Cassels

Positive Economic Impacts for First Nations Are Relevant for Decision Makers

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The Alberta Court of Appeal released its decision in *AltaLink Management Ltd. v Alberta (Utilities Commission)*[1] on October 15, 2021. The majority held that positive economic impacts for First Nations are relevant factors to be considered by the utilities commission in evaluating the public interest. This decision follows a recent trend among decision makers to consider not only mitigation and accommodation measures on the negative impacts projects may have on Indigenous peoples, but also positive economic outcomes for Indigenous peoples, in considering regulatory approvals.

AUC: First Nation Participation Costs Not Eligible for Rate Recovery; Savings on Shorter Route not Considered

The Alberta Utilities Commission's (AUC) predecessor, the Alberta Energy and Utilities Board, approved an expansion of Alberta's electrical transmission system in May 2005. To meet this demand, AltaLink Limited Partnership (AltaLink) applied for permission to construct and operate a new 240 kV transmission line, running approximately 100km between Pincher Creek and Lethbridge. The project was approved in March 2009, and the line was constructed and operational by October 2010.

The shortest and lowest cost route crossed two reserves: Piikani Indian Reserve No. 147 and Blood Indian Reserve No. 148. As part of its negotiations with landowners, AltaLink entered into agreements with the First Nations to give them an option to acquire up to a 51% interest in the operation of the portions of the transmission line crossing their reserve land, and setting out the relationship between AltaLink and the First Nations with respect to the operation of the transmission line. These options were exercised in February 2014 and October 2012, respectively.

AltaLink, in its capacity as general partner of the 51% Indigenous-owned limited partnerships that would own and operate the transmission line (First Nation LPs), filed transfer applications with the AUC in 2017.

The AUC reviewed the application under subsection 17(1) of the *Alberta Utilities Commission Act*, which requires that the AUC consider whether the operation of the transmission line is in the public interest, and applied a "no-harm test" to weigh the positive and negative impact of AltaLink's transfer applications.[2] The AUC approved the applications in November 2018 but in doing so included a condition that the First Nation

LPs could not pass hearing and auditing costs on to ratepayers. The AUC found these were additional costs that would not exist but for the transfer of the assets, and they could not consider savings from routing the transmission line through the First Nations or intangible benefits arising from the partnership with the First Nations as offsetting the additional costs.

Court of Appeal: Savings from Reserve Routing Relevant to the "No-Harm Test"

The Alberta Court of Appeal granted leave to appeal, and the majority considered whether the AUC erred by failing to consider all relevant factors as part of the "no-harm test" when reviewing the application.

The Court held that the AUC erred by failing to consider the cost savings from the initial construction phase as relevant. AltaLink's partnership with First Nations allowed for a route with lower maintenance, increased operational capacity, and a reduced environmental impact – all of which would offset any hearing and audit costs. The Court also noted that the AUC has previously allowed applicants to recover the cost of fostering relationships with First Nations.

The majority decision went on to note that projects that increase the likelihood of economic activity on a reserve are in the public interest.[3] It reasoned that addressing the employment gap between Indigenous and non-Indigenous Canadians is a benefit to society, and cited two examples of energy companies partnering with Indigenous people for mutual gain.

Having concluded that the AUC erred by failing to consider a relevant factor in its application of the "no-harm test," the majority decision declined to answer whether the public interest included the honour of the Crown and the principle of reconciliation. In a concurring decision, Justice Feehan described the honour of the Crown as the guiding principle that Crown representatives must conduct themselves with honour when engaging with Indigenous peoples on behalf of the Crown. Justice Feehan noted that in contrast, reconciliation referred to the work in progress of rebuilding the relationship between Indigenous peoples and the Crown following injustices by the Crown against Indigenous peoples. Much of the submissions before the Court had focused on whether the AUC was obligated to consider these factors, which would subsequently require the AUC to also consider the First Nation LPs' involvement in reaching its decision.

Justice Feehan agreed with the rest of the Court's ruling but also addressed whether the AUC's assessment should be informed by the principle of the honour of the Crown and the imperative of reconciliation.[4] Justice Feehan held that statutory decision-makers with a broad public interest mandate must consider the honour of the Crown and reconciliation when engaging in decision-making that has the potential to impact Indigenous peoples.

Implications for Resource Development and Infrastructure Projects: Greater Consideration of Positive Economic Impacts for First Nations

The AltaLink decision suggests that decision makers with public interest mandates should consider benefits that go to Indigenous peoples and benefits that working with Indigenous peoples can foster, such as a more direct and economical route.

This decision provides proponents with additional incentive for benefits such as preferential contracting and employment opportunities, and equity positions for Indigenous peoples, which are becoming increasingly common in the resource and energy sectors.

The economic benefits going to a community may take different forms. In this instance, the Court found that increased economic activity on a reserve and involvement in the workforce for Indigenous people were public interest benefits. It would appear reasonable that financial participation, spending on Indigenous-owned businesses, and equity interests in projects would also contribute to the public interest.

This decision follows on other recent jurisprudence holding that the Crown should consider negotiated socio-economic project benefits for Indigenous communities in making a decision. In *Ermineskin Cree Nation v Canada (Environment and Climate Change)* the Federal Court found that the loss of negotiated economic benefits to a First Nation could trigger the Crown's duty to consult.[5]

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[1] 2021 ABCA 342 [*AltaLink*].

[2] *Alberta Utilities Commission Act*, SA 2007, c A-37.2, s 17(1).

[3] *AtlaLink*, *supra* note 1, at para 59.

[4] *AtlaLink*, *supra* note 1, at paras 81-83.

[5] 2021 FC 758, at paras 6-10.