursues its appeal of the Ermineskin decision, and when the Federal Court and Alberta Court of Appeal consider whether the AER and the federal Minister should have consulted with Treaty 7 Nations on economic interests tied to the Grassy Mountain metallurgical coal project.

Proponents and Indigenous communities alike should follow these proceedings closely as they are sure to impact decisions regarding future economic development and the routes for securing regulatory and economic certainty. Canada's appeal of the Ermineskin decision, in particular, will have profound implications for the future of reconciliation in Canada.

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[1] 2021 FC 758.

[2] Notice of Appeal, Federal Court of Appeal File No. A-254-21 (filed 29 September 2021).

[3] Commission Decision 22612-D01-2018.

[4] AltaLink decision at para 37–41.

[5] AltaLink decision at para 41.

[6] AltaLink decision at para 59.

[7] AltaLink decision at paras 60–75.

[8] Impact Assessment Agency of Canada, Consultation Report: Grassy Mountain Coal Mine Project (Alberta) (22 July 2021 update) online, IAAC: https://iaac-aeic.gc.ca/050/documents/p80101/140987E.pdf [PDF] at 12.