RECONCILIATION: THE PUBLIC INTEREST AND A FAIR DEAL

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INTRODUCTION

From time to time a decision appears that may have a major impact on the regulation of energy utilities in Canada. The recent decision of the Alberta Court of Appeal in *AltaLink Management*[1] may be an example. There were two issues in the decision. The first is whether the Alberta Utilities Commission correctly applied the "no harm" test in approving the sale of transmission facilities by AltaLink to two aboriginal groups. The second and the most important issue concerned constitutional issues that involved five questions:

- Does the honour of the Crown principle apply to the decision-making authority of the Commission?
- If so, what is the impact of the honour-of-the-Crown principle on its decision-making authority?
- What are the legal benchmarks of "reconciliation"?
- Does the reconciliation concept apply to the decision-making authority of the Commission?
- If so, what is the impact of the reconciliation concept on its decision-making authority?

BACKGROUND

AltaLink owns and operates the largest transmission system in Alberta. In 2007 the company applied for permission to construct and operate a new transmission line that became necessary because of the growth in wind generation in the province. AltaLink considered three different routes. In the end the company chose the one that crossed the reserve lands of two aboriginal groups — the Piikani Nation and the Blood Tribe. These were the lowest cost routes.

AltaLink next faced a dispute regarding land access with both tribes. That was resolved when AltaLink granted the tribes an option to acquire an ownership interest in the transmission lines. The tribes subsequently exercised their options and AltaLink then applied the Alberta Utilities Commission to approve the sale and transfer of the assets.

The Commission Decision

The Commission approved the sale of the segments of the transmission line that were located on the reserves to the limited partnerships controlled by the Piikani Nation and the Blood Tribe. But there was a condition. The Commission ruled that the new limited partnerships could not recover new audit and hearing costs from ratepayers.

As is common in these cases the Commission applied what is known as the "no harm" test. As is also common the Commission focused on whether the transaction would increase rates or reduce reliability. There was no concern about reliability because under the agreement AltaLink would continue to manage and operate the transmission line.

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[1] *AltaLink Management Ltd v Alberta (Utilities Commission)*, 2021 ABCA 342.

However, the rate impact was a problem. The Commission found that there would be an increase in cost to ratepayers because of additional fees and hearing costs. The Commission rejected any offsetting benefits on the grounds that the no harm test is a forward-looking exercise and that any benefits arising from the partnerships were too speculative.

The Court of Appeal Decision

AltaLink then appealed the Commission decision to the Alberta Court of Appeal. The company argued that the Commission incorrectly applied the no harm test and had failed to properly apply principles relating to the honour of the Crown and reconciliation.

The majority agreed that the Commission erred in considering only forward-looking benefits when applying the no harm test indicating that there is no legislative basis for a strict forward-looking approach. The Commission stated at paragraph 55:

> [55] The Commission misfired when it characterized the cost savings solely from the initial construction phase as irrelevant. The manner in which this project was built necessarily involved a real prospect of forward-looking savings. There were predictable lower maintenance costs for this shorter and more accessible route. Moreover, the integration of the First Nations' corporations as operators linked to the larger grid also offered the prospect of further benefits over time as technology improves and the needs of the rate-paying population increase (as, for example, with electric vehicles) potentially involving increased requirements for operational capacity of the system. The benefit for the environment is also ongoing, and not frozen in the past. The Commission, in effect, rejected as speculative the suggestion that the comparatively modest incremental hearing and audit costs would be offset by these future benefits predictably linked to the how the lines were placed and constructed. Seen in this light, the fact that the placement and construction was in the past is not on its own a basis to disregard the predictable future benefits.

The majority further stated:

> [1] We allow this appeal and direct the Alberta Utilities Commission to allow two limited partnerships ultimately controlled by the Piikani Nation and the Blood Tribe to pass on audit and hearing costs they incur as utility owners to ratepayers. The Commission had ordered the appellants to absorb these costs. This is the first and only time that the Commission has issued such an order.
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> [2] The Commission determined that its approval of the electrical transmission asset transfer from AltaLink Management Ltd. to the limited partnership controlled by the Piikani Nation and the Blood Tribe would result in incremental costs to the ratepayers — the consumers of electricity. The transferees would each incur additional annual audit fees payable to external auditors and Commission hearing costs, estimated to be $60,000. The Commission refused to allow the transferees to pass these costs on to the ratepayers.
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> [11] The Commission committed a legal error by failing to take into account all relevant factors that determine whether a sale is in the public interest. Its decision to ignore the cost savings arising from the routing of the transmission lines across the reserves of the Piikani Nation and the Blood Tribe is an error of law.
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> [12] We vary the Commission's Decision 22612-D0l-2018 by ordering that the transferees be allowed to include the incremental audit and hearing costs in their respective tariff applications and recover them from ratepayers in the usual course.

THE CONCURRENCE

The majority did not address the constitutional questions. Instead they stated at paragraph 13:

> [13] Given our answer to the first question, we need not answer the other queries. Only one declaration

> of error is needed to strip the contested order of its legal effect.

What followed the majority decision was a 10 page concurrence by Justice Feehan. It began with the following statements:

> [81] I wholly concur with the decision of the majority. I agree with allowing the appeal and directing the Alberta Utilities Commission to supplement its decision 22612-D01-2018 by removing from its approval of the transfer of segments of the AltaLink southwest transmission line to KainaiLink LP and PiikaniLink LP the condition that those entities absorb the annual approximate $120,000 for audit and hearing costs.
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> [82] However, the focus of much of the written and oral argument before us was on the Commission's obligations respecting the principle of honour of the Crown and the imperative of reconciliation. All parties before us, including the Commission, asked this Court to clarify when the Commission has a duty to consider the honour of the Crown and reconciliation in its decisions.
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> [83] Specifically, the parties asked this Court to address the question of whether the Commission is obligated to consider the honour of the Crown and reconciliation when Indigenous collectives are involved as private partners in the energy transmission industry. Although this appeal can be resolved on the administrative law principles set out in the reasons for decision of the majority, it is important to address this question and clarify the Commission's duties to Indigenous peoples or their governance entities who appear before it.
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> [84] I conclude that the Commission, in exercising its statutory powers and responsibilities, must consider the honour of the Crown and reconciliation whenever the Commission engages with Indigenous collectives or their governance entities, and include in its decisions an analysis of the impact of such principles upon the orders made, when raised by the parties and relevant to the public interest.
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> [85] I hasten to add that the Crown, as represented by the Departments of Justice of Canada or Alberta, were not parties before this Court. This concurrence is not to be interpreted to say the Crown has failed in any way to act honourably in its dealings with the Blood Tribe or the Piikani Nation or their governance entities on this matter. There was no evidence of that before this Court on this appeal. This concurrence is meant to provide guidance and assist the Commission in exercising its statutory powers and responsibilities consistently with the honour of the Crown and the goal of reconciliation when raised by the parties and relevant to the public interest.

Justice Feehan notes in paragraph 95 that the Alberta Commission has the authority to consider questions of law including the honour of the Crown and reconciliation as relevant factors in determining the public interest. The Alberta Commission and all Canadian regulators our familiar with the concept of determining the public interest. It is a fundamental principle of public utility law in Canada and is involved in regulatory decisions approving every major construction project in the Canadian energy sector.

THE LEGAL BENCHMARKS OF RECONCILIATION

In Alberta section 17 of the *Alberta Utilities Commission Act*[2] is relevant to this issue:

> 17(1) Where the Commission conducts a hearing or other proceeding on an application to construct or operate a hydro development, power plant or transmission line under the *Hydro*

[2] SA 2007, c A-37.2.

> *and Electric Energy Act* or a gas utility pipeline under the *Gas Utilities Act*, it shall, in addition to any other matters it may or must consider in conducting the hearing or other proceeding, give consideration to whether construction or operation of the proposed hydro development, power plant, transmission line or gas utility pipeline **is in the public interest**, having regard to the social and economic effects of the development, plant, line or pipeline and the effects of the development, plant, line or pipeline on the environment.

Justice Feehan at paragraph 113 states that reconciliation is "'a work in progress' of rebuilding the relationship between indigenous people and the Crown following historical and continuing injustices by the Crown against indigenous people". He states further at paragraph 114 that "[w]hile reconciliation underlies the honour of the Crown in section 35 rights, it is a distinct concept that exist separately from the honour of the Crown and includes both legal and social dimensions".

The following statements in the concurrence deal precisely with the concept of reconciliation.

> [115] Reconciliation is a primary consideration where constitutionally protected interests are potentially at stake. The fundamental purpose of s 35 of the *Constitution Act, 1982* is to rebuild the relationship between the Crown and Indigenous peoples through reconciliation; legally, morally and socially. The fundamental objective of the modern law of Aboriginal and treaty rights is the reconciliation of Indigenous peoples and non-Indigenous peoples and their respective claims, interests, and ambitions: *Mikisew Cree*, paras 1, 63. Section 35 supports reconciliation of the assertion of Crown sovereignty over Canadian territory and prior occupation by distinctive Indigenous societies by "bridging Aboriginal and non-Aboriginal cultures": *R v Van der Feet*, [1996] 2 SCR 507, paras 42–45, 49–50, 137 DLR (4th) 289. The controlling question in all situations is what is required to effect reconciliation with respect to the interests at stake in an attempt to harmonize conflicting interests, and achieve balance and compromise: *Taku River*, para 2.
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> [116] The concept of reconciliation is illustrated in *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44, [2014] 2 SCR 257, para 23:
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> > What is at stake is nothing less than justice for the Aboriginal group and its descendants, and the reconciliation between the group and broader society It is in the broader public interest that land claims and rights issues be resolved in a way that reflects the substance of the matter. Only thus can the project of reconciliation this Court spoke of in *Delganuukw* be achieved.
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> [118] Any consideration of public goals or public interest must "further the goal of reconciliation, having regard to both the Aboriginal interest and the broader public objective": *Tsilhqot'in Nation*, Page: 29 para 82. Reconciliation requires justification of any infringement on or denial of Aboriginal rights, paras 119. 125, 139, and meaningful consideration of the rights of Indigenous collectives as part of the public interest.

The most important paragraphs in Justice Feehan's concurrence may be at paragraphs 119 and 120 as follows:

> [119] As this Court said in *Fort McKay*, the direction to all authorized government entities to foster reconciliation particularly requires that they consider this constitutional principle whenever they consider the public interest, para 68, and requires the Crown to act honourably in promoting reconciliation, such as by "encouraging negotiation and just settlements" with Indigenous

peoples: *Mikisew Cree*, para 26; *Fort McKay*, para 81.

> [120] Aiming to achieve reconciliation is a continuing obligation, existing separately from honour of the Crown. An important aspect of reconciliation is the attempt to achieve balance and compromise, essential to the consideration of the public good. Reconciliation must be a consideration whenever the Crown or a government entity exercising delegated authority contemplates a decision that will impact the rights of Indigenous peoples.

The concept of reconciliation means that for all practical purposes a Canadian energy regulator in determining the public interest where aboriginal land interests are involved must make a determination if the economic settlement arrived at between the aboriginal interests and the utility is a fair agreement.

CONCLUSION: THE PUBLIC INTEREST AND A FAIR DEAL

Justice Feehan concludes his concurrence with the following two paragraphs:

> [125] The Commission is an authorized governmental entity empowered to decide questions of law and constitutional issues, and make decisions that are in the public interest. As a result, it has special obligations to consider the honour of the Crown and reconciliation whenever these are raised by the parties and relevant to determining the public interest, and to provide in its decisions an analysis of the impact of such principles upon the orders made. Where one or more of the parties appearing before the Commission is an Indigenous collective which raises the honour of the Crown or reconciliation in its submissions, the Commission should consider whether those constitutional principles are applicable to its decision.
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> [126] The Commission must take all relevant factors into account in determining the public interest. In exercising its authority, it is required to consider the social and legal impact of its decisions on Indigenous peoples, including doing what is necessary to uphold the honour of the Crown and achieve reconciliation between the Crown and Indigenous peoples.

Canadian energy regulators have long understood that when they approve the construction of new energy projects they must make a determination that the project is in the public interest. That test is very broad. In some cases the legislation has been amended to add specific criteria such as a consideration of the environment.

Where energy projects are being built on aboriginal land and aboriginal parties are before them most regulators understand that they had a obligation to ensure that the Crown has undertaken meaningful consultation. The regulators also understand that the regulator may have the obligation to conduct that consultation.

The Concurrence adds a new requirement: the regulator must ensure that the agreement with respect to the land use is a fair deal. To cite the Concurrence the agreement between the utility and the aboriginals must display:

> "significant accommodation" (para 109), "constructive action" (para 114), "balance and compromise" (para 115), "justice for the aboriginal group" (para 116) and a "just settlement" (para 119)

What this also means is that aboriginal property rights as defined by the Concurrence are not different than those of all Canadians. Some will find that shocking. Others will say it is about time.

A third group will say this will help Canadian energy projects proceed in a timely fashion. It will remove a major obstacle and source of delay. Developers will understand that if they want to build on aboriginal land they will have to treat the aboriginal land interests just like any other Canadian property owner. ■