

Federal Court



Cour fédérale

Date: 20160718

Docket: T-133-15

Citation: 2016 FC 816

St. John's, Newfoundland and Labrador, July 18, 2016

PRESENT: The Honourable Madam Justice Heneghan

BETWEEN:

**COLDWATER INDIAN BAND AND CHIEF
LEE SPAHAN IN HIS CAPACITY AS CHIEF
ON BEHALF OF ALL MEMBERS OF THE
COLDWATER BAND**

Applicants

and

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

Respondents

ORDER

[1] By Confidential Judgment and Reasons issued on May 20, 2016, the application for judicial review commenced by Coldwater Indian Band (“Coldwater”) and Chief Lee Spahan (collectively, the “Applicants”) was dismissed with costs to the Minister of Indian Affairs and Northern Development (the “Minister”) and Kinder Morgan Canada Inc. (“Kinder Morgan”) (collectively, the “Respondents”).

[2] The Public Judgment and Reasons were issued on May 30, 2016.

[3] By a Direction issued on May 20, 2016, the parties were invited to file written submissions on costs, should they be unable to agree on the costs payable to the Respondents.

[4] The Applicants, in their submissions dated June 1, 2016, argue that each party should bear its own costs. Relying upon the decision in *Lax Kw'alaams Indian Band v. Canada*, [2009] 3 C.N.L.R. 172 (BCSC), they submit that the novelty of this claim and its public importance warrant such an order. They argue that this was a novel case since there was “no legal precedent directly applicable to this situation.”

[5] The Applicants also submit that this proceeding involved a matter of public importance, that is the scope of the Minister’s obligations to First Nations when considering the assignment of interests in reserves.

[6] Finally, the Applicants argue that should costs be awarded, they should be in a nominal amount.

[7] The Minister, in submissions dated June 13, 2016, seeks an order for her costs in the amount of \$16,750.49, inclusive of taxes and disbursements, in accordance with Column III of Tariff B of *Federal Courts Rules*, SOR/98-106 (the “Rules”). She submits that there is no reason in this case to depart from the general rule that costs follow the event.

[8] The Minister argues that there is no novelty in this proceeding; rather it involved the application of established legal principles to the factual circumstances of the case.

[9] The Minister further submits that the public interest exception to the general rule, that costs follow the event, does not apply when the party who brought the claim has a pecuniary interest in its outcome; see the decisions in *Harris v. Canada (T.D.)* (2001), [2002] 2 F.C.R. 484 at para. 22 and *McEwing et al. v. Canada (Attorney General)* (2013), 439 F.T.R. 149. She argues that the Applicants' primary motivation for this application was increased compensation for the pipeline easement.

[10] Kinder Morgan initially requested costs on a full indemnity basis. In submissions dated June 13, 2016, it sought an order for unit based costs and disbursements in the amount of \$18,701.19 in accordance with Column III of Tariff B.

[11] Kinder Morgan submits that the Applicants are not public interest litigants since this case did not involve issues beyond the immediate interests of the parties and the Applicants had a pecuniary interest in the outcome of the application.

[12] The Applicants, in reply submissions dated June 20, 2016, challenge Kinder Morgan's inclusion of counsel fees for travel, relying upon the decision in *Truehope Nutritional Support Ltd. v. Canada (Attorney General)*, 2013 FC 1153 (A.O.).

[13] The Applicants also argue that Kinder Morgan erred in its computation of the numbers of hours spent in court by including breaks. They further submit that the Minister's Bill of Costs should be reduced to 54.75 units to reflect the mid-range of Column III.

[14] I first would like to comment upon the Applicants' request that each party bear its own costs.

[15] The Judgment issued on May 20, 2016 dismissed the application for judicial review with costs. The Direction, issued on the same day, invited the parties to make written submissions on costs, if unable to agree upon costs payable to the Respondents. In my opinion, the Applicants have improperly reargued the issue of whether costs should be awarded to the Respondents.

[16] In any event, I am not persuaded that this application for judicial review involved any novel legal principles or issues which extend beyond the immediate interests of the parties involved. There are insufficient public interest considerations to justify a departure from the general rule that costs follow the event.

[17] Pursuant to Rule 400 of the Rules, the award of costs is wholly within the discretion of the Court. Rule 407 provides that party-and-party costs shall be assessed in accordance with Column III of Tariff B unless otherwise ordered.

[18] I will now address the Applicants' submissions about the Respondents' Bills of Costs.

[19] First, I do not agree with the Applicants that Kinder Morgan has improperly included travel by counsel to attend the hearing in its calculation of counsel fees.

[20] The Applicants rely upon the decision in *Truehope, supra* in this regard. In that decision, the Assessment Officer disallowed costs of travel by counsel because an Assessment Officer lacks the jurisdiction to allow the assessable services associated with travel, pursuant to Tariff B of the Rules.

[21] In the exercise of my discretion, I am allowing this claim of \$420.00.

[22] Second, the Applicants challenge Kinder Morgan's calculation of time spent in court.

[23] In my opinion, the lunch breaks should be excluded from the calculation of hearing time; see the decisions in *Estensen v. Canada (Attorney General)*, 2009 FC 152 (A.O.) and *Mercury Launch & Tug Ltd. v. Texada Quarrying Ltd.*, 2009 FC 331 (A.O.).

[24] However, I am not persuaded that brief recesses should be omitted from the calculation of time spent in court.

[25] In the exercise of my discretion, Fee Items 14(a) and (b) in Kinder Morgan's Bill of Costs will be reduced to 4.5 hours for the first day and 6 hours for the second day, at a rate of 3 units per hour. Accordingly, Fee Items 14(a) will be assessed at 31.5 units and Fee Item 14(b) at 15.75 units.

[26] Finally, the Applicants argue the Minister's costs should be reduced to reflect the mid-range of Column III. This is a reasonable argument and the Minister's costs will be reduced accordingly to 55.25 units.

[27] In the result, Kinder Morgan shall have its costs in the amount of \$18,076.44, inclusive of tax and disbursements, and the Minister shall have her costs in the amount of \$14,949.74, inclusive of tax and disbursements.

THIS COURT ORDERS THAT Kinder Morgan Canada Inc. shall have its costs in the amount of \$18,076.44 inclusive of tax and disbursements, and the Minister of Indian Affairs and Northern Development Canada shall have her costs in the amount of \$14,949.74, inclusive of tax and disbursements.

"E. Heneghan"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-133-15

STYLE OF CAUSE: COLDWATER INDIAN BAND AND CHIEF LEE SPAHAN IN HIS CAPACITY AS CHIEF ON BEHALF OF ALL MEMBERS OF THE COLDWATER BAND v. MINISTER OF INDIAN AFFAIRS AND NORTHERN DEVELOPMENT AND KINDER MORGAN CANADA INC.

PLACE OF HEARING: VANCOUVER, BRITISH COLUMBIA

DATE OF HEARING: NOVEMBER 18, 2015, NOVEMBER 19, 2015

ORDER: J. HENEGHAN

DATED: JULY 18, 2016

APPEARANCES:

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James Mackenzie Ronald Lauenstein	FOR THE RESPONDENT (MINISTER OF INDIAN AFFAIRS AND NORTHERN DEVELOPMENT)

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