

This Issue

AUC Issues its first Ruling on its Jurisdiction in relation to Aboriginal Consultation

BREAKING CASE LAW

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



This comment discusses briefly the legal and policy context of the first Alberta Utilities Commission (“AUC”) Ruling addressing its jurisdiction to consider the adequacy of Crown Aboriginal consultation in the course of AUC proceedings.¹ The AUC Ruling is dated October 7, 2016.

The Project before the AUC² had been designated as “critical transmission infrastructure.”³ The legal consequence of this designation was succinctly described by the Alberta Court of Appeal in *Shaw v Alberta (Utilities Commission)*:

[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.⁴

For this Project, the public interest jurisdiction of the AUC is limited to the proposed routing and siting of the transmission line and other facilities. AUC approval means approval of the construction of the Project according to site and routing conditions fixed by the AUC.

On September 2, 2016, the AUC received Notices of Questions of Constitutional Law (“NQCLs”) from Metis and First Nations. The AUC Ruling is a preliminary determination of its jurisdiction to consider the NQCLs and as issued prior to the commencement of its public hearing process.

The AUC held that final AUC approval of the proposed routing and siting of the Fort McMurray West 500-kV transmission line and other facilities does not itself trigger the duty to consult even though the AUC Decision, when issued, would be a final approval of the construction of the Project which might adversely affect Aboriginal rights. The AUC Ruling also confirmed that the AUC will not assess the adequacy of Crown Aboriginal consultation, because the Crown is responsible for all aspects of Crown consultation and accommodation and the Crown will make its assessment after the final AER Decision, when issuing instruments which are corollary to the construction and operation of the Project.⁵

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After the Ruling, the AUC hearing proceeded to conclusion without any participation by Alberta or the Aboriginal Consultation. The final AUC Decision is on reserve as of the date of publication of this comment.⁶

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 ("AER"), rather than the AUC. Alberta has issued a general policy entitled The Government of Alberta's Guidelines on Consultation with Metis Settlements on Land and Natural Resource Management 2016. It has a specific section on the AER, and refers to a Ministerial Guideline which "will provide direction on ACO and AER interaction." There is no equivalent specific reference to the AUC, nor any direction on ACO and AER interaction.

The law regarding the role which Tribunals can play in relation to the discharge of constitutional obligations of consultation and accommodation is discussed by the Supreme Court of Canada in *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*. The Court suggested that a Tribunal like the AUC, which has final approval authority and power to determine questions of law or constitutional law which arise in the course of its regulatory functions, might perform at least one of two functions: conducting consultation and accommodation, or assessing Crown consultation and accommodation. The AUC Ruling means that the AUC performs neither of these functions.⁷

At paragraph 109 of its Ruling the AUC supported its Ruling by reliance on the majority Judgment in the Federal Court of Appeal decision in *Chippewas of the Thames First Nation v. Enbridge Pipelines Inc.*⁸ That Federal Court of Appeal case was appealed to the Supreme Court of Canada. The appeal before the Court was argued on November 30, 2016, and Judgment was taken on reserve. During argument of the appeal before the Supreme Court of Canada, Counsel for the Attorney General of Canada conceded that the point relied upon by the AUC was wrongly decided by the majority decision of the Federal Court of Appeal. The impact which this may have on the AUC Ruling will be known when the Court issues its Judgment, likely in 2017, when the Court issues its Judgment in *Chippewas of the Thames First Nation v. Enbridge Pipelines Inc., et al.*⁹, and in a related appeal *Hamlet of Clyde River, et al. v. Petroleum Geo-Services Inc. (PGS), et al.*¹⁰

¹ The Ruling is here. It is necessary to login to the AUC inquiry system for proceeding 21030 in order to access the Ruling.

https://www2.auc.ab.ca/Proceeding21030/ProceedingDocuments/Proceeding21030-Rulingonjurisdictionode_1521.pdf.

² <http://www.auc.ab.ca/items-of-interest/pages/Fort-McMurray-West-500-kv.aspx>, <https://www.aeso.ca/grid/competitive-process/fort-mcmurray-west-500-kv-transmission-project/> and <http://www.albertapowerline.com/The-Project/>.

³ The University of Calgary School of Public Policy, the Environmental Law Center, and Bennett Jones LLP, respectively, commented on the legislative changes which gave rise to the phrase 'critical transmission infrastructure'. See: <https://www.policyschool.ca/wp-content/uploads/2016/03/transmissionpolicyonline.pdf>; http://elc.ab.ca/Content_Files/Files/Understanding_Bill_50.pdf

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http://elc.ab.ca/Content_Files/Files/NewsBriefs/Vol24No3.pdf and https://www.bennettjones.com/Publications/Updates/Alberta_s_Electricity_Transmission_Debate_%E2%80%93_An_Update_on_Bill_50. The status quo is briefly described on the Alberta Energy website <http://www.energy.alberta.ca/Electricity/transmission.asp>:

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.

What has been removed by Bill 8 is the power of the designate future projects as critical transmission infrastructure. Four CTI projects remain designated as such in the Schedule to the current *Electric Utilities Act*, SA 2003, c E-5.1, <http://canlii.ca/t/52dd1>. These do not go through a full needs assessment before the AUC. Bill 50 (2009) is here:

http://www.assembly.ab.ca/net/index.aspx?p=bills_status&selectbill=050&legl=27&session=2.

Bill 8 (2012) is here:

http://www.assembly.ab.ca/net/index.aspx?p=bills_status&selectbill=008&legl=28&session=1.

⁴*Shaw v Alberta (Utilities Commission)*, 2012 ABCA 378 (CanLII), at paragraphs 1 to 3 <http://canlii.ca/t/fv91j>; and see also *FortisAlberta Inc v Alberta (Utilities Commission)*, 2015 ABCA 295 (CanLII) at paragraph 93 <http://canlii.ca/t/gl6rn>.

⁵The AUC Application

https://www2.auc.ab.ca/Proceeding21030/ProceedingDocuments/Attach01-ApplicationText-Final_0144.pdf describes Government approvals which may be sought after AUC approvals as:

- 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.

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⁶ When issued, the AUC Decision will be available here:

<http://www.auc.ab.ca/applications/decisions/Pages/default.aspx>

⁷ *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, [2010] 2 SCR 650, 2010 SCC 43 (CanLII),

<http://canlii.ca/t/2d37q>

⁸ *Chippewas of the Thames First Nation v. Enbridge Pipelines Inc.*, 2015 FCA 222 (CanLII),

<http://canlii.ca/t/qlzcl>.

⁹ <http://www.scc-csc.ca/case-dossier/info/dock-regi-eng.aspx?cas=36776>

¹⁰ <http://www.scc-csc.ca/case-dossier/info/dock-regi-eng.aspx?cas=36692>

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