

ABORIGINAL PEOPLES

LANDS

Appeal from Federal Court (F.C.) decision (2016 FC 595) dismissing judicial review of respondent Minister of Indian Affairs and Northern Development's (Minister) decision to consent to assignment of easement indenture — Respondent Kinder Morgan operating pipeline traversing appellant's reserve — Appellant, other bands receiving compensation for pipeline right-of-way — Governor in Council authorizing granting of right-of-way easement in 1953 by way of Order in Council — Minister granting right-of-way through affected reserves by way of indenture in 1955 — Kinder Morgan applying to National Energy Board for certificate of public convenience, necessity to enlarge pipeline — Appellants expressing desire that Minister take opportunity afforded by request for consent to assignment to modernize terms of indenture — Minister inviting all affected bands to indenture modernization process — Appellants believing that Minister refusing to include their provisions in indenture, withdrawing from process — "Modification template" later completed, containing new terms — Use, implementation of modification template separate issue from Minister's decision regarding request for consent to assignment of easement indentures — Appellants, Kinder Morgan negotiating Protocol and Capacity Agreement to establish process for addressing legacy, operational issues, to set out engagement process for proposed expansion of pipeline — Minister consenting to assignment by way of assignment consent agreement — Issue before F.C. scope, proper discharge of Minister's fiduciary duty to appellants when deciding whether to consent to assignment of easement indenture — F.C. applying two-step process from *Osoyoos Indian Band v. Oliver (Town)*, 2001 SCC 85, [2001] 3 S.C.R. 746, i.e. (1) whether in public interest that taking or use of reserve lands, interest in reserve lands contemplated under Act, s. 35 be authorized; (2) if yes, Crown having to ensure that taking or use minimally impairing band's right to use, enjoy its reserve lands — F.C. finding that Minister meeting test, not required to reopen indenture — Main issues content of fiduciary duty owed by Minister when considering whether to consent to assignment; whether Minister reasonably discharging fiduciary obligation — *Per Dawson J.A.*(Rennie J.A. concurring): F.C. erring in concluding that Minister's decision reasonable — Minister required to consider appellants' current, ongoing best interest — Having to act as person of ordinary prudence managing own affairs while not defeating public interest in pipeline's continued operation — Having to minimally impair band's right to use, enjoy its lands — Extent of 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 — Minister herein not considering appellants' concerns about compensation, terms of indenture agreement when deciding to consent to assignment — Confining consideration to corporate capacity of assignee to carry out terms of original easement indenture — Minister's obligation to look to best interest of appellants, see that use, enjoyment of land minimally impaired requiring consideration of factors beyond corporate capacity of proposed assignee — As a result of indenture modernization process, Minister knowing that terms of indenture no longer responsive to current concerns — Minister not considering whether protection available to appellants under modernized template adequate — Minister's decision set aside, returned for redetermination — Appeal allowed — *Per Webb J.A.* (dissenting): — Important to focus on particular impact that refusing consent or granting consent in this case having on right of appellants to use, enjoy their lands — Only question for Minister whether rights of one corporate member in easement should be assigned to another corporation in same corporate group — No

basis to conclude that easement would cease to exist if Minister refusing to consent to assignment — As a result, regardless of whether Minister consenting to requested assignment of interest of one company to another company within Kinder Morgan group of companies, easement remaining in place — Use of land in question not changing; appellants right to use, enjoy land same whether consent granted or refused — Minister's decision approving assignment of easement reasonable.

COLD WATER INDIAN BAND V. CANADA (INDIAN AFFAIRS AND NORTHERN DEVELOPMENT) (A-214-16, 2017 FCA 199, Dawson and Webb JJ.A., judgment dated September 26, 2017, 37 pp.)