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ALBERTA UTILITIES COMMISSION

***Airport City East Ltd. Airport City Solar Project,
AUC Decision 27885-D01-2024***
Facilities – Duty to Consult

Application

Airport City Solar East Ltd. (“ACSE”) requested approval to construct and operate the 112-megawatt (“MW”) Airport City Solar power plant (the “Project”) bordering the Edmonton International Airport (“EIA”), near Leduc, Alberta. ACSE also applied to connect the Project to the FortisAlberta Inc. electric distribution system.

The application triggered two constitutional issues. The first issue was the Crown’s duty to consult. Second, because the Project will be located on Crown land, ACSE questioned the applicability to the Project of certain provincial legislation, such as the *Water Act*, *Environmental Protection and Enhancement Act*, the *Weed Control Act*, and the *Wildlife Act*.

Decision

The AUC approved the application from ACSE. The AUC determined that ACSE met its duty to consult with the Lac Ste. Anne Métis Community Association (“LSAMCA”).

Further, the AUC decided that ACSE did not meet its burden to establish the inapplicability of any provincial legislation.

Pertinent Issues

Applicability of Specific Provincial Laws

ACSE submitted that provincial environmental laws do not apply to the Project because: (i) it is located on federal Crown land, (ii) it is closely integrated with the aviation and aeronautics federal undertaking of the EIA, (iii) it is subject to federal environmental requirements, and (iv) the Edmonton Regional Airport Authority (“ERAA”) has exercised its statutory jurisdiction and determined that the Project will not cause any significant environmental impacts.

ACSE raised two constitutional grounds in support of its position that provincial environmental laws do not apply in these circumstances: the doctrine of interjurisdictional immunity and federal paramountcy.

Interjurisdictional Immunity

Interjurisdictional immunity applies when the impugned provisions trench on the core of an exclusive head of power under the *Constitution Act, 1867*, and the effect of this overlap impairs the exercise of the core of that head of power. The AUC held that the environment is not a matter that is exclusive to either the federal or provincial level of government. Rather, the environment touches several heads of power assigned the respective levels of government. The Supreme Court of Canada recently confirmed that both levels of government can pass laws dealing with those aspects of environmental protection that fall within their constitutional authority.



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The AUC found ACSE did not demonstrate that the provincial environmental laws impair the core of federal jurisdiction over federal Crown land and the federal undertakings of aviation and aeronautics.

Paramountcy

The doctrine of paramountcy provides that, when a validly enacted federal law conflicts with a validly enacted provincial law, the provincial law is rendered inoperative to the extent of the conflict. Conflict may arise where: (i) there is an operational conflict because it is impossible to comply with both laws; or (ii) although it is possible to comply with both laws, the operation of the provincial law frustrates the purpose of the federal enactment.

The AUC found that mere duplication is not sufficient to trigger the doctrine of paramountcy, particularly when both laws can be complied with. Both levels of government can pass laws dealing with those aspects of environmental protection that fall within their constitutional authority and the mere existence of federal notice of determination regarding the Project does not create a conflict with provincial laws. Accordingly, the AUC found that ACSE failed to demonstrate any conflict that would cause the otherwise valid provincial laws to not apply.

The AUC found that the Project was subject to provincial environmental laws, regulations and standards and premised its approval of the Project on the understanding that ACSE will comply with these laws, regulations and standards.

Duty to Consult

The AUC determined that the duty to consult was triggered by this application and that consultation was owed particularly to the LSAMCA. The duty to consult always rests with the Crown, which may delegate certain procedural aspects of consultation. The duty to consult arises when the Crown has knowledge of the potential existence of an Aboriginal right, title or interest, and contemplates Crown conduct that might adversely affect it.

The AUC is not the Crown or its agent, and it has not been delegated the Crown's duty to consult. However, an application before the AUC may trigger the duty to consult if the AUC's decision could adversely affect a recognized or asserted right. Where the duty to consult is so triggered, the Crown may rely on the AUC's process to assess and fulfil

that duty by addressing potential impacts on Aboriginal rights.

The AUC stated that it applied its hearing process to understand the concerns raised by LSAMCA. Based on the information available, and given the conditions imposed on ACSE in this approval, the AUC determined that the Project would have a low, if any, impact on LSAMCA. The AUC concluded that consultation with LSAMCA was adequate and that the potential impact on Métis harvesting and traditional land use arising from the Project is low.

Environmental Effects

Issues arose regarding the Project's layout as it infringed on permanent watercourses to an unacceptable degree. The Project area is mostly agricultural land and the environmental impact assessment submitted by ACSE indicated that one of the watercourses in the Project area is Deer Creek. While ACSE originally committed to a 10-meter setback from watercourses, it stated that the closest distance of a solar panel to the centreline of a small permanent watercourse would be 2.6 meters. ACSE stated that the Project's commercial viability would be impacted should the AUC enforce the watercourse setbacks contained in the *Wildlife Directive for Alberta Solar Energy Projects*. The AUC reiterated that ACSE is subject to provincial regulatory standards, including those regarding Project siting. Even if provincial standards did not apply to ACSE, the AUC would still need to be satisfied that the Project is in the public interest having regard to its environmental effects, including effects on wildlife habitat.

The AUC determined that approving the proposed layout could compromise the integrity of the watercourses and wildlife habitat within the Project area. Accordingly, the Project was approved on the condition that ACSE applies a setback with a minimum of 30 meters from the top of the break of small permanent watercourses or to the adjacent riparian zone, whichever is greater.

The AUC observed that this Project is unique in its risk to birds given its proximity to EIA, which is a major international airport. EIA has a full-time bird deterrent program in place that includes the Project area. As a result, and because of further mitigation proposed by ACSE, the AUC accepted that the bird mortality risk from the Project is low. The AUC noted its expectation that the EIA and ACSE will work together to make sure that the EIA's existing bird



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monitoring and deterrent program encompasses the Project and remains in place for the life of the Project.

The AUC determined that the application and the Project comply with all other rules and regulations, including *Rule 007: Applications for Power Plants, Substations, Transmission Lines, Industrial System Designations, Hydro Developments and Gas Utility Pipelines* ("Rule 007"), *Rule 012: Noise Control* ("Rule 012"), *Rule 033: Post-approval Monitoring Requirements for Wind and Solar Power Plants* ("Rule 033") and the *Hydro and Electric Energy Act* ("HEEA").

The AUC determined that approval of the Project was in the public interest, subject to specific conditions to ensure that the requirements of the applicable rules and regulations are met and that ACSE provides a Project update to show compliance with imposed conditions.