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Coal, Caribou and Consultation – Court Directs Accommodation in Treaty 8 Region

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In its recent decision in *West Moberly First Nations v. British Columbia (Chief Inspector of Mines) and First Coal Corporation,* the B.C. Supreme Court (the Court) examined the meaning of the treaty right to hunt for caribou in the context of a proposed coal exploration program in the Treaty 8 area of northeastern B.C. The Court ordered a stay of provincial exploration permits for 90 days and ordered the Crown, in consultation with the West Moberly First Nations (West Moberly), to proceed expeditiously to put in place a reasonable, active plan for the protection and augmentation of a local caribou herd. The Court's basis for this remedy can be summed up in the following passage from its reasons:

> "I conclude that a balancing of treaty rights of Native peoples within the rights of the public generally, including the development of resources for the benefit of the community as a whole, is not achieved if caribou herds in the affected territories are extirpated."

This decision adds to the evolving case law on the Crown's duty to consult and accommodate aboriginal and treaty rights, and illustrates what is "reasonable" accommodation. This case also squarely demonstrates how aboriginal law is influencing the shape of current environmental law, particularly the protection of species at risk.

BASIS OF WEST MOBERLY FIRST NATIONS CHALLENGE

In its judicial review application, West Moberly applied for a declaration of invalidity in respect of three exploration-related permits issued by the provincial government to First Coal Corporation (First Coal). These permits authorized First Coal to obtain bulk samples of coal, to conduct an advanced exploration program, and to clear trees to facilitate this exploration. West Moberly claimed that, in issuing these permits, the Crown failed to consult adequately and meaningfully concerning their Treaty 8 right to hunt caribou, and had failed to reasonably accommodate their hunting rights.

This litigation appears to have been preceded by the West Moberly asking the Province of British Columbia (the Province) to implement a rehabilitation plan for the Burnt Pine Herd of caribou, which is resident in the area of First Coal's mineral tenure, and which the West Moberly claim has been reduced to a population of 11. The Burnt Pine Herd form part of the Southern Mountain population of Woodland Caribou, which is a species listed as "threatened" under the federal *Species at Risk Act* (SARA).

All parties agreed that the Crown was required to consult West Moberly on the basis of its treaty right to hunt, but the parties diverged on the nature and scope of that right. Similarly, the parties advanced opposing submissions as to whether the Crown had adequately consulted and accommodated West Moberly's concerns, including whether a rehabilitation or recovery plan for the Burnt Pine Herd was necessary.

a) Nature of Treaty Right to Hunt

An important aspect of the Court's decision is how it defined the nature of the treaty right to hunt. In turn, this characterization of the right, together with the *nature of the impact* on it from the proposed exploration, is at the heart of the Court's conclusion that the Crown did not carry out consultation meaningfully and did not implement reasonable accommodation. Treaty No. 8, dated September 22, 1899, states, in part:

> "... Her Majesty the Queen hereby agrees with the said Indians that they shall have right to pursue their usual vocations of hunting, trapping, and fishing throughout the tract surrendered as heretofore described, subject to such regulations as may from time to time be made by the Government of the country acting under the authority of Her Majesty, and saving and excepting such tracts as may be required or taken up from time to time for settlement, mining, lumbering, trading, or other purposes."

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In interpreting this right, the Crown argued that the treaty right was a broad "right to hunt for meat" (not just caribou) across the First Nation's entire traditional territory, and was subject to the Crown's right to "take up" land for mining, as set out in the Treaty. Given the scope of this right and the expected impact, the Crown argued that its efforts to consult and accommodate were met, essentially because certain mitigation steps were developed by First Coal to avoid impact to the caribou herd and, more importantly, there were other caribou herds that could be hunted by the West Moberly. As such, the Crown contended that West Moberly's opportunity to hunt caribou in its traditional territory "will not be significantly reduced" by First Coal's activities.

The Court found that the West Moberly have a treaty-protected right to hunt caribou in the area impacted by First Coal's exploration activities. That area was part of West Moberly's traditional seasonal round, to which hunters travelled at certain times of the year. Given the Crown's concession that no recovery plan was in place for the caribou herd in that area, the Court held that the Crown had failed to reasonably accommodate West Moberly's concerns.

b) Accommodation Means Recovery of the Species

The West Moberly were concerned that the few remaining members of the Burnt Pine Herd not be impacted by First Coal's activities. Inherent in this concern was the historic decimation of the herd caused by past activity, including impacts related to the construction of the WAC Bennett and Peace Cannon Dams in the 1960s and 1970s. First Coal had submitted a Caribou Mitigation and Monitoring Plan (the Mitigation Plan) in response to concerns expressed by West Moberly in the consultation period prior to the permits being issued. Two government scientists commented on the Mitigation Plan, suggesting that while providing measures for avoiding and minimizing impacts to the herd, the Mitigation Plan was inconsistent with the goal of maintaining or increasing caribou numbers and distribution.

The Court found that the Crown's failure to establish a plan for the protection and *rehabilitation* of the Burnt Pine Herd was a failure to reasonably accommodate the West Moberly hunting rights. While First Coal's Mitigation Plan was a step in the right direction of protecting caribou habitat, the Court was concerned with the lack of a rehabilitation program for the herd.

In ordering the government to develop a caribou rehabilitation plan, the Court did not explicitly limit its remedy to the context of First Coal's permit applications. Such a general remedy, it could be argued, broadened the scope of accommodation beyond that of responding to First Coal's infringement of the First Nation's rights. In ordering the Crown to develop a plan to not just protect but also augment the Burnt Pine Herd, it could be argued that the Court ordered the government to find a way to redress past infringement of West Moberly's hunting rights.

c) Cumulative Impacts

The Crown recognized the cumulative impacts of First Coal's project on West Moberly's traditional territory, but when asked by West Moberly to address this in the permit process, the Crown answered that this issue is "beyond the scope of this project to fully assess". The Court commented that such a statement by a Crown decision-maker – that it does not have the authority to assess the "taking up" of a treaty right – fails to uphold the Crown's honour. This leaves for another day the intriguing question of whether cumulative impacts assessment is now part and parcel of the Crown's duty to consult/accommodate.

d) Species at Risk Issues

The Court did not analyze the requirements of species at risk laws, why the recovery planning for the Southern Mountain population of the woodland caribou has not been completed, or determine the relevance, if any, of the statutory recovery planning process to the question of whether the Crown had properly accommodated West Moberly's hunting rights. Because of this, it is difficult to predict how significant the decision may be to future recovery planning.

SARA requires the federal government to carry out recovery planning for species listed as "endangered" or "threatened" under the Act. It also contains specific requirements for this recovery planning to be carried out in cooperation with affected First Nations. British Columbia does not have similar legislative requirements, but has signed on to the federal/provincial *Accord for the Protection of Species at Risk*. This Accord, while non-binding, indicates a commitment on the part of the Province to participate in species recovery actions.

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Several recovery teams, consisting of representatives of federal and provincial governments, members of the scientific community and First Nations, have been working for a number of years to develop the recovery strategies for the various subpopulations of caribou listed under SARA. However, largely because of uncertainties in the science or understanding of all the causes of the woodland caribou's decline, the work has taken longer to complete than is required under SARA. Despite the lack of completion of formal recovery strategies under SARA, some plans for caribou recovery have been completed and are being implemented. One example is the *Mountain Caribou Recovery Implementation Plan*, which specifically impacts part of the Southern Mountain population. It does not, however, include the Burnt Pine herd.

West Moberly claimed that neither the federal nor provincial governments had lived up to their legal obligations under SARA and the Accord with respect to recovery planning for the Burnt Pine Herd. One troubling aspect of this argument is that recovery planning under SARA occurs at a population level. As such, even if the recovery strategy for the Southern Mountain population of the woodland caribou had been completed, it would not necessarily plan for or result in augmentation of this specific herd.

The Court's remedy of an order to plan recovery and augmentation of the Burnt Pine Herd may prove problematic, as it does not require co-ordination with the national development of recovery strategy for the Southern Mountain population of the woodland caribou under SARA, or the current plan being implemented by British Columbia for a portion of this particular population. It also fails to recognise the requirement under SARA for consultation with locally affected First Nations. Effectively, the Court has now imposed recovery planning requirements for one herd that may ultimately not be compatible with the recovery planning that is required under SARA for the species as a whole.

This decision also raises serious questions to whether the completion of recovery planning under SARA and provincial regimes will provide certainty to resource users as to how governments will regulate activities that potentially impact species at risk which are in traditional territories of the First Nations. Further, it raises serious questions as to whether the extensive First Nations' consultative processes written into SARA are sufficient to address the consultation duties of the Crown. At the very least, the decision raises the prospect that broad federal population-level recovery plans may not insulate provincial permit-holders from allegations that the permitted activity would impose unreasonable impacts on asserted aboriginal and treaty rights.

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