Court File No: T-133-15

FEDERAL COURT

BETWEEN:

COLDWATER INDIAN BAND and CHIEF LEE SPAHAN
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

APPLICATION RECORD OF THE APPLICANTS
Volume 2 of 2

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MEMORANDUM OF FACT AND LAW OF THE APPLICANTS

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PART 1 – STATEMENT OF FACTS

A. OVERVIEW

1. This is an Application for Judicial Review in respect of a decision of the Respondent Minister of Indian Affairs and Northern Development (the "**Minister**") consenting to the assignment of an indenture that grants an oil pipeline easement (the "**Indenture**") through Coldwater Indian Reserve No. 1 (the "**Reserve**") to the Respondent Kinder Morgan Canada Inc. ("**Kinder Morgan**"). Coldwater Indian Band ("**Coldwater**") seeks declaratory relief and an order quashing or setting aside the decision on the basis that the Minister's consent to the assignment is unlawful, as it is contrary to the legal or equitable obligations of the Minister.

2. The pipeline easement was granted in 1955 to Trans-Mountain Oil Pipeline Company Ltd. in order to transport oil from Edmonton, Alberta to the Burnaby, British Columbia. In consideration for the easement, the Department of Indian Affairs accepted a one-time payment of $1.00 per lineal rod on Coldwater's behalf, which amounted to a total of $1292. The oil pipeline was constructed through the Reserve and currently transmits approximately 300,000 barrels of oil per day (bpd) through the Reserve with no continuing financial benefit to Coldwater (apart from property taxes). The Indenture granting the easement contains an express prohibition against assignment without the consent of the Minister.

3. Through a series of corporate amalgamations, mergers and name-changes, the Indenture came to be held by Terasan Inc. who, in 2007, purported to assign it to Kinder Morgan, but failed to obtain the prior consent of the Minister, as required by the Indenture. For almost six years, Kinder Morgan operated the pipeline through the Reserve without a valid authorization. Then in 2012, Kinder Morgan applied to the Minister for his retroactive consent to the assignment, and was subsequently granted that consent by the Minister in 2014.

4. Coldwater has articulated a number of concerns to the Minister with regard to the pipeline and the assignment of the Indenture, including that the Indenture is outdated and is for indefinite duration for which Coldwater does not get any ongoing compensation (other than property tax). The Minister had the ability to change this, using his authority to refuse consent to the assignment of the Indenture, but did not do so. Further, Kinder Morgan has applied to the National Energy Board for approval to twin the pipeline, increasing the capacity to 890,000 bpd.

The proposal to twin the pipeline, if approved, will only serve to exacerbate the outdated terms of the Indenture by extending the lifespan of the pipeline and the Indenture.

5. The Minister is under a fiduciary duty to Coldwater in respect of the management of the Reserve. This fiduciary duty was engaged with respect to the Minister's authority to grant or withhold consent to the assignment of the Indenture, as the Minister was squarely interposed between Coldwater and Kinder Morgan in negotiating the terms of the assignment.

6. In the fulfillment of his fiduciary duty, the Applicants submit that, once the decision was made that the assignment of the Indenture to Kinder Morgan was in the public interest, the Minister was required to act in Coldwater's best interests with a view to minimally impairing the Reserve interest. It was in the best interests of Coldwater that the terms of the Indenture be modernized, including with respect to the compensation owed to Coldwater, before the Minister consented to the assignment of the Indenture. The Minister failed to do so, consenting to the assignment on the same outdated terms that were set in 1952.

7. Further, the Applicants submit that the Minister also breached Coldwater's procedural fairness rights, and his fiduciary duty to Coldwater, by failing to provide Coldwater with the materials before the Minister, before the decision on the assignment of the Indenture was made, contrary to the *audi alteram partem* principle and the Minister's fiduciary obligations.

8. Thus, the Minister, in consenting to the assignment of the outdated Indenture, unlawfully breached his fiduciary duty to Coldwater, and Coldwater's procedural fairness rights. The Applicants are, therefore, entitled to the relief sought.

B. COLDWATER, THE RESERVE AND KINDER MORGAN

9. Coldwater is a band as defined by the *Indian Act*, R.S.C., 1985, c I-5. Chief Lee Spahan is Coldwater's elected chief. Coldwater is the beneficial holder of three reserves, one of which is the Reserve. The Reserve is located approximately 10 km south of Merritt, B.C. near the Coquihalla Highway (Highway 5).

Reference: Affidavit of Lee Spahan ("Spahan Affidavit"), paras. 1-3 and 5; Applicants' Record ("AR"), Tab 3, pp. 32-33

10. Kinder Morgan operates an oil transmission pipeline that runs approximately 1,150 kilometers from Edmonton, Alberta to the Westridge Marine Terminal in Burnaby, British Columbia, passing through the Reserve (the "**Pipeline**"). Kinder Morgan acquired the Pipeline on or about April 30, 2007 from Terasen Inc. through an asset transfer agreement further described below.

Reference: Spahan Affidavit, paras. 28-29; AR, Tab 3, p. 38

C. THE INDENTURES

11. In or about April 1952, Trans Mountain Oil Pipeline Company (**"Trans Mountain"**) applied to the Department of Indian Affairs (the **"Department"**) for a 60-foot-wide right-of-way through the Reserve (as well as other reserves) for the purpose of constructing a 24-inch pipeline. The application was made on behalf of Trans Mountain by Canadian Bechtel Limited (**"Canadian Bechtel"**) in a letter dated April 1, 1952 to W.S. Arneil, Indian Commissioner for British Columbia. Trans-Mountain offered compensation in the amount of $1.00 per lineal rod (about 16.5 feet) of right-of-way.

Reference: Spahan Affidavit para. 11, Ex. B; AR, Tab 3, pp. 34, 45-46

12. In or about April 1952, the Department sought Coldwater's consent to Trans Mountain's application and, by Band Council Resolution dated April 22, 1952, received that consent from Coldwater's Band Council as follows:

> Trans-Mountain Pipeline Company be granted Right-of-way across Coldwater I.R. #1 on terms set out in the application dated April 1st from Canadian Bechtel Limited, agents for the Company.

Reference: Spahan Affidavit para. 12, Ex. C; AR, Tab 3, pp. 35, 47-50

13. By letter dated May 20, 1952, Indian Commissioner Arneil wrote to Canadian Bechtel advising that Coldwater's consent to the application had been obtained and noted that the consent restricts the installation to a single pipeline.

Reference: Spahan Affidavit para. 13, Ex. D; AR, Tab 3, pp. 35, 51-52

14. By Order-in-Council dated March 19, 1953, the Governor-in-Council, on the recommendation of the Acting Minister of Citizenship and Immigration (then responsible for

Indian Affairs) and on the consent of Coldwater, authorized the grant of an easement in the Reserve to Trans Mountain pursuant to the *Indian Act*, R.S.C. 1952, c. 149, s. 35 "for pipe line purposes for so long as same are required for that purpose" and on terms and conditions that the Minister may deem advisable.

Reference: Spahan Affidavit para. 14, Ex. E: AR, Tab 3, pp. 35, 53-54

15. The Department accepted the offer of $1.00 per lineal rod without question. This was a one-time payment for the right-of-way with no provision for ongoing lease or rental payments. This amounted to a payment of $1,292 for acquisition of the right-of-way (some additional money was paid to compensate for the removal of timber and impacts on residents). Based on the Bank of Canada's inflation index, this amounts to approximately $11,408 in 2014.

Reference: Spahan Affidavit paras. 15-16, Exs. F and G; AR, Tab 3, pp. 35-36, 55-57

16. By the Indenture dated May 4, 1955, entered into between Her Majesty the Queen in right of Canada, as represented by the Minister of Citizenship and Immigration, and Trans Mountain, the Minister granted a right-of-way in the Reserve to Trans Mountain "for such period as the said lands are required for the purpose of a pipe line right of way".

Reference: Spahan Affidavit para. 17, Ex. H; AR, Tab 3, pp. 36, 58-64

17. The Indenture included a term prohibiting the assignment of the Indenture by Trans Mountain without the written consent of the Minister. That term reads:

> 2. That the Grantee shall not assign the right hereby granted without the written consent of the Minister.

Reference: Spahan Affidavit para. 19, Ex. H; AR, Tab 3, pp. 36, 58-64

18. Starting in or about 1952, Trans Mountain constructed an oil pipeline (the "**Pipeline**") through the Reserve.

Reference: Spahan Affidavit para. 20; AR, Tab 3, p. 36

19. By letter dated November 28, 1957, Trans Mountain applied to the Department for a second easement in the Reserve to construct a looping line through the Reserve. According to a letter dated December 19, 1957 from G.E. Sharpe, Superintendent for the Nicola Indian Agency,

to Indian Commissioner Arneil, the Coldwater Band Council is said to have agreed in principal to the application by way of Band Council Resolution, but no such resolution has been located.

Reference: Spahan Affidavit, paras. 21-22, Exs. I and J; AR, Tab 3, pp. 37, 65-67

20. On or about May 1, 1958, the Governor-in-Council authorized the second application, again on the recommendation of the Acting Minister of Citizenship and Immigration and on the apparent consent of Coldwater, approving that Trans Mountain acquire the easement "for so long as such easement is needed for pipeline purposes"; and a second indenture was entered into on or about August 3, 1958 (collectively the "**Indentures**"). It also contained a term prohibiting the assignment without the written consent of the Minister.

Reference: Spahan Affidavit, para. 23-24, Ex. K and L; AR, Tab 3, pp. 37, 68-76

21. Unlike the Pipeline that was the subject of the Indenture, the looping line that was the subject of the second indenture was never built through the Reserve.

Reference: Spahan Affidavit, para. 25; AR, Tab 3, p. 37

D. THE PURPORTED ASSIGNMENT OF THE INDENTURES

1. The Purported Indenture Holders

22. The Respondent Kinder Morgan asserts that through a series of continuations, corporate name-changes, reorganizations, and amalgamations, Terasen Inc., a company incorporated pursuant to the laws of Canada, came to be the holder of both the Indentures by in or about April 2007.

Reference: Spahan Affidavit, para. 26; AR, Tab 3, pp. 37-38

23. Pursuant to the April 22, 1952 Band Council Resolution, Coldwater had authorized Trans Mountain to acquire a right-of-way through the Reserve on specific terms and for specific pipeline purposes. Coldwater was not consulted respecting the various corporate transformations that purportedly resulted in Terasen Inc. becoming holder of the Indentures. Further, the consent of the Minister for an assignment of the Indentures was neither sought nor obtained in respect of any of these transactions.

Reference: Spahan Affidavit, para. 27, Ex. M; AR, Tab 3, pp. 38, 77-82

2. The Purported Transfer of the Indentures

24. According to Kinder Morgan, on or about April 30, 2007, Terasen Inc. purportedly transferred its "oil transportation assets" to a company called Trans Mountain Pipeline ULC and, on the same day, Trans Mountain Pipeline ULC purportedly transferred or contributed its "oil transportation assets" either to a partnership called Trans Mountain Pipeline L.P. or to a company called Trans Mountain Pipeline Inc. (the **"Asset Transfers"**). Both Trans Mountain Pipeline ULC and Trans Mountain Pipeline L.P. apparently came to be owned and controlled by KMEP Canada ULC, which is a company related to the Respondent Kinder Morgan.

Reference: Spahan Affidavit, paras. 28-29, Ex. M; AR, Tab 3, pp. 38, 77-82

25. The Asset Transfers purported to include the Indentures. However, the Applicants maintain that the indentures were not transferred in fact (or in law) because the consent of the Minister to the assignment of the Indentures as required by section 2 of each Indenture was neither sought nor given. In addition, the Applicants maintain that the Band Council Resolution by which Coldwater consented, or is purported to have consented, to Trans Mountain acquiring an interest in the Reserve for pipeline purposes is ineffective to consent to Trans Mountain Pipeline ULC, or subsequently to Trans Mountain Pipeline Inc. or Trans Mountain Pipeline L.P., acquiring an interest in the Reserve.

Reference: Spahan Affidavit, para. 30; AR, Tab 3, p. 38

3. The Post-Transfer Reorganization and Sale of the Purported Transferor

26. Following the purported transfer of the "oil transportation assets" on or about April 30, 2007, Terasen Inc. underwent another series of continuations, amalgamations, and acquisitions, eventually purporting to become Fortis Inc. Since no later than April 30, 2007, the holder of the Indentures, be it Terasen Inc., Fortis Inc., or some other person or corporation, has not carried on the business of operating an oil transportation pipeline through the Reserve or otherwise, and thus does not need or require for pipeline purposes the interest in the Reserve acquired by Trans Mountain.

Reference: Spahan Affidavit, Ex. M; AR, Tab 3, pp. 77-82

E. REQUEST FOR AN ASSIGNMENT

27. By letter dated June 12, 2012, Kinder Morgan, together with Fortis Inc. and Fortis BC Holdings Inc. wrote to the Minister seeking his retroactive consent to the assignment of the Indentures from Terasen Inc. to Trans Mountain Pipeline ULC. The request for consent was made more than 5 years after the transfer of the "oil transportation assets" of Terasen Inc. and the purported transfer of the Indentures.

Reference: Spahan Affidavit, para. 31; AR, Tab 3, p. 38
Affidavit of Harold Aljam ("Aljam Affidavit"), para. 6, Ex. B; AR, Tab 4, pp. 118, 126-129

F. KINDER MORGAN'S PLANS FOR THE PIPELINE

28. Kinder Morgan has applied to the National Energy Board to almost triple the Pipeline carrying capacity. This proposal is to expand the Pipeline from its current maximum capacity of 300,000 bpd to 890,000 bpd. To achieve this increase in capacity, Kinder Morgan plans to "twin" the Pipeline by adding a second pipe at various points along the Pipeline route, including potentially through the Reserve.

Reference: Spahan Affidavit, paras. 32-36; AR, Tab 3, pp. 38-39

G. EXCHANGE OF CORRESPONDENCE

29. Through correspondence with the Minister and others within the Department of Aboriginal Affairs and Northern Development Canada ("**AANDC**"), beginning in April 2011, Coldwater has stated its concerns about the assignment of the Indentures to Kinder Morgan and stated its position objecting to the requested consents to the assignments. This correspondence includes letters dated April 25, 2012, July 3, 2012, January 9, 2013, and February 20, 2013.

Reference: Aljam Affidavit, paras.3-15; AR, Tab 4, pp. 117-121

30. By letter dated April 25, 2012, legal counsel for Coldwater wrote to the Minister advising that Kinder Morgan was expected to seek the Minister's retroactive consent to the assignment of the Indentures and stating that Coldwater "does not presently agree to the assignment" and asking for a meeting.

Reference: Aljam Affidavit, para. 4, Ex. A; AR, Tab 4, pp. 118, 124-125

31. On or about May 17, 2012, Harold Aljam, who was then the elected Chief of Coldwater, together with Coldwater's legal counsel, attended a meeting arranged by Kuldip Gill, a Land Management and Leasing Officer with AANDC in Vancouver. Mr. Gill advised that AANDC had received no formal request for consent to the assignment of the Indentures. Since no formal request had been made, Chief Aljam and Coldwater's legal counsel suggested that the meeting was pre-mature.

Reference: Aljam Affidavit, para. 5; AR, Tab 4, p. 118

32. On or about June 12, 2012, Kinder Morgan submitted a formal application to the Minister seeking his retroactive consent to the assignment of the Indentures.

Reference: Aljam Affidavit, para. 6, Ex. B; AR, Tab 4, pp. 118, 126-129

33. By letter dated June 21, 2012, Minister Duncan's staff responded to the April 25, 2012 letter and declined to meet with Coldwater.

Reference: Aljam Affidavit, para. 7, Ex. C; AR, Tab 4, pp. 118, 130

34. By letter dated July 3, 2012, legal counsel for Coldwater wrote to Canada requesting the following:

- that the Minister not provide his consent without first discussing the proposed assignment with Coldwater;
- that a meeting be scheduled to discuss the matter; and
- that if AANDC was collecting and reviewing materials in respect of the application for consent to the assignment, that these materials should be provided to Coldwater for review and consideration in advance of any meetings.

Reference: Aljam Affidavit, para. 8, Ex. D; AR, Tab 4, pp. 118-119, 131-132

35. By letter dated July 16, 2012, Mr. Gill wrote to Coldwater's Chief and Council formally advising that the application for consent to the assignment of the Indentures had been received and that AANDC was in the process of reviewing it. Mr. Gill did not otherwise contact Coldwater until November 14, 2012.

Reference: Aljam Affidavit, para. 9, Ex. E; AR, Tab 4, pp. 119, 133-135

36. By letter dated November 14, 2012, Mr. Gill wrote to Coldwater's Chief and Council advising that AANDC was "continuing to gather facts and information to assist the Minister in making a decision on the request for consent to these assignments". Mr. Gill indicated that the Minister would consider facts and information from 2007 to the present and specified areas of information that the Minister would consider. Mr. Gill invited Coldwater to provide information and asked to receive it by January 11, 2013.

Reference: Aljam Affidavit, para. 10, Ex. F; AR, Tab 4, pp. 119, 136

37. By letter dated January 9, 2013, legal counsel for Coldwater wrote to Mr. Gill, care of Ms. Thomas, making a number of information requests and offering to meet once that information could be considered. The letter also provided a list of issues that Coldwater expected to raise, including the potential expansion of the Pipeline, once full information had been received.

Reference: Aljam Affidavit, para. 11, Ex. G; AR, Tab 4, pp. 119-120, 137-141

38. In a February 8, 2013 letter sent in reply, Canada was unresponsive to Coldwater's request to receive information and materials that AANDC may have collected for review in connection with the request for consent to the assignment of the Indentures.

Reference: Aljam Affidavit, para. 12, Ex. H; AR, Tab 4, pp. 120, 142-144

39. With regard to the potential expansion of the Pipeline, Canada stated that AANDC "has no involvement" in Kinder Morgan's Pipeline expansion plans and merely referred Coldwater to the National Energy Board.

Reference: Aljam Affidavit, paras. 13-14; AR, Tab 4, pp. 120-121

40. By letter dated February 20, 2013, then Chief Harold Aljam, on behalf of Coldwater, wrote to Mr. Gill advising him that after giving the matter very serious consideration, with the benefit of full legal advice, "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 Indenture respecting the Coldwater Reserve." Consequently, Chief Aljam directed AANDC, as

the fiduciary of Coldwater in respect of the Reserve, to refuse consent to the assignments of the Indentures.

Reference: Aljam Affidavit, para. 15; AR, Tab 4, p. 121

H. FIRST LEGAL PROCEEDINGS

41. By Notice of Application filed in the Federal Court on or about March 21, 2013, Coldwater brought Judicial Review proceedings seeking to prevent or enjoin the Minister from consenting to the assignment of either of the Indentures. Coldwater asserted, among other things, that pre-emptive relief was necessary due to the potential that the Minister's consent (should it be granted) might give Kinder Morgan vested legal rights in the right-of-way or the Indentures that could not be reversed by way of judicial review.

Reference: Spahan Affidavit, para. 47; AR, Tab 3, p. 42

42. The matter ended up before the Federal Court of Appeal, which, on November 25, 2014, dismissed the Application for Judicial Review on the grounds that it was premature and ought not to have been brought unless and until the Minister decided to approve the requested assignments.

Reference: Spahan Affidavit, para. 48; AR, Tab 3, p. 42

I. THE FAILED INDENTURE MODERNIZATION PROCESS

43. On or about January 8, 2014, Canada in conjunction with the Tk'emlúps (Kamloops) Indian Band established a steering committee and a technical committee to work on the modernization of the all the indentures that provided for the Pipeline passing through various reserves in British Columbia, including those applicable to the Coldwater Reserve (the "**Indenture Modernization Process**"). The Indenture Modernization Process was constrained by Canada's position that "no new rights would be created nor existing rights diminished" through that Process. (Coldwater maintains that Kinder Morgan had no existing rights in respect of the Reserve due to the failure to obtain the Minister's consent to the assignment of either Indenture.)

Reference: Aljam Affidavit, para. 17; AR, Tab 4, pp. 121-122; Affidavit of Kuldip Gill, Ex. OOO, p. 1

44. Despite the potential limitations, Coldwater participated in the Indenture Modernization Process in good faith. Their representative attended several meetings and made written representations and proposals as to how the Indentures should be modernized. However, despite Coldwater's participation in the committee process, Canada refused to discuss or consider modernizing key elements of the Indentures as requested by Coldwater, including:

(a) ***First Nations as a party*** – Coldwater requested adding each First Nation as a party to the Indentures (or at minimum including the First Nation directly in certain provisions) so that, among other things, a First Nation may enforce its rights directly against the Indenture holder and not have to rely on Canada to do so on its behalf. Canada refused to consider this.

(b) ***Definition of pipeline*** – Coldwater requested defining "pipeline" so that the Indentures are not ambiguous as to what size, dimension or number of pipelines exactly are permitted to by the Indenture. Canada refused to consider this.

(c) ***Assignment*** – Coldwater put forward the idea of modernizing the assignment provisions to ensure that obligations to obtain consent to an assignment cannot be avoided by a corporate reorganization or share transfer agreement, making those provisions consistent with modern business practice. Canada refused to consider this.

(d) ***Decommissioning*** – Coldwater proposed clarifying that any decommissioning work is to be completed to the satisfaction of not only Canada, but also to the satisfaction of each First Nation whose land is affected by the Pipeline. Canada refused to agree to this.

(e) ***Pollution insurance*** – Coldwater proposed, in addition to insurance requirements that would focus on sudden and accidental damage as suggested by Canada, requiring insurance that would cover "pollution" or "slow leaks". Canada refused to consider this.

(f) ***Best practices*** – Coldwater requested that generally accepted "best practices" be followed, as opposed to only generally accepted practices. Canada refused to consider this.

(g) ***Environmental laws*** – Coldwater proposed that Canada apply certain provincial environmental laws to the reserve lands in question rather than have only (the comparatively weaker) federal environmental laws apply. Canada refused to consider this.

(h) ***Term and termination*** – Coldwater requested that the Indentures have a defined term and that there should be an express ability of Canada (or the Frist Nation) to terminate the Indentures. Canada refused to consider this.

(i) ***New Consideration*** – Coldwater requested that the consideration for the Indentures be updated to properly reflect the extent of the interest granted in the Reserve and Kinder Morgan' use of the Reserve. Canada refused to consider modernizing, updating or making any changes whatsoever to the one-time $1.00/lineal rod ($1,292) payment made by Trans-Mountain in 1952.

Reference: Aljam Affidavit, para. 18, Ex. L; AR, Tab 4, pp. 122-123, 152-154

45. In view of Canada's outright refusal to consider any of the above modernization proposals, Coldwater's legal counsel advised Canada by letter dated May 30, 2014, that Coldwater would be withdrawing from the Indenture Modernization Process.

Reference: Aljam Affidavit, para. 19, Ex. L; AR, Tab 4, pp. 123, 152-154

J. MINISTERIAL APPROVAL OF THE ASSIGNMENT

46. On December 29, 2014, by letter, Canada notified the Chief and Council of Coldwater that the Minister had consented to the assignment of the Indenture (but deferred consideration of the second indenture pending further information from Kinder Morgan). The Minister gave his consent without modernizing the outdated terms of the Indenture, including without updating the consideration to Coldwater and without any terms or conditions that would require such modernization.

Reference: Spahan Affidavit, para. 49, Ex. S; AR, Tab 3, pp. 42, 101-116

47. The assignment contained no conditions that would address the interests or concerns expressed by Coldwater in the failed modernization process, or otherwise protect, promote or advance Coldwater's interests.

Reference: Spahan Affidavit, para. 50; AR, Tab 3, p. 42

K. PROTOCOL AND CAPACITY AGREEMENT

48. On October 1, 2014, Coldwater, Kinder Morgan, and Trans Mountain Pipeline L.P. entered into a Protocol and Capacity Agreement ("the Protocol Agreement"). Under the Protocol Agreement, Kinder Morgan provides consideration to Coldwater for the unauthorized use of the Reserve for the seven years prior to the consent of the Minister to the assignment of the Indenture. Kinder Morgan also provides financial assistance to Coldwater for having to undertake consultation with Kinder Morgan to resolve issues regarding Kinder Morgan's use of the Reserve for the Pipeline and the proposed expansion of the Pipeline, and to undertake studies to be put before the National Energy Board in considering the expansion of the Pipeline.

Reference: Confidential Affidavit of Robert Love, Ex. B, cls. 3.1, 4.1 and 5.1

49. However, the Protocol Agreement does not provide any ongoing consideration for the use of the Reserve for the Pipeline under the Indenture. The Protocol Agreement further does not provide any protections for Coldwater, given the risks created by the Pipeline and the interference of the Pipeline with Coldwater's use and enjoyment of the Reserve. The Protocol Agreement is furthermore of limited duration – with a term of only one year.

Reference: Confidential Affidavit of Robert Love, Ex. B, cl. 9.1.

50. The Protocol Agreement does not constitute an acknowledgment of the legal validity of either Indenture or agreement to the assignment of the Indenture. The Protocol Agreement expressly states that it does not prejudice, limit or derogate any of Coldwater's rights.

Reference: Confidential Affidavit of Robert Love, Ex. B, cls. 5.7 and 6.1

L. COLDWATER'S CONCERNS WITH THE INDENTURE AND THE PIPELINE

51. Coldwater has articulated a number of concerns with regard to the Pipeline and the assignment of the Indenture, including that the Indenture is outdated and is for indefinite

duration for which Coldwater does not get any ongoing compensation (other than property tax). The Minister had the ability to change this, using his authority to refuse consent to the assignment of the Indenture, but did not do so. The proposal to twin the Pipeline, if approved by the National Energy Board, will only serve to exacerbate the outdated terms of the Indenture by extending the lifespan of the Pipeline and the Indenture.

Reference: Spahan Affidavit, para. 45; AR, Tab 3, p. 41

52. The current Pipeline interferes with Coldwater's use and enjoyment of their Reserve. There has been at least one incident where oil has leaked on to Coldwater's lands. Further, although the existing Pipeline is buried, the *National Energy Board Act* imposes a number of restrictions on Coldwater's ability to use their land by imposing a 30-metre safety zone on either side of the Pipeline where Coldwater's use of both the surface and subsurface is restricted. It has also restricted the irrigation of at least one lot on the Reserve.

Reference: Spahan Affidavit, paras. 38-44; AR, Tab 3, pp. 40-41
National Energy Board Act, R.S.C. 1985, c. N-7, s. 112

53. Given Canada's refusal to update the Indenture in the key respects put forward by Coldwater through the Indenture Modernization Process, and Coldwater's ongoing concerns with the Indenture and the Pipeline, Coldwater did not agree to the assignment of the Indenture as requested by Kinder Morgan. Coldwater advised the Minister of this position and directed him, as their fiduciary and the person with the legal obligation to manage the easement lands on their behalf and in their best interests, not to consent to the assignment of the Indenture.

Reference: Spahan Affidavit, para. 46; AR, Tab 3, pp. 41-42

54. Coldwater also has very significant concerns regarding the proposed expansion of the Pipeline and the potential use of the second indenture for this purpose. However, since the Minister has deferred consideration of the assignment of the second indenture, those concerns are not central to this Judicial Review.

M. PRODUCTION OF THE RECORD

55. By Notice of Application dated January 27, 2015, Coldwater commenced these proceedings. The Notice of Application contained a request pursuant to Rule 317 of the *Federal Courts Rules* that the Minister produce to the Registry and the Applicants "[a]ll material that was

made available to the Minister or his delegate in connection with his consideration of the request to consent to the assignment of the Indenture."

Reference: Notice of Application: AR Tab 1, p. 19

56. On February 12, 2015, Mr. Gill responded to the Rule 317 request and provided the material that was before the Minister pursuant to Rule 318 of the *Federal Courts Rules*. Contained in the material provided was the recommendation from AANDC staff to the Regional Director General dated December 9, 2014, recommending that the Regional Director General consent to the assignment of the Indenture. Coldwater had not previously been made aware of or been provided with this recommendation.

Reference: Aljam Affidavit, para. 16, Ex. J; AR, Tab 4, pp. 121, 147-149

PART 2 – POINTS IN ISSUE

57. Did the Minister act unlawfully in consenting to the assignment of the Indenture to Kinder Morgan in light of the fiduciary obligations he owes to Coldwater?

58. Did the Minister breach Coldwater's rights to procedural fairness, and the Minister's fiduciary obligations, by failing to provide Coldwater with a copy of the materials that were before him in making his decision on the assignment of the Indenture before that decision was made?

PART 3 – SUBMISSIONS

A. THE FIDUCIARY DUTY OF THE MINISTER

1. Nature of the Duty

59. It is well established that a fiduciary duty arises when the Crown is interposed between an Indian band and others with respect to a specific band interest, or when the Crown has discretionary control over such an interest. That is clearly the case here where the Minister exercises the power and discretion to grant or withhold his consent to the assignment of the Indenture.

Reference: *Guerin v. Canada*, [1984] 2 S.C.R. 335 at 384-385 ["*Guerin*"]
Wewaykum Indian Band v. Canada, 2002 SCC 79, [2002] 4 S.C.R. 245 ["*Wewaykum*"] at paras. 79-81

60. The Crown's fiduciary duty to First Nations is grounded in the honour of the Crown and the assumption by Canada of discretionary control over specific Aboriginal interests – in this case, the Reserve. This duty compels the Crown to act in the best interests of Coldwater in exercising discretionary control over the Reserve:

> 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.** (bold emphasis added)

Reference: *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 S.C.R. 511["*Haida*"] at para. 18

61. The honour of the Crown is at stake in its dealings with First Nations and the Crown may not lawfully act in a dishonourable way.[1] As Chief Justice Finch stated for a five-judge division of the B.C. Court of Appeal "[t]hat 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."

Reference: *Chief Joe Hall v. Canada (Attorney General)*, 2007 BCCA 133, 281 D.L.R. (4th) 752 at para. 48

62. The Crown's fiduciary duty to Indian Bands in respect of a specific Aboriginal interest is characterized by the following features:

(a) a duty of "utmost loyalty" to the Band;

(b) a duty to exercise any enlarged rights and powers[2] on behalf of the Band;

(c) a duty to act only in the best interests of the Band;

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[1] The Minister in consenting to the assignment of the Indenture contrary to his fiduciary obligations to Coldwater is acting unlawfully and *ultra vires*, which he plainly has no authority to do. Thus, the standard of review is not at issue in this case: *Chief Joe Hall v. Canada (Attorney General)*, 2007 BCCA 133, 281 D.L.R. (4th) 752, *Inuit Tapirisat of Canada v. Canada (Attorney General)*, [1980] 2 S.C.R. 735 and *Halifax (Regional Municipality) v. Canada (Public Works and Government Services)*, 2012 SCC 29; [2012] 2 S.C.R. 108.

(d) a duty to intervene between the Band and third parties who wish to make exploitative bargains;

(e) a duty to act in a manner of a person of "ordinary prudence managing his own affairs"; and

(f) correct an error in the best interests of the Band.

Reference: *Semiahmoo Indian Band v. Canada* (1998), 148 D.L.R. (4th) 523 (FCA) at 538 and 543-544 ["*Semiahmoo*"]; *Guerin* at 384 and 388-389; *Wewaykum*, paras. 94 and 98-100, 104; *Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development)*, [1995] 4 S.C.R. 344 ["*Blueberry*"] at paras. 12-17, 38, 96, 104 and 115; *Alberta v. Elder Advocates of Alberta Society*, 2011 SCC 24, [2011] 2 S.C.R. 261 at para. 43

2. Minister held to a High Standard of Diligence in Respect of Reserve Interest

63. The extent of the Minister's fiduciary duty to act in Coldwater's best interests in respect of any assignment of the Indenture is further informed by the importance of the interest in the Reserve land to Coldwater.

Reference: *Osoyoos Indian Band v. Oliver (Town)*, 2001 SCC 85, [2001] 3 S.C.R. 746 [*Osoyoos*] at paras. 43-47; *Opetchesaht Indian Band v. Canada*, [1997] 2 S.C.R. 119 at para. 52

64. The present case concerns an established Reserve and the Minister's ongoing obligations in respect of a prior disposition of an interest in that Reserve. The SCC in *Wewaykum* distinguished between when the Crown is exercising "ordinary government powers" in a pre-reserve creation scenario where there are conflicting demands confronting the Crown, from a post-reserve creation scenario when the Crown is acting as a fiduciary to preserve and protect a band's "quasi-proprietary" interest in a reserve.

Reference: *Wewaykum* at paras. 94-104

[2] "Enlarged rights and powers" refers to rights and powers that were added to the terms after the Band's original authorization or surrender: *Blueberry River* para. 12. In this case, "enlarged rights and powers" would include terms of the Indentures that were concluded after Coldwater's consent was given to the easements.

65. In the post-reserve creation scenario, the role of "honest referee" does not exhaust the Crown's fiduciary obligations. The Minister "could not, merely by invoking competing interests, shirk its fiduciary duty" to protect and preserve Coldwater's Reserve interest from exploitation.

Reference: *Wewaykum* at para. 104; *Alberta v. Elder Advocates of Alberta Society*, 2011 SCC 24, [2011] 2 S.C.R. 261 at para. 43

66. Once the decision was made in 1952 that land in the Reserve was required in the public interest for the proposed Pipeline, the Minster came under a fiduciary obligation to act in Coldwater's best interests in negotiating the terms of the Indenture and, it is submitted, a continuing obligation to act in Coldwater's best interest regarding further dealings with and transactions under the Indenture.

Reference: *Osoyoos* at para. 52; *Wewaykum* at paras. 98-99; *Semiahmoo* at 543

67. This is a continuing obligation that endures throughout the life of the Indentures. In *Semiahmoo Indian Band v. Canada,* the Federal Court of Appeal stated:

> 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. (emphasis in original)

And that:

> 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**. (bold emphasis added)

Reference: *Semiahmoo* at 538-539 and 543

68. Although *Semiahmoo* concerned a surrender, it is nevertheless directly analogous to the present case. Here, the Minister sought and obtained the Coldwater's consent to the granting of the easement, much like the circumstances of a surrender. The instrument granting the easement, like the surrender document in *Semiahmoo*, gives the Minister "power to exert control" over the easement lands. That power includes the right to refuse consent to an assignment of the

Indentures and it is a power that must be exercised in a manner that "serves the best interests of the band".

Reference: *Semiahmoo* at 543

69. This is not a pre-reserve creation situation. Here there is an established Reserve, an interest acquired by a third party in that Reserve and an agreement reached between that third party (or its predecessor) and the Minister. Kinder Morgan, as the potential assignee of that third party, is a sophisticated business entity that was fully capable of looking after its own interests in negotiating the terms of the assignment of the Indenture. The Minister, on the other hand, was acting on behalf of Coldwater in negotiating the terms of the assignment of the Indenture, to whom he owed a fiduciary duty to act with utmost loyalty in their best interests.

70. The Minister is not exercising "ordinary government powers", but the powers given to him under the Indentures. That power is infused with and must be exercised in accordance with his fiduciary duty to Coldwater.

Reference: *Wewaykum* at paras. 96, 98-104

B. BREACH OF THE MINISTER'S DUTIES IN THIS CASE

1. Fiduciary Obligations of the Minister

71. Coldwater submits that the Minister's fiduciary duty to Coldwater included, in this case, at least the following obligations:

(a) an obligation to refuse his consent to the assignment of the Indenture unless he was satisfied that the assignment was in the best interests of Coldwater, which would include an obligation to ensure that the terms or conditions of any assignment maximize the benefits to Coldwater and minimally impair the Reserve interest; and

(b) in the alternative, an obligation to abide by the informed direction of Coldwater, the Minister's beneficiary, to refuse his consent to the assignments.

2. The Minister Breached his Duty to Act with Utmost Loyalty in the Best Interests of Coldwater by Consenting to the Assignment of the Outdated Indenture

(a) Coldwater's best interests required modernization of the terms of the Indenture

72. In considering the request for consent to the assignment of the Indenture, the Minister was at the very least obligated to take the opportunity of Kinder Morgan's request to scrutinize the terms of the Indenture and to re-negotiate those terms in Coldwater's best interests. The Minister in consenting to the assignment of the Indenture without modernizing the outdated terms of the Indenture, including without updating the consideration to Coldwater, and without imposing any terms or conditions that would require such modernization, breached his fiduciary duty to Coldwater.

73. The terms on which the easement was granted to Trans Mountain under the Indenture are highly unfavourable to Coldwater. If that was not evident at the time the easement was granted in 1955, it was absolutely clear at the time the Minister gave his consent to the assignment of the Indenture.

74. In considering the request for the assignment of the Indenture, the Minister had the power and the duty to require the renegotiation and modernization of the Indenture as a precondition to his consent. Kinder Morgan needed the Minister's consent and could not acquire the Indenture without that consent. To paraphrase the Federal Court of Appeal in *Semiahmoo,* this gave the Minister the power under the terms of the instrument to exert control over the encumbered Reserve lands in a manner that serves the best interests of the band. In those circumstances, the Minister "is under a fiduciary duty to exercise that power." He refused to do so.

Reference: *Semiahmoo* at 543; *Coon v. Port Sidney Development Corp.*, 2007 BCSC 580, [2007] B.C.J. No. 847 at paras. 9-10; *Brio Beverages (B.C.) Inc. v. Koala Beverages Ltd.*, [1997] B.C. J. No. 2999 at paras. 7-9; *American Eco Corp*, [2001] O.J. No. 873; *P. & G. Cleaners v. Johnson,* (1995) 105 Man.R. (2d) 175 (Q.B.) at para. 24; *Tredegar v. Harwood,* [1928] ALL E.R. Rep. 11 at 14

75. Kinder Morgan's affiant, Mr. Robert Love, points to the Protocol Agreement between Kinder Morgan and Coldwater as a source of ongoing commitments to Coldwater. However, the Protocol Agreement does not relate to the ongoing use of the Reserve for the Pipeline under the Indenture.

Reference: Affidavit of Robert Love, para. 84

76. The Protocol Agreement only provides compensation for:

(a) "Legacy Issues" – which is compensation for the past use of the Reserve for the 7-year period when Kinder Morgan did not have any legal entitlement to use the Reserve, as Kinder Morgan failed to get the consent of the Minister as required under the Indenture. It contains no provision for ongoing compensation or compensation more generally for the assignment of the Indenture.

(b) "Capacity Funding" – financial assistance for Coldwater having to undertake consultation with Kinder Morgan to resolve issues regarding Kinder Morgan's use of the Reserve for the Pipeline and the proposed expansion of the Pipeline; and

(c) Traditional Land Use and Traditional Knowledge Funding – funding to undertake studies to be put before the National Energy Board in considering the expansion of the Pipeline (the current Pipeline is not within the scope of that review process).

None of this funding provides compensation for Kinder Morgan gaining an interest in the Reserve, for the impacts of the Pipeline on Coldwater's use and enjoyment of the Reserve, or for the risks of the Pipeline to the Reserve and Coldwater.

Reference: Confidential Affidavit of Robert Love, Ex. B

77. The terms of the Indenture further do not provide adequate protections for Coldwater, given the risks created by the use of the Reserve for the Pipeline and the impacts of the Pipeline on the use and enjoyment of the Reserve. As a result, the terms of the Indenture do not ensure that Coldwater's Reserve is minimally impaired by the Pipeline.

78. As a fiduciary negotiating the terms of the assignment of the Indenture, it was incumbent upon the Minister to scrutinize the terms of the Indenture and endeavor to obtain terms that accorded with the best interests of Coldwater and protected their Reserve interest to the greatest extent possible. In this case the interests of Coldwater could only have been served by the Minister requiring the modernization of the Indenture and the consideration in the key respects put forward by Coldwater in the Indenture Modernization Process as a pre-condition to any

consent. The Minister failed to do so and, in fact, granted the assignment on the exact same outdated terms that were set in 1952.

79. The law is clear that when the Minister is presented with an opportunity to exert control over a band's interest, he must do so with regard to the band's best interests. As noted above, in *Semihamoo*, the Federal Court of Appeal confirmed that "so long as the Crown has the power ... 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."

Reference: *Semiahmoo* at 543

80. Likewise, in *Lower Kootenay Indian Band v. Canada*, the Federal Court found that the Crown breached its fiduciary duty by failing to inform the Band of a material deficiency in a lease and to take the opportunity to cancel the lease when it turned out to be an improvident bargain for the Band. In that case, the Crown had leased surrendered reserve land to a third party in 1934 but discovered in 1948 that that there had been no order in council accepting the surrender. This defect made the surrender and the lease void ab initio and would have entitled the Crown to cancel the lease. However, the Crown failed to disclose this fact to the Band, including in 1974 when the Band pressed the Crown to cancel the lease. Further, by 1974, the lessee had committed a number of breaches of the lease that would have entitled the Crown to terminate the lease, but it failed to do so. In both instances the Court found that the Crown breached its fiduciary duty.

Reference: *Lower Kootenay Indian Band v. Canada*, [1992] 2 C.N.L.R. 54 (FC) ["*Lower Kootenay*"]

81. With regard to the Crown's conduct in 1974, the Court found at 108:

> By 1974, all those who were interested knew, or ought to have known, that the lease rentals were inadequate and that the Indians wanted to terminate the lease. There were obvious grounds for such termination, apart from the legal fact that the lease was null and void ab initio.
>
> ...
>
> Again, as under question 4, supra, **had the Crown moved with some degree of alacrity, the band could have benefitted from an earlier termination of what had turned out to be a bad deal for them.** Eventually, after years of dilatoriness on the part of departmental officials, the band took action on its own and was successful in 1982 in forcing Creston to settle and to terminate the lease. **The Crown was remiss in its duty**

> **by failing to take any effective action against Creston from 1974 onwards.** (bold emphasis added)

82. The Applicants do not argue here that the Minister was necessarily obligated to terminate the Indenture due to the failure to obtain the Minister's consent to the assignment of the Indenture. However, they do say that the Minister had a fiduciary duty to take the opportunity of Kinder Morgan's request for the assignment to remedy what is obviously a bad deal for Coldwater.

83. Given the broad terms of the assignment provisions in the Indenture, and in light of the Minister's fiduciary duty, the Minister had the discretion to withhold consent to the assignment of the Indenture, unless better terms were agreed to. The Minister was, therefore, duty bound to respond to these circumstances in the best interests of Coldwater, having regard to Coldwater's best interests, and obtain better terms.

Reference: *Lower Kootenay*; S*emiahmoo; P. & G. Cleaners v. Johnson,* (1995) 105 Man.R. (2d) 175 (Q.B.) at para. 24; *Tredegar v. Harwood,* [1928] ALL E.R. Rep. 11 at 14

84. Yet, the Minister consented to the assignment of the Indenture without requiring Kinder Morgan to agree to updated terms for Coldwater's benefit, contrary to Coldwater's wishes. The result was that, rather than protecting Coldwater from an improvident transaction, the Minister facilitated the entry of Coldwater into a transaction – against Coldwater's wishes – in which Coldwater and its Reserve will be subject to an outdated Indenture for indefinite duration, for which it does not get any ongoing compensation. This is a breach of the Minister's duty.

(b) The Minister cannot shirk his fiduciary duty by invoking competing interests

85. The Minister cannot invoke "competing duties" to diminish his responsibility to Coldwater. Any public interest in continuing the operation of the Pipeline through the Reserve is not affected by imposing conditions that would modernize the Indenture and the consideration that Coldwater should receive for this ongoing use of their land. The fact that a project may be necessary for the public interest in no way diminishes the Minister's obligation to act as a fiduciary in ensuring that the Band's best interests are protected, that proper consideration is secured, and the rights of the band are only minimally impaired.

Reference: *Wewaykum* at para. 104; *Osoyoos* at paras. 52-55; *Blueberry* at para. 14

86. The SCC in *Osoyoos* establishes a two-step process to reconcile the Crown's use of a band's land in the public interest and the Crown's fiduciary duty to protect a band's interests. The first step is for the Crown to determine whether the use of the land is in the public interest. If the use of the land is required in the public interest, then, for the second step, the Minister has a fiduciary duty to ensure "a minimal impairment of the use and enjoyment of Indian lands by the band".

Reference: *Osoyoos* at paras. 52-55

87. While this case does not concern the duties relating to the taking of reserve land under s. 35 of the *Indian Act*, as in *Osoyoos*, it does concern the Minister's ongoing obligations relating to the assignment of an interest that was acquired under s. 35. The framework in *Osoyoos* is, therefore, a relevant guide in determining whether the Minister discharged his fiduciary obligations to Coldwater in this case.

Reference: *Osoyoos* at paras. 52-55; *Semiahmoo* at 543

88. Here, the Minister appears to have determined that the assignment is necessary for the public interest, but has completely ignored the second step of the *Osoyoos* framework, which is to then act as a fiduciary on behalf of Coldwater. The Minister did not secure updated terms for the assignment that protect Coldwater's interest in the Reserve and ensure only the minimal impairment of the use and enjoyment of that interest. Instead, the Minister granted the assignment on the same outdated terms as were set in 1952, with no added protections or consideration for Coldwater (despite Coldwater repeatedly having raised concerns about the interference of the Pipeline with the use and enjoyment of the Reserve). This was not in Coldwater's best interests.

Reference: *Osoyoos* at paras. 52-55; *Semiahmoo* at 543

89. The Minister owes no competing fiduciary obligation to Kinder Morgan to allow it to acquire an interest in the Reserve, or to Trans Mountain to enable it to transfer the interest originally granted. Kinder Morgan is a large, sophisticated business enterprise that looks out for its own interests. It requires the Minister's consent to the assignments for its own interests and its own benefit. There is nothing untoward about the Minister as a fiduciary taking the

opportunity of Kinder Morgan's request for his consent to the assignment to require better terms for Coldwater. In fact, it is the only option for a fiduciary.

Reference: see for example the Crown's approach to managing the Band's interest in *Lower Kootenay* at 92. See also *Mannpar Enterprises v. Canada*, 1999 BCCA 239, 67 B.C.L.R. (3d) 64.

90. The Minister was not bound by the Indenture Modernization Process, including its limitation that the process would not create any new rights or diminish any existing rights under the Indenture. At all material times, the Minister had the discretion to require updated terms from Kinder Morgan that would minimally impair Coldwater's Reserve interest before consenting to the assignment, but failed to do so. The Minister, thus, breached his fiduciary duty to Coldwater.

C. ALTERNATIVE: THE MINISTER BREACHED HIS DUTY TO ABIDE BY COLDWATER'S INFORMED DIRECTION

91. In the alternative, Coldwater submits that the Minister had a fiduciary duty abide by the informed direction of Coldwater in respect of the assignment of the Indentures. Coldwater has been represented by legal counsel throughout the time that it has been considering Kinder Morgan's request for retroactive consent to the assignment of the Indentures and, therefore, has had full capacity to determine what is in its own best interests in relation to its own Reserve. It has directed the Minister accordingly.

92. As a general point, the content of a fiduciary duty includes full disclosure of material facts and adherence to the beneficiary's instructions.

Reference: M.V. Ellis, *Fiduciary Duties in Canada*, loose-leaf (consulted on May 8, 2015), (Toronto: Carswell, 2004) at pp. 1-7–1-8

93. The SCC emphasized in *Blueberry* that the *Indian Act* strikes a balance between the autonomy of the band to make decisions respecting their own land, and protection by the Crown to prevent exploitative bargains. Speaking for the Court on this issue, McLachlin J. stated:

> **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.** (bold emphasis added)
>
> Reference: *Blueberry* at para. 35

94. The consent requirement for a surrender as discussed in *Blueberry* is analogous to the consent requirement for an assignment of the Indenture. Both serve to protect a band's interest from exploitative bargains, but neither detracts in any way from the autonomy of a band to make informed decisions about its own land. Coldwater's consent was sought and obtained by the Crown prior to granting the easement to Trans Mountain, further injecting the autonomy principle into the transaction that led to the Indenture.

95. Further support for the autonomy principle is found in the *First Nations Land Management Act*, which provides First Nations with the opportunity to exert more direct authority over their reserve lands through the adoption of a Land Code. Specifically, the Act provides for the transfer to a First Nation of "rights and obligations of Her Majesty as grantor in respect of the interests or rights and the licences" in a reserve.

Reference: *First Nations Land Management Act*, S.C. 1999, c. 24, s. 16

96. In fact, two of the reserves that are subject to the same Indentures at issue in this case are subject to a Land Code under the *First Nations Land Management Act* and, in each case, the band, and not the Minister, has the sole decision-making authority on whether to consent to the assignment of the very same Indenture that is at issue in this case.

Reference: see for example *Matsqui First Nation Land Code*, ss. 31.14 and 36.2
Affidavit of Chelsea Craighead, Ex. A; AR, Tab 5, p. 156-159

97. The fact that the Minister's authority can be and has been fully transferred to a First Nation shows that the purpose of the consent requirement exists for the sole benefit of the First Nation and does not engage "public law" considerations. If the Minister had public law obligations in the exercise of the authority to grant or refuse consent to an assignment of an easement, it could not devolve that public law duty to a First Nation. A First Nation exercising the authority transferred to it under a Land Code has no public law obligations in exercising its acquired decision-making authority. It need only act in its own interests.

98. The same must therefore be true of the Minister's authority where the First Nation has not adopted a Land Code. The *First Nations Land Management Act* provides First Nations with the opportunity to have more direct control over their lands without the filter of the Minister. However, the legal character of those lands remains unchanged in that the legal title to those lands remains with Her Majesty for the use and benefit of the band. Where no Land Code is in place, the Minister remains responsible for managing reserve lands in accordance with the band's direction and in the best interests of the band.

Reference: *First Nations Land Management Act*, s. 5

99. The Minister was, therefore, duty bound to respect the direction of Coldwater in relation to the assignment of the Indenture, except to avoid an exploitative or improvident bargain. In consenting to the assignment of the Indenture, the Minister not only facilitated the entry of Coldwater into a transaction that was contrary to Coldwater's best interests and improvident, but acted directly contrary to the clear direction of Coldwater. This is a breach of the Minister's duty.

D. DISCLOSURE OF THE RECORD – AUDI ALTERAM PARTEM

100. The second issue on this Application for Judicial Review is whether Coldwater's procedural fairness rights have been breached. It is a trite point of administrative law that a party whose rights are affected by a decision is entitled to know the case to be met and have a fair opportunity to comment on materials that will be before the decision-maker. The principle of *audi alteram partem* requires decision-makers to provide adequate opportunities for those affected by their decisions to present their case and respond to the evidence in the knowledge or possession of the decision-maker.

Reference: David Jones and Anne de Villars, *Principles of Administrative Law*, 5th ed (Toronto: Carswell, 2009) at pp. 255, 266

101. A fiduciary must also disclose all material facts to the beneficiary. The recommendation by AANDC staff to consent to the assignment of the Indenture, contrary to Coldwater's direction and interests, is a material fact to the decision of the Minister. The Minister failed to disclose this recommendation to Coldwater prior to making the decision to consent to the assignment of the Indenture.

Reference: M.V. Ellis, Fiduciary Duties in Canada, loose-leaf (consulted on May 8, 2015) (Toronto: Carswell, 2004) at pp. 1-7-1-8; *Wewaykum* at para. 94

102. Coldwater submits that the Minister's procedural fairness obligations in the present case are at the high end of the spectrum for the following reasons:

(a) A property right of the band in its Reserve is at stake. It is well settled that a decision that affects property rights attracts a high degree of fairness.

Reference: *Lazarov v. Canada (Secretary of State)* (1973), 39 D.L.R. (3d) 738 (FCA) at 743-744

(b) The property right at stake is reserve land which, itself, is recognized at law to have a unique value and importance to First Nations.

Reference: *Osoyoos* at paras. 43-47

(c) The decision engages the honour of the Crown and the fiduciary obligations of the Crown to Coldwater, requiring disclosure of all relevant information.

Reference: *Haida Nation* at paras. 43-46; *Guerin* at 388-389; *Wewaykum* at para. 94

(d) The Minister is exercising a decision-making authority pursuant to Indentures granted under the *Indian Act*. The fundamental scheme of the *Indian Act* is to maintain intact for Indian bands, reserves that are set apart for their benefit.

Reference: *The Queen v. Devereaux*, [1965] S.C.R. 567 at 572; *Opetchesaht Indian Band v. Canada*, [1997] 2 S.C.R. 119 at para. 52

(e) As expressed by Coldwater, the present decision is of fundamental importance to them and to their ability to continue to use and enjoy their reserve.

Reference: Spahan Affidavit, paras. 37-46; AR, Tab 3, p. 39-42

(f) Based on the fact that Canada obtained Coldwater's consent to the original taking of the right-of-way in 1952, Coldwater has legitimate expectations of an ongoing high degree of participation in Crown decisions that might follow upon that original taking, including the present decision.

Reference: In respect of all these factors, see generally the factors set out in *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817

103. Given all these circumstances, the Minister was, at a minimum, obligated to provide the materials on which his consideration would be based to Coldwater and give Coldwater an opportunity to comment on them before the decision was made, not after as was done here. The Minister's failure to provide Coldwater with the record of materials that was before him in making the decision in advance of his decision is a breach not only of his fiduciary obligations, but of procedural fairness, rendering the decision in excess of jurisdiction and void.

PART 4 - ORDERS SOUGHT

104. Coldwater respectfully seeks the following orders:

i. A declaration that the Minister has legal or equitable obligations to act in the best interests of Coldwater in exercising the Minister's authority to grant or refuse his consent to the assignment of the Indenture from Terasen Inc. to Trans Mountain Pipeline ULC, and from Trans Mountain Pipeline ULC to Trans Mountain Pipeline L.P.;

ii. A declaration that the Minister has a legal duty to consult with Coldwater and accommodate their interests in respect of the assignment of the Indenture and that the Minister has failed to fulfill that legal duty;

iii. A declaration that the Minister's consent to the assignment of the Indenture is unlawful as it is contrary to the legal or equitable obligations of the Minister to act in the best interests of Coldwater, and an order quashing or setting aside the Minister's decision to consent to the assignment of the Indenture;

iv. In the alternative, a declaration that the Minister had legal or equitable obligations to seek and follow Coldwater's instructions with respect to the request for consent to the assignment of the Indenture and that the Minister's consent to the assignment of the Indenture is unlawful as it is contrary to the Minister's obligation(s) to act in accordance with Coldwater's instructions, and an order quashing or setting aside the Minister's decision to consent to the assignment of the Indenture;

v. A declaration that, before exercising his authority to consent to the assignment of the Indenture, the Minister had a legal obligation to share with Coldwater all information that the Minister had available for his consideration, in particular any recommendation from AANDC staff in respect of the assignment of the Indenture, and to provide Coldwater with a reasonable opportunity to review and make submissions on that information, and that the Minister has failed to fulfill that legal obligation;

vi. Costs; and

vii. Such further and other relief as this Honourable Court may deem appropriate and just.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Dated: May 11, 2015

FOR **F. Matthew Kirchner**

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PART 5 - AUTHORITIES

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2. *American Eco Corp*, [2001] O.J. No. 873

3. *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817

4. *Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development)*, [1995] 4 S.C.R. 344

5. *Brio Beverages (B.C.) Inc. v. Koala Beverages Ltd.*, [1997] B.C. J. No. 2999

6. *Chief Joe Hall v. Canada (Attorney General)*, 2007 BCCA 133, 281 D.L.R. (4th) 752

7. *Coon v. Port Sidney Development Corp.*, 2007 BCSC 580, [2007] B.C.J. No. 847

8. *Guerin v. Canada*, [1984] 2 S.C.R. 335

9. *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 S.C.R. 511

10. *Halifax (Regional Municipality) v. Canada (Public Works and Government Services)*, 2012 SCC 29, [2012] 2 S.C.R. 108.

11. *Inuit Tapirisat of Canada v. Canada (Attorney General)*, [1980] 2 S.C.R. 735

12. *Lazarov v. Canada (Secretary of State)* (1973), 39 D.L.R. (3d) 738 (FCA)

13. *Lower Kootenay Indian Band v. Canada*, [1992] 2 C.N.L.R. 54 (FC)

14. *Mannpar Enterprises v. Canada*, 1999 BCCA 239, 67 B.C.L.R. (3d) 64

15. *Opetchesaht Indian Band v. Canada*, [1997] 2 S.C.R. 119

16. *Osoyoos Indian Band v. Oliver (Town)*, 2001 SCC 85, [2001] 3 S.C.R. 746

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18. *Semiahmoo Indian Band v. Canada* (1998), 148 D.L.R. (4th) 523 (FCA)

19. *The Queen v. Devereaux*, [1965] S.C.R. 567

20. *Tredegar v. Harwood,* [1928] ALL E.R. Rep. 11

21. *Wewaykum Indian Band v. Canada,* 2002 SCC 79, [2002] 4 S.C.R. 245

LEGISLATION:

22. *First Nations Land Management Act*, S.C. 1999, c. 24

23. *Indian Act,* R.S.C. 1985, c. I-5

24. *Indian Act,* R.S.C. 1952, c. 149

25. *Matsqui First Nation Land Code*

26. *National Energy Board Act,* R.S.C. 1985, c. N-7

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28. M.V. Ellis, *Fiduciary Duties in Canada*, loose-leaf (consulted on May 8, 2015), (Toronto: Carswell, 2004)