Federal Court of Appeal | Cour d'appel fédérale

Date: 20170926

Docket: A-214-16

Citation: 2017 FCA 199

CORAM: **DAWSON J.A.**
WEBB J.A.
RENNIE J.A.

BETWEEN:

COLDWATER INDIAN BAND and CHIEF LEE SPAHAN in his capacity as Chief of the Coldwater Band on behalf of all members of the Coldwater Band

Appellants

and

THE MINISTER OF INDIAN AFFAIRS AND NORTHERN DEVELOPMENT and KINDER MORGAN CANADA INC.

Respondents

Heard at Vancouver, British Columbia, on June 20, 2017.

Judgment delivered at Ottawa, Ontario, on September 26, 2017.

REASONS FOR JUDGMENT BY:	DAWSON J.A.
CONCURRED IN BY:	RENNIE J.A.
DISSENTING REASONS BY:	WEBB J.A.

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REASONS FOR JUDGMENT

DAWSON J.A.

[1] A pipeline right-of-way easement was granted for the Trans Mountain Pipeline in 1955. The easement indenture allowed the Trans Mountain Oil Pipe Line Company to construct,

operate and maintain a pipeline through portions of ten Indian reserves located in British Columbia, including the Coldwater Indian Reserve No. 1.

[2] Of relevance to this appeal is clause 2 of the easement indenture, which prevents Trans Mountain from assigning the rights granted to it under the easement without the written consent of the responsible Minister.

[3] On December 19, 2014, the Minister of Indian Affairs and Northern Development (Minister) consented to the assignment of the easement indenture from one affiliate of Kinder Morgan Canada Inc. to another affiliate. The Minister granted his consent notwithstanding that the Coldwater Band Council had previously advised him that it had "determined that it is not in the interests" of the Coldwater Indian Band (Coldwater) for the Minister to consent to the assignment of the easement indenture (underlining in original).

[4] Coldwater's application for judicial review of the Minister's decision to consent to the assignment of the easement indenture was dismissed by the Federal Court (2016 FC 595).

[5] On this appeal from the judgment of the Federal Court, Coldwater argues that the Federal Court erred in determining the appropriate standard of review to be applied to the Minister's decision and further erred by concluding that the Minister acted in accordance with the fiduciary duty he owed to Coldwater when the Minister consented to the assignment of the easement indenture.

[6] Before considering the asserted errors, I will briefly review the relevant facts and the material aspects of the decision of the Federal Court.

I. Facts

[7] The appellant Coldwater is an Indian Band as defined in the *Indian Act*, R.S.C. 1985, c. I-5 (Act). The respondent Minister is the minister responsible for the administration of the Act. At the time the consent at issue was granted, the Minister was the Honourable Bernard Valcourt.

[8] Kinder Morgan operates a number of pipeline systems and terminal facilities in Canada, including the Trans Mountain Pipeline. The Trans Mountain Pipeline carries oil from Sherwood Park, Alberta to Burnaby, British Columbia. The pipeline currently traverses 14 Indian reserves held for the benefit of 18 First Nations.

[9] Trans Mountain was incorporated in 1951 by a Special Act of Parliament in order to construct an oil pipeline running from Alberta through parts of British Columbia. In January of 1952, a request was made on behalf of Trans Mountain for 60-foot right-of-way easements across a number of Indian reserves. This request was approved by the Minister then responsible for the administration of the *Indian Act*, R.S.C. 1952, c. 149 (1952 Act).

[10] Trans Mountain offered compensation to Coldwater and the other Bands whose reserves were traversed by the pipeline in the amount of one dollar per lineal rod of land crossed by the right-of-way. One dollar per lineal rod of right-of-way was the amount paid along the entire

length of the right-of-way for easements on lands located both inside and outside of Indian reserves.

[11] The Coldwater Band Council agreed to both the proposed right-of-way and the proposed compensation, as evidenced by a Band Council Resolution dated April 22, 1952.

[12] Thereafter, the Governor in Council authorized the granting of the right-of-way easement on March 19, 1953, by way of an order in council. The order in council authorized the right-of-way pursuant to section 35 of the 1952 Act for "pipe line purposes for so long as the same are required for that purpose, upon such terms, conditions, and provisions" as the responsible Minister might deem necessary and advisable.

[13] On May 4, 1955, the Minister granted the right-of-way through the affected reserves by way of the indenture.

[14] As consideration for the easement over its lands, Coldwater received the sum of $1,292.00 ($1.00 for each lineal rod) plus compensation for its damages and loss of timber in the amount of $1,125.09.

[15] Between 2002 and 2007, Trans Mountain underwent a series of corporate mergers and acquisitions. These changes left the Trans Mountain Pipeline under the management and control of Kinder Morgan. Both the National Energy Board and the Governor in Council approved the

transfer of the pipeline assets, including the indenture, and the required certificates of public convenience and necessity were issued to allow Kinder Morgan to operate the pipeline.

[16] Notwithstanding the requirement that the Minister approve any assignment of the indenture, it was not until June 12, 2012, that Kinder Morgan wrote seeking ministerial consent. The appellants were informed of this request on July 16, 2012.

[17] Subsequently, the appellants corresponded with the Minister on a number of occasions about the requested consent. In a letter sent to Coldwater and all of the other affected First Nations, a representative of the Department of Indian Affairs and Northern Development (Department) advised that the Minister would "consider facts and information from the time frame of 2007 through to the present" relating to "the legal capacity of the companies making the assignment and, in respect of the companies receiving the assignments, the legal capacity, corporate track record, operational track record, financial capacity and the overall capability to fulfill the terms of the easement".

[18] Thereafter, in 2013, Kinder Morgan applied to the National Energy Board for a certificate of public convenience and necessity in order to enlarge the pipeline so as to roughly triple its capacity. The proposed expansion contemplates twinning the pipeline; the existing line would carry refined petroleum products, synthetic crude oils and light crude oils, while the proposed new line would carry heavier oils.

[19] The appellants expressed their concern to the Minister about the proposed expansion of the pipeline. They also expressed their desire that the Minister take the opportunity afforded by the request for consent to the assignment to modernize the terms of the indenture so as to include more generous compensation for the Band, and modernize the indenture's terms on such things as current environmental practices and enhanced rights for the Band.

[20] On February 20, 2013, Coldwater wrote to the Department advising that the Band had determined that it was not in the interests of the Band for the Minister to consent to the assignment. This conclusion was said to be based on a number of factors, including the proposed pipeline expansion and the safety and integrity of oil transmission through the Reserve. The letter concluded by instructing the Minister to refuse his consent to the assignment of the indenture.

[21] In December 2013, the Department and the Tk'emlúps te Secwépemc First Nation invited all of the Bands with reserve lands located along the pipeline to participate in an indenture modernization process. Participation was voluntary. In the working group discussions held early in the process it was agreed that work would be based on the principle that no new rights would be created and no existing rights would be diminished in the modernization process. A steering committee was created to help move the process along. It was also agreed that a technical working group would draft an "umbrella" indenture agreement that could later be modified to accommodate First Nations' specific interests.

[22] Coldwater initially participated in the indenture modernization process, but withdrew in May 2014, because it felt that the Minister refused to modernize the indenture by including most of the provisions that it proposed. In fact, however, it appears it was the steering committee, not the Minister alone, that determined the content of the proposed modernized indenture.

[23] By letter dated July 15, 2014, signed jointly by a representative of the Department and the Chief of the Tk'emlúps te Secwépemc First Nation, Coldwater was advised that the steering and technical committees had completed their work, and that on June 11, 2014, the steering committee had approved a "modification template", a copy of which was attached.

[24] The modification template contained a number of new terms, including terms requiring the indenture holder to do such things as patrol and inspect the right-of-way, maintain the pipeline, prepare a spill response plan, comply with environmental protection measures and take all necessary mitigative and remedial action in the event of any spill, release or migration of a contaminant.

[25] The July 15, 2014 letter went on to state that:

> The modifications contained in the template document will enhance the existing easement instruments by better delineating the roles and responsibilities of the parties under the easement indentures. In addition, specific provisions about environmental matters and heritage resources are incorporated. Implementation of the modifications to easement indentures within a First Nation's reserve will be an option for each First Nation. If a First Nation does not wish to implement the modification on their reserves the existing easement indenture will remain in full force and effect and will be unmodified.

[26] The letter concluded by advising that "the use and implementation of the modification template is a separate issue from the Minister's decision regarding Trans Mountain's request for consent to assignment of the easement indentures. The Minister's decision on this matter may be made prior to modifying the current easement indentures." As will be explained later, it is alleged that the failure of the Minister to consider issues arising from the modernization process was one element of the breach of fiduciary duty.

[27] On October 1, 2014, direct negotiations between the appellants and Kinder Morgan resulted in a Protocol and Capacity Agreement to establish a process, including capacity funding, for addressing legacy and operational issues and to set out the engagement process for the proposed expansion of the pipeline. The respondent Minister was not involved in these negotiations, nor was he aware of them.

[28] On December 19, 2014, the Minister consented to the assignment by way of an assignment consent agreement, registered in the Indian Land Registry. No conditions were attached to the Minister's consent. The terms of the easement indenture were unchanged.

[29] Coldwater was informed of this decision by letter dated December 29, 2014. This letter advised Coldwater that the Minister had considered "the grantee credit record, grantee environmental record, grantee contract record, grantee eligibility, valid grantor, adequate description, appropriate circumstances and proper documentation for the assignment of the Trans Mountain Pipeline." The letter went on to advise that Kinder Morgan "was able to demonstrate

to the Minister they have the legal capacity, corporate track record, operational track record, financial capacity and the overall capability to fulfill the terms of the easement."

[30] As of March 2015, one First Nation had agreed with the Minister and Kinder Morgan on a final form of a modified indenture based on the indenture modification template. However, the changes had not been implemented at the time the appellants filed their application in the Federal Court.

[31] Clause 1 of the existing easement indenture obliges the easement grantee to pay all charges, taxes, rates and assessments charged on lands encumbered by the easement. The Coldwater Band Council levies and collects an annual property tax on Kinder Morgan's 60-foot right-of-way (considered to be land) and on the pipeline itself (considered to be a building). Since 2010, Kinder Morgan has paid the following property taxes to Coldwater:

$77,958.88 in 2010

$83,748.73 in 2011

$87,427.64 in 2012

$107,843.86 in 2013

$124,911.51 in 2014

II. Decision of the Federal Court

[32] The Federal Court began its analysis by considering the standard of review to be applied to the Minister's decision. The Federal Court concluded that the "existence and content of a

fiduciary duty are questions of law, reviewable on the standard of correctness" while the "discharge of such duty by the Crown is reviewable on the standard of reasonableness" (reasons, paragraphs 177, 178).

[33] Before the Federal Court all of the parties acknowledged, and the Court agreed, that the Minister owed a fiduciary duty to the appellants when deciding whether to consent to the assignment of the easement indenture (reasons, paragraphs 181, 183). What was at issue was the scope of the duty and its proper discharge.

[34] In *Osoyoos Indian Band v. Oliver (Town)*, 2001 SCC 85, [2001] 3 S.C.R. 746, the Supreme Court articulated a two-step process to be applied when a taking or use of reserve lands or an interest in reserve lands is contemplated under section 35 of the Act. At the first step of the process the question to be answered is whether it is in the public interest that the taking or use be authorized. If that question is answered in the affirmative, the next step requires the Crown to ensure that the taking or use minimally impairs a Band's right to use and enjoy its reserve lands. The Federal Court accepted the respondents' submission that the approach used in an expropriation under section 35 of the Act should also apply to consideration of the assignment of an interest that arose from such an expropriation (reasons, paragraph 191).

[35] With respect to the application of the two-step process, the Federal Court found no evidence in the record that any challenge was made in respect of the original taking. In the absence of evidence to the contrary, the Court found that the initial taking of the easement for the pipeline right-of-way was in the public interest. Insofar as the assignment of the easement

indenture was for the purpose of facilitating the operation of the pipeline, the Court was satisfied that the consent to the assignment was a continuation of the initial recognition of the public interest (reasons, paragraphs 199, 203). Therefore, the first part of the two-step process was met.

[36] Turning to the second step, the Federal Court found that the Minister's consent to the assignment minimally impaired Coldwater's use and enjoyment of its land (reasons, paragraph 206). The Court also found that the Minister discharged the fiduciary duty he owed to the appellants. The assignment of the indenture did not increase the impairment of Coldwater's use of their land, the Minister reasonably concluded that Kinder Morgan was able to fulfil the terms of the original indenture, and the Minister engaged with Coldwater on many occasions during the process that followed from the original request for the consent to the assignment and the indenture modernization process so as to be aware of Coldwater's concerns before making his decision (reasons, paragraphs 207-209).

[37] The Federal Court rejected Coldwater's submission that the Minister was obliged to renegotiate the terms of the indenture, including the term that related to compensation (reasons, paragraph 216). Rather, the Minister's fiduciary duty required him to ensure minimal impairment of Coldwater's interest in its reserve. The discharge of that duty did not require the Minister to reopen the indenture to alter its terms for the purpose of increasing the compensation paid to Coldwater. Thus, the Minister's decision to consent to the assignment without imposing conditions on Kinder Morgan was reasonable.

[38] Finally, the Federal Court rejected the submission that the Minister should have considered the proposed pipeline expansion when making his decision. The proposed pipeline expansion is the subject of other administrative proceedings, and Kinder Morgan has advised that the proposed expansion will not take place on Coldwater's lands without its consent (reasons, paragraphs 218-221).

[39] It followed that the application for judicial review should be dismissed.

III. The Issues

[40] In my view, the issues to be decided on this appeal are:

1. What is the standard of review to be applied to the decision of the Federal Court?
2. What is the standard of review to be applied to the Minister's decision?
3. What is the content of the fiduciary duty owed by the Minister when considering whether to consent to the assignment?
4. Did the Minister reasonably discharge his fiduciary obligation?

IV. Consideration of the Issues

1. The standard of review to be applied to the decision of the Federal Court

[41] The parties agree that on an appeal from an application for judicial review in the Federal Court, this Court's role is to determine whether the Federal Court selected the correct standard of review and applied it correctly. In practice, this requires the reviewing court to step into the shoes of the lower court; the focus of this Court is on the administrative decision (*Agraira v.*

Canada (Public Safety and Emergency Preparedness), 2013 SCC 36, [2013] 2 S.C.R. 559, at paragraphs 45 and 46).

2. The standard of review to be applied to the Minister's decision

[42] As explained above, the Federal Court found that: (i) the existence of a fiduciary duty and the content of the duty are questions of law, reviewable on the standard of correctness; and, (ii) the discharge of the fiduciary duty by the Minister is reviewable on the standard of reasonableness (reasons, paragraphs 177, 178).

[43] The appellants agree that the scope of the duty owed is a question of law reviewable on the standard of correctness. However, they argue that the discharge of the fiduciary duty is reviewable on the standard of correctness because the question "is one of the jurisdiction of the Minister to act how he did in consenting to the assignment". They submit that the Federal Court erred by importing the standard of review from the duty to consult context. This is said to be in error because the exercise of the fiduciary duty is distinct from the duty to consult, "with the fiduciary obligation being the more onerous of the two" duties.

[44] In my view, the Federal Court did not err by concluding that the discharge of the fiduciary duty was to be reviewed on the standard of reasonableness. Assuming, without deciding, that true questions of jurisdiction exist, no question of jurisdiction is raised in the present case. This is so because, without doubt, the Minister had jurisdiction to consent or withhold his consent to the assignment.

[45] The more deferential reasonableness standard is usually applied when an administrative decision-maker is interpreting its home statute, or a statute closely connected to its function, unless the question falls into the category of questions to which the correctness standard continues to apply (*Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61, [2011] 3 S.C.R. 654, at paragraph 34; *Edmonton (City) v. Edmonton East (Capilano) Shopping Centres Ltd.*, 2016 SCC 47, [2016] 2 S.C.R. 293, at paragraphs 22-24).

[46] In the present case, the Minister was required to exercise his discretion to decide whether to consent to the assignment of a right originally granted under section 35 of the Act. The exercise of discretion was in largest measure fact dependent. The exercise of discretion did not raise a constitutional question, a question of the jurisdictional boundaries between competing specialized tribunals, a question of importance to the legal system as a whole, or a true question of jurisdiction. It was, therefore, a question to be reviewed on the reasonableness standard.

[47] Before leaving the issue of the standard of review, it is important to observe that Coldwater, as a beneficiary of a fiduciary duty, cannot be deprived of that benefit because the fiduciary is a decision-maker whose decisions are to be reviewed under the principles articulated in *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190. Thus, the fiduciary obligations imposed on the Minister serve to constrain the Minister's discretion, narrowing the range of reasonable outcomes.

3. The content of the fiduciary duty owed by the Minister when considering whether to consent to the assignment

[48] In the Federal Court, and in this Court, both the Minister and Kinder Morgan acknowledge that the Minister owed a fiduciary duty to the appellants when considering whether to consent to the assignment of the indenture.

[49] I acknowledge that not all obligations that exist between the parties to a fiduciary relationship are themselves fiduciary in nature. In every case it is necessary to focus on the relevant Crown obligation and determine whether the Crown assumed discretionary control over that obligation sufficient to ground a fiduciary obligation (*Wewaykum Indian Band v. Canada*, 2002 SCC 79, [2002] 4 S.C.R. 245, at paragraph 83). In the present case, Coldwater had a cognizable interest in its reserve lands. By requiring that the Minister consent to any assignment of the easement right, the Crown undertook discretionary control over any assignment in a way that invoked a fiduciary obligation on its part.

[50] The next task is to ascertain the content or scope of the fiduciary duty owed in respect of the assignment of the easement right. For the Federal Court, this question was answered by the Supreme Court in *Osoyoos*, which was to be applied by way of analogy because the ministerial action under review was not an expropriation, but rather a consent to an assignment of a right created as a result of the original taking of the easement right under section 35 of the Act (reasons, paragraph 192). The Federal Court then went on to find that the consent "was a continuation of the initial recognition of the public interest" (reasons, paragraph 203) and that the consent minimally impaired Coldwater's use and enjoyment of its land (reasons, paragraph 206).

[51] In the present case, because the assignment was an assignment of an existing right – there was no new taking or use to ground application of the principles articulated in *Osoyoos* – I prefer to begin my analysis from the fundamental principle that the content of the Crown's fiduciary duty towards Aboriginal people varies with the nature and importance of the interest at issue (*Wewaykum*, paragraph 86). Here, what was at issue was Coldwater's use and enjoyment of its land. This is an issue of central importance.

[52] Unlike the situation in *Wewaykum*, the Crown was interposed between Coldwater and Kinder Morgan with respect to the Band's interest in the use and enjoyment of its land. The Crown's mandate was the exercise of its discretion to consent, or not, to an assignment of the existing easement right. In this circumstance, particularly in light of the importance of Coldwater's interest in its reserve lands, the Crown was under a continuing duty to preserve and protect the Band's interest in the reserve land from an exploitive or improvident bargain (*Wewaykum*, paragraphs 98-100).

[53] This said, the Crown is no ordinary fiduciary. As the Supreme Court explained in *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 S.C.R. 511, at paragraph 18, the content of the fiduciary duty may vary to take into account the Crown's other, broader obligations. At the same time, the fiduciary duty still required the Crown to act with reference to Coldwater's best interest when deciding whether to consent to the assignment of the easement indenture.

[54] In the present case this required the Minister to have regard to both Coldwater's current and ongoing best interest as well as the interests of all affected parties in the continued operation of the pipeline. As counsel for the appellants acknowledged during oral argument, the Minister's exercise of discretion had to be exercised in a manner so as not to defeat the public interest in the continued operation of the pipeline.

[55] I find support for the view that the Minister was required to consider Coldwater's current and ongoing best interest in the decision of this Court in *Semiahmoo Indian Band v. Canada*, [1998] 1 F.C.R. 3, 148 D.L.R. (4th) 523 where the Court, in the context of a surrender of Indian land, found an ongoing obligation to provide relief when, after the fact of a surrender, the Crown ascertained that an excessive surrender had been granted.

[56] More particularly, in 1951 the Crown had negotiated an absolute surrender of part of an Indian reserve for the purpose of improving a customs facility adjacent to the reserve. By 1969, the land had not been used and the Federal Court found that the Crown knew, or ought to have known, that:

i. Public Works did not have any definite plans for development of the land in the foreseeable future, but was retaining the land for the sake of convenience;

ii. The Band wanted the land back for economic development; and,

iii. Private interests had approached Public Works to buy or lease a portion or portions of the surrendered land.

[57] This Court held that the Crown had a post-surrender fiduciary duty to advance, to the extent possible having regard to the terms of the surrender agreement, the best interest of the Band. Particularly, the Crown had a post-surrender fiduciary duty of reasonable diligence to correct any error in the original surrender agreement.

[58] Before I turn to the application of these principles to the present case, I reject the submission that jurisprudence decided in the context of section 37 of the Act, the surrender jurisprudence, has no relevance to section 35 of the Act. In the cases of both a taking by a local authority under section 35 of the Act and a surrender under section 37 of the Act, there is a loss or diminution of a Band's interest in its land. I see no reason in principle why the continuing obligation to act in a Band's best interest found to exist when land is surrendered would not apply equally where a Band's land is taken or used by a local authority.

[59] In the present context, application of the principles articulated in *Semiahmoo* would require the Minister to consider whether consenting to the assignment of the original easement on its original terms would be in Coldwater's continuing best interest, or whether it would continue what is now alleged to be an improvident arrangement or an excessive intrusion on the right of Coldwater to enjoy and use its reserve lands.

[60] As a fiduciary, the Minister is required to exercise his discretion in a manner consistent with his obligations of loyalty and good faith and to act in what he reasonably and with diligence regards as Coldwater's best interest while, at the same time, being mindful of the public interest in the pipeline's continued operation. Put another way, the Minister must act as a person of

ordinary prudence managing his own affairs while not defeating the public interest in the pipeline's continued operation by imposing conditions on his consent that are so onerous that they defeat the public purpose.

[61] While I have approached the issue of determining the content of the fiduciary duty from the first principles articulated by the Supreme Court in *Wewaykum*, the requirement that the Crown have regard to the public interest in the continued operation of the pipeline results in largely the same outcome as that reached when applying the second step of the process articulated in *Osoyoos*. The Minister must act so as to minimally impair a Band's right to use and enjoy its land.

[62] In the present context, minimal impairment must be understood as follows. The extent of the impairment of Coldwater's current and ongoing interest in its land must be assessed at the time the Minister exercises his discretion to grant, or withhold, consent. The extent of the impairment must be assessed with regard to the current and ongoing impact of the continuation of the original terms of the easement on Coldwater's right to use and enjoy its reserve lands.

4. The discharge of the fiduciary obligation

[63] Before I turn to consider the arguments Coldwater advances in this Court, it is appropriate, for completeness, to deal with two arguments that I understand Coldwater does not pursue, or no longer pursues, in this Court.

[64] First, Coldwater initially argued that the Minister was obliged to accept its direction that the Minister not consent to the assignment. I agree with the Federal Court that the Minister was not obliged to accept this direction (reasons, paragraph 196). This argument is inconsistent with the appellants' acknowledgement in this Court that the Minister was required to have regard to the interests of all affected parties in the continued operation of the pipeline. Thus, the Minister could not impose conditions on the granting of his consent that would be inconsistent with the public interest in the continued operation of the pipeline.

[65] Second, Coldwater originally argued that the Minister erred by failing to consider the impact of the proposed pipeline expansion. I agree with the Federal Court that this was an issue the Minister was not required to consider. As the Federal Court correctly noted, Kinder Morgan has advised Coldwater that the proposed expansion will not take place on its reserve without Coldwater's consent (reasons, paragraphs 218, 221). In this Court, counsel for the appellants agreed that it is simply speculative to suggest that the expansion would prolong the life of the pipeline.

[66] In this Court, Coldwater's argument is premised on its assertion that the terms of the easement indenture "are outdated, improvident, and ill-suited to current and future use of Coldwater's lands for oil transmission pipeline purposes for the indefinite future." It argues that the "Minister had the discretion and, it is submitted, duty to exercise a power in relation to that easement by requiring negotiations towards a renewed easement agreement as a condition of any consent to the assignment sought by Kinder Morgan. This is what any person of ordinary prudence would have done if they had that power in relation to their own land."

[67] The shortcomings said to exist in the existing indenture are the inadequacy of the small, one-time payment made as consideration for the easement, and the inadequacies of the remaining indenture terms as identified by Coldwater in the Indenture Modernization Process.

[68] In response, the respondents argue that the Minister engaged with the appellants in order to understand their interests, and that the assignment of the easement did not increase the impairment of Coldwater's interest in the use and enjoyment of its land.

[69] In oral argument, counsel for the Minister and Kinder Morgan argued that, properly construed, clause 2 of the indenture simply required the Minister to satisfy himself that the proposed assignee had the capacity to comply with its obligations under the indenture and that the Minister's fiduciary duty was coextensive with this requirement. To this, counsel for the Minister added that the fiduciary duty owed by the Minister was "in a way analogous" to this requirement. The fiduciary duty required the Minister to engage with Coldwater in order to understand its interests and concerns. Only when armed with that knowledge could the Minister be satisfied that consenting to the assignment would minimally impair Coldwater's interest in its lands. In the context of an expropriation, the requirement to act in the best interests of a Band means to minimally impair a Band's interest in its land.

[70] Counsel for the respondents also submitted, apparently in the alternative, that because the Minister knew that the adequacy of the consideration was of significant concern to Coldwater, we ought to infer from the outcome that the Minister directed his mind to the issue of

compensation and decided that it was unnecessary or inappropriate to seek additional compensation.

[71] In my view, these submissions lend themselves to the following analysis:

i. Did the Minister direct his attention to the adequacy of the consideration Coldwater received?

ii. Did clause 2 of the indenture limit the relevant factors to be considered to the capacity of the proposed assignee to comply with the indenture?

iii. Did the Minister reasonably conclude that consenting to the assignment would minimally impair Coldwater's interest in its reserve lands?

[72] Each item will be considered in turn.

(1) Did the Minister direct his attention to the adequacy of the consideration Coldwater received?

[73] As explained above, during oral argument counsel for the respondents submitted that the Minister had considered Coldwater's desire for increased compensation. We were asked to infer that the Minister decided it was unnecessary or inappropriate to seek additional compensation.

[74] In order to properly consider this submission it is necessary to consider the nature of an inference. Drawing an inference is a matter of logic. As stated by the Newfoundland Supreme Court (Court of Appeal) in *Osmond v. Newfoundland (Workers' Compensation Commission)*, 2001 NFCA 21, 200 Nfld. & P.E.I.R. 202, at paragraph 134:

> […] Drawing an inference amounts to a process of reasoning by which a factual conclusion is deduced as a logical consequence from other facts established by the evidence. Speculation on the other hand is merely a guess or conjecture; there is a gap in the reasoning process that is necessary, as a matter of logic, to get from one fact to the conclusion sought to be established. Speculation, unlike an inference, requires a leap of faith.

[75] The House of Lords in *Caswell v. Powell Duffryn Associated Collieries, Limited*, [1940] A.C. 152 described the difference between conjecture and an inference in these terms at pages 169-70:

> Inference must be carefully distinguished from conjecture or speculation. There can be no inference unless there are objective facts from which to infer the other facts which it is sought to establish. In some cases the other facts can be inferred with as much practical certainty as if they had been actually observed. In other cases the inference does not go beyond a reasonable probability. But if there are no positive proved facts from which the inference can be made, the method of inference fails and what is left is mere speculation or conjecture.
>
> [Emphasis added]

Thus, an inference cannot be drawn where the evidence is equivocal in the sense that it is equally consistent with other inferences or conclusions.

[76] In the present case, counsel acknowledged that there is nothing in the record that expressly demonstrates that the Minister considered the adequacy of the compensation paid to Coldwater. It is therefore necessary to examine the evidentiary record to see what inference, if any, it can support.

[77] I consider the following information from the record to be relevant.

[78] First, by letter dated November 14, 2012, from the Department, Coldwater was advised that the Department was gathering facts and information to assist the Minister in making his decision. The letter advised:

> The Minister will consider facts and information from the time frame of 2007 through to the present. The facts and information under consideration include the legal capacity of the companies making the assignment and, in respect of the companies receiving the assignments, the legal capacity, corporate track record, operational track record, financial capacity and the overall capability to fulfill the terms of the easement.

[79] Missing is any reference to the Minister considering facts and information about the amount of compensation and the appropriateness of the other terms of the indenture.

[80] Second, the recommendation from Departmental staff to the decision-maker recommending that the assignment be consented to advised that the request for consent to the assignment "was assessed to ensure Kinder Morgan Canada Inc. met reasonable business requirements, including fulfilling the indentures' obligations." By way of background, the recommendation went on to note that while the Department had no specific policy for indenture assignments under section 35 of the Act "it was determined further to internal consultation that certain criteria should be considered, including grantee credit, grantee environmental record, grantee contract record and grantee eligibility, valid grantor, adequate description, appropriate circumstances, and proper documentation."

[81] In setting out the considerations that led to the Department's favourable recommendation, the Department noted that it had determined internally that there was no duty to consult with First Nations prior to a decision regarding the assignments; however, in order to uphold the

honour of the Crown, the Department sought information from First Nations on whose lands the pipeline was located. After setting out that Kinder Morgan held a Certificate of Public Convenience and Necessity, it was noted that "Kinder Morgan Canada Inc. has the financial means and the expertise to operate the Trans Mountain Pipeline and continues to fulfill the obligations of the Indentures."

[82] Missing in the document forwarded to the decision-maker is any acknowledgement or advice about Coldwater's concerns about the adequacy of the consideration it received and the adequacy of the terms of the easement indenture.

[83] Finally, the December 29, 2014, letter that advised Coldwater of the Minister's decision stated that the Minister had consented to the assignment after considering the facts and information researched by the Department and provided by the First Nations, Kinder Morgan and the National Energy Board. The letter specified that the facts and information considered "pertained to the grantee credit record, grantee environmental record, grantee contract record, grantee eligibility, valid grantor, adequate description, appropriate circumstances and proper documentation for the assignment of the Trans Mountain Pipeline." The letter concluded that Kinder Morgan "was able to demonstrate to the Minister they have the legal capacity, corporate track record, operational track record, financial capacity and the overall capability to fulfill the terms of the easement."

[84] This letter expressly negates the suggestion that the Minister considered the adequacy of the compensation and the other terms of the easement indenture.

[85] The record before the Court does not support, on a balance of probabilities, the submission that the Minister considered Coldwater's concerns about compensation and the terms of the indenture agreement when deciding to consent to the assignment. In my view, the record before the Court demonstrates on a balance of probabilities that these factors were not considered by the Minister. He confined his consideration to the corporate capacity of the assignee to carry out the terms of the original easement indenture.

(2) Did clause 2 of the indenture limit the relevant factors to be considered to the capacity of the proposed assignee to comply with the indenture?

[86] I agree that the capacity of a proposed assignee to comply with the obligations imposed by the indenture is a relevant factor to be considered when determining whether to consent to the assignment. The question raised is whether this is the only relevant factor.

[87] The respondents did not support their submission that, properly construed, clause 2 of the indenture only required the Minister to satisfy himself that the proposed assignee had the capacity to comply with its obligations under the indenture by reference to the text, context or purpose of the easement indenture. I see nothing in the text, context or purpose of the indenture to support the submission.

[88] Significantly, the indenture contains no provision to the effect that the Minister's consent to the assignment is not to be unreasonably withheld. As counsel for Kinder Morgan agreed in oral argument, absent such an express limitation a broad discretion exists in the Minister as to whether to give, or to withhold, consent to the assignment (*Tredegar v. Harwood*, [1928]

All E.R. Rep. 11 (H.L.); *P. & G. Cleaners Ltd. v. Johnson*, [1995] 9 W.W.R. 487, 105 Man. R. (2d) 175 (Q.B.)).

[89] Further, construing the scope of the Minister's discretion as narrowly as the respondents propose is inconsistent with the scope of the fiduciary duty I have found to be imposed upon the Minister. The Minister is obliged to look to the best interest of Coldwater and to see that the use and enjoyment of its land are minimally impaired. This requires consideration of factors beyond the corporate capacity of the proposed assignee.

(3) Did the Minister reasonably conclude that consenting to the assignment would minimally impair Coldwater's interest in its reserve lands?

[90] As explained above, a beneficiary of a fiduciary duty cannot be deprived of that benefit because the fiduciary's decision is reviewed on the reasonableness standard. Rather, the fiduciary obligation serves to constrain the fiduciary's discretion, narrowing the range of reasonable outcomes.

[91] Also as explained above, the Minister was required to act as a person of ordinary prudence managing his own affairs, while not defeating the public interest in the pipeline's continued operation. In the present context, this required the Minister to ensure that consenting to the assignment would impair only minimally Coldwater's interest in the use and enjoyment of its land. In assessing the extent of the impairment the Minister was obliged to have regard to the current and ongoing impact of the continuation of the terms of the easement on Coldwater's right to use and enjoy its reserve lands.

[92] Thus, while there is no suggestion that the compensation initially received by Coldwater was improvident, the Minister was required to consider if his consent to the assignment would continue what is said to have become an improvident arrangement. This could entail consideration by the Minister of such things as the fact that by operation of clause 1 of the indenture, Coldwater now receives substantial income each year by virtue of levying and collecting tax on Kinder Morgan.

[93] Similarly, as a result of the Indenture Modernization Process, the Minister knew, or ought to have known, that the terms of the indenture were no longer responsive to current concerns, and that while Coldwater could choose to adopt the proposed modernized template, such template imposed no new obligations on Kinder Morgan. The Minister was therefore required to consider whether the protection available to Coldwater under the modernized template was adequate in order to protect the land, and thus minimally impair Coldwater's interest in the land.

[94] The record demonstrates that the Minister did not do this – he confined his consideration to the corporate capacity of the assignee to carry out the terms of the original easement indenture.

[95] The Minister's failure to assess the current and ongoing impact of the continuation of the easement on Coldwater's right to use and enjoy its lands rendered his decision unreasonable. The Federal Court erred in its application of the reasonableness standard when it concluded otherwise.

[96] It follows that I would set aside the Minister's decision and return the matter to the Minister for redetermination in accordance with these reasons.

V. Conclusion

[97] For these reasons, I would allow the appeal with costs here and in the Federal Court payable by each respondent to the appellants. Pronouncing the judgment that the Federal Court ought to have pronounced, I would set aside the decision of the Minister of Indian Affairs and Northern Development made on December 19, 2014 consenting to the assignment of the 1955 indenture granting an oil pipeline easement through Coldwater Indian Reserve No. 1. I would return the matter to the responsible Minister for redetermination in accordance with these reasons.

"Eleanor R. Dawson"
J.A.

"I agree.
Donald J. Rennie J.A."

WEBB J.A. (Dissenting Reasons)

[98] I agree that the Crown owed a fiduciary duty to Coldwater in relation to the issue of whether consent to the assignment of the easement should have been granted. I also agree that the impact that granting consent to the assignment of the easement would have on Coldwater's right to use and enjoy the lands is a relevant factor. However, in my view, it is important to focus on the particular impact that refusing consent or granting consent in this case would have on the right of Coldwater to use and enjoy its lands.

[99] The Minister, in this case, was not asked whether the pipeline should remain on the property in question. Rather the only question for the Minister was whether the rights of one corporate member of the Kinder Morgan group of companies in the easement should be assigned to another corporation in the same corporate group. In my view, the impact that refusing or consenting to this assignment would have on the use and enjoyment of the lands by Coldwater can be determined from the record.

[100] The pipeline that runs through the Coldwater Reserve is part of the pipeline that transports oil from Sherwood Park, Alberta to Burnaby, British Columbia, a distance of approximately 1,150 kilometres. The length of the pipeline running through the reserve is 1,292 lineal rods and, based on a rod being approximately 16.5 feet, this would mean that the length of the pipeline running through the reserve is approximately 6.5 kilometres or less than 1% of the total length of the pipeline.

[101] The easement in question is contained in an indenture dated May 4, 1955 between the Crown and Trans-Mountain Oil Pipe Line Company (the Grantee). Clause 2 of the indenture provides that:

> 2. …the Grantee shall not assign the right hereby granted without the written consent of the Minister.

[102] This clause does not require the consent of the Minister unless the Grantee is assigning the right granted under the indenture. As a result not all corporate transactions would require consent. For example, a sale of shares of the Grantee would not, in and of itself, result in the Grantee assigning the right granted under the indenture and, therefore, would not require the consent of the Minister.

[103] As a result of various corporate transactions the holder of the easement in 2005 was Terasen Pipelines (Trans Mountain) Inc. On December 1, 2005 the shares of Terasen Pipelines (Trans Mountain) Inc. were acquired by a company within the Kinder Morgan group of companies. Therefore, Kinder Morgan had control of the company that held the easement and there was no allegation that the consent of the Minister was required in relation to any of these transactions.

[104] In 2007, Kinder Morgan agreed to sell the shares of Terasen Inc. (the parent company of Terasen Pipelines (Trans Mountain) Inc.) to an arm's length purchaser. However, the pipeline was to remain with the Kinder Morgan group of companies. To achieve this result, the pipeline assets (including the easement) were, prior to the closing of the sale of shares of Terasen Inc., conveyed first to one company and then to another company within the Kinder Morgan group of

companies. Consequently, the easement, which had already been acquired by a company within the Kinder Morgan group of companies, would remain within the Kinder Morgan group of companies if the assignment of the easement is approved.

[105] The indenture in question provides that:

> NOW THEREFORE, this Indenture witnesseth that in consideration of the sum of three thousand, five hundred and fifty-four dollars, ($3,554.00) paid to the Minister by the Grantee, the receipt whereof is hereby acknowledged, the Minister grants, conveys, releases, assigns and confirms to the Grantee, its successors and assigns, the right to lay down, construct, operate, and maintain a pipe line on, over, under and/or through the said lands, being portions of the several Indian Reserves in the Province of British Columbia named in the said SCHEDULE.
>
> TO HAVE AND TO HOLD unto the Grantee, its successors and assigns, for such period as the said lands are required for the purpose of a pipe line right of way;
>
> (emphasis added)

[106] The easement was not granted to the Grantee for so long as the Grantee required the lands for use as a pipeline, but rather "for such period as the said lands are required for the purpose of a pipe line right of way". There is no dispute that oil continues to flow through this pipeline. Therefore, when the Minister was requested to consent to the assignment of the easement, the lands located within the boundaries of the Coldwater Reserve were still required for the purpose of a pipeline right of way. In my view, there is no basis to conclude that the easement would cease to exist if the Minister were to refuse to consent to the assignment. As a result, regardless of whether the Minister would have consented to the requested assignment of the interest of Terasen Pipelines (Trans Mountain) Inc. to another company within the Kinder Morgan group of companies, the easement would remain in place. Counsel for Coldwater, during oral argument,

also acknowledged that the easement would remain in place even if the Minister would have refused to consent to the assignment.

[107] In my view, this would also mean that the use of the land in question (as a right of way for a pipeline) would not change whether consent was granted or refused. In either case, the land would continue to be used as a right of way for the pipeline as the land for this 6.5 km stretch of the 1,150 km was (and still is) "required for the purpose of a pipe line right of way". Therefore, consenting to the assignment of the easement would not change the use of this land. Coldwater's right to use and enjoy this land would be the same regardless of whether the consent was granted or refused.

[108] Even though the easement would remain in place, the next question would be whether refusing or consenting to the assignment would affect the right of Trans Mountain Pipeline ULC, as general partner of Trans Mountain L.P. to operate the pipeline. For any pipeline, the operator of that pipeline must hold a certificate of public convenience and necessity issued under the *National Energy Board Act*, R.S.C. 1985, c. N-7.

[109] Subsection 30(1) of the National Energy Board Act provides that:

30 (1) No company shall operate a pipeline unless	30 (1) La compagnie ne peut exploiter un pipeline que si les conditions suivantes sont réunies :
(*a*) there is a certificate in force with respect to that pipeline; and	*a*) il existe un certificat en vigueur relativement à ce pipeline;
(*b*) leave has been given under this Part to the company to open the pipeline.	*b*) elle a été autorisée à mettre le pipeline en service aux termes de la présente partie.

[110] The company that is required to obtain the necessary certificates of public convenience and necessity is the company that is operating the pipeline. In 2007, by Orders of the National Energy Board (which were approved by an Order in Council), the certificates of public convenience and necessity issued in relation to the operation of the pipeline (OC-2 and OC-49) were changed to amend the name of the holder of these certificates to Trans Mountain Pipeline Inc., as general partner of Trans Mountain L.P. (for ease of convenience Trans Mountain Pipeline Inc. as general partner of Trans Mountain L.P. will be hereinafter referred to as the assignee). Trans Mountain Pipeline Inc. later changed its name to Trans Mountain Pipeline ULC.

[111] The Certificate of Public Convenience and Necessity OC-2 was issued for the entire pipeline not just the part that traversed the Coldwater reserve. The amendment to the certificates to change the name to the assignee is not before us nor is there any indication that anyone challenged the decision to make this amendment.

[112] There is nothing to suggest that if the consent to the transfer of the easement would have been refused that the assignee would no longer hold the certificates of public convenience and necessity for the operation of the 1,150 km pipeline, including the 6.5 km part that traverses the Coldwater reserve. In my view, if the consent would have been refused it would simply mean that the owner of the easement would be a different person than the operator of the pipeline but the operator of the entire pipeline would continue to be the assignee.

[113] It is not clear whether the assignee, as the operator of the pipeline, would need to access the lands on a regular basis in relation to the operation of the pipeline or only if a problem arose.

At the time of the transfer of the pipeline assets in 2007, both the transferor and the assignee were part of the Kinder Morgan group of companies. Therefore, presumably the assignee had the permission of Terasen Pipelines (Trans Mountain) Inc. to use the easement to operate the pipeline. The transactions related to the sale of the shares of Terasen Inc. also included a declaration of trust that the easement would be held in trust for the benefit of the assignee. Therefore, following the sale of the shares of Terasen Inc., the assignee would also have the permission of the legal owner to use the easement to operate the pipeline.

[114] The issue of whether the permission of the legal owner of the easement would allow the assignee to access the lands in relation to the operation of the pipeline is, however, not before us. The only issue that is before us is whether the approval of the assignment of the easement to the assignee was reasonable. In analyzing the reasonableness of the Minister's decision, there are two possible answers to the question of whether the permission of the legal owner of the easement would allow the assignee to access the lands in relation to the operation of the pipeline. Either such permission would allow the assignee to access such lands or it would not.

[115] If the permission of the legal owner of the easement would permit the assignee to access the lands in relation to the operation of the pipeline, then the assignee would continue to operate the pipeline with permitted access to the lands. The decision of the Minister to approve the assignment of the legal interest in the easement (or to not approve this assignment) would not impact this access to the lands.

[116] If the permission of the legal owner of the easement would not allow the assignee to access the lands in relation to the operation of the pipeline, then the assignee would not be able to access the lands to fix any problem that might arise or to perform any maintenance that may be required. The assignee had received the approval to operate the pipeline in 2007 and that approval was not before the Minister. The Minister, in deciding whether to approve the assignment of the easement to the assignee, had to base such decision on the fact that the assignee was the operator of the pipeline. Assuming that the permission of the legal owner of the easement would not allow the assignee to access the lands in relation to the operation of the pipeline, then the decision of the Minister to approve the assignment would be reasonable as the assignee may well need access to the lands in relation to the operation of the pipeline. If there was a problem with the pipeline that required access to the lands to fix, the assignee should have access to the lands to fix the problem. It would be in the best interests of Coldwater if any problem with the pipeline could be fixed.

[117] Since the easement would remain in place and the assignee would continue as the operator of the pipeline regardless of whether the Minister consented to the assignment of the easement, it is difficult to determine, in this situation, how the use and enjoyment by Coldwater of this particular parcel of land would be different if consent was refused or granted. In my view, the issue was only related to the legal ownership of the easement, not the use of the lands in question. Refusing to consent to the assignment would mean that the easement would not be owned by the operator of the pipeline. It would not mean that the lands were no longer required for the purpose of a pipeline right of way. If refusing to consent to the assignment would mean that the assignee could not enter the lands to fix a problem with the pipeline, then this would

support a finding that the decision of the Minister to approve the assignment of the easement was reasonable.

[118] The Minister in this case was not asked to approve the acquisition of the easement by the Kinder Morgan group of companies. This had occurred in 2005 and this acquisition is not part of the transactions that are under review. The Minister was only asked to consent to the assignment of the easement from one member of the Kinder Morgan group of companies to another member of the same corporate group. Under the terms of the indenture, the easement would remain in place as long as the lands were required for the pipeline and therefore it would remain in place regardless of whether consent was granted. The operator of the pipeline through the Coldwater reserve would also not change as the decision to approve the assignee as the operator of the pipeline was made in 2007 and was not before the Minister. Prior to granting consent to the assignment of the easement, the Minister considered the factors as set out in the letter dated December 29, 2014 which included the credit record, environmental record and contract record of the proposed assignee.

[119] As a result, in my view, the decision of the Minister to approve the assignment of the easement, in the circumstances of this case, was reasonable and I would dismiss the appeal.

"Wyman W. Webb"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-214-16
STYLE OF CAUSE:	COLDWATER INDIAN BAND AND CHIEF LEE SPAHAN IN HIS CAPACITY AS CHIEF OF THE COLDWATER BAND ON BEHALF OF ALL MEMBERS OF THE COLDWATER BAND v. THE MINISTER OF INDIAN AFFAIRS AND NORTHERN DEVELOPMENT and KINDER MORGAN CANADA INC.
PLACE OF HEARING:	VANCOUVER, BRITISH COLUMBIA
DATE OF HEARING:	JUNE 20, 2017

SUPPLEMENTARY WRITTEN SUBMISSIONS RECEIVED SEPTEMBER 1, 2017 FROM THE APPELLANTS AND SEPTEMBER 11, 2017 FROM THE RESPONDENTS.

REASONS FOR JUDGMENT BY:	DAWSON J.A.
CONCURRED IN BY:	RENNIE J.A.
DISSENTING REASONS BY:	WEBB J.A.
DATED:	SEPTEMBER XX, 2017

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