

## Legal update

### Alberta Utilities Commission has no jurisdiction to rule on suitability of Crown consultation

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**October 2016**  
**Aboriginal**  
**Energy**  
**Litigation**

The Alberta Utilities Commission (AUC) has confirmed it does not have jurisdiction to rule on the suitability of Crown consultation with aboriginal groups in connection with applications to approve transmission projects.

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#### Background

A market participant sought approval to construct and operate a transmission line between Wabamun and Fort McMurray. This resulted in applications to the AUC under the *Hydro and Electric Energy Act* and the *Electric Utilities Act*. Certain aboriginal groups intervened, raising an issue as to whether the AUC must assess whether the Crown had discharged its duty to consult about potential adverse impacts on treaty and aboriginal rights.

#### Legal framework

The AUC is a creature of statute. Its powers are limited to those expressly set out in its enabling legislation. Unlike superior courts, the AUC has no “inherent jurisdiction.”

In relation to transmission lines that are considered to be critical transmission infrastructure under the *Electric Utilities Act*, the AUC may consider evidence on various matters, including potential impacts on the environment and the interests of interveners. As stated by the AUC: “The onus is on the applicant to demonstrate that it has met the Commission’s requirements, that potential impacts are avoided or mitigated, and that the proposed route is in the public interest ...”.

The Crown’s duty to consult arises in an entirely different legal framework. The Supreme Court of Canada has stated that the Crown’s duty arises “when the Crown has knowledge, real or constructive, of the potential existence of the Aboriginal right or title and contemplates conduct that might adversely affect it.” The test has three elements: (i) the Crown’s actual or constructive knowledge of a potential aboriginal claim or right; (ii) the contemplated Crown conduct; and (iii) the potential that the conduct may adversely affect the aboriginal claim or right.

#### Issue before the AUC

The AUC noted that while it has power to hear questions of constitutional law, it has no express power to determine the adequacy of Crown consultation. Thus, the issue was whether the AUC may determine, as a question of constitutional law, whether the Crown has discharged its duty to consult “with holders of relevant Aboriginal interests.”

## AUC ruling

The AUC ruled that:

- *Assessing Crown consultation at a preliminary stage 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.”
- *The issuance of a permit and licence by the AUC is not Crown conduct sufficient to trigger the Crown duty to consult.* The AUC operates as part of the executive branch of government, under the mandate of the legislature. This is not Crown conduct. Further, the hearing process “is designed to allow parties to bring forward evidence that will assist the Commission to make decisions on the potential impacts of routing and siting of the project and whether such potential impacts may be avoided or mitigated.”

The AUC concluded that it has “no explicit or implicit duty to assess the Crown duty to consult before making determinations on the applications ... where the Crown is not a participant or an applicant ... and no Crown decision is before the Commission.”

## Significance of AUC ruling

The AUC ruling clarifies the scope of its statutory jurisdiction. While there may be questions relevant to both the sufficiency of Crown consultation and whether a proposed project is in the public interest, the AUC has signalled that it intends to limit its review to the latter.

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