Coldwater Indian Band v. Canada (Aboriginal Affairs and Northern Development), 2017 FCA 199, Federal Court of Appeal (Dawson, Rennie and Webb JJ.A.), 26 September 2017

September 26, 2017

The Federal Court of Appeal set aside a decision of the Minister of Aboriginal Affairs and Northern Development approving the assignment of an easement on the Kinder Morgan Trans Mountain pipeline, and remitted the matter back to the Minister for redetermination. The Court of Appeal held that the Minister's determination was unreasonable, and not in compliance with his fiduciary duty, as the Minister failed to consider whether a consent to the assignment of the easement on its original terms would be in the Band's best interests.

The Coldwater Indian Band possesses reserves near Merritt, British Columbia. In 1952, Trans Mountain Oil Pipeline Company sought a 60-foot right of way through one of the Band's reserves for the purpose of building an oil pipeline. The Band Council passed a resolution approving the ROW, and an Order-in-Council was passed in March 1953 approving the ROW. The Band received $1,292.00 for the ROW, calculated at the standard rate of the time, and has levied property taxes for the easement since that time.

In 1955, Trans Mountain entered into an agreement with the Crown relating to the easement. One of the terms stated that Trans Mountain shall not assign the ROW without the written consent of the Minister. The pipeline was subsequently built, and carries approximately 300,000 barrels of oil per day from Alberta.

Through a complex series of corporate transactions, Trans Mountain sold its pipeline assets in 2007 to interests controlled by Kinder Morgan. In 2012, Kinder Morgan made a request to the Minister to consent to the assignment of the assets. The Coldwater Indian Band became aware of the request, and took the position that the original indenture was void due to the failure in 2007 to obtain a consent to the assignment, and that a new process needed to be started.

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 approximately triple its capacity. The Band expressed its concern about the expansion, and also expressed

its desire to the Minister to modernize the terms of the ROW, to deal with matters such as environmental practices and enhanced rights for the Band. For a period of time, the Band participated in a process involving other Indigenous groups relating to the modernization of pipeline easements. The Band later removed itself from the modernization process because many of the provisions it had proposed were not included in in the modernized easement.

The Band applied to the Court for an order declaring that the Minister is obligated to follow its instructions, and deny retroactive consent to the assignment of the ROW. In November 2013, the Federal Court dismissed an application brought by the Band, and ruled that the Minister does not have an obligation to follow the instructions of the Band: 2013 FC 1138 (summarized in our e-Newsletter of 13 February 2014). The Federal Court of Appeal affirmed this ruling in November 2014: 2014 FCA 277 (summarized in our e-Newsletter of 17 December 2014).

In December 2014, following the Court of Appeal decision, the Minister consented to the assignment of the pipeline easement. In a letter informing the Band of the decision, the Minister said he 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". However, the decision did not include consideration of whether the assignment would minimally impair the Band's interest in the use and enjoyment of the land, and also did not include consideration of the impact of the continuation of the terms of the ROW on the Band's right to use and enjoy the reserve lands.

The Band sought judicial review of this decision, and such application was dismissed by the Federal Court: 2016 FC 595. The chambers judge held that the Minister's decision was reasonable, and complied with the two-step process established in Osoyoos Indian Band v Oliver (Town), 2001 SCC 85 regarding the taking or use of reserve land: (1) the taking or use was in the public interest or is authorized and (2) the Crown ensured that the taking or use minimally impairs a Band's right to use and enjoy its reserve lands.

The Federal Court of Appeal, in a 2:1 split, reversed the Federal Court decision. The Minister's decision, in regards to the discharge of his fiduciary duty, would be reviewed on the standard of reasonableness. The majority of the Court of Appeal held that the December 2014 decision was unreasonable and must be set aside.

The Minister's fiduciary duty was described as follows:

... 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.

Although "reasonableness" is the standard, the range of "reasonable" outcomes is narrowed by the fiduciary duty owed to the Band. The Band's use and enjoyment of its land is "an issue of central importance". The Court of Appeal also recognized that the Crown is not an ordinary fiduciary, and must take into account the public interest.

The Court of Appeal held that the Minister was required to consider the Band's current and ongoing best interest. Dawson J.A. stated:

... the 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. ...

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.

The Court could find no evidence on the record that the duty was discharged. There was no evidence that the Minister directed his attention to the adequacy of the consideration that the Band received. The terms of the indenture for the ROW did not restrict the factors to be considered at the time of the assignment. The Minister was required to consider if his consent would continue what had become an improvident arrangement. The Court of Appeal noted that the Minister could take into account the extent of property taxes being levied by the Band.

Further, as a result of the modernization process initiated by the Minister, he ought to have known that the terms of the ROW were no longer responsive to current concerns. 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".

The Court of Appeal held that the Minister's decision was unreasonable due to his failure to assess the current and ongoing impact of the continuation of the ROW on the Band's right to use and enjoy its lands. The Court noted that the Minister was not required to consider the expansion of the Trans Mountain pipeline in discharging its duty – Kinder Morgan has advised the Band that the proposed expansion will not take place without the Band's consent.

In dissent, Webb J.A. focused on the fact that the assignment was from one subsidiary of Kinder Morgan to another subsidiary, and therefore it was impossible to see how the Band's use or enjoyment of the land would be any different as a result of the assignment. Further, it would be possible that the interest of the proposed assignee would be held in trust, regardless of the Minister's consent. Therefore, irrespective of whether the fiduciary duty had been discharged, the result of consent or non-consent would be the same.

https://decisions.fca-caf.gc.ca/fca-caf/decisions/en/item/235242/index.do

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