Federal Court of Appeal | Cour d'appel fédérale

Date: 20141125

Docket: A-399-13

Citation: 2014 FCA 277

CORAM: **NADON J.A.**
WEBB J.A.
BOIVIN J.A.

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

Appellants/Respondents in Cross Appeal

and

THE MINISTER OF INDIAN AFFAIRS AND NORTHERN DEVELOPMENT

Respondent

and

KINDER MORGAN CANADA INC.

Respondent/Appellant in Cross-appeal

Heard at Vancouver, British Columbia, on November 25, 2014.
Judgment delivered from the Bench at Vancouver, British Columbia, on November 25, 2014.

REASONS FOR JUDGMENT OF THE COURT BY: NADON J.A.

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REASONS FOR JUDGMENT OF THE COURT
(Delivered from the Bench at Vancouver, British Columbia, on November 25, 2014).

NADON J.A.

[1] Before us are an appeal and a cross appeal of a decision of Hughes J. of the Federal Court (the judge) rendered on November 7, 2013 (2013 FC 1138) wherein the judge allowed, in part, the appellants' (Coldwater) judicial review application and granted declaratory relief.

[2] The application arises out of a request by the respondent Kinder Morgan Canada Inc. (Kinder Morgan) to the Minister of Indian Affairs and Northern Development (the Minister) to consent to an assignment of two easements for oil pipelines located, in part, on one of the reserves of Coldwater.

[3] Before the Minister could make a decision on Kinder Morgan's request, Coldwater commenced its judicial review application seeking, *inter alia*, an order prohibiting the Minister from giving his consent to the assignment and a declaration that the Minister was legally bound to follow its instructions with respect to Kinder Morgan's request for consent to the assignment of the easements.

[4] The judge, in answer to the issues before him, held that the Minister did not have an absolute duty to refuse to consent to the assignments upon being advised that Coldwater did not agree that consent should be given. He further held that the Minister had to re-examine the question of whether Coldwater's consent was required and in particular with regard to the second easement so as to determine whether it was in Coldwater's and the public's interest to give the consent sought by Kinder Morgan. These answers led the judge to declare that the Minister should consider Coldwater's request that consent be withheld unless terms more favourable to it could be obtained from Kinder Morgan.

[5] Coldwater appeals this decision on the basis of the Crown's fiduciary duty to First Nations and asks us to declare that the Minister must follow its direction to withhold consent.

Coldwater further seeks an order of prohibition preventing the Minister from consenting to the assignment of the easements.

[6] Kinder Morgan cross appeals and requests that we set aside the judge's decision and dismiss the application for judicial review in its entirety. Kinder Morgan further submits that the judicial review application was premature in that the judge exceeded his jurisdiction in ordering declaratory relief.

[7] The Minister, in his written submissions, asked that the appeal be dismissed, but took no position on the cross appeal. At the hearing, Mr. Mackenzie, for the Minister, said that he agreed with Kinder Morgan that the judicial review application was premature.

[8] We are of the view that the judicial review application is premature and that there is no basis for the Federal Court or for this court to interfere with the administrative process which requires the Minister to decide whether he should consent to the two assignments sought by Kinder Morgan.

[9] In *Canada (Border Services Agency) v. C.B. Powell Ltd.*, 2010 FCA 61, [2011] 2 F.C.R. 332 and 400 N.R. 367 (*C.B. Powell*), our Court at paragraphs 30 to 33 made it clear that we were not to interfere with an ongoing administrative process until all adequate remedial recourses in the administrative process had been exhausted unless there were "exceptional circumstances". We went on to say in *C.B. Powell* that such exceptional circumstances were few and that the

threshold for "exceptional" was high. In particular, Stratas J.A., writing for the Court, said at paragraph 33:

> Courts across Canada have enforced the general principle of non-interference with ongoing administrative processes vigorously. This is shown by the narrowness of the "exceptional circumstances" exception. Little need be said about this exception, as the parties in this appeal did not contend that there were any exceptional circumstances permitting early recourse to the courts. Suffice to say, the authorities show that very few circumstances qualify as "exceptional" and the threshold for exceptionality is high: see, generally, D.J.M. Brown and J.M. Evans, *Judicial Review of Administrative Action in Canada* (looseleaf) (Toronto: Canvasback Publishing, 2007) at 3:2200, 3:2300 and 3:4000 and David J. Mullan, *Administrative Law* (Toronto: Irwin Law, 2001) at pages 485-494. Exceptional circumstances are best illustrated by the very few modern cases where courts have granted prohibition or injunction against administrative decision-makers before or during their proceedings. Concerns about procedural fairness or bias, the presence of an important legal or constitutional issue, or the fact that all parties have consented to early recourse to the courts are not exceptional circumstances allowing parties to bypass an administrative process, as long as that process allows the issues to be raised and an effective remedy to be granted: see *Harelkin, supra; Okwuobi, supra at paragraphs 38-55; University of Toronto v. C.U.E.W, Local 2* (1988), 52 D.L.R. (4th) 128 (Ont. Div. Ct.). As I shall soon demonstrate, the presence of so-called jurisdictional issues is not an exceptional circumstance justifying early recourse to courts. [emphasis added]

[10] Coldwater argues that its application was justified in the circumstances as the Minister will be acting contrary to his fiduciary duty and thus outside his jurisdiction. Moreover, the constitutional nature of the Minister's fiduciary obligations make this Court's intervention appropriate. Coldwater also says that the Minister's consent would function as a waiver of Terasen Inc.'s failure to have the indentures properly signed, that it may "invigorate the potentially expired [second] indenture" and that it may grant to Kinder Morgan a legal interest in the reserve that could not later be undone.

[11] Mr. Kirchner, counsel for Coldwater, was quite candid before us when he said that he was, in effect, seeking a remedy akin to a directed verdict in a jury trial. In his view, the Minister could not, in law, decide the consent issue other than in the way proposed by Coldwater.

[12] In our view, the circumstances put forward by Coldwater to justify its pre-emptive strike are not exceptional circumstances. Further we cannot see any irreparable harm or prejudice arising from having the Minister decide the question which is before him. To this we would add that we are satisfied that the Minister can provide the remedy sought by Coldwater, i.e. that the indentures not be assigned to Kinder Morgan.

[13] The rationale for limiting early recourse to the judicial system was spelled out in unequivocal terms by our Court in *C.B. Powell* at paragraph 32:

> This prevents fragmentation of the administrative process and piecemeal court proceedings, eliminates the large costs and delays associated with premature forays to court and avoids the waste associated with hearing an interlocutory judicial review when the applicant for judicial review may succeed at the end of the administrative process anyway....

[14] Here the judicial review application has resulted in just these types of negative consequences. In particular, the administrative process and the Minister's ultimate decision have been delayed and the parties have no doubt incurred extensive costs in bringing this matter to both the Federal Court and to this Court on the appeal. Should the Minister follow or agree with Coldwater's instructions, these proceedings would in all probability become moot. On the other hand, whether the Minister consents to the assignments or not, there is a real likelihood that a judicial review application to quash the Minister's decision will be commenced. As a matter of

fact, Coldwater commenced its judicial review application on March 21, 2013 and, as a result, the Minister has yet to render a decision on Kinder Morgan's request.

[15] Thus, we are satisfied that the judge ought to have refused to entertain this judicial review application and should have allowed the administrative process to take its course.

[16] For these reasons, the appeal will be dismissed with costs, the cross appeal will be allowed with costs, the decision of the Federal Court dated November 7, 2013 will be set aside and the judicial review application will be dismissed with costs.

"M. Nadon"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-399-13
(APPEAL FROM A JUDGMENT OR ORDER OF THE HONOURABLE MR. JUSTICE HUGHES OF THE FEDERAL COURT, DATED NOVEMBER 7, 2013, DOCKET NO. T-491-13.)	
STYLE OF CAUSE:	COLDWATER INDIAN BAND ET AL v. THE MINISTER OF INDIAN AFFAIRS AND NORTHERN DEVELOPMENT ET AL
PLACE OF HEARING:	Vancouver, British Columbia
DATE OF HEARING:	NOVEMBER 25, 2014
REASONS FOR JUDGMENT OF THE COURT BY:	NADON J.A. WEBB J.A. BOIVIN J.A.
DELIVERED FROM THE BENCH BY:	NADON J.A.

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