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What are the Rules Governing Consents to Assignments of Pipeline Easements across Indian Reserves?

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Case commented on: *Coldwater Indian Band v Minister of Indian Affairs and Northern Development*, 2013 FC 1138

This case raises the question of the leverage available to a First Nation to claim hold-out rents where a pipeline crosses reserve lands and the current owner/operator of the pipeline has failed to obtain required consents to an assignment of the pipeline easement.

Built in the 1950s, the Trans Mountain Oil Pipeline (TMOP), like many similar linear developments, crosses the reserves of a number of First Nations in British Columbia. One of those First Nations is the Coldwater Indian Band or First Nation. The Coldwater First Nation passed a Band Council Resolution (BCR) approving the grant of a right of way which was accepted by federal Order in Council. Relying on the Order in Council, the Crown, represented by the relevant Minister, entered into an indenture granting TMOP an easement for pipeline purposes. The habendum provided that the grant was to last for so long as the lands were required for pipeline purposes. The consideration was a lump sum payment. One clause of the easement provided that TMOP "shall not assign the right hereby granted without the written consent of the Minister." The pipeline was built and still operates today. It provides the only pipeline access to tide water on the west coast for Alberta oil. There was a similar BCR, Order in Council and grant of easement for a second right of way some three years later – also for a lump sum. That second easement has never been used.

It is important to emphasize a couple of points about the legal character of these two easements. First, they are, on the face of it consensual documents. The acquisition of the easements did not involve an act of expropriation (even though it may have occurred under the shadow of such state authority) and therefore does not engage s. 35 of the *Indian Act*, RSC 1985, c. I-5. Second, the grants did not take the form of an easement for a term of years but rather took the form of an easement for a defeasible estate in fee simple (either determinable or subject to a condition subsequent – the distinction may be important in relation to the second easement since if it were determinable it likely automatically came to an end at some point during the last sixty years). Third, the parties to the easement were the Crown and TMOP. Consistent with the terms of the *Indian Act* and the common law rules dealing with First Nation lands (and more generally lands reserved for Indians, see *Delgamuukw v British Columbia*, [1997] 3 SCR 1010), the Crown was a necessary intermediary in the transaction.

The TMOP assets were apparently sold to Kinder Morgan (KM), the current operator of the pipeline, in 2007 but there was no effort to obtain consent to the assignment at that time. As is well known Kinder Morgan is currently planning a significant expansion of TMOP to increase

the throughput from 300,000 barrels per day to 900,000 barrels per day to provide increased tidewater access for the growing volumes of oil sands production. In 2012 KM seems to have realized that there was some legal risk associated with failing to obtain the Minister's consent to the assignment and accordingly applied for that consent. The Coldwater First Nation learned of the application and objected to the Minister granting any such consent and eventually commenced this application in Federal Court under ss.18 and 18.1 of the *Federal Courts Act*, RSC 1985, c. F-7 in relation to the Minister's pending decisions seeking (at para 2) declaratory relief and a prohibition or injunction.

According to the Court the application raised the following issues (at para 27):

- Does the Minister and/or the Crown owe a fiduciary duty to the Applicant Coldwater?
- If so, what is the nature and extent of that duty?
- On the facts of this case, how is that duty to be exercised?
- What relief, if any, should be given?

Justice Roger Hughes referred to a number of key cases including *Guerin v The Queen*, 1984 CanLII 25 (SCC), [1984] 2 SCR 335; *Blueberry River Indian Band v Canada*, 1995 CanLII 50 (SCC), [1995] 4 SCR 344; *Osoyoos Indian Band v Oliver (Town)*, 2001 SCC 85 (CanLII), [2001] 3 SCR 746, *Ermineskin Indian Band & Nation v Canada*, 2009 SCC 9 (CanLII), [2009] 1 SCR 222 (see ABlawg post here) and *Manitoba Metis Federation Inc v Canada (Attorney General)*, 2013 SCC 14 (CanLII), 2013 SCC 14 (see ABlawg post here). And he then suggested that it was possible to draw the following conclusions from those decisions (at para 60):

- The Crown owes a fiduciary duty to First Nations persons in respect of claims relating to title to and use of lands set aside as a reserve;
- The nature and extent of that fiduciary duty may vary according to the circumstances and importance of the matter;
- The Crown has a duty to prevent the First Nation from being exploited; and
- The Crown must listen in good faith to the concerns of the First Nation, but has a duty to weigh those concerns against other public interests that the Crown represents; it must endeavour to reach a compromise between those interests, while endeavouring to obtain the best possible result for the First Nation.

Applying these conclusions to the facts Justice Hughes concluded (at para 65) that the Minister "does not have an absolute duty to refuse to consent to the assignments" if the First Nation does not support the assignments but must consider both the First Nation's interest and the public's interest in deciding whether "Coldwater's consent is required." Beyond this Justice Hughes stated "*particularly with respect to the second easement*, the Minister should consider whether that easement has expired for non-use; and, therefore, whether re-negotiation with Kinder Morgan for terms much more favourable to Coldwater is required should Kinder Morgan wish to use that second easement or a new easement for another pipeline." (emphasis added)

Commentary

In working through this case it is useful to begin by considering how the case might be decided if the arrangements involved two private parties. If that were the case I think that the key issues for the grantor (the Crown in this case) would be: (1) what is the effect of the failure to obtain consent to an assignment of an easement, (2) on what grounds might the grantor withhold consent, and (3) in relation to the second easement, what is the effect of non-use for sixty years?

As to the first, I think it is clear that the failure to obtain consent does not cause the easement to terminate; it is simply a breach of the agreement. If the duty to obtain consent can be interpreted as a condition, breach of the condition might give rise to a right of re-entry but likely subject to an application for relief from forfeiture which might be granted on terms. If the duty to obtain consent is merely a term of the contract then the only remedy would lie in damages unless the breach can be characterized as a fundamental breach which might afford the grantor the option to repudiate the arrangement. It is unlikely that the breach could be characterized as fundamental since neither the term nor the result of breach go to the heart of the contract.

As for the second point (the grounds on which consent may be withheld), the contract here does not provide that consent may not be unreasonably withheld and the law will not imply such a term. However, as noted above, unless the requirement of consent takes the form of a condition, the consequences of the failure to obtain consent, retrospectively or prospectively, will only sound in damages.

As to the third point, the grantor is likely entitled to a declaration that the second easement has terminated in accordance with its own terms – at least if the interest is determinable. The easement should have been used for pipeline purposes within a reasonable period of time. Sixty years is not a reasonable period of time! In a properly framed action the grantor should be entitled to a declaration that the easement is of no force or effect.

How does the case change if we assume that the grantor is a trustee for some other person (other than a First Nation)? As between the grantor and the grantee nothing changes whatsoever. As between the grantor and the beneficiary the grantor owes a duty to the beneficiary to manage the property as a reasonable and prudent person would manage their own property (the trustee's duty of care) and not to put its own interests ahead of those of the beneficiary (the trustee's undivided duty of loyalty). What would that mean on these facts? I think that the trustee's duty of care would require the trustee to pursue termination of the second easement and to take reasonable steps to extract some value out of the grantee's failure to comply with the terms of the first easement. While there might be a duty to ascertain the wishes of the beneficiary there is no duty to follow the instructions of the beneficiary. The trustee, for example, might reasonably conclude that the withholding of consent to an assignment would likely lead to expensive litigation with uncertain outcomes.

How does the case change when we overlay on the second scenario the facts that: (1) the Crown is the trustee/fiduciary, (2) the beneficiary is a First Nation, (3) the subject matter involves reserve lands held under the terms of the *Indian Act*, and (4) the application that is before the Court is brought by the First Nation against the Crown on administrative law grounds?

Let's begin with the easy case, the unused easement. I said above that in a private context the trustee would have a duty to seek a declaration that the easement had terminated. I think that the Crown has a similar duty here although the matter is not directly raised in Coldwater's administrative law proceeding. However, Justice Hughes seems to suggest that the matter would not be clear cut and that in making any decision in relation to private interests in reserve lands the Minister must balance the interests of the First Nation against other public interests (see paras 60 and 63). It is not clear to me that the case law on which Justice Hughes relies supports this approach. There is, for example, no suggestion in any of the judgments in *Guerin*, that the Crown should balance anything against its duty to ensure that it did not go beyond what the First Nation had actually authorized. Indeed the very suggestion that that there might have been a competing public interest in that case is vaguely absurd – a public interest in what? The membership interests of a private golf club?

It is certainly true, especially where expropriation decisions are involved, that the Crown, of necessity, is wearing multiple hats and cannot live up to the ideal of undivided loyalty: *Osoyoos* – but even in such a case there is a duty of minimal impairment (at para 52). But where, as here, the case does not involve an expropriation it is hard to see where the competing public interest lies. If Kinder Morgan loses its unused easement and then realizes that it requires the additional right of way to implement its expansion plans it will still be permitted to access the expropriation provisions of the *National Energy Board Act*, RSC 1985, c. N-7 if it cannot reach a new agreement with the First Nation (through the Crown) (and thus s. 35 of the *Indian Act*) assuming that the National Energy Board (or ultimately the Governor General in Council) accepts that the expansion is in the "public convenience and necessity" (*NEBA*, s. 52).

As for the consent issues I suggested above that an ordinary trustee might have a duty to use the consent as an opportunity to obtain some value for its beneficiary. The same may be equally true of the Crown in this case. Justice Hughes seems to accept that this is the case in relation to the second easement (see paras 60 and 64) but equally he seems to dismiss its possible application to the first pipeline without giving much in the way of supporting reasons for the distinction.