CARIBOU ISSUES INCREASE IN RELEVANCE

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The recent decision of the British Columbia Court of Appeal in *West Moberly First Nations* v. *British Columbia (Chief Inspector of Mines)*, 2011 BCCA 247 provides an example of how the decline of boreal caribou populations is increasingly linked with issues of Aboriginal consultation. The decision once again highlights both the potential impacts to resource companies where the Crown fails in its duty to consult and the risks to those who operate in areas where caribou numbers have declined.

The appeal is noteworthy as the lower court held that the right to hunt (in this case the right to hunt a small herd of endangered caribou in the vicinity of the West Moberly First Nations ("WMFN") reserve pursuant to Treaty 8) was a species-specific right. On that basis, the Court concluded that the Crown must develop a plan to rehabilitate the caribou population in the area in order to appropriately accommodate the projected impacts.

The appeal is also significant as it is one of the first cases from the B.C. Court of Appeal since the Supreme Court of Canada's latest refinement to the jurisprudence on the duty to consult in *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, 2010 SCC 43 ("*Carrier Sekani*"). Each of the justices addresses the *Carrier Sekani* decision in their respective judgments.

The facts are as follows: the First Coal Corporation[1] ("First Coal") sought various permits and licenses to conduct a bulk sampling program for coal in the Chetwynd area of British Columbia. The area designated for the bulk sampling project lay 50 kilometers to the southwest of the WMFN and well within the area considered to be the Band's preferred traditional hunting ground. Of greatest concern to the WMFN was the impact of the proposed work on the winter feeding grounds of the Burnt Pine caribou herd, traditionally an important source of food to the WMFN. While the herd had not been actively hunted for over forty years, and consisted of only eleven animals, the WMFN raised concerns about the impact of the project on the current sustainability and future growth of this herd.

At trial, Justice Williamson held that the Ministry of Energy, Mines and Petroleum Resources ("MEMPR") had failed to adequately consult the WMFN in granting First Coal authorizations to conduct its bulk sampling program based on the potential impacts of the project on the Burnt Pine Herd. Justice Williamson imposed a 90 day stay of First Coal's permits during which time he directed the parties to come up with a plan to augment and recover the caribou population as appropriate accommodation in the circumstances.

The Province of British Columbia appealed the decision on the basis that it had fulfilled its duty of consultation in the circumstances and that Justice Williamson erred in concluding that the right to hunt was a "species-specific right". The Province's appeal was supported by First Coal who argued that the Court erred in holding that the scope of the Crown's duty to consult included consideration of

[1] First Coal Corporation became a wholly owned subsidiary of Xstrata Coal on August 4th, 2011.

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the cumulative effects of "past wrongs", an issue considered in the *Carrier Sekani* decision. The Attorney General of Alberta, who intervened, alleged that the trial judge erred in concluding that the right to hunt was species-specific, and had further erred in ordering caribou rehabilitation, which in its view was a public policy question within the authority of other branches of government.

In the Court's view, the parties' submissions gave rise to five issues:

1. whether judicial review was an appropriate procedure under which to allege, and seek a remedy for, the Crown's failure to consult and accommodate;

2. whether the trial judge erred in concluding that the Crown had failed to act honorably by delegating to Ministerial officials the duty to consult without also providing those officials with the power to consider and fully accommodate the WMFN's concerns;

3. whether the judge erred in considering the cumulative effects (or past wrongs) that had led to the depletion of the Burnt Pine Herd and whether the trial judge erred in considering future events, namely the impact of a full mining operation in the area, as opposed to the activities associated with the exploration permits only;

4. whether the trial judge mischaracterized or misconstrued the WMFN's treaty right to hunt, and further, whether in consideration of the relevant issues the trial judge erred in holding that the Crown had failed to consult and accommodate meaningfully the WMFN's treaty right to hunt; and

5. whether the judge erred in holding that only one form of accommodation, namely a plan to augment the Burnt Pine Herd, was reasonable under the circumstances.

The Court of Appeal's decision was not unanimous.

All members of the Court agreed that judicial review was an appropriate remedy for an alleged failure to consult. The Justices also agreed, in respect of issue 2, that statutory decision-makers are required to respect legal and constitutional limits and that the MEMPR was obligated to act in cognizance of Treaty 8 and in doing so would be acting within its statutorily defined role.

In respect of the scope of the duty on the facts, the majority distinguished the *Carrier Sekani* decision and clarified that in their view *Carrier Sekani* did not stand for the proposition that what may have occurred in the past was irrelevant when a project will have an adverse impact on First Nation's rights. Rather, historical impacts and context can be used to underline the seriousness of the potential impacts on a First Nation's right, in this case the right to hunt. Furthermore, the Court held that the trial judge had erred by considering the future impacts arising from the exploration permits and to the extent that it had not considered the consequences of a full mining operation it had failed to provided meaningful consultation. The majority further held that the trial judge had not erred in considering the specific location and species in determining the scope of the right to hunt under Treaty 8 and concluded that the scope of the right to hunt at issue included the right to hunt caribou as part of a seasonal round.

Having concluded that consultation was inadequate, Chief Justice Finch determined that consultation should continue and that the accommodation ordered by the trial judge (namely the development of a plan to reinvigorate caribou numbers) be set aside, without prejudice to this type of accommodation being agreed to through more in-depth consultation.

This case confirms that accommodation measures offered to aboriginal groups must be rationally connected to the impacts of the proposed Crown decision. The decision also suggests that the Crown should attempt to provide greater detail for its conclusions when proposing accommodation measures.

The majority's decision to uphold the trial judge's findings on the scope of the First Nation's right to hunt being species-specific, as opposed to the broader interpretation of the right to hunt urged by the Crown, could potentially have broader implications for project proponents planning to operate in areas where specific species historically relied on by First Nations are under pressure. This could potentially include areas in Alberta's oilsands given the decline of caribou in the area (assuming the Alberta Courts adopt the B.C. Court's conclusions).

Furthermore, the Court's conclusions as they relate to *Carrier Sekani* are of note. The Court seems to recognize that while past infringements may not be addressed, they can be relevant to the determination of the seriousness of the impact.

Leave to appeal is being sought.

The decision of the B.C. Court of Appeal, as well as the Federal Court's decision in *Adam v. Canada*[2] highlight the growing risks and uncertainty to resource developers arising from the decline of caribou. Oilsands producers in particular may be interested in the decisions as much of the boreal caribou's range in Alberta is underlain by recoverable bitumen resources. These decisions make it clear that caribou issues are taking on increased relevance as Aboriginal groups who traditionally relied on caribou are increasingly using the declining numbers as a leverage point in respect of the Crown's duty to consult.

As a final note, on May 26, 2011, one day after the ruling, First Coal Corporation announced that it was halting plans to act upon its permits, demonstrating the potential impact the Crown's failure to consult meaningfully can have a on a project proponent.

[2] *Adam v. Canada (Environment),* 2011 FC 962 (CanLII), wherein certain ENGOs and First Nations sought and order to compel the Minister of the Environment to recommend the issuance of an emergency protection order, pursuant to section 80 of the Species at Risk Act, to protect boreal caribou in Northern Alberta.