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The Intersection of Discretionary Powers, Fiduciary Duties, the Public Interest and the Standard of Review

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Case Commented On: *Coldwater Indian Band v Canada (Aboriginal Affairs and Northern Development)*, [2017 FCA 199 \(CanLII\)](#)

In this decision, the Federal Court of Appeal, by a majority (per Justice Eleanor Dawson, Justice Donald Rennie concurring; Justice Wyman Webb, dissenting), concluded that the Minister of Indian Affairs and Northern Development breached the fiduciary duty he owed to the Coldwater Indian Band when he approved the assignment of a pipeline right of way easement of 1955 from one affiliate of Kinder Morgan Canada Inc to another affiliate without taking steps to improve the terms of the bargain or at least to ensure that the Crown had been vigilant in its continuing fiduciary obligation to preserve and protect the Band's interest in the reserve land from an exploitive or improvident bargain. Since the matter came before the Court as an application for judicial review, the Court set aside the Minister's decision and returned the matter to the Minister for redetermination in accordance with the Court's reasons. An earlier application by the Band to prevent the Minister from granting approval to the assignment had been dismissed by the Federal Court on the basis that that the application was premature; see the decision in *Coldwater Indian Band v Canada (Indian Affairs and Northern Development)*, [2014 FCA 277 \(CanLII\)](#). For my earlier post on those proceedings see [here](#).

The [Coldwater Indian Band](#) comprises Interior Salish people who belong to the Nlaka'pamux Nation. The main Coldwater Reserve area (IR#1) is located approximately 13 km southwest of Merritt, British Columbia. In 1955 Trans Mountain Pipeline Company (TMPL) secured a pipeline right of way easement across IR#1. The Governor in Council authorized the grant of the right of way by Order in Council under the terms of section 35 of the *Indian Act*, RSC 1952, c 149 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." The Band had agreed to the arrangement as evidenced by a Band Council Resolution of April 22, 1952. As compensation, the Band received a one-time payment of \$1.00 for each lineal rod for a total of \$1,292.00 plus compensation for loss of timber. Trans Mountain paid the same lineal rate for the easement along the entire length of the pipeline (at para 10) on both Indian Reserves and other lands. Clause 1 of the easement obliges the easement grantee to pay all charges, taxes, rates and assessments charged on lands encumbered by the easement. The judgment notes (at para 31) that the Coldwater Band Council currently 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. Clause 2 provided that "the Grantee shall not assign the right hereby granted without written consent of the Minister."

Between 2002 and 2007 TMPL underwent a series of corporate mergers and acquisitions which left the pipeline under the management and control of Kinder Morgan but it was not until June 12, 2012 that Kinder Morgan wrote to the Minister seeking consent to the assignment of the easement. The Minister communicated this request to Coldwater and advised it and other First Nations in a similar position that the Minister would (at para 17) “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”.

In 2013 Kinder Morgan applied to the National Energy Board (NEB) for a certificate of public convenience and necessity for an expansion of the pipeline. The expansion involves twinning the existing pipe and would roughly triple the capacity of the line and carry heavier oils (at para 18). The Band expressed its concerns to the Minister as well as noting the opportunity to modernize the terms of the easement, but ultimately took the position (at paras 19-20) “that the Band had determined that it was not in the interests of the Band for the Minister to consent to the assignment.”

Within the same timeframe (December 2013-May 2014) the Band also participated in a working group of First Nations and the Department charged with producing a modernized easement form. While Coldwater eventually withdrew from that process the “modification template” that emerged (July 2014) contained (at para 24) “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.” Coldwater was advised that the use of the modification template was a separate issue from the Minister’s decision in relation to the assignment. The Minister consented to the assignment without conditions in December 2014. The Minister communicated that decision to the Band noting (at para 29) 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.’

The Band commenced this application for judicial review on January 27, 2015. The Federal Court denied the application.

Standard of Review on the Appeal and in Relation to the Minister’s Decision

The Court concluded (at para 41) 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.” As for the Minister’s decision, the nature of the duty owed by the Minister to the Band in making the decision on the assignment was a question of law to be reviewed on a correctness standard (at para 43). The discharge of the duty by the Minister was to be reviewed on the standard of reasonableness with the important qualification (at para 47, see also para 90) 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 (CanLII), [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.

It is interesting to reflect on the implications of bringing this case as an application for judicial review rather than as an action. If the matter had been brought on as an action presumably the Court would have considered the argument with respect to breach of fiduciary duty as a matter of correctness rather than reasonableness. In the end it did not matter to the outcome of this case given the interplay between the Crown’s power under clause 2 of the easement and the Crown’s fiduciary duty since the latter duty narrowed (perhaps dramatically) the range of what might be considered reasonable in terms of the exercise of the Crown’s power.

The Content of the Duty

Both parties acknowledged that the Minister owed the Band a fiduciary duty. This was correct in principle because (at para 49): “Coldwater had a cognizable interest in its reserve lands” (see *Wewaykum Indian Band v Canada*, [2002 SCC 79 \(CanLII\)](#) at para 83). While the fact pattern presented has similarities with those of *Osoyoos Indian Band v Oliver (Town)*, [2001 SCC 85 \(CanLII\)](#), Justice Dawson saw a distinction (at para 51) in that “In the present case ... the assignment was an assignment of an existing right – [and thus] there was no new taking or use to ground application of the principles articulated in *Osoyoos*.” Accordingly, she preferred to resort to first principles and thus referenced (from *Wewaykum*) (at para 52), the “continuing duty to preserve and protect the Band’s interest in the reserve land from an exploitive or improvident bargain.” But, as in other fiduciary cases involving First Nations, the Court also acknowledged the *sui generis* nature of the Crown/First Nation fiduciary relationship with the implication that, in addition to considering the best interests of Coldwater, the Minister also had to consider (at para 54) “the interests of all affected parties in the continued operation of the pipeline” and ultimately “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.” This application of first principles resulted, as Justice Dawson herself acknowledged at para 61, 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.” And “minimal impairment” in the present context required (at para 62) that:

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.

Discharge of the Duty

The Crown seems (at para 70) to have had two arguments to support the claim that it had discharged its duty to the Band. The first argument was simply that the Minister had satisfied himself (at para 69) "that the proposed assignee had the capacity to comply with its obligations under the indenture" and that that was all the duty required. The second argument seems to have been that the Minister heard the Band's concerns with respect to the adequacy of the consideration that it received and had taken that into account (at para 70). The majority rejected both arguments. As to the first argument, the Court concluded that there was nothing in the language of the easement that required the Minister to confine himself to consideration of the capacity of the proposed transferee. The relevant clause was not subject to a reasonableness requirement and accordingly the Minister had a broad discretion (or power) as well as a fiduciary duty which (at para 89) "requires consideration of factors beyond the corporate capacity of the proposed assignee." What did that mean in the present context? It meant (at para 91) that

... 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.

In more concrete terms it required the Minister to assess whether the consideration originally payable meant that in the current environment the deal was an improvident bargain—although the Court also mentioned that this might entail (at para 92) "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." Furthermore, the Minister was obliged to consider other elements of the modernization template which might be included as conditions on any approved assignment. The Minister's failure to take account of these factors was unreasonable, at least when viewed through the lens of the Minister's fiduciary obligation.

The Crown's second argument failed on the facts. The Court simply concluded (at paras 73-85) that the evidence did not support counsel's claim that the Minister had in fact considered the adequacy of the compensation payable to the Band.

In sum, the majority set aside the Minister's decision (at para 97) and returned the matter back to the Minister for redetermination in light of these reasons.

Other Important Conclusions from the Majority

The majority was at pains to emphasise several points which deserve attention. First, the Court rejected (at para 64) any claim “that the Minister was obliged to accept [the Band’s] direction that the Minister not consent to the assignment.” Justice Dawson reasoned that such a claim (at para 64) was “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.”

Presumably what Justice Dawson had in mind was that the Minister cannot be required by his fiduciary duty to impose conditions on the assignment that impair the viability of the pipeline. Second, the majority agreed with the Federal Court that the Minister was not required to take into account the possible (or indeed approved) expansion of the pipeline in making a decision on the assignment. This was particularly so in the case of the Coldwater reserve since Kinder Morgan had indicated (at para 65) that the twinned pipeline would only go through the reserve if the Band consented. Thus, the two questions were severable. Presumably Kinder Morgan was able to make this undertaking because the geography of the line in this location permitted alternative routes. One wonders if the two decisions would be quite so severable if the new line had to be located (because of geographical constraints) within the existing right of way.

Justice Webb’s Dissent

Justice Webb dissented. He agreed that the Minister owed the Band a fiduciary duty but he focussed that duty on (at para 98) “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.” He also emphasised that the National Energy Board and the Governor in Council had already acceded to the transfer of the certificates of public convenience and necessity for the pipeline to Kinder Morgan and that it would be anomalous if Kinder Morgan did not have access to the right of way. Justice Webb’s dissent ignores the question of whether the Crown had a duty to exercise the power afforded by the consent requirement to better the interests of the Band.

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