Federal Court  Cour fédérale

Date: 20131107

Docket: T-491-13

Citation: 2013 FC 1138

Vancouver, British Columbia, November 7, 2013

PRESENT: The Honourable Mr. Justice Hughes

BETWEEN:

COLDWATER INDIAN BAND AND CHIEF HAROLD ALJAM IN HIS CAPACITY AS CHIEF OF THE COLDWATER BAND ON BEHALF OF ALL MEMBERS OF THE COLDWATER BAND

Applicants

and

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

Respondents

REASONS FOR JUDGMENT AND JUDGMENT

[1] In the 1950's, the Coldwater Indian Band passed two resolutions empowering the Minister responsible for Indian Affairs to grant two easements in favour of Trans Mountain Pipeline to permit two pipelines to be built and carry oil through one of Coldwater's Reserves. One pipeline was built and is still operating; the other was never built. Over the years, Trans Mountain went

through several corporate re-organizations and in 2007 was sold to interests controlled by Kinder Morgan. The easements granted to Trans Mountain required the consent of the Minister to any assignments. It was not until 2012 that Kinder Morgan asked for that consent. Coldwater does not want the Minister to give that consent, sensing that there is a much better deal to be made if Kinder Morgan was required to bargain under some duress. Hence, the present application.

[2] In particular, this is an application brought under the provisions of sections 18 and 18.1 of the *Federal Courts Act*, R.S.C. 1985, c. F-7 respecting decisions pending by the Minister of Indian Affairs and Northern Development pursuant to a request made by Kinder Morgan Canada Inc. for retroactive consent to the assignment of two easements for the purposes of oil pipelines over lands Reserved for the Coldwater Indian Band. The Applicant Coldwater seeks declaratory relief, a prohibition or injunction, and other relief.

[3] For the reasons that follow, I find that the Minister is not obligated to follow the instructions of Coldwater not to consent to the requested assignments; however, the Minister is required to listen in good faith to those concerns, particularly with respect to the unused easement, balance those concerns with the public interest, and negotiate with Kinder Morgan with a view to obtaining more favourable terms for Coldwater.

THE EVIDENCE

[4] The evidence in the record before the Court consists of:

- The affidavit of Harold Aljam, member and elected Chief of the Coldwater Indian Band, together with Exhibits A to Y, filed by the Applicant;

- The affidavit of Robert Love, Manager Lands and Rights-of-Way, for the Respondent Kinder Morgan Canada Inc, together with Exhibits A to EEE, filed by the Respondent Kinder Morgan;

- Two affidavits of Kuldip Gill, Lands Management and Leasing Officer, Department of Aboriginal Affairs and Northern Development (AANDC), together with Exhibits A to W to the first affidavit, sworn May 21, 2013; and Exhibit A to the second affidavit, sworn October 24, 2013; both filed by the Respondent Minister;

- Affidavit of Gemma Sykes, a legal assistant in the law firm acting for the Applicant, together with Exhibits A to D, filed by the Applicant.

[5] Only Gill was cross-examined. He was cross-examined by Counsel for the Applicant, and a transcript of that cross-examination was filed in the supplementary record of the Applicant.

THE FACTS

[6] The relevant facts are largely not in dispute. The Applicant Coldwater is an Indian Band recognized as such under the *Indian Act*, R.S.C. 1985, c. I-5. It possesses certain reserves under that *Act*, which are located near Merritt, British Columbia. This case is concerned with one of those reserves, identified as Reserve No. 1.

[7] In April 1952, a company called Trans Mountain (sometimes written as Trans-Mountain) Oil Pipeline Company wrote to the Department of Indian Affairs stating that it was desirous of acquiring a 60-foot right of way through the reserves of various Indian Bands, including Coldwater, for the purpose of building an oil pipeline. Coldwater passed a resolution approving such a right of way. In March 1953, the Privy Council made an Order-in-Council approving such a right of way.

[8] On May 4, 1955, an agreement, by way of indenture, was entered into between Her Majesty in right of Canada, represented by the Minister of Citizenship and Immigration, of the first part; and Trans-Mountain Oil Pipeline Company, of the second part. I will refer to this as the first agreement or first easement. It provided for, among other things:

- in consideration of the sum of $3,554.00, the Minister granted to Trans Mountain, its successors and assigns, the right to lay down, construct, operate and maintain a pipeline on, over, under and/or through the Reserve No. 1;
- TO HAVE AND TO HOLD…for such period as the said lands are required for the purposes of a pipeline right of way;
- Clause 2: That the Grantee (Trans Mountain) shall not assign the right hereby granted without the written consent of the Minister.

[9] Since the time of this agreement and continuing through the present time, a pipeline has been installed and is in use, carrying in the order of 300,000 barrels per day of oil from Sherwood Park Alberta, through several Indian Band Reserves, including Coldwater Reserve No. 1, to facilities in British Columbia and the United States.

[10] In November 1957, Trans Mountain again wrote to Indian Affairs saying that it was desirous of securing another easement to place an additional pipeline within certain reserve lands, including Coldwater's Reserve No. 1. While there is no Band resolution that can presently be located, Coldwater does not make an issue of the fact that it did make a resolution in principle granting such a right of way. On May 1, 1958, the Privy Council issued an Order-in-Council approving such a right of way.

[11] On the third day of August, 1958, Her Majesty, as represented by the Minister and Trans Mountain, entered into another agreement by way of Indenture with terms which, for the purposes of these proceedings, are the same as those which have been previously set out respecting the first agreement; a difference being that the sum of $1,778.00 was paid another difference being that no consent of the Minister was required in respect of a mortgage. I will refer to this as the second easement or second agreement.

[12] Unlike the pipeline contemplated by the first agreement which was built and is operating, no second pipeline as contemplated by the second agreement has ever been built.

[13] It is contemplated that Kinder Morgan may shortly make an application to the National Energy Board to build a second pipeline, which would increase the capacity from 300,000 barrels per day to just under 900,000 barrels per day. However, no such application has yet been made although its Counsel indicates that an application may be made before the end of this year. At this time, it is simply speculation as to whether the right of way that is the subject of the second agreement would be used for the purposes of this second pipeline.

[14] Since the two agreements were entered into by Trans Mountain, it has undergone a number of corporate name changes, corporate re-organizations, and amalgamations, the result of which is that as of April 2007, a corporation known as Terasen Inc. emerged as the successor to Trans Mountain in the pipeline business. While the consent of the Minister to these various events was neither sought nor given, Coldwater does not, for the purposes of the present case, take issue with them, as they are apparently largely internal corporate restructurings involving the same entity.

[15] In early 2007, there were a number of transactions wherein the pipeline assets of Trans Mountain were ultimately sold to interests controlled by Kinder Morgan. Counsel for Kinder Morgan has taken up about three pages of their Memorandum of Fact and Law to explain the transactions, even briefly. I will reproduce the summary of these transactions as set out in a letter dated June 12, 2012 from the President of Kinder Morgan and Vice President of Fortis BC Holdings Inc. to the Minister of Aboriginal Affairs and Northern Development:

> *Pursuant to an acquisition agreement dated February 26, 2007 (the "Acquisition Agreement"), Fortis Inc. ("Fortis") agreed to purchase Terasen Inc. and its' subsidiaries from Kinder Morgan, Inc. ("Kinder Morgan"). Prior to closing of the sale contemplated by the Acquisition Agreement, the following corporate re-organization occurred: (i) Terasen Pipelines (Trans Mountain) Inc. (the owner of the Trans Mountain pipeline assets) amalgamated with Terasen Inc.; and (ii) the Trans Mountain pipeline assets were then transferred to affiliated entity Trans Mountain Pipeline ULC and then contributed to a new limited partnership called Trans Mountain Pipeline L.P. ("the "Re-organization"). Subsequent to the Re-organization, Terasen Inc. (which in March of 2011 changed its name to FortisBC Holdings Inc.), was sold to Fortis.*
>
> *Pursuant to the Re-organization, all of the assets related to the Trans Mountain pipeline, including all agreements and related rights, interests and obligations, were ultimately transferred to Trans Mountain Pipeline L.P., prior to contemplation of the acquisition of Terasen Inc. by Fortis.*

[16] That letter of June 12, 2012 makes a request that the Minister consent to these transfers. This consent is the basis for Coldwater's present application to this Court. The letter says:

> *Included in the Trans Mountain pipeline assets are certain indentures and easements entered into with Her Majesty Queen Elizabeth the Second, as listed in Schedule A attached hereto (the "Indentures"). It has recently come to our attention that consent of the Minister, as contemplated in the Indentures, was not obtained at the time of the transfer of the Trans Mountain pipeline assets from Terasen Inc. to its' affiliate Trans Mountain Pipeline ULC, and therefore Fortis and Kinder Morgan are requesting that the Minister provide the required consent at this time.*

[17] Coldwater became aware that such a request may be made. On April 25, 2012, Coldwater's Counsel wrote a letter to the Minister of Aboriginal Affairs and Northern Development saying, *inter alia*:

> *It has come to our client's attention that Kinder Morgan Canada Inc. ("Kinder Morgan") has asked or will be asking for the written consent of the Minister, pursuant to the Indenture, to the assignment of Terasen Inc.'s rights in respect of the Indenture to Kinder Morgan.*
>
> *We write to advise that the Coldwater Band does not presently agree to the assignment and to ask that you not provide that consent without first discussing the proposed assignment, and its potential implications, with our client. In this respect, we note that the terms and conditions outlined in the Indenture put you, as Minister, in the position of a fiduciary in respect of the Band's interests in this matter and you must act accordingly.*

[18] There followed a series of correspondence between the Minister's officials and the Department of Justice and Coldwater and its Counsel.

[19] In the meantime, Coldwater wrote directly to Kinder Morgan. In a letter dated July 5, 2012, the Chief of the Coldwater Band wrote:

> *We have received notice of Kinder Morgan's Application to the Minister dated June 12, 2012 (we were not provide with a copy until two weeks later). This Application confirms that Kinder Morgan is aware that the existing right-of-way does not authorize its current use of the pipeline.*
>
> *In the absence of a current permit from the Band, we hereby demand that you cease operation of the pipeline through our Reserve within 10 days. We further ask that you make arrangements with us to remove the associated pipeline structure as soon as reasonably possible, unless interim permits are obtained.*
>
> *In the event that you have not ceased operation of the pipeline, or otherwise reached an interim agreement with the Band by July 15, 2012, we will take such actions as necessary to stop such unauthorized operation. We wish to give you fair notice that we will not be held liable for any consequential damage that may result.*

[20] Kinder Morgan's President replied by a letter dated July 12, 2012 saying, *inter alia*:

> *In your letter you state that if we have not reached an interim agreement by July 15, 2012, Coldwater "will take such actions as necessary to stop such unauthorized operations." You also state that Coldwater will "not be held liable for any consequential damage that may result." We take great issue with this threat, and need to make our position clear on the record that if any damage is done to the pipeline, it may result in serious damage to the environment and to the safety of those in the vicinity of the damage. We will not tolerate anyone intentionally damaging the pipeline, and anyone so damaging the pipeline will be liable to the fullest extent of the law, including responsible for consequential damages, which damages could be significant.*
>
> *We propose a meeting at your convenience next week between your legal counsel and ours, and yourself and our Manager of Aboriginal Relations. We are prepared to be flexible regarding the time and place of the meeting. We continue to be committed to resolving all issues as between us in the most cooperative and expeditious method possible, and hope you share that same resolve.*

[21] There is subsequent correspondence between these parties; however, as is evident, the matter has not been resolved between them.

[22] Coldwater's Counsel wrote a letter dated January 9, 2013 to the Minister's official, Mr. Gill (who gave evidence in these proceedings), stating reasons for Coldwater's request that consent to the assignments not be given by the Minister. That letter said, *inter alia*:

> *…It is our contention that the Indenture is void, and has been void for 5 years or more, and cannot be revived. A new Indenture is required, which would require a new process to be entered into with the Coldwater Indian Band.*
>
> *Alternatively, it is clear that the appropriate company did not apply for the necessary consent for the assignment. Further, it is clear that there was no intent to do so over the last 5 year or so. Any transfer of the Indenture, without a concurrent lawful request for assignment, would have invalidated the Indenture at the time. It is a fundamental breach of a serious nature.*
>
> ***E. <u>The nature of the new Applicant</u>**: Our understanding is that the current Applicant, Kinder Morgan, is a significantly different entity than the original holder of Trans-Mountain Oil Pipeline Company. Kinder Morgan is a foreign-controlled company – without the same roots in Canada that the original operator had. The original operator was, we understand, a Canadian-owned company and was incorporated by a special act of Parliament. The consent of the Coldwater Indian Band at the time of the original Indenture would have factored in the nature of the Applicant, and the public interest in Canada of the original project. Those factors do not apply to Kinder Morgan.*
>
> ***F. <u>The safety and operating record of the applicant</u>**: Further, the safety record of Kinder Morgan and their Parent company is a very different one from the original company, and in our view, much inferior. We wish time to investigate that matter and to make submissions upon it. That will take some time, and co-operation from federal regulatory authorities. Please advise us of what investigations Canada has undertaken in this regard – clearly before exercising its fiduciary or trustee powers of consent on these lands on behalf of the Band, Canada must investigate that matter.*

[23] On February 20, 2013, the Chief of the Coldwater Band wrote a letter to Mr. Gill on behalf of the Band stating:

> *As Chief and Council, we have given this matter very serious consideration and, with the benefit of full legal advice about the matter, the Coldwater Band Council has determined that it is not in the interests of the Coldwater Band for the Minister to consent to the requested assignment of the indentures respecting the Coldwater Reserve.*
>
> *This conclusion is based on a wide range of factors, some of which include the following:*
>
> - *Kinder Morgan proposes a major expansion of oil transmission operations through our reserve and proposes to do so within the existing (Trans Mountain) right-of-way.*
> - *The 1957 Indenture, which was valid only for so long as required for pipeline purposes, has expired in that the line that was proposed to be built in 1957 was never built.*
> - *We have serious reservations about the safety and integrity of oil transmission through our reserve and do not consider it to be in our best interests to maintain, let alone expand, these transmissions.*

[24] No reply is in the record. These proceedings were instituted a month later. The Minister has not yet taken any action.

THE ISSUES

[25] The Applicant has put the following matters in issue:

1. Does the Minister have a fiduciary duty to refuse to consent to the Assignment upon being advised by Coldwater that it does not agree that the Minister should consent?

2. In the alternative, is the Minister obliged to re-examine whether Coldwater's consent is required, and whether consent in respect of easement number 1 or number 2 is in Coldwater's best interests and/or in the public's best interest?

[26] A further issue was initially raised; that of production of documents in the Minister's possession. That issue has been resolved, save as to the matter of costs, which will be addressed later in these Reasons.

[27] In resolving these issues, the Court must consider the following:

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

FIDUCIARY DUTY

[28] Counsel for the Minister concedes that the Minister/Crown owe a fiduciary duty to the Applicant. The nature and extent of that duty must be considered.

RELEVANT LEGISLATION

[29] The principal legislation respecting the matters at issue is section 35 of the *Indian Act* as it stood in the 1950's – the period relevant to the signing of the easements at issue – SC 1951, c. 29. That section read:

> ***LANDS TAKEN FOR PUBLIC PURPOSES.***
>
> *35. (1) Where by an Act of the Parliament of Canada or a provincial legislature Her Majesty in right of a province, a municipal or local authority or a corporation is empowered to take or to use lands or any interest therein without the consent of the owner, the power may, with the consent of the Governor in Council and subject to any terms that may be prescribed by the Governor in Council, be exercised in relation to lands in a reserve or any interest therein.*
>
> *(2) Unless the Governor in Council otherwise directs, all matters relating to compulsory taking or using of lands in a reserve under subsection (1) shall be governed by the statute by which the powers are conferred.*
>
> *(3) Whenever the Governor in Council has consented to the exercise by a province, authority or corporation of the powers referred to in subsection (1), the Governor in Council may, in lieu of he province, authority or corporation taking or using the lands without the consent of the owner, authorize a transfer or grant of such lands to the province, authority or corporation, subject to any terms that may be prescribed by the Governor in Council.*
>
> *(4) Any amount that is agreed upon or awarded in respect of the compulsory taking or using of land under this section or that is paid for a transfer or grant of land pursuant to this section shall be paid to the Receiver General of Canada for the use and benefit of the band or for the use and benefit of any Indian who is entitled to compensation or payment as a result of the exercise of the powers referred to in subsection (1). 1951, c. 29, s. 35.*

[30] As can be seen, this section of the *Indian Act*, which has not been changed materially since then, specifically deals with the taking of land. There is no part of that *Act* dealing with easements or the like.

[31] Section 35 of the *Indian Act* was specifically commented upon by Justice McLachlin (as she then was) in *Opetchesaht Indian Band v Canada*, [1997] 2 SCR 119 at paragraph 86, where she wrote (in dissent, but not as to this matter):

> *86 The only other way Indian interests in reserve land can be permanently disposed of under the Indian Act is by expropriation. Where the greater public good so requires, interests in reserve land may be expropriated: s. 35. The procedure is strictly regulated and subject to consent of the Governor in Council, exercised by Cabinet, which owes the Indians a fiduciary duty to act in their best interests. The process is politically sensitive and open to public scrutiny.*

[32] The *Pipe Lines Act*, SC 1949, c. 20, provides for a Board of Transport Commissioner for Canada which, among other things, may grant leave to construct a pipeline in Canada. Where a company applies to the Board for such leave, subsections 12(3) and (5) of that *Act* provide:

> *(3) Upon the application, the Board shall have regard to all considerations that appear to it to be relevant and in particular to the objection of any party interested, to a public interest that in the Board's opinion may be affected by the granting or the refusing of the application, and to the financial responsibility of the applicant.*
>
> . . .
>
> *(5) Where the Board grants leave to construct a line, it may impose such terms and conditions as it considers proper and may limit the time within which the company shall construct and complete the line. 1949, c. 20, s. 12.*

[33] The *Pipe Lines Act* was the statute in place in the 1950's when the two easement agreements were signed. Currently, the *National Energy Board Act*, RSC 1985, c. N-7 deals with such matters. Section 52 of that *Act* deals with certificates that the Board may issue when a pipe line is complete. Provision is made in that section for regard to any public interest and environmental assessments.

[34] Trans Mountain Oil Pipeline Company, the party to whom the easements at issue were given, was incorporated under a special Act of the Parliament of Canada, assented to the 21st March, 1951 with objects as set out in section 6:

> *6. The Company, subject to the provisions of any general legislation relating to pipe lines for the transportation of oil or any liquid product or by-product thereof which is enacted by Parliament, may*
>
> *(a) within or outside Canada construct, purchase, lease, or otherwise acquire, and hold, develop, operate, maintain, control, lease, mortgage, create liens upon, sell, convey, or otherwise dispose of and turn to account any and all interprovincial and/or international pipe lines, for the transportation of oil including*
>
> . . .
>
> *(b) purchase, hold, lease, sell, improve, exchange or otherwise deal in real property or any interest and rights therein legal or equitable or otherwise howsoever and deal with any portion of the lands and property so acquired*
>
> . . .

[35] None of the *Pipe Lines Act* or the *National Energy Board Act*, or the *Trans Mountain Act* make specific provisions in respect of the *Indian Act*, or lands set aside as reserves for aboriginal persons.

[36] The *First Nations Land Management Act*, SC 1999, c. 24, enacted in 1999, provides a mechanism by which a Code may be established under which direct control of matters affecting an Indian Band is passed from the Minister directly to a particular Band. Section 16 of that Act states:

16. (1) After the coming into force of a land code, no interest or right in or licence in relation to First Nation land may be acquired or granted except in accordance with the land code of the First Nation.

Marginal note: Interests or rights of third parties

(2) Subject to subsections (3) and (4), interests or rights in and licences in relation to First Nation land that exist on the coming into force of a land code continue in accordance with their terms and conditions.

Marginal note: Transfer of rights of Her Majesty

(3) On the coming into force of the land code of a First Nation, the rights and obligations of Her Majesty as grantor in respect of the interests or rights and the licences described in the First Nation's individual agreement are transferred to the First Nation in accordance with that agreement.

Marginal note: Interests and rights of First Nation members

(4) Interests or rights in First Nation land held on the coming into force of a land code by First Nation members pursuant to allotments under subsection 20(1) of the Indian Act or pursuant to the custom of the First Nation are subject to the

16. (1) L'acquisition ou l'attribution de droits ou intérêts ou de permis relatifs aux terres de la première nation ne peuvent, à compter de l'entrée en vigueur du code foncier, être effectuées qu'en conformité avec celui-ci.

Note marginale :Droits ou intérêts des tiers

(2) Sous réserve des paragraphes (3) et (4), les droits ou intérêts et les permis détenus, à la date d'entrée en vigueur du code foncier, relativement aux terres de la première nation sont maintenus, ainsi que les conditions dont ils sont assortis.

Note marginale :Transfert

(3) Les droits et obligations de Sa Majesté à l'égard des droits ou intérêts et des permis précisés dans l'accord spécifique sont, à la date d'entrée en vigueur du code foncier, transférés à la première nation en conformité avec cet accord.

Note marginale :Droits ou intérêts des membres de la première nation

(4) Sont assujettis, à compter de la date d'entrée en vigueur du code foncier, aux dispositions de celui-ci en matière de transfert, de bail et de participation aux revenus tirés des ressources naturelles, les

provisions of the land code governing the transfer and lease of interests or rights in First Nation land and sharing in natural resource revenues.	*droits ou intérêts des membres de la première nation sur ses terres qui découlent soit de la possession accordée en conformité avec le paragraphe 20(1) de la Loi sur les Indiens, soit de la coutume de la première nation.*

[37] By way of example, a Matsqui First Nation Code was set up October 17, 2007. Subsections 31.1, 36.1 and 36.2 of that Code read as follows:

> ***31. Limits on Interests and Licences***
>
> *All Dispositions in Writing*
>
> *31.1 An interest in, or licence to use, First Nation Land may only be created, granted, disposed of, assigned or transferred by an Instrument issued in accordance with this Land Code.*
>
> ***36. Transfer and Assignment of Interests***
>
> *Transfer of Interests*
>
> *36.1 The Governing Body may enact Laws providing that a Member holding a leasehold interest in First Nation Land may transfer, devise or otherwise dispose of that leasehold interest to another Member.*
>
> *36.2 Except for transfers that occur by operation of Law, including transfers of estates by testamentary disposition or in accordance with a Law enacted under section 37:*
>
> > *(a) there will be no transfer or assignment of an interest in First Nation Land without the written consent of the Governing Body; and*
> >
> > *(b) the grant of an interest is deemed to include section 36.2(a) as a condition of any subsequent transfer or assignment.*

[38] No such Code has been established for Coldwater.

[39] Lastly, there is a policy document issued by Indian and Northern Affairs Canada entitled "Land Management Manual". The current version was marked as Exhibit 1 to the cross-examination of Gill held July 31, 2013.

[40] The policy in respect of assignments is set out in section 4. I reproduce sections 4.1, 4.2 and 4.4:

> ***4. Policy – Assignments***
>
> *4.1 Assignee's Obligations: An assignment cannot be used as a means to change the terms of an existing lease. Therefore, before the Minister consents to an assignment, the assignee must agree in writing to perform and observe all of the lessee's covenants and obligations under the lease.*
>
> *4.2 Lessee's Obligations: Despite a common misconception to the contrary, although a lessee has, with the Minister's consent, assigned his or her interest in a lease to a third party, the lessee is still legally bound by his or her commitments under the lease, unless the lessee obtains an express release from the Crown. If the assignee fails to perform his or her lease obligations, then the lessee will be held responsible for those obligations.*
>
> . . .
>
> *4.4 First Nation Consent: As a matter of policy, the department will seek the written consent of the First Nation and/or locatee to the assignment. The Minister may only refuse consent to an assignment without a valid reason if the lease makes provision for such an action. Valid grounds for refusing the assignment should be submitted to the Minister or the Minister's delegate for consideration. The First Nation or locatee should be asked to provide their concurrence or concerns within a reasonable period.*

[41] The Policy deals with the taking or using of lands under section 35 of the *Indian Act*, supra, in section 6. It is to be noted that there are no specific Policies respecting easements. I reproduce section 6.1:

> ***6. Policy***
>
> *6.1 The expropriating authority must obtain First Nation Council's consent before seeking the Governor in Council's consent to the taking or using of reserve lands. The taking or using of reserve lands without First Nation consent must only be sought in exceptional circumstances, with the support of departmental headquarters and the Department of Justice ("DOJ").*

[42] Policy documents such as this are the kind of "soft law" discussed by Evans JA in *Canada (Minister of Citizenship and Immigration) v Thamotharem*, 2007 FCA 198. Such documents serve as useful guides for those who administer statutes and regulations, and for the public; but are not in themselves law. They are not legally binding and it may be an error of law to misinterpret or misapply them. I repeat what he wrote, for the Court, at paragraphs 57 to 61:

> *57 Both academic commentators and the courts have emphasized the importance of these tools for good public administration, and have explored their legal significance. See, for example, Hudson N. Janisch, "The Choice of Decision-Making Method: Adjudication, Policies and Rule-Making" in Special Lectures of the Law Society of Upper Canada 1992, Administrative Law: Principles, Practice and Pluralism; David J. Mullan, Administrative Law (Toronto: Irwin Law, 2001) at 374-79; P.P. Craig, Administrative Law, 5th edn. (London: Thomson, 2003) at 398-405, 536-40; Capital Cities Communications Inc. v. CRTC, [1978] 2 S.C.R. 141 at 171; Vidal v. Canada (Minister of Employment and Immigration) (1991), 49 Admin. L.R. 118 (F.C.T.D.) at 131; Ainsley at 82-83.*
>
> *58 Legal rules and discretion do not inhabit different universes, but are arrayed along a continuum. In our system of law and government, the exercise of even the broadest grant of statutory discretion which may adversely affect individuals is never absolute and beyond legal control: Roncarelli v. Duplessis, [1959] S.C.R. 121 at 140. (per Rand J.). Conversely, few, if any, legal rules admit of no*

element of discretion in their interpretation and application: Baker at para. 54.

59 Although not legally binding on a decision-maker in the sense that it may be be an error of law to misinterpret or misapply them, guidelines may validly influence a decision-maker's conduct. Indeed, in Maple Lodge Farms Ltd. v. Canada, [1982] 2 S.C.R. 2, McIntyre J., writing for the Court, said (at 6):

> *The fact that the Minister in his policy guidelines issued in the Notice to Importers employed the words: "If Canadian product is not offered at the market price, a permit will normally be issued; ..." does not fetter the exercise of that discretion. [Emphasis added]*

The line between law and guideline was further blurred by Baker at para. 72, where, writing for a majority of the Court, L'Heureux-Dubé J. said that the fact that administrative action is contrary to a guideline "is of great help" in assessing whether it is unreasonable.

60 The use of guidelines, and other "soft law" techniques, to achieve an acceptable level of consistency in administrative decisions is particularly important for tribunals exercising discretion, whether on procedural, evidential or substantive issues, in the performance of adjudicative functions. This is especially true for large tribunals, such as the Board, which sit in panels; in the case of the RPD, as already noted, a panel typically comprises a single member.

61 It is fundamental to the idea of justice that adjudicators, whether in administrative tribunals or courts, strive to ensure that similar cases receive the same treatment. This point was made eloquently by Gonthier J. when writing for the majority in Consolidated-Bathurst Packaging Ltd. v. International Woodworkers of America, Local 2-69, [1990] 1 S.C.R. 282 at 327 ("Consolidated-Bathurst"):

> *It is obvious that coherence in administrative decision-making must be fostered. The outcome of disputes should not depend on the identity of the persons sitting on the panel for this result would be "difficult to reconcile with the notion of equality before the law, which is one of the main corollaries of the rule of law, and perhaps also the most intelligible one". [Citation omitted]*

FIDUCIARY DUTY OF THE CROWN – NATURE AND EXTENT

[43] The Minister has conceded that a fiduciary duty is owed to Coldwater; the question then becomes: What is the nature and extent of that duty?

[44] The nature and extent of the fiduciary duty owed by the Crown and its Ministers to Canada's First Nations is ever evolving under our laws. It finds its roots in the honour owed by the Crown to the First Nations of our country, and continues to find expression in our evolving jurisprudence. The circumstances of a particular fact situation will have a great effect as to how that duty is to be interpreted.

[45] I will consider a number of decisions of the Supreme Court of Canada beginning with *Guerin v The Queen*, [1984] 2 SCR 335. In that case, the Crown leased Indian Band reserve land on terms less favourable than the Band had insisted. The Band sued the Crown; the Trial Judge found in their favour; the Federal Court of Appeal reversed that decision. The Supreme Court restored the Trial Judge's decision. Justice Dickson, for the majority, wrote at pages 383 – 384:

> *(c) The Crown's Fiduciary Obligation*
>
> *The concept of fiduciary obligation originated long ago in the notion of breach of confidence, one of the original heads of jurisdiction in Chancery. In the present appeal its relevance is based on the requirement of a "surrender" before Indian land can be alienated.*
>
> *The Royal Proclamation of 1763 provided that no private person could purchase from the Indians any lands that the Proclamation had reserved to them, and provided further that all purchases had to be by and in the name of the Crown, in a public assembly of the Indians held by the governor or commander-in-chief of the colony in which the lands in question lay. As Lord Watson pointed out in St. Catherine's Milling, supra, at p. 54, this policy with respect to the*

sale or transfer of the Indians' interest in land has been continuously maintained by the British Crown, by the governments of the colonies when they became responsible for the administration of Indian affairs, and, after 1867, by the federal government of Canada. Successive federal statutes, predecessors to the present Indian Act, have all provided for the general inalienability of Indian reserve land except upon surrender to the Crown, the relevant provisions is the present Act being ss. 37-41.

The purpose of this surrender requirement is clearly to interpose the Crown between the Indians and prospective purchasers or lessees of their land, so as to prevent the Indians from being exploited. This is made clear in the Royal Proclamation itself, which prefaces the provision making the Crown an intermediary with a declaration that "great Frauds and Abuses have been committed in purchasing Lands of the Indians, to the great Prejudice of our Interests, and to the great Dissatisfaction of the said Indians…" Through the confirmation in the Indian Act of the historic responsibility which the Crown has undertaken, to act on behalf of the Indians so as to protect their interests in transactions with third parties, Parliament has conferred upon the Crown a discretion to decide for itself where the Indians' best interests really lie. This is the effect of s. 18(1) of the Act.

This discretion on the part of the Crown, far from ousting, as the Crown contends, the jurisdiction of the courts to regulate the relationship between the Crown and the Indians, has the effect of transforming the Crown's obligation into a fiduciary one. Professor Ernest Weinrib maintains in his article The Fiduciary Obligation (1975), 25 U.T.L.J. 1, at p. 7, that "the hallmark of a fiduciary relation is that the relative legal positions are such that one party is at the mercy of the other's discretion." Earlier, at p. 4, he puts the point in the following way:

[Where there is a fiduciary obligation] there is a relation in which the principal's interests can be affected by, and are therefore dependent on, the manner in which the fiduciary uses the discretion which has been delegated to him. The fiduciary obligation is the law's blunt tool for the control of this discretion.

I make no comment upon whether this description is broad enough to embrace all fiduciary obligations. I do agree, however, that where by statute, agreement, or perhaps by unilateral undertaking, one party has an obligation to act for the benefit of another, and that obligation carries with it a discretionary power, the party thus empowered becomes a fiduciary. Equity will then supervise the

> *relationship by holding him to the fiduciary's strict standard of conduct.*
>
> *It is sometimes said that the nature of fiduciary relationships is both established and exhausted by the standard categories of agent, trustee, partner, director, and the like. I do not agree. It is the nature of the relationship, not the specific category of actor involved that gives rise to the fiduciary duty. The categories of fiduciary, like those of negligence, should not be considered closed.*

[46] The next case to be considered is the Supreme Court's decision in *Blueberry River Indian Band v Canada*, [1995] 4 SCR 344. In that case, certain Indian Reserve lands were surrendered to the Crown to sell or lease, particularly to returning veterans. Mineral rights had not been reserved, and gas was discovered under the land. Justice McLachlin (as she then was) wrote a dissenting opinion, but that part at paragraphs 34 and 35 was not part of her dissent. She wrote that the duty of the Crown was not to substitute its decision for that of the Band, but to prevent exploitation:

> *34 The Bands contend that the Indian Act imposed a duty on the Crown to refuse to allow the Band to surrender its lands in light of its interest in the land and the paternalistic scheme of the Indian Act. When a reserve is granted to a band, as was done here in 1916, title does not pass to the band. Rather the Crown holds the fee simple title. The Crown thus possesses power with respect to those lands and must, it is argued, exercise that power as a fiduciary on behalf of the band. This is reinforced by the paternalistic tone of the Indian Act, which it is argued imposes a duty upon the Crown to protect the Indians from themselves and prevent them from making foolish decisions with respect to their land. This is why, it is submitted, title remains in the Crown. The Crown, on the other hand, paints the Band as an independent agent with respect to the surrender of its lands.*
>
> *35 My view is that the Indian Act's provisions for surrender of band reserves strikes a balance between the two extremes of autonomy and protection. The band's consent was required to surrender its reserve. Without that consent the reserve could not be sold. But the Crown, through the Governor in Council, was also required to consent to the surrender. The purpose of the requirement of Crown consent was not to substitute the Crown's decision for that*

> *of the band, but to prevent exploitation. As Dickson J. characterized it in Guerin (at p. 383):*
>
> > *The purpose of this surrender requirement is clearly to interpose the Crown between the Indians and prospective purchasers or lessees of their land, so as to prevent the Indians from being exploited.*
>
> *It follows that under the Indian Act, the Band had the right to decide whether to surrender the reserve, and its decision was to be respected. At the same time, if the Band's decision was foolish or improvident -- a decision that constituted exploitation -- the Crown could refuse to consent. In short, the Crown's obligation was limited to preventing exploitative bargains.*

[47] The Supreme Court dealt directly with the question of an easement in *Opetchesaht Indian Band v Canada*, [1997] 2 SCR 119. An easement had been granted to the Hydro authority for a right-of-way required for the purpose of a transmission line. No express clause respecting termination was provided. No transmission line had been built, and the Indian Band wanted to use the land for its purposes. Justice Major, for the majority, wrote at paragraphs 28 and 29 that no grant of an easement is perpetual; it endures only for so long as the stated purpose is required:

> *28 Nor can the permit be characterized as perpetual because its duration is purely under the control of the respondent Hydro. In Canada (Attorney General) v. Canadian Pacific Ltd., [1986] 1 C.N.L.R. 1 (B.C.S.C.), aff'd [1986] B.C.J. No. 407 (C.A.), it was held that a grant of an interest in reserve land for so long as required for railway purposes was not an interest determinable at the sole will of the railroad. The Court of Appeal found that the reserve land was no longer required for railway purposes, and that therefore, the transfer of the land from CP to its subsidiary, Marathon Realty Corporation, was void.*
>
> *29 The duration of the easement in the instant case is similarly qualified. It endures only so long as the right-of-way is required for the purpose of an electric transmission line. The respondent Hydro has some discretion as to the decisions it makes with respect to the placement and utility of transmission lines. However, since the word "required" is used, it would be wrong to conclude that the expiry of the permit is solely dependant upon the will of the respondent Hydro.*

> *Whether the line is required is a justiciable issue: Canadian Pacific Railway Co. v. Town of Estevan, [1957] S.C.R. 365; Canada (Attorney General) v. Canadian Pacific Ltd., supra. See also The Queen v. Bolton, [1975] F.C. 31 (T.D.), at p. 35.*

[48] This case is factually very similar to the second agreement in the present case where no pipeline has ever been built.

[49] The next case for consideration is the decision of the Supreme Court of Canada in *Osoyoos Indian Band v Oliver (Town),* [2001] 3 SCR 746. In that case, the Governor-in-Council approved the taking of a strip of land within an Indian Reserve for the purposes of building an irrigation canal. The municipal authorities wanted to tax the Indian Band as owners of the canal. The Band argued that the land had been taken from them. Justice Iacobucci, writing for the majority, found that the Crown's fiduciary duty under section 35 of the *Indian Act* is not restricted to instances of surrender; it extends to permitting others to use the land. Public interest does not trump the interests of the Band; an attempt must be made to reconcile the two interests. He wrote at paragraphs 51 and 52:

> *51 The intervener the Attorney General of Canada submits that when Canada's public law duty conflicts with its statutory obligation to hold reserve lands for the use and benefit of the band for which they were set apart, then a fiduciary duty does not arise. The Attorney General argues that the existence of a fiduciary duty to impair minimally the Indian interest in reserve lands is inconsistent with the legislative purpose of s. 35 which is to act in the greater public interest and that the opening phrase of s. 18(1) of the Indian Act, "Subject to the provisions of this Act ...", effectively releases the Crown from its fiduciary duty in respect of s. 35 takings. In addition, the Attorney General contends that a fiduciary [page772] obligation to impair minimally the Indian interest in reserve lands is inconsistent with the principles of fiduciary law which impose a duty of utmost loyalty on the fiduciary to act only in the interests of the person to whom the duty is owed. Thus, the Attorney General submits that the holding in Guerin, supra, that the surrender of an Indian interest of land gives rise to a fiduciary duty on the part of the Crown to act in the best interests of the Indians does not extend to the*

> *context of expropriation, and that the duty of the Crown to the band in the case of an expropriation of reserve land is similar to its duty to any other land holder -- to compensate the band appropriately for the loss of the lands.*
>
> *52 In my view, the fiduciary duty of the Crown is not restricted to instances of surrender. Section 35 clearly permits the Governor in Council to allow the use of reserve land for public purposes. However, once it has been determined that an expropriation of Indian lands is in the public interest, a fiduciary duty arises on the part of the Crown to expropriate or grant only the minimum interest required in order to fulfill that public purpose, thus ensuring a minimal impairment of the use and enjoyment of Indian lands by the band. This is consistent with the provisions of s. 35 which give the Governor in Council the absolute discretion to prescribe the terms to which the expropriation or transfer is to be subject. In this way, instead of having the public interest trump the Indian interests, the approach I advocate attempts to reconcile the two interests involved.*

[50] In *Wewaykum v Canada*, [2002] 4 SCR 245, the Supreme Court stated that the Crown represents the interests of many parties, some of which cannot help but be conflicting; the Crown should not solely be concerned with Band interests. Binnie J, for the Court, wrote at paragraph 96:

> *96 When exercising ordinary government powers in matters involving disputes between Indians and non-Indians, the Crown was (and is) obliged to have regard to the interest of all affected parties, not just the Indian interest. The Crown can be no ordinary [page294] fiduciary; it wears many hats and represents many interests, some of which cannot help but be conflicting: Samson Indian Nation and Band v. Canada, [1995] 2 F.C. 762 (C.A.). As the Campbell River Band acknowledged in its factum, "[t]he Crown's position as fiduciary is necessarily unique" (para. 96). In resolving the dispute between Campbell River Band members and the non-Indian settlers named Nunns, for example, the Crown was not solely concerned with the band interest, nor should it have been. The Indians were "vulnerable" to the adverse exercise of the government's discretion, but so too were the settlers, and each looked to the Crown for a fair resolution of their dispute. At that stage, prior to reserve creation, the Court cannot ignore the reality of the conflicting demands confronting the government, asserted both by the competing bands themselves and by non-Indians. As Dickson J. said in Guerin, supra, at p. 385*

> *It should be noted that fiduciary duties generally arise only with regard to obligations originating in a private law context. Public law duties, the performance of which requires the exercise of discretion, do not typically give rise to a fiduciary relationship. [Emphasis added.]*

[51] The more flexible approach to fiduciary duty of the Crown was again expressed by the Supreme Court in *Haida Nation v British Columbia (Minister of Forests)*, [2004] 3 SCR 511, where Chief Justice McLachlin, for the Court, wrote at paragraph 18:

> *18 The honour of the Crown gives rise to different duties in different circumstances. Where the Crown has assumed discretionary control over specific Aboriginal interests, the honour of the Crown gives rise to a fiduciary duty: Wewaykum Indian Band v. Canada, [2002] 4 S.C.R. 245, 2002 SCC 79, at para. 79. The content of the fiduciary duty may vary to take into account the Crown's other, broader obligations. However, the duty's fulfilment requires that the Crown act with reference to the Aboriginal group's best interest in exercising discretionary control over the specific Aboriginal interest at stake. As explained in Wewaykum, at para. 81, the term "fiduciary duty" does not connote a universal trust relationship encompassing all aspects of the relationship between the Crown and Aboriginal peoples:*
>
> > *... "fiduciary duty" as a source of plenary Crown liability covering all aspects of the Crown-Indian band relationship ... overshoots the mark. The fiduciary duty imposed on the Crown does not exist at large but in relation to specific Indian interests.*

[52] The several duties owed by the Crown was again expressed by the Supreme Court in *Ermineskin Indian Band & Nation v Canada*, [2009] 1 SCR 222, where Rothstein J, for the Court, wrote at paragraph 129:

> *129 The Crown's position in the setting of the interest rate paid to the bands is also unique. On the one hand, it has fiduciary duties that are owed to the bands, including the duty of loyalty and the obligation to act in the bands' best interests. On the other hand, the Crown must pay the interest owed to the bands with funds from the*

> *public treasury financed by taxpayers. The Crown has responsibilities to all Canadians, and some balancing inevitably must be involved.*

[53] Most recently, the Supreme Court in *Manitoba Metis Federation Inc v Canada (Attorney General)*, 2013 SCC 14, the Chief Justice McLachlin and Justice Karakatsanis, for the majority, summarized several aspects of the fiduciary duty owed by the Crown, indicating that it varies with the nature and importance of the interest sought to be protected. They wrote at paragraph 49:

> *49 In the Aboriginal context, a fiduciary duty may arise as a result of the "Crown [assuming] discretionary control over specific Aboriginal interests": Haida Nation v. British Columbia (Minister of Forests), 2004 SCC 73, [2004] 3 S.C.R. 511, at para. 18. The focus is on the particular interest that is the subject matter of the dispute: Wewaykum Indian Band v. Canada, 2002 SCC 79, [2002] 4 S.C.R. 245, at para. 83. The content of the Crown's fiduciary duty towards Aboriginal peoples varies with the nature and importance of the interest sought to be protected: Wewaykum, at para. 86.*

[54] I also refer to three cases in other Courts.

[55] In *Lower Kootenay Indian Band v Canada*, [1992] 2 CNLR 54, Justice Dubé of the Federal Court an Indian Band brought an action against the Crown arguing that the Crown had leased reserve lands on unfavourable terms. Reference was made to evidence consisting of correspondence between Crown officials, in which those persons took the view that consent to a transfer could be used as a lever to open negotiations. Justice Dubé wrote at page 92:

> *The Justice officials were also of the opinion that Creston could take no legal action against the Crown for refusing to consent to any Creston transfer for there "is no provision that such consent shall not be unreasonably withheld."*
>
> *Mr. Millin reported back to Mr. Hett and recommended that the consent clause be used as "a lever to open negotiations with the*

> *present lessee to update the rental and enter into a new lease with the proper protective covenants for the Band."*

[56] In setting this out, Justice Dubé was reciting some of the evidence. He did not say that he agreed with or approved of what was said.

[57] In *Chief Joe Hall v Canada (Attorney General)*, 2007 BCCA 133, the British Columbia Court of Appeal dealt with a claim by an Indian Band respecting land formerly used by the Canadian Armed Forces as a rifle range. Chief Justice Finch wrote the decision of the Court and addressed an argument that the duty of the Crown to consult was a constitutional issue. He held that such duty was not to be found in any statute, but had a "constitutional character". He wrote at paragraphs 47 and 48:

> *[47] The learned chambers judge held that the duty to consult was a "constitutional issue". Counsel for the Attorney General vigorously contested the constitutional nature of the duty to consult. He conceded that the duty is a "legal duty" which has as its source "the honour of the Crown" but argued that "…it is not a constitutional right or obligation."*
>
> *[48] I do not accept that as a sound proposition. The honour of the Crown speaks to the Crown's obligation to act honourably in all its dealings with aboriginal peoples. It may not lawfully act in a dishonourable way. That is a limitation on the powers of government not to be found in any statute, that has a constitutional character because it helps to define the relationship between government and the governed.*

[58] The last decision to which I will refer is that of the Federal Court of Appeal in *Semiahmoo Indian Band v Canada*, (1997), 148 DLR (4^{th}) 523. That case dealt with reserve land taken by the Crown for use as a customs facility. It was not used for that purpose and, ultimately, the Crown

sought to sell it for use as a resort. The Band alleged that the Crown had breached its fiduciary duty. Chief Justice Isaac, for the Court, addressed the Crown's fiduciary duty at pages 538-9:

> *I should emphasize that the Crown's fiduciary obligation is to withhold its own consent to surrender where the transaction is exploitative. In order to fulfil this obligation, the Crown itself is obliged to scrutinize the proposed transaction to ensure that it is not an exploitative bargain. As a fiduciary, the Crown must be held to a strict standard of conduct. Even if the land at issue is required for a public purpose, the Crown cannot discharge its fiduciary obligation simply by convincing the Band to accept the surrender, and then using this consent to relieve itself of the responsibility to scrutinize the transaction.*

[59] Chief Justice Isaac continued by considering the Supreme Court of Canada decision in *Apsassin v Canada*, [1995] 4 SCR 344, Chief Justice Isaac found at page 543, among the principles to be derived from that decision were:

> *(iv) Even in the context of an absolute surrender for sale, the Crown has a post-surrender fiduciary duty to advance the best interests of the Indian Band, to the extent possible, having regard to the terms of the surrender agreement. Therefore, so long as the Crown has the power, whether under the terms of the surrender instrument or under the Indian Act, to exert control over the surrendered land in a manner that serves the best interests of the Band, the Crown is under a fiduciary duty to exercise that power (at 405).*

And at page 544:

> *(v) More particularly, the Crown has a post-surrender fiduciary duty to correct any errors in surrender agreements which have a negative impact upon the Indian Band (at 366).*
>
> . . .
>
> *In Apsassin, the Crown's mistake in the original surrender was in failing to reserve the mineral rights for the benefit of the Indian Band contrary to a longstanding government policy to do so.*

> *In my view, the Crown made a similar mistake in this case as to the quality or scope of the surrender that was required. The Crown obtained an absolute surrender from the Band when, having regard to the uncertainty of the public need for the land, a conditional or qualified surrender would have sufficed. In both cases, the result was that the original surrender did not impair as little as possible the interests of the affected Indian Band. Therefore, I am of the view that in this case, as in Apsassin, the Crown was under a post-surrender fiduciary duty to correct the error that it made in the original surrender for as long as it remained in control of the land.*

[60] From the jurisprudence recited above, from the Supreme Court of Canada and the three further cases that I have cited, I draw the following conclusions as to the jurisprudence:

- 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.

IN THE FACTS OF THIS CASE – HOW IS THE DUTY TO BE EXERCISED

[61] In the present case, there are two easements that were granted in the 1950's by the Crown; originally to Trans Mountain. The purposes of the easements were for the construction and

operation of a pipeline. The first easement has been used, and continues to be used, for that purpose. The second easement has never been used. No pipeline has been built and obviously, none has been operated in respect of the second easement.

[62] Trans Mountain had undergone several internal corporate restructurings until about 2007, when its pipeline interests were sold to Kinder Morgan or a company controlled by it. Coldwater says it does not want the Minister to consent to an assignment of the easements to Kinder Morgan. It raises essentially three grounds; one is that a spill occurred while Kinder Morgan was operating the pipeline. That spill did not amount to a reportable spill, and was quickly cleaned up by Kinder Morgan. The second ground is that Kinder Morgan is not "Canadian", whatever may be the meaning and result of that. The third ground is the Kinder Morgan may wish to revive its interest in the second easement so as to build another pipeline that would treble the flow through the Reserve with consequent safety, environmental and restriction on land use issues.

[63] The Minister has to balance Coldwater's position against other public interests. One such interest is the maintenance of the existing pipeline. The other is a future interest should Kinder Morgan apply for a second pipeline, and should it wish to use the second easement for that purpose.

[64] From the material I have in the Record, there seems to be little reason for the Minister to withhold consent in respect of the first easement, that is, the easement that is presently in use as a pipeline. However, with respect to the second easement, over fifty years have gone by without any construction of, or use as, a pipeline. A reasonable argument can be made that the easement has ceased to exist. If Kinder Morgan wants to build a second pipeline, it is not clear whether the second

easement would be satisfactory for that purpose, in any event. The Minister would be prudent in taking Coldwater's concerns into account in respect of the second easement; particularly if it would require some expansion of the restrictions on the use of land on and near the easement or extended boundaries of the easement and raise safety and environmental concerns, with a view to obtaining a much better result for Coldwater.

IN ANSWER TO THE APPLICANT'S ISSUES

[65] In answer to the issues presented by the Applicant:

1. The Minister does not have an absolute duty to refuse to consent to the assignments upon being advised that Coldwater does not agree to them.

2. The Minister is required to re-examine whether Coldwater's consent is required; particularly in respect of the second easement, and to determine if it is in Coldwater's and the public's interest not to consent.

WHAT RELIEF SHOULD BE GIVEN

[66] The Minister has not yet made a decision. I have determined that, 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.

COSTS

[67] Counsel were not prepared to make any specific submissions as to costs. I consider success to be divided, and that it would be appropriate to make no order as to costs. I find no reason for awarding costs in respect of the production of documents issue.

JUDGMENT

FOR THE REASONS PROVIDED,

THIS COURT'S JUDGMENT is that:

1. It is declared that the Minister, particularly in determining whether consent to an assignment of the unused easement should be given, consider the request of Coldwater that consent not be given unless terms much more favourable to Coldwater can be extracted from Kinder Morgan; and

2. No Order as to costs.

"Roger T. Hughes"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-491-13
STYLE OF CAUSE:	COLDWATER INDIAN BAND AND CHIEF HAROLD ALJAM 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:	OCTOBER 30 & 31, 2013
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DATED:	NOVEMBER 7, 2013

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