COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *West Moberly First Nations v. British Columbia (Chief Inspector of Mines),* 2011 BCCA 247

Date: 20110525
Docket: CA038048

Between:

Chief Roland Willson on his own behalf and on behalf of the members of the West Moberly First Nations and the West Moberly First Nations

Respondents
(Petitioners)

And

Her Majesty the Queen in Right of The Province of British Columbia as represented by Al Hoffman, Chief Inspector of Mines, Victor Koyanagi, Inspector of Mines, and Dale Morgan, District Manager, Peace Forest District

Appellants
(Respondents)

And

First Coal Corporation

Respondent
(Respondent)

And

**Treaty 8 First Nations of Alberta,
Grand Council of Treaty #3, and
Attorney General of Alberta**

Intervenors

Before: The Honourable Chief Justice Finch
The Honourable Madam Justice Garson
The Honourable Mr. Justice Hinkson

On appeal from: Supreme Court of British Columbia, March 19, 2010,
(*West Moberly First Nations v. British Columbia (Chief Inspector of Mines)*,
2010 BCSC 359, Victoria Docket No. 09-4823)

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For the Intervenor, Attorney General of Alberta:	Written Submissions Only
Place and Dates of Hearing:	Vancouver, British Columbia January 4, 5 and 6, 2011
Place and Date of Judgment:	Vancouver, British Columbia May 25, 2011

Written Reasons by:
The Honourable Chief Justice Finch

Concurring Reasons by:
The Honourable Mr. Justice Hinkson (page 46 para. 169)

Dissenting Reasons by:
The Honourable Madam Justice Garson (page 52, para. 186)

Reasons for Judgment of the Honourable Chief Justice Finch:

I. Introduction

[1] The Province of British Columbia ("B.C.") appeals from the order of the Supreme Court of British Columbia pronounced 19 March 2010 declaring the Crown to be in breach of its duties to consult and accommodate the petitioners, West Moberly First Nations, who are Treaty 8 First Nations, concerning decisions made by government officials at the request of the respondent First Coal Corporation. Two of those decisions, made by officials in the Ministry of Energy, Mines and Petroleum Resources ("MEMPR") on 1 September 2009, and 14 September 2009, amended existing permits to allow First Coal to obtain a 50,000 tonne bulk sample of coal, and to engage in a 173 drill hole, five trench Advanced Exploration Program.

[2] The petitioners say those two decisions were made without proper consideration of their right to hunt caribou in the affected area as part of their traditional seasonal round, and without making adequate provision for the protection and restoration of those caribou, described as the Burnt Pine caribou herd.

[3] The order granted by the chambers judge is in the following terms:

> THIS COURT DECLARES THAT:
>
> 1. The Respondent, Her Majesty the Queen in right of the Province of British Columbia, as represented by Al Hoffman, Chief Inspector of Mines, Victor Koyanagi, Inspector of Mines and Dale Morgan, District Manager, Peace Forest District ("British Columbia") failed to consult adequately and meaningfully and failed to accommodate reasonably the Petitioners' hunting rights provided by Treaty No. 8 with respect to the Bulk Sample amendments and Advanced Exploration amendments to mining permit CX-9-022 and with respect to Occupant Licences to Cut L48261 and L48269.
>
> THIS COURT ORDERS THAT:
>
> 2. The effect of the issuing of the amendment of September 14, 2009 permitting the Advanced Exploration Program is stayed and the effect of the Occupant Licenses to Cut is suspended for 90 days from March 19, 2010;
> 3. Within the said 90 day period, British Columbia, in consultation with the Petitioners, will proceed expeditiously to put in place a

> reasonable, active plan for the protection and augmentation of the Burnt Pine caribou herd, taking into account the views of the Petitioners, as well as the reports of British Columbia's wildlife ecologists and biologists Dr. Dale Seip and Pierre Johnstone; ...
>
> [Emphasis added.]

[4] No stay was ordered in respect of the amended Bulk Sample Permit of 1 September 2009 but, as will appear below, it has not been acted upon.

[5] The third decision challenged by the petitioners in the court below, made on 8 October 2009 by the Deputy Minister of the Ministry of Forests and Range ("MOFR"), permitted First Coal to cut and clear up to 41 hectares of woodlands to facilitate the Advanced Exploration Program. The learned chambers judge held that the Deputy Minister's decision was made in accordance with the relevant statutory powers granted to him (paras. 65-70 of the reasons), but he stayed action under that permit for 90 days as well. This aspect of his ruling is not in issue on appeal, and we need not address that decision further in these reasons.

[6] On this appeal, as in the court below, B.C. acknowledges its duty to consult, and says that it was fulfilled. The Province says the learned chambers judge erred in interpreting the petitioners' Treaty 8 right to hunt as a "species specific right", and in holding that the petitioners' interests could only be accommodated in one specific way. It says the chambers judge also erred in holding the departmental officials to an unreasonable standard with regard to the scope of their delegated authority. They were not authorized to address all Aboriginal issues and concerns.

[7] As a result, B.C. says the chambers judge erred in holding that the Crown's consultation and accommodation was unreasonable.

[8] First Coal supports B.C.'s appeal against the judge's order. First Coal says the chambers judge erred in holding that the scope of the Crown's duty to consult included consideration of the cumulative effect of "past wrongs", and potential future developments, instead of focusing on the potential impact of the challenged permits. First Coal says further that the learned chambers judge erred in law by rejecting the

plan put forward by First Coal, the Caribou Mitigation and Monitoring Plan ("CMMP"), as a reasonable form of accommodation.

[9] Alternatively, First Coal says the chambers judge erred by imposing a "sanction" upon it, in the form of the 90-day stay directed by paragraph 2 of the order, when it had done nothing wrong.

[10] B.C.'s appeal is also supported by the intervenor, the Attorney General of Alberta. It says the chambers judge misinterpreted the Treaty 8 right to hunt as species specific, and erred in deciding a public policy question, restoration of caribou, a matter within the authority of the other branches of government.

[11] In response, the petitioners say the learned chambers judge made no reversible error. He correctly determined the nature and scope of the petitioners' Treaty 8 right to hunt. He correctly determined the seriousness of the impact that the mining exploration would have on that right. And he correctly held that the consultation process was unreasonable, and that the proposed accommodation did not honourably balance the rights and interests at stake.

[12] The petitioners' position on this appeal is supported by two intervenors, Treaty 8 First Nations of Alberta, and Grand Council of Treaty #3.

[13] The notice of appeal was filed in these proceedings on 16 April 2010. The 90-day period stipulated by the chambers judge's order for putting in place a plan for the protection and augmentation of the Burnt Pine caribou herd ended on 19 June 2010.

[14] The Court was advised that during the 90-day period following the order there were discussions between the parties. B.C. and the petitioners agreed on the formation of a "knowledge team" and a "planning team" who were to recommend measures necessary to protect and augment the Burnt Pine caribou herd, and to restore the petitioners' treaty right to harvest caribou.

[15] On 18 June 2010, B.C. adopted one option of the planning team's report, which, we were told, did not meet the petitioners' objectives.

[16] On 25 June 2010, the petitioners issued a new petition (No. 10-2786 Victoria Registry) seeking a declaration that B.C. is in breach of the order made on 19 March 2010, the subject of this appeal, as well as various other relief including orders quashing the Bulk Sample Permit and Advanced Exploration Amending Permit, and an interim injunction against First Coal.

[17] That petition was amended on 23 July 2010.

[18] We are advised by counsel that they have agreed to hold proceedings under the new petition in abeyance pending the outcome of this appeal. Since the expiration of the 90-day stay period, the parties have conducted themselves by agreement, rather than by the terms of the order.

II. Background

A. The Petitioners

[19] The West Moberly First Nations people are descendants of the Mountain Dunne-Za, also known as the Beaver Indians. The West Moberly First Nations' reserve is located at the westerly end of Moberly Lake. This area lies to the west of what is now Fort St. John, and roughly midway between Hudson's Hope and Chetwynd, B.C. To the southwest lies the town of Mackenzie, situated near the W.A.C. Bennett Dam at the southerly end of the Williston Reservoir (Lake).

[20] The Beaver Indians of Fort St. John adhered to Treaty 8 in 1900. The Hudson Hope Band of Beaver Indians adhered in 1914. The Hudson Hope Band separated into the West Moberly First Nations and the Halfway River First Nation in 1977.

[21] First Coal's proposed coal exploration activities are located at the Goodrich Central South property area, which lies about 50 kilometres southwest of the West

Moberly Lake 168A Reserve, and within what the petitioners consider to be a preferred traditional hunting area.

[22] Historically, the Mountain Dunne-Za were hunters who followed game's seasonal migrations and redistributions based on their knowledge and understanding of animal behaviour. In their seasonal round, the Dunne-Za hunted ungulate species, including moose, deer, elk and caribou, in addition to birds and fish. Moose appears to have been the most important food source, but caribou hunting was important, especially in the spring. The animals were taken in large numbers when available, and the meat was preserved by drying. Dry meat was an important food source for the Mountain Dunne-Za year round.

[23] The Mountain Dunne-Za utilized all parts of the caribou, including the hide, internal organs, and bones. They used these materials to make clothing, bags, and a variety of tools and utensils.

[24] It appears that after the Bennett Dam and Williston Reservoir were created the caribou population of this region declined significantly. The petitioners' people hold the view that the reservoir cut off traditional migration routes for the caribou, depriving them of what had formerly been important habitat.

[25] The Mountain Dunne-Za valued the existence of all species, including caribou, and treated them and their habitat with respect. They knew where the caribou's calving grounds were, and where the winter and summer feeding grounds were located. The people felt and feel a deep connection to the land and all its resources, a connection they describe as spiritual. They regard the depopulation of the species they hunt as a serious threat to their culture, their identity and their way of life.

[26] Since about the 1970s, the West Moberly elders have imposed a ban on their people's hunting of caribou. Where the caribou once existed in abundance, the Burnt Pine caribou herd, of concern in these proceedings, is said now to consist of 11

animals. The petitioners' people recognize that unless the herd is protected and restored it is no longer possible to hunt these animals without risk of its extirpation.

B. First Coal Corporation

[27] First Coal is a federally incorporated company holding several provincial licences or tenures to explore for coal in an area near Chetwynd. The first *Mines Act*, R.S.B.C. 1996, c. 293, permit was issued to First Coal in June 2005. The exploration and sampling projects which are the subject of these proceedings are located within the petitioners' preferred traditional hunting ground.

[28] The original Bulk Sample Permit authorized First Coal to extract 100,000 tonnes of coal. The original Exploration Permit authorized construction of the "Spine Road" which traversed the high ground in the exploration area, and passed through important winter caribou habitat.

[29] The high ground is important winter caribou habitat because the ridges are windswept, reducing the depth of snow that caribou must dig through in order to uncover the ground lichen which is their source of food.

[30] In May 2008, First Coal applied to amend the Bulk Sample Permit from 100,000 tonnes to 50,000 tonnes. The judge found that the main reason for seeking this reduction was economic. The amendment would cut in half the time required to obtain the sample, and thus reduce the associated cost accordingly.

[31] In November 2008, First Coal applied to amend its Advanced Exploration Permit. The amendment would eliminate use of, and provide restoration of, the Spine Road. It would also allow for the drilling of 173 test holes, and the construction of a network of roads to provide access to the test hole sites.

[32] The taking of the proposed bulk sample had two purposes. The first purpose was to test the quality and economic viability of the coal in the proposed mining area. A second purpose was to test a new technology for the mining of coal known as the "Addcar System".

[33] The Addcar System is designed to replace both open pit mining, and underground mining by men. In the Addcar System, a series of trenches are dug at right angles to the coal seams on the mountainside. A “launch vehicle” is then positioned over the trench. The dimensions of the launch vehicle are not in evidence, but from the photographs it appears to be a large portable structure that contains a control room, a crew cabin, and a platform on which coal cars are placed and then “launched”. A drilling machine also launched from the platform extracts coal from the underground tunnels it digs, and loads the coal into a car which follows the drilling machine into the tunnel. As each coal car is filled, a new car is added to the underground coal train, hence the name “Addcar”.

[34] As this is new technology for First Coal, it wished to test it by removing the bulk sample.

[35] At the time of the hearing below, it was anticipated that the bulk sample of 50,000 tonnes would have been completed by the time judgment was delivered, no interim injunction having been sought or granted. However, the new technology did not work as expected, the cutting head was returned to the United States, and the bulk sampling was deferred.

[36] At the time of the hearing in this Court, the trenches have been dug but the bulk sample has not been extracted.

[37] When First Coal became aware of the petitioners’ opposition to the bulk sampling and exploration projects in June 2008, First Coal began developing plans to mitigate harm from the project and to monitor its effects upon the caribou. From 27 October 2008 to 1 May 2009, First Coal’s Caribou Mitigation and Monitoring Plan went through five versions.

[38] The CMMP is a report prepared by Aecom Canada Limited, a firm providing consulting services on wildlife biology and ecology. The plan provides information and opinion on the potential effects of First Coal’s amended Bulk Sample and Advanced Exploration Programs. It provides background information on the Burnt

Pine caribou herd and its seasonal habitats, and it addresses the potential impacts of First Coal's proposed activities on direct habitat loss, indirect habitat loss, and habitat fragmentation effects. The CMMP also provides advice on potential mitigation measures, and a plan for monitoring the effects of the sampling and exploration programs on the caribou herd.

[39] The CMMP refers to (and may be regarded in part as a response to) the advice of two government experts: Dr. Dale Seip, a wildlife ecologist with the Province's Northern Interior Forest Region, and Pierre Johnstone, an ecosystem biologist employed by the Province's Ministry of the Environment ("MOE"). They are referred to in para. 3 of the judge's order, and parts of their reports are referred to at paras. 22 and 23 of the reasons for judgment. Dr. Seip's report of 25 September 2008 included this:

> It is also necessary to understand what the longer term implications are for these caribou. The Goodrich property encompasses most of the core caribou habitat on Mt. Stephenson. Mining over this entire area would destroy a major portion of the core winter range for this caribou herd. It is short-sighted and misleading to evaluate this proposal for bulk sampling without also considering the longer term consequences of more widespread mining activity occurring over the entire property. [Emphasis added.]

C. The Consultation Process

[40] The Aboriginal Relations Branch of MEMPR prepared a document reviewing developments and representations by various persons up to 20 July 2009. The document is titled "Considerations To Date". An appendix to that document is a "Consultation Log" which records a summary of communications among the four Treaty 8 First Nations in the area, First Coal, and the three government ministries engaged in the process, MEMPR, MOFR and MOE.

[41] The "Considerations" document records that "MEMPR has proceeded with consultation towards the deeper end of the consultation spectrum". It records West Moberly First Nations' opposition to the Bulk Sample and Exploration Project. The Considerations document records that "operational mine activities are not under current consideration":

> 6.1.2 Operational Mine Activities Not Under Current Consideration
>
> Pierre Johnstone, R.P.Bio. Ecosystem Biologist, MOE, provided comments on the CMMP on February 13, 2009 as follows:
>
> *"It is reasonable to expect that mining beyond the Bulk Sample will occur in the future. Given this, assessment of impacts should include the full use scenario, where all available coal is mined; the additional assessments and/or mitigation that "may be required" (p.1) should be described. Furthermore, to more accurately characterize potential impacts to Caribou, FCC should consider potential impacts that could be expected if all their tenured property was developed, in the context of existing and proposed development in the region."*
>
> (see APPENDIX VI for complete comments)
>
> A decision on the present application does not authorize full scale mining activity on the Central South Property. Any proposal to move towards an operating mine by FCC will be subject to further assessment and review through the Environmental Assessment (EA) process. Further mitigation and accommodation activities may be considered if the Central South Property is considered under the EA process for authorization to mine. The impacts of mining exploration and bulk sample activities are measured on the merits and impacts of the proposed activity alone and not potential future activities of greater impact. It is only through completion of the Bulk Sample process that FCC will be able to undertake their appropriate due diligence and consider whether to apply for further mine development.
>
> [Italic emphasis in original.]

[42] With respect to the cumulative effects of prior events, the Considerations document states:

> Cumulative Impacts
>
> WMFN links the decline of the caribou to a number of cumulative factors including habitat loss and fragmentation of habitat due to logging, industrial development and other impacts and in particular the construction of the WAC Bennett Dam and the creation and flooding of the Williston Reservoir.
>
> MOE's Pierre Johnstone in his June 19, 2009 letter states, *"the cumulative effects of any incremental increase to habitat alienation have not been analyzed to fully appreciate potential impacts."*
>
> MEMPR recognizes that the issue of cumulative impacts has been raised by WMFN and MOE, but it is beyond the scope of the review of this Project to fully assess cumulative impacts in the WMFN traditional territory. This Project has a relatively small footprint relative to other activities, and potentially impacts 0.69% of the caribou in the WMFN traditional territory. However, MEMPR is committed to facilitating and/or participating in land use planning and cumulative impact assessments through the Economic Benefits Completed Agreements.
>
> [Italic emphasis in original.]

[43] The Considerations document records the petitioners' submissions, and the Crown's obligations flowing from the *Constitution Act*, *1982*, and from Treaty 8. It refers to the petitioners' cultural connection to caribou, and the risk of potential extirpation of the Burnt Pine caribou herd.

[44] The document ends with a summary of the accommodation measures proposed respectively by West Moberly First Nations and by MEMPR:

> Accommodation Measures proposed by WMFN
>
> The following are drawn from statements from the Initial Submissions that could be considered as proposed accommodation measures.
>
> - Accommodation should include rejection of FCC application;
> - WMFN should be given the opportunity to participate in the decision making process;
> - Consultation as a form of accommodation;
> - Recovery of the Burnt-Pine Caribou herd; and
> - Re-location of FCC activities.
>
> Accommodation Measures Taken or Proposed by MEMPR
>
> - Consultation at the higher end of the spectrum;
> - Application of CMMP;
> - Reduction of the Bulk Sample permit by 50%;
> - Closures of the Spine Road;
> - Use of ADDCAR system;
> - Consideration of WMFN's extensive input including the Initial Submissions in the decision making process;
> - Through promotion, facilitation and participation in planning processes flowing from the EBA [Economic Benefits Agreement] as well as through the Caribou Task Force, MEMPR will work towards addressing the issues of:
>
> - cumulative impacts;
> - a Caribou Recovery Plan;
> - land use planning; and
> - the location of FCC and other companies' activities.

D. Rationale for MEMPR's Decisions

[45] On 1 September 2009, the Chief Inspector of Mines, Al Hoffman, issued the amendment to Permit CX-9-022, permitting First Coal to obtain the 50,000 tonne bulk sample from the "Goodrich Properties". On 14 September the Inspector of

Mines, Victor Koyanagi, issued an amendment to the Exploration Permit authorizing First Coal's proposed drilling program.

[46] The rationale for these amending decisions was dated 4 September 2009, and was sent to the petitioners by e-mail on 9 September 2009. The rationale records that in addition to West Moberly First Nations, other interested First Nations were Halfway River First Nation (HRFN), Saulteau First Nation (SFN) and Macleod Lake Indian Band (MLIB). The rationale includes the following:

> 3.0 Assessment of degree of impact
>
> In assessing any potential impacts to aboriginal interests associated with the proposed activity, we have considered the following relevant factors:
>
> - the project is located on a coal lease on Crown land;
> - the project is located within core caribou habitat reorganized under the Forests and Range Act;
> - the project is located within the Treaty 8 area;
> - the availability of caribou and other ungulate species in the project area; and
> - the project involves significant additional disturbance on a previously modified site.
>
> The key concern expressed by First Nations, and WMFN in particular, was impacts to the Burnt-Pine Caribou Herd.
>
> 4.0 Approach to Consultation
>
> In consideration of the legal framework set out in the *Mikisew* decision regarding consultation with Treaty First Nations and the degree of impact to Treaty rights, MEMPR has proceeded generally with consultation towards the low end of the consultation spectrum set out in the *Haida* decision. However, due to WMFN's level of concern regarding the potential impacts on the Burnt-Pine Caribou Herd, MEMPR has proceeded with consultation with WMFN on the issue of impacts to caribou towards the deeper end of the consultation spectrum.
>
> 5.0 Consultation and Accommodation Summary
>
> MEMPR has been engaged with the four T8 FNs in discussions on the proposed project for over four years. The level of concern among the four T8 FNs has been mixed. The WMFN have voiced their opposition to the proposed project, primarily due to the potential impacts to the Burnt-Pine Caribou Herd. Both the MLIB and HRFN have a positive work relationship with FCC and have signed MOUs in support of the Project. Likewise, SFN has a positive work relationship with FCC and has entered into MOU negotiations with FCC.
>
> ...

5.3 Response to West Moberly First Nations' "Initial Submission"

In June 2009, MEMPR received a 90+ page confidential document from WMFN entitled "Initial Submission: I want to eat Caribou before I die". WMFN identified issues with MEMPR's consultation process and requested that MEMPR respond to the Initial Submission in writing. MEMPR provided its response to WMFN on July 20, 2009 and met with WMFN on August 5 and 12, 2009 to discuss issues raised in the Initial Submission.

Specifically, WMFN raised the crown's obligation to consult and the nature and constitutional protection of their rights under Treaty 8 (1899) with a focus on their defined right around hunting, trapping and fishing. MEMPR has recognized its obligations and carried out meaningful consultation towards the deeper end of the spectrum with WMFN on the issue of impacts to the Burnt-Pine Caribou Herd.

5.4 Accommodation Measures

The key interest related to this Project is the impact on the Burnt-Pine Caribou Herd. The following accommodation measures have been taken to reduce the impact of the Project on the Burnt-Pine Caribou Herd.

Caribou Mitigation and Monitoring Plan

FCC hired a wildlife consultant to prepare a Caribou Mitigation and Monitoring Plan (the CMMP) in response to concerns of the four T8 FNs. The purpose of the CMMP is to minimize the impact of the mining activities on the Burnt-Pine Caribou Herd during the advanced exploration and Bulk Sample programs. The CMMP also outlines mitigation measures to avoid or limit effects and monitoring programs designed to ensure that mining activities do not have a significant impact on the Burnt-Pine Caribou Herd, and to increase understanding of habitat use, distribution, movements and population dynamics of the Burnt-Pine Caribou Herd.

FCC presented the CMMP to the four T8 FNs and staff at MEMPR, MOFR, and MOE on January 20th, 2009. At that time FCC requested that the four T8 FNs and government staff review the CMMP and provide FCC with their comments.

...

As part of the CMMP, FCC established a Burnt-Pine Caribou Task Force. The purpose of the Task Force is to review monitoring results in the context of past and ongoing research on the Burnt-Pine Caribou Herd, and to discuss other ways in which FCC can assist in the recovery of the population. Membership on the Task Force has been offered to the four T8 FNs, MEMPR, MOE and MOFR.

Since January 20, 2009, the four T8 FNs and government staff have provided FCC with comments on the CMMP and it is currently in its 5th revision. The CMMP will continue to be reviewed based on comments by the four T8 FNs, MEMPR, MOE, MOFR.

On April 30, 2009 a meeting was held in Fort St. John facilitated by FCC to explain the revisions to the CMMP and the Reclamation Plan. This meeting

> was attended by MEMPR, MOE, MOFR and the representatives from the four First Nations.
>
> Amendment to Bulk Sample Permit Application
>
> FCC initially applied for a 100,000 tonne Bulk Sample permit. To reduce the impact on the Burnt-Pine Caribou Herd, FCC has reduced their Bulk Sample permit to 50,000 tonnes. This will result in reduced impact by limiting the number of trenches to one instead of two, will result in approximately 50% waste rock and will reduce the traffic required to move the Bulk Sample.
>
> Closure of Spine Road
>
> Through discussions with MOE and MOFR, FCC recognized the significance of the wind-swept ridge to caribou. As the spine road is located on the wind-swept ridge, to minimize and limit impacts to the caribou, FCC agreed to discontinue use of and prohibit activities on the spine road (excepting reclamation as outlined in the CMMP).

[47] Thus, the "rationale" expresses MEMPR's reasons for granting the amended Bulk Sample and Advanced Exploration Permits. This is the decision that was subjected to judicial review in the court below.

III. Reasons for Judgment

[48] The learned chambers judge held that the consultation provided was not meaningful (para. 49). He held the petitioners were not given sufficient time to consider First Coal's project, and the CMMP.

[49] He also held the Crown had failed to accommodate reasonably:

> [51] ... I conclude that at least since June of 2009, when the West Moberly presented a detailed report of the danger to that herd and its relationship to their treaty protected right to hunt, the Crown's failure to put in place an active plan for the protection and rehabilitation of the Burnt Pine herd is a failure to accommodate reasonably.
>
> [52] While First Coal's "Mitigation and Monitoring Plan" is a step in the direction of protecting critical caribou habitats, as the Crown itself stated in the "Considerations to Date" document of July 20, 2009, there is currently no rehabilitation program in effect for the Burnt Pine herd.
>
> [53] I conclude that a balancing of the treaty rights of Native peoples with 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.
>
> [54] Further, here the Crown has delegated its duty towards First Nations peoples to departmental officials. But in so doing it has not given those

> officials the authority to consider fully the First Nations concerns, nor the power to accommodate those concerns. The same July 20, 2009, document which states that the Ministry of Energy, Mines and Petroleum Resources recognizes that the cumulative impacts of First Coal's project upon West Moberly's traditional territory have been raised by both West Moberly and the Ministry of the Environment, states that it is "beyond the scope of this project to fully assess" those impacts.
>
> [55] The honour of the Crown is not satisfied if the Crown delegates its responsibilities to officials who respond to First Nations' concerns by saying the necessary assessment of proposed "taking up" of areas subject to treaty rights is beyond the scope of their authority.
>
> [Emphasis added.]

[50] The judge considered in some detail the CMMP and comments on it by the government experts, Dr. Seip and Mr. Johnstone. He concluded that because there was no recovery plan for the Burnt Pine caribou herd, as the Crown conceded, the CMMP could not be seen as a reasonable accommodation (para. 59).

[51] The judge said the right to hunt had to be "meaningful", which included a right to hunt in its traditional territories:

> [62] Nor can the suggestion that the Burnt Pine herd constitutes only a minor part of the hunting potential for the West Moberly prevail. As noted in para. 15 above, the Supreme Court of Canada has stated that a meaningful right to hunt means a right to hunt in "its" (here West Moberly's) traditional territories. The area impacted by the First Coal project includes a portion of West Moberly's traditional seasonal round of hunting caribou, and impacts not only hunting for food, but upon the use of caribou for other cultural and practical reasons. It is not an accommodation to say "hunt elsewhere".
>
> [63] ... Thus, in the case at bar, the Court is required to take into account West Moberly's treaty protected right to hunt, including the traditional seasonal round, and the impact of these decisions upon that right. Here, I conclude that treaty protected right is the right is [*sic*] to hunt caribou in the traditional seasonal round in the territory effected [*sic*] by the First Coal Operation.

[52] As to remedy, the judge held that quashing the amended permits would not strike the proper balance (para. 78). He held:

> [78] The Court may quash a decision should it be found there has not been appropriate consultation or accommodation: *Klahoose First Nation v. Sunshine Coast Forest District (District Manager)* 2008 BCSC 1642, [2009] 1 C.N.L.R. 110, *Kwikwetlem First Nation v. British Columba (Utilities Commission),* 2009 BCCA 68, [2009] 9 W.W.R. 92. However, I conclude such

> an order in this case would not constitute a proper balancing of the rights of the petitioners with other First Nations, and the public, including First Coal.
>
> [79] Rather, I conclude that a pragmatic and reasonable step is to stay the effect of the issuing of the amendment of September 14, 2009 permitting the Advanced Exploration Program, and to suspend the effect of the licence to cut, for a determined period to permit and to mandate a proper accommodation of West Moberly's concerns with respect to the Burnt Pine herd.
>
> ...
>
> [82] When considering a constitutional right, it is open to the court rather than to stay the effect of the decisions pending proper accommodation, to stay the impugned decisions for a determined period and to give directions as to the accommodation which should be put in place within that time: see *Platinex Inc. v. Kitchenuhmaykoosib Inninuwug First Nation* (2006), 272 D.L.R. (4th) 727, [2006] 4 C.N.L.R. 152, (Ont. S.C.J.).
>
> [83] In the circumstances, I conclude that the stay which I have ordered should be in effect for 90 days from the date of these reasons.

IV. Treaty 8

[53] The relevant provision of Treaty 8 is as follows:

> And 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. [Emphasis added.]

[54] With this text must be read the report of the Treaty Commissioners submitted to the Superintendent General of Indian Affairs on 22 September 1899. The following extracts of the Commissioner's report are relevant:

> There was expressed [by the Indians] at every point the fear that the making of the treaty would be followed by the curtailment of the hunting and fishing privileges ...
>
> We pointed out that the Government could not undertake to maintain Indians in idleness; that the same means of earning a livelihood would continue after the treaty as existed before it, and that the Indians would be expected to make use of them ...
>
> Our chief difficulty was the apprehension that the hunting and fishing privileges were to be curtailed. The provision in the treaty under which ammunition and twine is to be furnished went far in the direction of quieting the fears of the Indians, for they admitted that it would be unreasonable to

> furnish the means of hunting and fishing if laws were to be enacted which would make the hunting and fishing so restricted as to render it impossible to make a livelihood by such pursuits. But over and above the provision, we had to solemnly assure them that only such laws as to hunting and fishing as were in the interest of the Indians and were found necessary in order to protect the fish and fur-bearing animals would be made, and that they would be as free to hunt and fish after the treaty as they would be if they never entered into it.
>
> We assured them that the treaty would not lead to any forced interference with their mode of life.
>
> [Emphasis added.]

V. Issues on Appeal

[55] The parties' submissions give rise to a number of issues.

A. Whether judicial review is the appropriate procedure in which to allege, and to seek a remedy for, the Crown's failure to consult and accommodate (the procedural issue).

B. Whether the judge erred in holding that the Crown failed to act honourably by delegating to Ministerial officials the duty to consult, without also providing those officials with the power to consider fully, and to accommodate reasonably, the petitioners' concerns (the delegation issue).

C. Whether the judge erred in considering "past wrongs", or the cumulative effects of past events, that led to the depleted population of caribou in the Burnt Pine herd, and whether the judge erred in considering future events, namely the impact of a full mining operation in the area, rather than the exploration for which the amended permits were granted (the scope of consultation issue).

D. Whether the judge mischaracterized or misconstrued the petitioners' Treaty 8 right to hunt (the interpretation issue).

E. Whether, considering the results of the issues above, the learned chambers judge erred in holding that the Crown had failed to consult

meaningfully and to accommodate reasonably, the petitioners' Treaty 8 right to hunt. This is the fundamental issue on appeal (the consultation issue).

F. Whether the judge erred in holding that only one method of accommodation was reasonable in the circumstances, namely, a plan to protect and augment the Burnt Pine caribou herd (the accommodation issue).

VI. The Parties' Positions

A. British Columbia

[56] B.C. says the chambers judge erred in interpreting the petitioners' Treaty 8 hunting rights as a "species specific" right. B.C. says the error appears in this sentence in the judge's reasons at para. 63: "Here, I conclude that treaty protected right is the right is [*sic*] to hunt caribou in the traditional seasonal round in the territory effected [*sic*] by the First Coal Operation".

[57] That is to say, B.C. says the judge erred in holding that the petitioners had a specific treaty right to hunt and harvest the Burnt Pine caribou herd. The court should not have had such a narrow focus. It will result in the "balkanization" of treaty rights. The hunting right in Treaty 8 is not so confined. It is a right to hunt anywhere in the petitioners' traditional Treaty 8 territories, and for such species as may be available. The treaty rights should not be restricted to a single species, nor to an unreasonably limited area of land.

[58] Moreover, B.C. says the hunting right is subject to the Crown's right to take up such tracts of land as may be required for, *inter alia*, mining. So the hunting right does not exclude other land uses as provided for in the Treaty. The Province points out that the petitioners' people have not hunted caribou in the area of concern for almost 40 years.

[59] The Province further contends that the chambers judge erred in holding that only a single specific accommodation was the appropriate outcome, and in evaluating the Crown's consultation process from that perspective. B.C. says that, if

the consultation process is found to be insufficient, the question of accommodation should be referred back to the decision maker. B.C. says it was an error of law to order a specific accommodation, a matter in which the courts should not be involved.

[60] Next, B.C. says the chambers judge erred by misapprehending the proper role of the court in reviewing the exercise of a statutory power of decision. B.C. says the chambers judge erred (at paras. 54 and 55 of the reasons) in saying that the Crown failed to provide its officials with authority sufficient to consider fully and to accommodate all concerns that might arise in the consultation process. B.C. says it is not reasonable to expect that a statutory decision maker, such as MEMPR, should have authority to address all Aboriginal concerns raised, even if those concerns raise issues outside the scope of the consultation process. Here MEMPR authorized the amendment of two permits for sampling and exploration. B.C. says it is not realistic to expect Ministry officials to engage in an environmental review process, or an assessment of what was necessary to protect and restore this particular herd of caribou.

[61] So B.C. says the judge erred in holding that its consultation and accommodation with the petitioners was unreasonable. The subject of the consultation was the impact of the permit amendments, and not a review of the petitioners' Treaty 8 rights generally, nor the historic decline of caribou.

[62] B.C. asks that the order of 19 March 2010 be set aside in its entirety.

B. First Coal

[63] First Coal supports B.C.'s position on the appeal.

[64] In addition, First Coal says the chambers judge erred in assessing the scope of the Crown's duty to consult. First Coal says the judge erred in treating the scope of the duty to consult as including the cumulative effect of past wrongs suffered by the petitioners' people, and in considering the potential impact of a fully operational coal mine. Rather, the scope of the duty to consult was limited to the impact of the

amended Sampling and Exploration Permits that were challenged on this judicial review.

[65] First Coal placed emphasis on the decision of the Supreme Court of Canada in *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council,* 2010 SCC 43, [2010] 2 S.C.R. 650, a judgment pronounced on 28 October 2010, well after the chambers judge gave his reasons in this case.

[66] First Coal says the chambers judge also erred in his decision as to what would constitute reasonable accommodation in the circumstances of this case. In particular, it says the chambers judge erred (at para. 51 of his reasons), by holding the Crown in breach of its duty to accommodate by failing to put in place "an active plan for the protection and rehabilitation of the Burnt Pine caribou herd". It says whether the Crown was in breach of its treaty obligations is a different question from whether it was in breach of its duty to consult and accommodate concerning the amended permits.

[67] First Coal says the judge erred in law, and applied an unsupported standard, in rejecting First Coal's CMMP and its other initiatives as a reasonable form of accommodation. The potential impacts of the sampling and exploration projects are limited, and the mitigation proposed was reasonable. MEMPR's decision (the "rationale") to grant the amended permits was reasonable, and the judge should not have substituted his view of the matter for that of the decision maker.

[68] Finally, First Coal says the judge erred by ordering a 90-day stay of any activity under the two amended permits. First Coal says this amounted to a sanction upon it, with no logical connection to the rest of the remedy granted, and in spite of the fact that First Coal had acted reasonably throughout, and done everything that was expected of it.

C. The Intervenor - The Attorney General of Alberta

[69] Alberta also supports B.C.'s position on this appeal. In its factum, Alberta agrees with the errors in the judgment identified by B.C. Alberta affirms that the judge erred in adopting a narrow characterization of the petitioners' Treaty 8 right to hunt, as one to hunt a specific species in a specific geographical area. It says judicial review is not the appropriate forum for addressing such an issue, which should be considered in the context of a trial.

[70] Alberta says treaty interpretation is inappropriate in this case because the parties to the treaty, and in particular Canada, are not before the court.

[71] Alberta says the focus should be on the reasonableness of the consultation process, rather than upon its outcome.

[72] Alberta says B.C. was entitled to rely on the steps taken by First Coal, the proponent of the sampling and exploration projects, to mitigate and address the specific concerns raised by the petitioners.

[73] Alberta further says that whether positive steps should be taken to implement a recovery plan for the Burnt Pine caribou herd is a public policy choice to be made by government, and is well beyond any remedy available to the petitioners on judicial review of the decision to amend the permits. Alberta says it is up the Crown, and to the statutory decision makers with delegated authority, to determine where the appropriate balance is to be struck. Courts should show a high degree of deference to the Crown when it has followed a reasonable process in balancing competing considerations.

[74] Here Alberta says B.C. made a difficult policy decision with respect to the Burnt Pine caribou herd and that if the public does not like the policy decision, the appropriate remedy is the "ballot box" not judicial review.

D. West Moberly First Nations

[75] The petitioners say there are two over-arching issues. The first is the nature and scope of the Treaty 8 hunting right guaranteed to the First Nations. The second is the reasonableness of the relief ordered by the chambers judge.

[76] As to the nature and scope of the treaty right to hunt, the petitioners say the statutory decision maker was wrong. The petitioners' right to harvest caribou and other game is rooted in the "traditional seasonal round" of the Mountain Dunne-Za. To ignore this as the petitioners say MEMPR did, was to misapprehend the nature and scope of the duty to consult.

[77] The standard of review as to the nature and scope of the duty to consult is correctness. The statutory decision maker got it wrong, and the chambers judge got it right. The judge had proper regard for the text of Treaty 8 and for the Crown's oral promises to the First Nations peoples.

[78] The petitioners say the appropriate standard of review for assessing the consultation process actually engaged in by the Crown, and the results of that process, is reasonableness. Here the petitioners say the consultation process engaged in by MEMPR, and the mitigation and accommodation measures it adopted from the CMMP, were unreasonable. The petitioners rely on the opinions of the experts in the MOFR and the MOE. Both said that the proposed exploration activity, even with the mitigation proposed in the CMMP, will result in unacceptable adverse impacts to the caribou. It will destroy core winter habitat for caribou, and that is incompatible with recovery of the Burnt Pine herd.

[79] The petitioners maintain the preservation of a resource is necessary for the continuing treaty rights to exploit that resource. It is appropriate to consider the cumulative impacts. The petitioners say this case is distinguishable from *Rio Tinto*.

[80] MEMPR's decision to issue the amended permits failed to consider the petitioners' right to hunt caribou according to the traditional seasonal round. B.C.,

and MEMPR, have mistakenly miscategorized the petitioners' existing treaty right, as an asserted but unproven and potential Aboriginal right. The treaty right exists, and includes the right to its meaningful exercise.

[81] It was an error of law for MEMPR to so mischaracterize the treaty right, and the consultation and accommodation were therefore unreasonable.

[82] As to the content of the duty to consult and accommodate, the petitioners say that MEMPR did not, but the chambers judge did, adequately assess the seriousness of the potential adverse effects of MEMPR's decisions on the affected treaty right.

[83] The seriousness of the impact must take into account its effects on the First Nations peoples. One cannot assess those effects without considering the history of the relationship between the Crown and the First Nations. The historic decline of the caribou is also a relevant concern, because the impact of the proposed exploration will be felt on the herd in its depleted condition. The new adverse impacts distinguish this case from *Rio Tinto*.

[84] The consultation process was not reasonable, nor was the proposed accommodation. The judge was right to exercise his discretion as he did in ordering a specific form of accommodation.

E. The Intervenor - Treaty 8 First Nations of Alberta

[85] This organization represents 24 Treaty 8 First Nations in Alberta. Each member of those First Nations is a descendant from the original signatories to Treaty 8, or adherents thereto.

[86] Treaty 8 First Nations of Alberta supports the position of the West Moberly First Nations on this appeal. It says that consultation and accommodation must be meaningful. It says the statutory powers conferred on the decision maker, such as MEMPR, cannot limit the scope of consultation which the Crown has a duty to afford. If the officials in question do not have requisite authority, the Crown must engage

other government representatives who do have capacity to address all issues arising in the consultation process. The duty to consult and accommodate is not based on statute, but is rather a constitutional imperative.

F. The Intervenor - Grand Council of Treaty #3

[87] The Grand Council of Treaty #3 ("GCT3") represents the Anishinaabe Nation, an Aboriginal signatory to Treaty #3.

[88] The GCT3 also supports the position of the petitioners on this appeal. It says the harvesting rights promised in the 11 numbered treaties across Canada must be interpreted in the context of the circumstances of each First Nation having regard to the unique cultural, political, historical and geographical context of each numbered treaty and each Aboriginal people. In this case, GCT3 says the court below properly held the duty to consult and accommodate had to be informed by these considerations.

[89] GCT3 also says the courts have broad remedial powers in cases where the duty to consult and accommodate is called into question, including the power to make orders that provide a reasonable level of specificity as to how the consultation and accommodation is to be carried out. This approach to remedies is consistent with upholding the rule of law and allows for the orderly and informed development of the law of consultation and accommodation. It is also consistent with the balanced approach to remedies encouraged by courts in other duty to consult cases.

[90] GCT3 points out the framework for judicial supervision of statutory decision makers is set out in the *Judicial Review Procedure Act*, R.S.B.C. 1996, c. 241, and referred specifically to sections 5 and 6 of that *Act*.

[91] GCT3 affirms that consideration of cumulative impacts is important. It says First Coal confuses the question of consultation with respect to past infringements with the assessment of past land uses in order fully to appreciate the significance and effect of proposed land use. It says that if half the land had already been

appropriated, the impact of new development on what remained would be much greater than if there had been no previous development. The extent of past land use renders the impact of the proposed land use more significant. It says this approach is consistent with *Beckman v. Little Salmon/Carmacks First Nation*, 2010 SCC 53, [2010] 3 S.C.R. 103.

VII. Analysis

A. The Procedural Issue

[92] The appellants and intervenor Attorney General for Alberta have raised the question whether judicial review is the appropriate procedure in which to allege, and remedy, the Crown's failure to consult and accommodate.

[93] In oral submissions, B.C. suggested that judicial review was not the correct means by which to determine the scope of the treaty right to hunt. Counsel for the Province said that because the petition for judicial review was to be decided on affidavit evidence, the process provided too limited a basis on which to assess or define the scope of the treaty right. Counsel said that procedure was inappropriate for a specific finding on the scope of the treaty right, because the evidence was insufficient, and there was no cross-examination on any of the affidavits.

[94] The intervenor Attorney General of Alberta supports this position, but adds to it. Alberta says that "[q]uestions about asserted rights are best left to be dealt with in the context of a trial where full evidence is comprehensively reviewed and considered" (intervenor's factum at para. 5). Alberta points to both *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 S.C.R. 511, and *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, 2004 SCC 74, [2004] 3 S.C.R. 550, as cases where issues of asserted rights were severed from judicial review applications and referred to the trial list.

[95] Moreover, Alberta says that for a decision on whether the Treaty is to be interpreted as ensuring a First Nations' right to hunt a specific species "into the

future", there would have to be a "full trial of the historical issues, based on a fulsome evidentiary record" (intervenor's factum at para. 12). Here, not all the proper parties were before the Court. In particular, Canada was not a party to the process, and since it was a party to Treaty 8, it should be heard in any case involving the treaty's interpretation.

[96] I see no merit in the argument that judicial review was an inappropriate procedure for resolving the issues in this case. I note at the outset that no party took this position in the court below, and no party below suggested that Canada should be added as a party.

[97] In any event, the matter has now been put beyond question by the decision of the Supreme Court of Canada in *Beckman* where the Court said:

> [47] The parties in this case proceeded by way of an ordinary application for judicial review. Such a procedure was perfectly capable of taking into account the constitutional dimension of the rights asserted by the First Nation. There is no need to invent a new "constitutional remedy". Administrative law is flexible enough to give full weight to the constitutional interests of the First Nation. Moreover, the impact of an administrative decision on the interest of an Aboriginal community, whether or not that interest is entrenched in a s. 35 right, would be relevant as a matter of procedural fairness, just as the impact of a decision on any other community or individual (including Larry Paulsen) may be relevant.

[98] In my respectful view, Alberta's reliance on *Haida* and *Taku* is misplaced. Those were both cases about the existence of Aboriginal rights asserted by First Nations, but as yet unproven. There is no such question in this case, because Treaty 8 declares the right. While there remain issues as to the scope of the right, that is to be largely decided by interpreting the Treaty, in its historical context, as a matter of law.

[99] I would not give effect to the assertion that judicial review was not the proper way of proceeding to resolve the questions in issue in this case.

B. The Delegation Issue

[100] The appellants assert that the judge erred in holding that the Crown failed to act honourably by delegating to ministry officials the duty to consult and accommodate, without also providing those officials with the necessary powers to consider fully, and to accommodate reasonably, the petitioners' concerns.

[101] This issue arises from what the chambers judge said at paras. 54 and 55 of his reasons, which I repeat here for convenience:

> [54] Further, here the Crown has delegated its duty towards First Nations peoples to departmental officials. But in so doing it has not given those officials the authority to consider fully the First Nations concerns, nor the power to accommodate those concerns. The same July 20, 2009, document which states that the Ministry of Energy, Mines and Petroleum Resources recognizes that the cumulative impacts of First Coal's project upon West Moberly's traditional territory have been raised by both West Moberly and the Ministry of the Environment, states that it is "beyond the scope of this project to fully assess" those impacts.
>
> [55] The honour of the Crown is not satisfied if the Crown delegates its responsibilities to officials who respond to First Nations' concerns by saying the necessary assessment of proposed "taking up" of areas subject to treaty rights is beyond the scope of their authority.

[102] The "cumulative impacts of First Coal's project" referred to in para. 54 is a reference to the passage in the "Considerations" document under the heading "Cumulative Impacts" quoted above at para. 42.

[103] B.C. contends that in so holding the chambers judge was effectively saying that a statutory decision maker, such as MEMPR, must be empowered to address all concerns raised by First Nations, or else the honour of the Crown will not be upheld. B.C. says that to demand such authority in a statutory decision maker would compel it to go beyond its statutory mandate. It points to *Taku* and says that the petitioners' Treaty 8 concerns lay outside the ambit of the consultation process required for the approval of the amended Bulk Sampling and Advanced Exploration Permits. B.C. says such concerns "could only be the subject of later negotiations with the government", and that it was unreasonable to expect MEMPR to address them.

[104] The Attorney General for Alberta supports B.C. in this position. Alberta expresses the argument in its factum in this way:

> 33. The Justice erred in finding that it is not sufficient for a statutory decision maker to focus on mitigation efforts that are within his or her statutory authority. Is not dishonourable for a statutory decision maker to decline to address concerns that are "out of scope" or beyond the decision maker's statutory mandate. His approach effectively requires a Crown decision maker to enlist other Crown ministries and decision makers if the concerns of the First Nation are beyond his or her statutory authority and power to consider or address. This approach is contrary to *Carrier Sekani*, and to administrative principles generally.
>
> 34. With respect, the Justice went beyond reviewing the specific decisions before him and, instead, considered broader wildlife management issues that were the responsibility of other government decision makers, despite a court proceeding that was limited to the judicial review of specific administrative decisions.

[105] And further:

> 37. Statutory decision makers have no inherent jurisdiction. When broad concerns are raised, that require remedial powers that fall outside the confines of their statutory authorities and jurisdiction, they are simply not the proper forum for such concerns to be raised or considered. In this case, the Ministries charged with making the challenged decisions were not the proper forum to raise broad wildlife management concerns related to overall caribou management policy.

[106] With respect, I do not consider this position to be tenable. MEMPR was not limited by its statutory mandate, so far as its duty and power to consult were concerned. It is a well established principle that statutory decision makers are required to respect legal and constitutional limits. The Crown's duty to consult lies upstream of the statutory mandate of decision makers: see *Beckman* at para. 48 and *Halfway River First Nation v. British Columbia*, 1999 BCCA 470, 64 B.C.L.R. (3d) 206 at para. 177.

[107] In other words, in exercising its powers in this case, MEMPR was bound by, and had to take cognizance of, Treaty 8 and its true interpretation. B.C. says that such a view of the decision maker's position is unreasonable. With respect, I disagree. There is nothing in the legislation creating and governing MEMPR that would prevent that body from consulting whatever resources were required in order

to make a properly informed decision. A statutory decision maker may well require the assistance or advice of others with relevant expertise, whether from other government ministries, or from outside consultants.

[108] In this case, MEMPR appears to have relied, at least in large part, on the CMMP prepared by Aecom, the consultant retained by First Coal. MEMPR was entitled to consider the opinions of First Coal's consultant, but it was not limited to so doing. I would not give effect to this ground of appeal.

C. The Scope of the Duty to Consult

[109] The appellants, and First Coal in particular, assert that the judge erred in considering "past wrongs", or the cumulative effect of past events, that led to the depleted population of the Burnt Pine caribou herd; and erred as well in considering future events, namely the potential impact of a full mining operation, rather than simply the exploration programs authorized by the amended permits.

[110] First Coal submits that the chambers judge erred in determining the scope of the Crown's duty to consult. It says the consultation should have been limited, as it was by MEMPR, to the immediate adverse impacts of the two Amended Permits for the Bulk Sampling and Advanced Exploration Programs, and whatever steps might be necessary to address and accommodate those impacts.

[111] Instead, First Coal says the chambers judge embarked on a consideration of the historical decline of the Burnt Pine caribou herd, and in so doing purported to redress "past wrongs". In particular, First Coal says the chambers judge erred in considering the petitioners' submissions concerning the construction of the W.A.C. Bennett and Peace Canyon Dams in the 1960s and 1970s, and the creation of the Williston Reservoir.

[112] First Coal says the effect of these considerations on the chambers judge's decision is evident from his holding that the Crown failed to put in place a plan for the protection and rehabilitation of the Burnt Pine herd.

[113] Such focus on, and attempts to remedy, events in the past is, in First Coal's submission, contrary to the decision of the Supreme Court of Canada in *Rio Tinto* (at paras. 45 to 54). First Coal says that the order to rehabilitate or augment the Burnt Pine caribou herd is a remedy for prior events, which have no causal connection to any adverse impacts that the Amended Exploration Permits might give rise to.

[114] First Coal also contends that the chambers judge erred in holding that the duty to consult included an obligation to consider the potential adverse impacts of a full mining operation that might follow the exploration programs. The "longer term implications ... [of mining] over this entire area" are referred to in Dr. Seip's comments of 25 September 2008, quoted at para. 22 of the reasons for judgment, and in the petitioners' response to a letter from MEMPR of 8 August 2009 in which the Ministry said "further stages of development would not be considered in the permit amendment decisions", referred to at para. 34 of the reasons.

[115] In his analysis, the chambers judge referred again to the reports of Dr. Seip and Pierre Johnstone in which Dr. Seip expressed a view that the Bulk Sampling and Exploration Programs would cause habitat destruction "incompatible with efforts to recover the populations" (reasons para. 57), and Pierre Johnstone is quoted as saying that "mine development" in the habitat area would be inconsistent with maintaining or increasing the number of caribou (reasons para. 58).

[116] To deal first with the "past wrongs" submission, and the requirement that a causal relationship be shown between the government's decision and the risk of an adverse impact, I consider that *Rio Tinto* is distinguishable on its facts from the present case. There the Court addressed an argument that energy purchase agreements (EPAs) made in 2007 between Alcan and B.C. Hydro would trigger the duty to consult, because the EPAs were part of a larger hydroelectric project initiated some 40 or 50 years earlier on which the First Nations peoples had not been consulted. The Utilities Commission found that the 2007 EPA would not have <u>any adverse</u> effect on the Nechako River and its fishery (see *Rio Tinto* at para. 77). The First Nations peoples argued that even if the 2007 EPA would have no impact, or

inconsequential effects, the duty to consult was nevertheless triggered. The Court rejected this argument. It said in part:

> [45] The third element of a duty to consult is the possibility that the Crown conduct may affect the Aboriginal claim or right. The claimant must show a causal relationship between the proposed government conduct or decision and a potential for adverse impacts on pending Aboriginal claims or rights. Past wrongs, including previous breaches of the duty to consult, do not suffice.
>
> ...
>
> [49] The question is whether there is a claim or right that potentially may be adversely impacted by the *current* government conduct or decision in question. Prior and continuing breaches, including prior failures to consult, will only trigger a duty to consult if the present decision has the potential of causing a novel adverse impact on a present claim or existing right. ...
>
> ...
>
> [53] I cannot accept this view of the duty to consult. *Haida Nation* negates such a broad approach. It grounded the duty to consult in the need to preserve Aboriginal rights and claims pending resolution. It confines the duty to consult to adverse impacts flowing from the specific Crown proposal at issue — not to larger adverse impacts of the project of which it is a part. The subject of the consultation is the impact on the claimed rights of the *current* decision under consideration.
>
> ...
>
> [83] In my view, the Commission was correct in concluding that an underlying infringement in and of itself would not constitute an adverse impact giving rise to a duty to consult.
>
> [Italic emphasis in original; underline emphasis added.]

[117] I do not understand *Rio Tinto* to be authority for saying that when the "current decision under consideration" will have an adverse impact on a First Nations right, as in this case, that what has gone before is irrelevant. Here, the exploration and sampling projects will have an adverse impact on the petitioners' treaty right, and the historical context is essential to a proper understanding of the seriousness of the potential impacts on the petitioners' treaty right to hunt.

[118] The amended permits authorized activity in an area of fragile caribou habitat. Caribou have been an important part of the petitioners' ancestors' way of life and cultural identity, and the petitioners' people would like to preserve them. There remain only 11 animals in the Burnt Pine herd, but experts consider there to be at

least the possibility of the herd's restoration and rehabilitation. The petitioners' people have done what they could on their own to preserve the herd, by banning their people from hunting caribou for the last 40 years.

[119] To take those matters into consideration as within the scope of the duty to consult, is not to attempt the redress of past wrongs. Rather, it is simply to recognize an existing state of affairs, and to address the consequences of what may result from pursuit of the exploration programs.

[120] I would not give effect to this branch of First Coal's submission.

[121] First Coal's second contention on the scope of the duty to consult is that it must be limited to the impact of the amended exploration permits, and must exclude consideration of whatever effects a full mining operation might have.

[122] It is correct that the consultation in this case must be directed at the Bulk Sampling and Advanced Exploration Permits and their impact. However, the result of this consultation will necessarily determine not only what constitutes reasonable accommodation for the exploration permits, but will also affect subsequent events if the exploration proceeds.

[123] On my reading of the chambers judge's reasons, it does not appear that he gave much, if any, weight to the potential impact of a full mining operation as a relevant factor in the Crown's duty to consult. However, the whole thrust of the petitioners' position was forward looking. It wanted to preserve not only those few animals remaining in the Burnt Pine caribou herd, but to augment and restore the herd to a condition in which it might once again be hunted. If that position were to be given meaningful consideration in the consultation process, I do not see how one could ignore at least the possibility of a full mining operation, if it were shown to be justified by the exploration programs. That was the whole object of the Bulk Sampling and Advanced Exploration Programs.

[124] There does not appear to be any evidence contrary to the opinion of Pierre Johnstone that mine development in this area "would be inconsistent with maintaining or increasing Woodland Caribou numbers". Similarly Dr. Seip's view that "it is short-sighted and misleading to evaluate this proposal for bulk sampling without also considering the longer term consequences of more widespread mining activity occurring over the entire property" (quoted above at para. 39), is not contradicted by the evidence.

[125] I am therefore respectfully of the view that to the extent the chambers judge considered future impacts, beyond the immediate consequences of the exploration permits, as coming within the scope of the duty to consult, he committed no error. And, to the extent that MEMPR failed to consider the impact of a full mining operation in the area of concern, it failed to provide meaningful consultation.

[126] I would not give effect to these grounds of appeal.

D. The Interpretation Issue (The Petitioners' Treaty 8 Right to Hunt)

[127] B.C. accepts that the statutory decision maker was obliged to consider the nature and scope of the petitioners' treaty right to hunt in the consultation process, but B.C. says that due consideration was given to that right. B.C. says the chambers judge erred in interpreting that right as a specific right to hunt caribou in its traditional area as part of its seasonal round.

[128] The nature and scope of the petitioners' right to hunt must be understood as the petitioners' ancestors, and as the Crown's treaty makers, would have understood that right when the treaty was made or adhered to. That understanding is to be derived from the language used in the treaty, informed by the report of the Commissioners, quoted above at para. 54.

[129] In examining the nature and scope of the petitioners' right to hunt, it must be remembered that it is not merely a right asserted and as yet unproven, as in cases of Aboriginal rights claims in non-treaty cases. Here the right relied on is an existing

right agreed to by the Crown and recorded in a Treaty. While there may be disagreement over the limits on or the scope of the right, consultation must begin from the premise that the First Nations are entitled to what they have been granted by the Treaty.

[130] The Treaty 8 right to hunt is not merely a right to hunt for food. The Crown's promises included representations that:

(a) the same means of earning a livelihood would continue after the Treaty as existed before it, and that the Indians would be expected to continue to make use of them;

(b) they would be as free to hunt and fish after the Treaty as they would be if they never entered into it; and

(c) the Treaty would not lead to "forced interference with their mode of life" (see *R. v. Badger*, [1996] 1 S.C.R. 771 at para. 39).

[131] These promises have been affirmed in previous Treaty 8 cases.

[132] In *Badger*, the Supreme Court of Canada held at para. 52 that treaties relating to indigenous peoples should be construed liberally, "... and any uncertainties, ambiguities or doubtful expressions should be resolved in favour of the Indians ... the words in the treaty must not be interpreted in their strict technical sense nor subjected to rigid, modern rules of construction".

[133] On this appeal, B.C. relies on the words in the Treaty that limit the right to pursue hunting, et cetera, "... saving and excepting such tracts as may be required or taken up from time to time for settlement, mining, lumbering, trading, or other purposes".

[134] Just as the right to hunt must be understood as the treaty makers would have understood it, so too must "taking up" and "mining" be understood in the same way. As the Supreme Court of Canada said in *Badger* at para. 55:

> Since the Treaty No. 8 lands were not well suited to agriculture, the government expected little settlement in the area. The Commissioners, cited in Daniel, at p. 81, indicated that "it is safe to say that so long as the fur bearing animals remain, the great bulk of the Indians will continue to hunt and to trap". The promise that this livelihood would not be affected was repeated to all the bands who signed the Treaty. Although it was expected that some white prospectors might stake claims in the north, this was not expected to have an impact on the Indians' hunting rights. For example, one commissioner, cited in René Fumoleau, O.M.I., *As Long as this Land Shall Last*, at p. 90, stated:
>
> > We are just making peace between Whites and Indians for them to treat each other well. And we do not want to change your hunting. If Whites should prospect, stake claims, that will not harm anyone.
>
> [Emphasis added.]

[135] I interject to point out that "some white prospectors [who] might stake claims", to the understanding of those making the Treaty, would have been prospectors using pack animals and working with hand tools. That understanding of mining bears no resemblance whatever to the Exploration and Bulk Sampling Projects at issue here, involving as they do road building, excavations, tunnelling, and the use of large vehicles, equipment and structures.

[136] In *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, 2005 SCC 69, [2005] 3 S.C.R. 388, the Supreme Court of Canada expanded upon what it had said in *Badger*:

> 47 ...
>
> *Badger* recorded that a large element of the Treaty 8 negotiations were the assurances of *continuity* in traditional patterns of economic activity. Continuity respects traditional patterns of activity and occupation. The Crown promised that the Indians' rights to hunt, fish and trap would continue "after the treaty as existed before it" (p. 5). This promise is not honoured by dispatching the Mikisew to territories far from their traditional hunting grounds and traplines.
>
> 48 ...
>
> The "meaningful right to hunt" is not ascertained on a treaty-wide basis (all 840,000 square kilometres of it) but in relation to the territories over which a First Nation traditionally hunted, fished and trapped, and continues to do so today. If the time comes that in the case of a particular Treaty 8 First Nation "no meaningful right to hunt" remains over *its* traditional territories, the significance of the oral promise that "the same means of earning a livelihood would continue after the treaty as existed before it" would clearly be in

> question, and a potential action for treaty infringement, including the demand for a *Sparrow* justification, would be a legitimate First Nation response.
>
> [Italic emphasis in original; underline emphasis added.]

[137] It is clear from the above passages that, while specific species and locations of hunting are not enumerated in Treaty 8, it guarantees a "continuity in traditional patterns of economic activity" and respect for "traditional patterns of activity and occupation". The focus of the analysis then is those traditional patterns.

[138] The result in *Mikisew* is instructive on this point. That case involved the construction of a winter road in Wood Buffalo National Park that ran through the Mikisew First Nation Reserve. The road corridor occupied approximately 23 square kilometres and traversed the traplines of approximately 14 Mikisew families that resided in the area. The federal and provincial Crowns argued that while 23 square kilometres were "taken up" there remained a meaningful right to hunt in the 840,000 square kilometres covered by Treaty 8. The Federal Court of Appeal in the decision below held that rights to hunt, fish and trap were only infringed "where the Crown has taken up land in bad faith or has taken up so much land that no meaningful right to hunt remains". In rejecting these arguments Mr. Justice Binnie said the following at para. 44:

> The Draft Environmental Assessment Report acknowledged the road could potentially result in a diminution in quantity of the Mikisew harvest of wildlife, as fewer furbearers (including fisher, muskrat, marten, wolverine and lynx) will be caught in their traps. Second, in qualitative terms, the more lucrative or rare species of furbearers may decline in population. Other potential impacts include fragmentation of wildlife habitat, disruption of migration patterns, loss of vegetation, increased poaching because of easier motor vehicle access to the area and increased wildlife mortality due to motor vehicle collisions. While *Haida Nation* was decided after the release of the Federal Court of Appeal reasons in this case, it is apparent that the proposed road will adversely affect the existing Mikisew hunting and trapping rights, and therefore that the "trigger" to the duty to consult identified in *Haida Nation* is satisfied.

[139] The question to be answered is whether the proposed activity will adversely affect existing hunting rights. In this case it is clear that the petitioners have historically hunted caribou in the area affected by the Bulk Sampling and Advanced Exploration Programs. Since the 1970s West Moberly elders have imposed a ban on

hunting caribou because of diminishing numbers, but it is hoped that hunting may resume in the future. It is also clear from the evidence of Pierre Johnstone and Dr. Seip that the Bulk Sampling and Advanced Exploration Programs as well as any full mining operation will have an adverse impact on caribou in the area and consequently the petitioners' ability to hunt. Therefore, the duty to consult has been engaged.

[140] The chambers judge did not err in considering the specific location and species of the petitioners' hunting practices.

E. The Consultation Issue

[141] The question then is whether the consultation process was reasonable. A reasonable process is one that recognizes and gives full consideration to the rights of Aboriginal peoples, and also recognizes and respects the rights and interests of the broader community.

[142] The record of the consultation process in this case, summarized in the document "Considerations To Date" prepared by MEMPR as of 20 July 2009, the appended Consultation Log (para. 40 above), and in MEMPR's "Rationale" dated 4 September 2009, details the consideration given to the concerns raised by the petitioners.

[143] The essence of the petitioners' position (see para. 44 above) was that First Coal's application for the Bulk Sampling and Advanced Exploration Permits should be rejected, and their proposed mining activities relocated to another area where the habitat for the Burnt Pine caribou herd would not be affected; and, further that a plan should be put in place for the recovery of the Burnt Pine caribou herd.

[144] This position is, of course, completely irreconcilable with the projects proposed by First Coal. To be considered reasonable, I think the consultation process, and hence the "Rationale", would have to provide an explanation to the petitioners that, not only had their position been fully considered, but that there were

persuasive reasons why the course of action the petitioners proposed was either not necessary, was impractical, or was otherwise unreasonable. Without a reasoned basis for rejecting the petitioners' position, there cannot be said to have been a meaningful consultation.

[145] In *Mikisew*, the Court said:

> 54 This is not correct. Consultation that excludes from the outset any form of accommodation would be meaningless. The contemplated process is not simply one of giving the Mikisew an opportunity to blow off steam before the Minister proceeds to do what she intended to do all along. Treaty making is an important stage in the long process of reconciliation, but it is only a stage. What occurred at Fort Chipewyan in 1899 was not the complete discharge of the duty arising from the honour of the Crown, but a rededication of it.
>
> ...
>
> 64 The duty here has both informational and response components. In this case, given that the Crown is proposing to build a fairly minor winter road on *surrendered* lands where the Mikisew hunting, fishing and trapping rights are expressly subject to the "taking up" limitation, I believe the Crown's duty lies at the lower end of the spectrum. The Crown was required to provide notice to the Mikisew and to engage directly with them (and not, as seems to have been the case here, as an afterthought to a general public consultation with Park users). This engagement ought to have included the provision of information about the project addressing what the Crown knew to be Mikisew interests and what the Crown anticipated might be the potential adverse impact on those interests. The Crown was required to solicit and to listen carefully to the Mikisew concerns, and to attempt to minimize adverse impacts on the Mikisew hunting, fishing and trapping rights. The Crown did not discharge this obligation when it unilaterally declared the road realignment would be shifted from the reserve itself to a track along its boundary. I agree on this point with what Finch J.A. (now C.J.B.C.) said in *Halfway River First Nation* at paras. 159-60.
>
> > The fact that adequate notice of an intended decision may have been given does not mean that the requirement for adequate consultation has also been met.
> >
> > The Crown's duty to consult imposes on it a positive obligation to reasonably ensure that aboriginal peoples are provided with all necessary information in a timely way so that they have an opportunity to express their interests and concerns, and to ensure that their representations are seriously considered and, wherever possible, demonstrably integrated into the proposed plan of action.]
>
> [Italic and underline emphasis in original.]

[146] In my respectful view, the Considerations document and the Rationale do not meet this test. MEMPR effectively accepted First Coal's CMMP as a satisfactory response to the petitioners' position. However, the CMMP does not explain why the petitioners' position that the Exploration Permits should be cancelled, First Coal's activities relocated, and the Burnt Pine caribou herd restored, was rejected. It does not address why the petitioners' position was unnecessary, impractical, or otherwise unreasonable. Rather, the CMMP proceeds on the footing that the Bulk Sampling and Advanced Exploration Programs should proceed, and then proposes measures to minimize or mitigate whatever adverse effects those programs will have. It contains proposals to monitor the impact of the projects on the Burnt Pine caribou herd and to "discuss" ways in which First Coal can assist in recovery of the caribou population.

[147] The decision reached by MEMPR based on the CMMP and the position put forward by the petitioners are as two ships passing in the night. There was no real engagement of the petitioners' position. It was not a position that could be dismissed out of hand, supported as it was by the expert opinions of the government's own biologists, Dr. Seip and Pierre Johnstone.

[148] If the petitioners' position were to be addressed head on, and a careful consideration given to whether the exploration programs should be cancelled, First Coal's activities relocated, and the Burnt Pine caribou herd restored, it may be that MEMPR could give a persuasive explanation as to why such steps were unnecessary, impractical, or otherwise unreasonable. The consultation process does not mandate success for the First Nations interest. It should, however, provide a satisfactory, reasoned explanation as to why their position was not accepted.

[149] The consultation in this case does not do that. I think the reason is apparent. MEMPR never considered the possibility that the petitioners' position might have to be preferred. It based its concept of consultation on the premise that the exploration projects should proceed and that some sort of mitigation plan would suffice. However, to commence consultation on that basis does not recognize the full range

of possible outcomes, and amounts to nothing more than an opportunity for the First Nations “to blow off steam”.

[150] Effectively, MEMPR regarded the petitioners’ Treaty 8 right to hunt as subject to, or inferior to, the Crown’s right to take up land for mining or other purposes. There are at least two problems with this approach. First, it is inconsistent with what First Nations peoples were told when the Treaty was signed or adhered to. They were given to understand that they would be as free to make their livelihood by hunting and fishing after the Treaty as before, and that the Treaty would not lead to “forced interference with their mode of life”. Second, the concept of mining, as understood by the treaty makers would never have included the possibility that areas of important ungulate habitat would be destroyed by road building, excavations, trenching, the transport of heavy equipment and excavated materials, and the installation of an “Addcar system”.

[151] When MEMPR entered into the consultation process without a full and clear understanding of what the Treaty meant, the process could not be either reasonable or meaningful. A consultation that proceeds on a misunderstanding of the Treaty, or a mischaracterization of the rights that the Treaty protects, is a consultation based on an error of law, and cannot therefore be considered reasonable.

[152] These are different reasons than those given by the chambers judge for holding that the consultation was not meaningful. He gave two reasons for reaching his conclusion. He said first that the Crown was too slow to advise the petitioners as to the potential adverse effects of the exploration program, by not providing them with a “substantial assessment” until August 2009, about only one month before the rationale was settled upon (reasons at para. 50). Second, the judge said MEMPR responded to the petitioners’ concerns about potential extirpation of the Burnt Pine caribou herd with something approaching “standard form referral letters” (reasons at para. 51).

[153] I consider that both of these reasons are correct, but the underlying explanation for MEMPR's slow and superficial response is, as I have attempted to explain above, a failure to understand or appreciate the basis of the petitioners' objection, grounded in a constitutionally protected treaty right.

[154] I am therefore of the opinion that the chambers judge was correct to consider that the consultation was not meaningful and was therefore not reasonable.

F. The Accommodation Issue

[155] The appellants assert that the judge erred in holding that only one method of accommodation was reasonable in the circumstances, namely a plan to protect and augment the Burnt Pine caribou herd.

[156] This ground of appeal challenges para. 3 of the judge's order which, to repeat, was:

> 3. Within the said 90 day period, British Columbia, in consultation with the Petitioners, will proceed expeditiously to put in place a reasonable, active plan for the protection and augmentation of the Burnt Pine caribou herd, taking into account the views of the Petitioners, as well as the reports of British Columbia's wildlife ecologists and biologists Dr. Dale Seip and Pierre Johnstone ...

[157] This part of the order is supported specifically by this sentence in the judge's reasons for judgment at para. 63:

> Here, I conclude that treaty protected right is the right is [*sic*] to hunt caribou in the traditional seasonal round in the territory effected [*sic*] by the First Coal Operation.

[158] B.C. says the chambers judge erred in restricting the petitioners' treaty right to hunt to a single species, caribou, or to a specific geographical location. It says an order directing a specific accommodation is contrary to earlier decisions in this Court. It says the predetermination of the only acceptable accommodation coloured the judge's consideration of whether the consultation was meaningful and reasonable.

[159] B.C. says the judge's focus on a single herd of caribou, as opposed to restoration of caribou generally, will result in the "balkanization" of treaty rights, or the "micro-application" of the treaty right. It says this is not a remedy sought in the petition.

[160] First Coal supports B.C.'s position on this issue. Alberta says whether steps should be taken to implement a recovery plan for the Burnt Pine caribou herd is a public policy issue for decision by government, and not the courts.

[161] The petitioners say the accommodation directed by the judge was within his discretion, and it is supported in this by the intervenor, Grand Council of Treaty #3. Counsel referred us to the *Judicial Review Procedure Act*, and the remedial powers granted by ss. 5 and 6:

> Powers to direct tribunal to reconsider
>
> 5 (1) On an application for judicial review in relation to the exercise, refusal to exercise, or purported exercise of a statutory power of decision, the court may direct the tribunal whose act or omission is the subject matter of the application to reconsider and determine, either generally or in respect of a specified matter, the whole or any part of a matter to which the application relates.
>
> (2) In giving a direction under subsection (1), the court must
>
> (a) advise the tribunal of its reasons, and
>
> (b) give it any directions that the court thinks appropriate for the reconsideration or otherwise of the whole or any part of the matter that is referred back for reconsideration.
>
> Effect of direction
>
> 6 In reconsidering a matter referred back to it under section 5, the tribunal must have regard to the court's reasons for giving the direction and to the court's directions.

[162] I must say I would not interpret the judge's statement in the sentence quoted from para. 63 of his reasons as the appellants do. I do not understand the judge to be saying that the petitioners' right to hunt is the right to hunt caribou, and only caribou, in the affected area. Such an interpretation ignores the rest of the judge's reasons. I understand the sentence to mean simply that the petitioners' Treaty 8

right to hunt includes the right to hunt caribou as part of the seasonal round, and that it is that part of the Treaty 8 right that is in issue in this case.

[163] Having said that, it is not in my respectful view necessary to reach a final conclusion on whether the judge erred in declaring a specific form of accommodation. The *Judicial Review Procedure Act* would appear to grant a sufficiently broad discretion to make such an order but this, and other courts, have shown a reluctance to do so, so as not to impair further consultation.

[164] For the reasons expressed above, I have concluded that the judge was correct in holding that the consultation process was not meaningful, although for somewhat more expansive reasons than he gave on that issue. For that reason, it seems to me the proper remedy is to remit the matter for further consultation between the parties, having regard for what the scope of the consultation ought properly to include.

[165] I make no further comment on the ambit of a judge's discretion to give specific directions as provided for in ss. 5 and 6 of the *Judicial Review Procedure Act*. However, it is preferable in this case that the specific direction be set aside so that the parties may resume consultation as indicated, and unfettered.

VIII. Conclusion

[166] I would affirm the judge's declaration in para. 1 of the order that the Crown failed to consult adequately and meaningfully, and failed to accommodate reasonably the petitioners' hunting rights as provided by Treaty 8.

[167] I would direct that implementation of, or action under the Amended Bulk Sampling Permit and the Advanced Exploration Permit be stayed pending meaningful consultation conducted in accordance with these reasons.

[168] I would set aside the accommodation directed in para. 3 of the order, without prejudice to the giving of such directions for accommodation following further consultation between the parties, as may appear appropriate.

"The Honourable Chief Justice Finch"

Reasons for Judgment of the Honourable Mr. Justice Hinkson:

[169] I have had the privilege of reading the draft reasons for judgment of Chief Justice Finch, and agree with his disposition of the issues on this appeal described at para. 55 of those draft reasons, and with his reasons for that disposition with one exception regarding the last ground of appeal. While I agree with Chief Justice Finch that the accommodation directed in para. 3 of the order below should be set aside; my reasons for setting aside that paragraph of the order differ from his, with respect to what was described in that paragraph as "the protection and augmentation of the Burnt Pine caribou herd".

[170] The chambers judge found that the respondent West Moberly's harvesting practice included a traditional seasonal round, which meant that hunters travelled to particular preferred areas within the treaty territory during specific times of the year, including the area impacted by the First Coal mining operation. The West Moberly traditionally hunted for bison, moose, deer, mountain sheep, and caribou. The bison in the Treaty 8 areas became extinct in the nineteenth century.

[171] The population of caribou in the area of First Coal's operations has been decimated. In his affidavit of October 19, 2009, Chief Willson swore:

> Caribou numbers have been reduced to such as [sic] extent in West Moberly preferred Treaty territory that the woodland caribou are a threatened species under the federal *Species at Risk Act*. Ever since I came of age to hunt, I have never been able to hunt caribou in West Moberly's preferred Treaty area. West Moberly members have not hunted caribou since the 1970's, when caribou became scarce, as our Elders put a moratorium on all our members, including myself, hunting caribou because their numbers are so few.

[172] Not unlike the bison before them, the Burnt Pine caribou herd, is now approaching extirpation, having been reduced to an estimated population of only 11.

Discussion

[173] At paras. 14-15 of his reasons, the chambers judge made reference to two decisions of the Supreme Court of Canada that have particular relevance to the rights of the West Moberly that are in issue:

> With respect to Treaty No. 8, the Supreme Court of Canada stated in *R. v. Badger*, [1996] 1 S.C.R. 771, [1996] 4 W.W.R. 457, at para. 55 and 56:
>
> > Since the Treaty No. 8 lands were not well suited to agriculture, the government expected little settlement in the area. The Commissioners, cited in Daniel, at p. 81, indicated that "it is safe to say that so long as the fur-bearing animals remain, the great bulk of the Indians will continue to hunt and to trap." The promise that this livelihood would not be affected was repeated to all the bands who signed the Treaty. Although it was expected that some white prospectors might stake claims in the north, this was not expected to have an impact on the Indians' hunting rights. For example, one commissioner, cited in René Furmoleau, O.M.I., *As Long As This Land Shall Last*, at p. 90, stated:
> >
> > > We are just making peace between Whites and Indians - for them to treat each other well. And we do not want to change your hunting. If Whites should prospect, stake claims, that will not harm anyone.
> >
> > Commissioner Laird told the Indians that the promises made to them were to be similar to those made with other Indians who had agreed to a treaty. Accordingly, it is significant that the earlier promises also contemplated a limited interference with Indians' hunting and fishing practices.
>
> Further, in *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, 2005 SCC 69, [2005] 3 S.C.R. 388, the Court held that given the Crown's oral promises, Treaty No. 8 protects the right to exercise meaningfully traditional hunting practices. The unanimous Court stated at para. 48:
>
> > The "meaningful right to hunt" is not ascertained on a treaty-wide basis (all 840,000 square kilometres of it) but in relation to the territories over which a First Nation traditionally hunted, fished and trapped, and continues to do so today. If the time comes that in the case of a particular Treaty 8 First Nation "no meaningful right to hunt" remains over *its* traditional territories, the significance of the oral promise that "the same means of earning a livelihood would continue after the treaty as existed before it" would clearly be in question, and a potential action for treaty infringement, including the demand for a *Sparrow*

> justification, would be a legitimate First Nation response.
> [Emphasis in original.]

[174] I accept, as did the chambers judge, the submission of the West Moberly that the appropriate standard of review in consultation cases for the Crown's assessment of the extent of its duty to consult is correctness, and that the appropriate standard of review for assessing the process adopted for a particular consultation and the results of that process is that of reasonableness.

[175] The Crown properly conceded that in the circumstances it had a duty to consult meaningfully with West Moberly and accepted that it was required to accommodate the interests of West Moberly in a reasonable manner after balancing the interests of West Moberly with the interests of other First Nations and of the public. The scope of the required consultation must be considered before the extent of the necessary accommodation can be addressed.

[176] Here, there was consultation between First Coal and West Moberly respecting the concerns raised by West Moberly, the MOE and the MOFR about the Burnt Pine caribou herd. At paras. 51 and 52 of his reasons, the chambers judge found:

> ... The prime concern of the West Moberly is the real potential for the extirpation of the Burnt Pine caribou herd. I conclude that at least since June of 2009, when the West Moberly presented a detailed report of the danger to that herd and its relationship to their treaty protected right to hunt, the Crown's failure to put in place an active plan for the protection and rehabilitation of the Burnt Pine herd is a failure to accommodate reasonably.
>
> While First Coal's "Mitigation and Monitoring Plan" is a step in the direction of protecting critical caribou habitats, as the Crown itself stated in the "Considerations to Date" document of July 20, 2009, there is currently no rehabilitation program in effect for the Burnt Pine herd.
>
> [Emphasis added.]

[177] As I have indicated above, the Burnt Pine caribou herd has been so decimated that the West Moberly have refrained from hunting its members for some 40 years. The project proposed by First Coal has been pursued only since June of 2005. In *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, 2010 SCC 43, [2010]

25 C.R. 650, at para. 79, the Supreme Court of Canada confirmed that a duty to consult a First Nation arises when there is:

> (a) knowledge, actual or constructive, by the Crown of a potential Aboriginal claim or right,
>
> (b) contemplated Crown conduct, and
>
> (c) the potential that the contemplated conduct may adversely affect the Aboriginal claim or right.

[178] In explaining factor (c) above, the Court stated that the potential adverse effect on an Aboriginal right must be causally linked to current Crown conduct, and not past events. At para. 49 the Court stated:

> The question is whether there is a claim or right that potentially may be adversely impacted by the *current* government conduct or decision in question. Prior and continuing breaches, including prior failures to consult, will only trigger a duty to consult if the present decision has the potential of causing a novel adverse impact on a present claim or existing right. This is not to say that there is no remedy for past and continuing breaches, including previous failures to consult. As noted in *Haida Nation*, a breach of the duty to consult may be remedied in various ways, including the awarding of damages. To trigger a fresh duty of consultation - the matter which is here at issue - a contemplated Crown action must put current claims and rights in jeopardy.
>
> [Italic emphasis in original; underline emphasis added.]

[179] In applying these factors, the Court went on to state at para. 83:

> In my view, the Commission was correct in concluding that an underlying infringement in and of itself would not constitute an adverse impact giving rise to a duty to consult. As discussed above, the constitutional foundation of consultation articulated in *Haida Nation* is the potential for adverse impacts on Aboriginal interests of state-authorized developments. Consultation centres on how the resource is to be developed in a way that prevents irreversible harm to existing Aboriginal interests. Both parties must meet in good faith, in a balanced manner that reflects the honour of the Crown, to discuss development with a view to accommodation of the conflicting interests. Such a conversation is impossible where the resource has long since been altered and the present government conduct or decision does not have any further impact on the resource. The issue then is not consultation about the further development of the resource, but negotiation about compensation for its alteration without having properly consulted in the past.

[180] What these passages demonstrate is that for the duty to consult to be triggered, the Crown's current proposed conduct must itself be causally linked to the

potential adverse consequence affecting the Aboriginal right. It follows that where this test is met, the duty to accommodate should only be concerned with addressing the potential adverse affects of the current proposed Crown conduct, and not with remedying harm caused by past events. That is not to say, as the Court in *Rio Tinto* noted at para. 49 above, that past harms are without remedy, only that those harms are not properly addressed by way of consultation and accommodation undertaken in connection with current Crown conduct.

[181] While I fully agree with the Chief Justice that "the historical context is essential to a proper understanding of the seriousness of the potential impacts on the petitioners' treaty right to hunt", I do not understand that the duty to accommodate, as explained in *Rio Tinto*, obliges the Crown to accommodate the effects of prior impacts upon the treaty rights of the West Moberly. Accommodation with respect to the prior decimation of the Burnt Pine caribou herd from events prior to the First Coal project is not required *vis a vis* the First Coal Project. Certainly the loss of the large numbers of caribou in the area in general, and the decimation of the Burnt Pine caribou herd in particular should inform the scope of the necessary consultation process, but cannot, in my view, justify an obligation on the part of the Crown to restore or augment the number of ungulates that have been reduced as a result of activities or events prior to 2005 when First Coal began seeking approval for its project.

[182] The need for the rehabilitation of the Burnt Pine caribou herd arose from events prior to the 1970s when the herd was all but extirpated. The emphasis placed by the chambers judge upon the need for the rehabilitation of the Burnt Pine caribou herd cannot, in my view, be considered as an accommodation that arises from the project proposed by First Coal, and thus cannot be the basis for the order granted by the chambers judge. The protection of what remains of the Burnt Pine caribou herd is an appropriate matter to be considered when the accommodation of the treaty rights of the West Moberly is addressed.

[183] At para. 59, the chambers judge concluded:

> Because, as the Crown concedes, no recovery plan for the caribou is in place, I conclude this cannot be seen as a reasonable accommodation of West Moberly's concerns.

[184] In my view, the chambers judge erred in law by conflating his consideration of the Crown's duty to consult with the West Moberly with what he considered to be a reasonable accommodation of the rights of the West Moberly. In terms of the Burnt Pine caribou herd, the consultation that the Crown needed to engage in with the West Moberly could properly include an historic perspective recognizing the depletion of the Burnt Pine caribou herd, but the need for rehabilitation and the increase of the herd were not appropriate accommodations arising from First Coal's proposed project.

[185] I would therefore set aside the accommodation directed in para. 3 of the order of the chambers judge, as would the Chief Justice, but would do so because the requirement that the Crown put in place a reasonable, active plan for more than the protection of the Burnt Pine caribou herd goes beyond the scope of the duty of reasonable accommodation.

"The Honourable Mr. Justice Hinkson"

Reasons for Judgment of the Honourable Madam Justice Garson:

[186] I have had the privilege of reading in draft form the reasons for judgment of the Chief Justice and the concurring reasons of Justice Hinkson. For the reasons that follow, and with the greatest respect, I reach a somewhat different conclusion than my colleagues and I would allow the appeal and dismiss the petition.

[187] In his reasons for judgment, the Chief Justice has set out the facts and issues under appeal. I agree with the Chief Justice's reasons in respect to the first and second issues namely, whether judicial review is the appropriate procedure and whether the Crown improperly delegated duties to Ministerial assistants.

[188] The Chief Justice described the fundamental issue on this appeal, as whether the Crown adequately consulted with the petitioners. I adopt for my analysis of this issue the framework generally set out in *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, 2004 SCC 74, [2004] 3 S.C.R. 550:

- Did the Crown have a duty to consult, and if indicated, to accommodate West Moberly First Nations' ("WMFN") interests in hunting caribou?
- What was the scope and extent of that duty to consult and to accommodate WMFN?
- Did the Crown fulfill its duty to consult and to accommodate in this case?

Standard of Review

[189] Before turning to the substantive analysis, I will briefly describe the standard by which the court should review the decisions of the statutory decision makers.

[190] At para. 10 of his reasons, the chambers judge described the standard of review to be applied to his review of the statutory decision makers' decisions:

> The appropriate standard of review for the Crown's assessment of the extent of its duty to consult is correctness. The appropriate standard of review for assessing the consultation process, including any accommodation measures,

> is that of reasonableness. The parties do not differ on these standards of review.

[191] WMFN submits that the chambers judge correctly articulated the applicable standards of review. The First Nation says that both the consultation process and the result of that process were unreasonable in this case. I do not understand the other parties to disagree with the position of WMFN as to the applicability of the reasonableness standard. As this question is an important one to my analysis, I will elaborate on the application of this standard.

[192] In *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 S.C.R. 511, at paras. 61-63, the Court explained the bifurcated standard to be applied to consultation decisions:

> On questions of law, a decision-maker must generally be correct: for example, *Paul v. British Columbia (Forest Appeals Commission)*, [2003] 2 S.C.R. 585, 2003 SCC 55. On questions of fact or mixed fact and law, on the other hand, a reviewing body may owe a degree of deference to the decision-maker. The existence or extent of the duty to consult or accommodate is a legal question in the sense that it defines a legal duty. However, it is typically premised on an assessment of the facts. It follows that a degree of deference to the findings of fact of the initial adjudicator may be appropriate. The need for deference and its degree will depend on the nature of the question the tribunal was addressing and the extent to which the facts were within the expertise of the tribunal: *Law Society of New Brunswick v. Ryan*, [2003] 1 S.C.R. 247, 2003 SCC 20; *Paul, supra*. Absent error on legal issues, the tribunal may be in a better position to evaluate the issue than the reviewing court, and some degree of deference may be required. In such a case, the standard of review is likely to be reasonableness. To the extent that the issue is one of pure law, and can be isolated from the issues of fact, the standard is correctness. However, where the two are inextricably entwined, the standard will likely be reasonableness: *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748.
>
> The process itself would likely fall to be examined on a standard of reasonableness. Perfect satisfaction is not required; the question is whether the regulatory scheme or government action "viewed as a whole, accommodates the collective aboriginal right in question": *Gladstone, supra*, at para. 170. What is required is not perfection, but reasonableness. As stated in *Nikal, supra*, at para. 110, "in ... information and consultation the concept of reasonableness must come into play .... So long as every reasonable effort is made to inform and to consult, such efforts would suffice." The government is required to make reasonable efforts to inform and consult. This suffices to discharge the duty.

> Should the government misconceive the seriousness of the claim or impact of the infringement, this question of law would likely be judged by correctness. Where the government is correct on these matters and acts on the appropriate standard, the decision will be set aside only if the government's process is unreasonable. The focus, as discussed above, is not on the outcome, but on the process of consultation and accommodation.
>
> [Emphasis added.]

[193] I agree with the *dicta* of Grauer J. in *Klahoose First Nation v. Sunshine Coast Forest District (District Manager)*, 2008 BCSC 1642, [2009] 1 C.N.L.R. 110, where he summarized and applied *Haida Nation* at para. 34:

> As mandated in the *Haida* case, *supra*, the *extent* of the duty to consult or accommodate is a question of law to be judged on the standard of correctness, although it is capable of becoming an issue of mixed law and fact to the extent that the appropriate standard becomes that of reasonableness. The *adequacy* of the consultation process is governed by a standard of reasonableness.
>
> [Italic emphasis in original; underline emphasis added.]

[194] In *Beckman v. Little Salmon/Carmacks First Nation*, 2010 SCC 53, [2010] 3 S.C.R. 103, the Court appeared to adopt a higher standard of review in assessing the adequacy of consultation (at para. 48):

> In exercising his discretion under the Yukon *Lands Act* and the *Territorial Lands (Yukon) Act*, the Director was required to respect legal and constitutional limits. In establishing those limits no deference is owed to the Director. The standard of review in that respect, including the adequacy of the consultation, is correctness. A decision maker who proceeds on the basis of inadequate consultation errs in law. Within the limits established by the law and the Constitution, however, the Director's decision should be reviewed on a standard of reasonableness: *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, and *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339. In other words, if there was adequate consultation, did the Director's decision to approve the Paulsen grant, having regard to all the relevant considerations, fall within the range of reasonable outcomes? [Emphasis added.]

[195] In my view, *Beckman's* adoption of a higher standard was attributable to the fact that the case concerned the construction of a modern, comprehensive treaty; a precise document negotiated by sophisticated and well resourced parties. In that case, the Crown argued that the treaty was a complete code and there was no obligation to consult beyond the treaty itself. I would therefore distinguish *Beckman*.

[196] Thus, I would apply a reasonableness standard to the question of the adequacy of the consultation where the historical treaty does not provide the degree of specificity necessary to ascertain the "correct" process.

[197] As was held in *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, 2010 SCC 43, [2010] 2 S.C.R. 650, at para. 74, "[c]onsultation itself is not a question of law, but a distinct constitutional process requiring powers to effect compromise and do whatever is necessary to achieve reconciliation of divergent Crown and Aboriginal interests". Compromise is a difficult, if not impossible, thing to assess on a correctness standard.

[198] In summary, the Crown's determination of the scope and extent of its duty to consult must be assessed on a correctness standard. But the third *Taku* question, as to the adequacy of the consultation and the outcome of the process, must be assessed on a reasonableness standard as those questions are either questions of fact or mixed fact and law. The consultation process must also meet the administrative law standards of procedural fairness.

Did the Crown have a duty to consult and, if indicated, to accommodate WMFN's interests in hunting caribou?

[199] Chief Justice McLachlin said in *Taku* at para. 25, "The duty to consult arises when a Crown actor has knowledge, real or constructive, of the potential existence of Aboriginal rights or title and contemplates conduct that might adversely affect them."

[200] McLachlin C.J. went on to describe the constituent elements of this test in *Rio Tinto* at para. 31: (1) the Crown's knowledge, actual or constructive, of a potential Aboriginal claim or right; (2) contemplated Crown conduct; and (3) the potential that the contemplated conduct may adversely affect an Aboriginal claim or right.

[201] In *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage),* 2005 SCC 69, [2005] 2 S.C.R. 388 at para. 34, Binnie J., speaking for the Court, applied

the *Taku* test to a treaty right. He framed the question of the adequacy of consultation in slightly different language when he said:

> In the case of a treaty the Crown, as a party, will always have notice of its contents. The question in each case will therefore be to determine the degree to which conduct contemplated by the Crown would adversely affect those rights so as to trigger the duty to consult. … [Emphasis added.]

[202] Under s. 35 of the *Constitution Act, 1982*, treaty rights have the same constitutional status as Aboriginal rights: *Halfway River First Nation v. British Columbia (Minister of Forests)*, 1999 BCCA 470, 64 B.C.L.R. (3d) 206, at para. 127.

[203] In this case, the Crown accepted that it had a duty to consult arising from the applications for mining permits made by First Coal. In the July 20, 2009, "Considerations to Date" document, prepared by the Ministry of Energy Mines and Petroleum Resources (MEMPR) as part of its consultation with WMFN, the statutory decision maker described the "Impact of the Project on Aboriginal Interests" in the following way:

> The four T8 FNs have treaty rights within the Central South Property. More specifically they have the right to use the land to support their way of life and their usual vocations of hunting, trapping and fishing. The potential habitat destruction, displacement from core ranges, and increased access leading to disturbance, poaching and excessive predation could potentially impact the Burnt-Pine Caribou Herd. However, there is no projected impact on the four T8 FNs hunting rights of other species such as moose, elk and deer.

[204] In the same document the statutory decision maker recorded that MEMPR had proceeded with consultation towards the deeper end of the consultation spectrum in recognition of WMFN's stated interest in hunting caribou.

[205] Thus, the first of the *Taku* questions may be answered affirmatively. The treaty right at issue, the right to use the land to support WMFN's way of life and usual vocation of hunting, was assumed by the Crown, for the purposes of consultation, to include the Burnt Pine caribou herd.

What was the scope and extent of the duty to consult and to accommodate WMFN?

[206] In this case, the second *Taku* question involves an examination of the following:

(i) the degree to which the treaty right to hunt would be adversely affected by the impact on the specific herd;

(ii) in assessing the degree to which the treaty right to hunt would be impacted, are past wrongs, cumulative effects and potential future impacts of an operational mine (if developed) relevant, or should the consultation be confined to adverse impacts directly attributable to the permits in question; and,

(iii) in assessing the degree to which the treaty right to hunt would be impacted, should the Treaty be interpreted in its historical context only, or should the correct interpretation include a modern context.

[207] In responding to issues raised by WMFN in the consultation process, the statutory decision makers considered these questions either implicitly or explicitly. In their decisions they described their interpretation of the treaty right in question in relation to the permits being applied for.

(i) The degree to which the treaty right to hunt would be adversely affected by the impact on the specific herd

[208] The chambers judge found at para. 63 that the "Treaty protected right is the right ... to hunt caribou in the traditional seasonal round in the territory [affected] by the First Coal Operation".

[209] The Crown argues that the "right" is a general right to hunt. The Crown maintains that this right is not species nor herd specific.

[210] Treaty 8 describes the right in general terms. It provides:

> And 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 ...

[211] The Crown argues that the judge erred in narrowly focussing his analysis on this one herd of caribou. In its factum, the Crown submits that it is an error to declare a treaty right to "a microcosm of hunting rights". Rather the Crown says a proper interpretation of treaty rights should involve a "macro-level" analysis. In support of this argument the Crown says that the following facts are important:

a) WMFN is a sub-group of the original collective that adhered to Treaty 8 in 1910;

b) WMFN's ancestors hunted a wide variety of ungulates, including bison, moose and caribou, when and where available;

c) WMFN do not now and have not, since at least the early 1970s hunted caribou at all;

d) WMFN do not follow a traditional seasonal round due to participation in the regional economy;

d) WMFN wish to hunt in a location that is convenient to their current lifestyle, given their participation in the regional economy; and

e) WMFN are only one of several Treaty 8 First Nations with interests in the area in question.

[212] The Crown argues in this appeal that all the consultation between the Crown, First Coal and WMFN was "for nought, as the only accommodation, in the Court's eyes, at the chambers hearing, that could make the outcome, and therefore the process itself, reasonable, was a Burnt Pine caribou herd augmentation plan". The Crown contends that the chambers judge erred in focussing on the result rather than the process.

[213] WMFN says, in reliance on *Mikisew*, that the Court must look not only at the broad contours of the treaty right, the "right to pursue their usual vocation of hunting" but also the rights necessarily included for its meaningful exercise. They argue that the chambers judge "did not find that Treaty No. 8 provides a blanket of protection over any and every species within the Treaty territory. Instead, he found that for

[WMFN's] harvesting rights to be meaningful, they must necessarily include the right to hunt according to the traditional seasonal round".

[214] There has been some judicial commentary, in both treaty rights cases and Aboriginal rights cases, on this question of whether hunting, fishing, and trapping rights pertain to a specific species. I recognize that in this case the asserted treaty right is alleged to include a specific herd, as there are other caribou herds which would be unaffected by the granting of approval for First Coal's applications for mining permits, but it is convenient to compare the analysis of cases concerning alleged "species specific" rights to the rights asserted here by WMFN.

[215] In *R. v. Powley,* 2003 SCC 43, [2003] 2 S.C.R. 207, the accused, a Metis, was charged with hunting a moose without a license. He claimed that he had an Aboriginal right to hunt for food. At para. 20, the Court characterized the relevant right not as the right "...to hunt moose but to hunt for food in the designated territory" (emphasis in original).

[216] In *R. v. Sappier; R. v. Gray*, 2006 SCC 54, [2006] 2 S.C.R. 686 at para. 21, Aboriginal rights were described as generally founded upon practices, customs, or traditions rather than a right to a particular species or resource. Although in some cases the practice, by its very nature, will refer only to one species as was found in *Lax Kw'alaams Indian Band v. Canada (Attorney General)*, 2009 BCCA 593, [2010] 1 C.N.L.R. 278, at paras. 35 and 38 (trade in eulachon grease) and in *R. v. Gladstone,* [1996] 2 S.C.R. 723 (sale of herring spawn on kelp).

[217] In the context of treaty rights, *R.* v. *Lefthand*, 2007 ABCA 206, [2007] 4 C.N.L.R. 281, leave to appeal ref'd [2008] 1 S.C.R. x, Slatter J.A. proposed a functional approach to the right to hunt at para. 88:

> ... A rule that no longer protects its very objective is obsolete. The modern test should be functional: it should focus on the "for food" aspect of the "right to hunt". The focus should be on (a) ensuring that there is some suitable, ample, and reasonably accessible source of food available at all times of the year, especially at, but not limited to, a subsistence level, and (b) recognizing that the right to hunt for food is a communal, multi-generational right that must be protected in the long term, and thus must be managed.

And at para. 91:

> Likewise, seasonal and species limitations may be justified, depending on the extent of the precise aboriginal right in question... Being able to hunt and fish "year round" just means that there will always be food available, not that there is a right to harvest every species at all times. Many aboriginal people had seasonal diets: fish at some times, eggs at others, berries at others, mammals at others, birds at others, etc... For example, a ban on hunting mountain goats is justified if there is evidence that there are ample mule deer around to meet the aboriginal need for food.

[218] I conclude from these authorities, and from the language of the Treaty itself, quoted above, that the treaty right in question is not a specific right to hunt the Burnt Pine caribou herd, but rather that it affords protection to the activity of hunting. Thus, in my respectful opinion, the chambers judge erred when he characterized the treaty protected right as the right to hunt caribou.

[219] In this case, one of the statutory decision makers, Mr. Hans Anderssen, of MEMPR, in correspondence that predated his September 4, 2009 Rationale for Decision, characterized WMFN's right as the right "to maintain a meaningful right to hunt wildlife generally within their traditional territory". In his August 8, 2009 letter, he provided a thorough explanation of the basis for his conclusion that the treaty right in question was not species specific. After referring to the cases of *Tsilhqot'in Nation v. British Columbia*, 2007 BCSC 1700, [2008] 1 C.N.L.R. 112 [*William*], *Powley, Sappier*, *Gray* and *Mikisew* he concluded that:

> As set out in the *Mikisew* case, when there are established Treaty rights, the content of the Crown's duty to consult is to be determined by "*the degree to which conduct contemplated by the Crown would adversely affect those rights so as to trigger the duty to consult" (at para. 34).* In accordance with our understanding of the nature of the Treaty 8 right to hunt, and the Crown's right to take up lands for mining purposes, we have assessed the potential impact of the proposed activity on the treaty right by considering whether the WMFN will have a meaningful right to hunt wildlife generally within WMFN's traditional territory, which may include any caribou that occur in that area. We acknowledge that the exploration and bulk sample activities as originally proposed had the potential to significantly impact the Burnt-Pine Caribou herd, a herd which has been identified as threatened under the federal *Species at Risk Act.* However, in light of the fact that the WMFN are able to maintain a meaningful right to hunt wildlife generally within their traditional territory such as deer, moose and elk, and the fact that there are nine other herds of Caribou within WMFN's traditional territory (totalling 1599 animals),

> we do not consider that WMFN's treaty right to hunt will be infringed by the approval of the proposed mining activity. The scope of consultation required in these circumstances would appear to be in the low to moderate range.
>
> However, given the significance of this herd, WMFN's concerns regarding this herd and the impacts to its established treaty right to hunt, and the information received from biologists within MOE and MOFR regarding the severity of the potential impacts to the herd, MEMPR has engaged at the deeper end of the *Haida* consultation spectrum. MEMPR has worked closely with the proponent, First Coal Corporation, in making significant changes to the original proposed activity to impact the Burnt-Pine Caribou habitat as little as possible.
>
> [Emphasis in original.]

[220] In his October 8, 2009, Rationale for Approval for Occupant Licenses to Cut, the statutory decision maker, Mr. Dale Morgan of the Ministry of Forests and Range (MOFR) described the treaty right in question in a similar way. He wrote, "I would summarize my opinion; on the right to hunt as the right is 'global' in nature and does not imply that there is a right to a specific animal or species."

[221] There is undisputed evidence of the importance to WMFN of caribou, for a variety of purposes.

[222] According to *Mikisew* at para. 34, the statutory decision makers were obliged to consider the degree to which the conduct contemplated by the Crown might adversely affect WMFN's treaty right to hunt. As I concluded above, the right in question is a general right to hunt. That bundle of rights includes the right to participate in various hunting activities and the right to hunt many species. The impact of the contemplated Crown permits on this treaty right may have been minor, modest, significant, serious, or none at all. In assessing the degree to which the permits, if granted, might impact the general right to hunt, it was entirely appropriate for the statutory decision makers to have taken into account, as they did, the abundance of other ungulates, the proportion of caribou territory impacted by the contemplated permits, and the presence of other larger herds of caribou in the area.

[223] The chambers judge concluded that the Crown failed to reasonably accommodate WMFN's "prime concern about the violation of its treaty right to hunt

caribou" (reasons at para. 64). This narrow characterization of the right in question led the chambers judge to find that the impact of the immediate permit approvals was significant and required more in the way of accommodation. In my view, inclusion of rights to a particular species or herd within the right to hunt does not translate into an absolute guarantee to hunt that species or herd. The statutory decision makers properly considered the impact of First Coal's proposed activities on the Burnt Pine caribou herd within the broader context of the Treaty 8 right to hunt.

(ii) Past wrongs, cumulative effects, and future impacts

[224] Is it appropriate to consider past wrongs, cumulative effects, or future impacts on the Aboriginal right in question or should the consultation focus only on the effect of the particular decision?

[225] The chambers judge described the threatened state of the Burnt Pine caribou herd in the following passage:

> [17] The evidence discloses that the caribou were a source of food, and that caribou hide, bone, and antlers were important to the manufacturing of a number of items both for cultural and practical reasons. However, the evidence also discloses that due to the decline in the caribou population, which the petitioners claim is the result of incremental development in the area, including the construction of the WAC Bennett and Peace Cannon Dams in the 1960s and 1970s, and the creation of large lakes behind those dams, West Moberly's right to carry on their traditional harvesting practice has been diminished.
>
> [18] In particular, the petitioners say that the population of caribou in the area of First Coal's operations has been decimated. They point to the fact that the relevant southern mountain population of caribou has been listed, pursuant to the *Species at Risk Act*, S.C. 2002, c. 29, as "threatened". The material filed shows the specific herd, the Burnt-Pine herd, has been reduced to a population of 11.

[226] And at para. 22 of his reasons for judgment, the chambers judge considered the comments of a wildlife ecologist, Dr. Dale Seip, who noted the potential for the complete eradication of the Burnt Pine herd if the project one day became an operational mine. In a September 25, 2008 letter, Dr. Seip said:

> It is also necessary to understand what the longer term implications are for these caribou. The Goodrich property encompasses most of the core caribou

> habitat on Mt. Stephenson. Mining over this entire area would destroy a major portion of the core winter range for this caribou herd. It is short-sighted and misleading to evaluate this proposal for bulk sampling without also considering the longer term consequences of more widespread mining activity occurring over the entire property.

[227] There were three decisions under review by the chambers judge: the amendment to the existing permit to reduce the bulk sample from 100,000 to 50,000; the amendment to the existing permit approving a 173 drill hole, five trench, advanced exploration program; and the associated licences to cut and clear up to 41 hectares of land to facilitate the advanced exploration (and to replace the "spine road" that was being reclaimed).

[228] First Coal notes in its factum that "[w]hile there are many permits and stages a proponent such as First Coal must go through before advancing to the stage of an operating mine, the current decisions … are the only decisions for which the potential adverse impact can be considered." The thrust of First Coal's submission is that the remedy ordered by the chambers judge responds to WMFN's demand that the Crown implement a plan to both preserve and augment the herd, but that that remedy is essentially redressing past wrongs and cumulative impacts. Similarly any consideration of the impact of a future mine are, according to First Coal, outside the scope of considerations of these statutory decision makers. First Coal notes that before a permit is granted for an operational mine there will be a full environmental review: see *Environmental Assessment Act*, S.B.C. 2002, c. 43, s. 8 and *Reviewable Project Regulations*, B.C. Reg. 370/2002, Part 3 – Mine Mine Projects. First Coal emphasizes that the decision makers were mandated to consider three very limited permit applications, one of which actually reduced the impact of First Coal's activities from what was first contemplated under the application.

[229] Mr. Devlin for WMFN contended in oral argument that the statutory decision makers erred in holding that cumulative impacts were not relevant. He argues that the cumulative impacts of development in WMFN's treaty protected hunting areas have resulted in fragmentation and decimation of the Burnt Pine caribou herd. He says that the present state of the herd was a proper consideration for the decision

makers. In other words, as I understand the First Nations' argument, the permits are part of an incremental process that has resulted in the present, threatened state of the herd, and that incremental context was something the statutory decision makers were obliged to consider. The grant of these permits, it is argued, might be the tipping point in terms of the life of the herd and possible extirpation of the herd is a new adverse impact which expands the scope of the duty to consult.

[230] The decision makers and their advisors responded to WMFN's concerns regarding a possible full mining operation and cumulative impacts to the herd.

[231] In his August 8, 2009 letter to WMFN, Mr. Anderssen of MEMPR stated:

> It is only if the exploration stage is successful in delineating an economic resource that a decision is made by the company to proceed to a *Mines Act* mine application (and if the project exceeds a certain threshold an Environmental Assessment Certificate would be required). MEMPR is committed to consulting with the WMFN should that occur and accommodate where appropriate.

[232] In the "Considerations to Date" document dated July 20, 2009, Mr. Anderssen responded to WMFN's initial submission titled "I Want To Eat Caribou Before I Die". He noted:

> A decision on the present application does not authorize full scale mining activity on the Central South Property. Any proposal to move towards an operating mine by [First Coal] will be subject to further assessment and review through the Environmental Assessment (EA) process. ... The impacts of the mining exploration and bulk sample activities are measured on the merits and impacts of the proposed activity alone and not potential future activities of greater impact.

[233] Mr. Anderssen recognized the fragile state of the Burnt Pine caribou herd in the same document where he commented that even without further development, and quite apart from further development, the herd required a recovery plan.

[234] While he acknowledged that the issue of cumulative impacts had been raised by WMFN, Mr. Anderssen declined to consider such impacts. He noted that cumulative impacts were "beyond the scope of the review" he was conducting, that the project had a "relatively small footprint" when compared to other activities in

WMFN's traditional territory, and that WMFN's right to hunt caribou would "not be significantly reduced" by First Coal's proposed activities. Finally, Mr. Anderssen stated that the appropriate venue for assessing cumulative impacts was the Economic Benefits Agreement ("EBA") process, which MEMPR was "committed to facilitating and/or participating in".

[235] In *Rio Tinto* the question of past wrongs and cumulative impacts was considered by the Court under the rubric of the first *Taku* question – whether a duty to consult arises. (Because in this case the appellants acknowledge that a duty to consult does arise, this question becomes more relevant to the second *Taku* question concerning the scope and extent of the duty.)

[236] *Rio Tinto* involved an application for approval of the sale of excess power generated by a hydro electric dam. The dam, which was constructed in the 1950s had diverted water from the Nechako River. The diversion impacted the First Nations' fishery in that river. The First Nations were not consulted at the time. Those same First Nations sought consultation within the 2007 process to approve the sale of excess power produced by the dam. The Chief Justice speaking for the Supreme Court of Canada held at para. 49:

> The question is whether there is a claim or right that potentially may be adversely impacted by the *current* government conduct or decision in question. Prior and continuing breaches, including prior failures to consult, will only trigger a duty to consult if the present decision has the potential of causing a novel adverse impact on a present claim or existing right. [Emphasis in original.]

And at paras. 53-54 she continued:

> … [*Haida Nation*] confines the duty to consult to adverse impacts flowing from the specific Crown proposal at issue - not to larger adverse impacts of the project of which it is a part. The subject of the consultation is the impact on the claimed rights of the *current* decision under consideration.
>
> The argument for a broader duty to consult invokes the logic of the fruit of the poisoned tree - an evidentiary doctrine that holds that past wrongs preclude the Crown from subsequently benefiting from them. Thus, it is suggested that the failure to consult with the CSTC First Nations on the initial dam and water diversion project prevents any further development of that resource without consulting on the entirety of the resource and its management. Yet, as *Haida*

> *Nation* pointed out, the failure to consult gives rise to a variety of remedies, including damages. An order compelling consultation is only appropriate where the proposed Crown conduct, immediate or prospective, may adversely impact on established or claimed rights. Absent this, other remedies may be more appropriate.

[237] *Rio Tinto* is distinguishable from this case because in *Rio Tinto* there was a finding that the sale of excess power would have no adverse effect on the Nechako River fishery. Here, there is a link between the adverse impacts under review and the "past wrongs". However, *Rio Tinto* is applicable for the more general proposition that there must be a causative relationship between the proposed government conduct and the alleged threat to the species from that conduct. It is fair to say that decisions, such as those under review in this case, are not made in a vacuum. Their impact on Aboriginal rights will necessarily depend on what happened in the past and what will likely happen in the future. Here it could not be ignored that this caribou herd was fragile and vulnerable to any further incursions by development in its habitat. Thus, although past impacts were not specifically "reeled" into the consultation process, neither could the result of past incursions into caribou habitat be ignored.

[238] However, Mr. Devlin, for WMFN, noted in his oral submissions that this is not a "taking up" case because the land had already been taken up for mining purposes. As I understood his submissions, he meant that the taking up occurred when the original mining permits were granted in 2005. He said that WMFN were not contesting the original permits. This statement belies the contention that the statutory decision makers ought to have taken into account the fact that earlier Crown authorized activity had, at least in part, caused the present decimated state of the Burnt Pine caribou herd, thus the need for an augmentation or recovery plan to restore the health of the herd. The need for a recovery plan arose from past development and, thus, would not be a consequence of the permits under consideration.

[239] In my view the statutory decision makers could not, and did not, ignore the fragile threatened state of the Burnt Pine caribou herd in defining the scope and

extent of consultations. Those consultations proceeded on the basis that further incursions into the habitat of the caribou might result in extirpation of the herd. The decision makers drew the line at implementing a recovery plan because the need for recovery did not emanate from, or was not causally related to, the permits sought. I am of the view that the decision makers were correct in their understanding of this aspect of the scope and extent of the Crown's consultation obligations. Similarly, consideration of the impact of a possible full-scale mining operation on the herd would be the subject of a full environmental review, and was beyond the scope of these decision makers' mandate (*Rio Tinto* at para. 53).

[240] Practically speaking the decision makers did not have an application for a full mining operation before them. Since its inception in 2005, the project scope had shifted from a small, open-pit concept to a combined, trenching/underground system. Subsequent exploration would utilize an experimental technology that might or might not prove viable. Based on this background, it was certainly possible that the nature of the project would change once again, or that development might not proceed beyond the exploration phase at all. It was not wrong for the decision makers to limit their inquiry to the adverse effects of the permits under review, and decline to consider possible future scenarios on a hypothetical basis.

(iii) Historical or modern Treaty interpretation and taking up provisions of the Treaty

[241] I conclude from my review of the authorities on this point that the promises made under Treaty 8 must be interpreted within their historical context. But it is only logical to consider the degree to which government action adversely impacts those promises in light of modern realities. The manner in which the First Nations treaty rights are exercised is not frozen in time: *R. v. Van der Peet*, [1996] 2 S.C.R. 507 at para. 132. Nor can an assessment of the degree to which government conduct impacts the exercise of those rights ignore the modern day economic and cultural environment.

[242] The objective of the numbered treaties, and Treaty 8 specifically, was to facilitate the settlement and development of the West. However, it is clear that for the Indians the guarantee that hunting, fishing and trapping rights would continue was the essential element which led to their signing: *R. v. Badger* at para. 39.

[243] In recognition of this objective, Treaty 8 recites: "the said Indians have been notified and informed by Her Majesty's said Commission that it is Her desire to open for settlement, immigration, trade, travel, mining, lumbering and such other purposes as to Her Majesty may seem meet". The First Nations own oral histories indicate their understanding that some land would be taken up and occupied in a way which precluded hunting when it was put to a visible use that was incompatible with hunting: *R. v. Badger* at para. 58.

[244] In *Mikisew,* Binnie J. describes an "uneasy tension between the First Nations essential demand that they continue to be as free to live off the land after the treaty as before and the Crown's expectation of increasing numbers of non-Aboriginal people moving into the surrendered territory" (at para. 25).

[245] While the treaty guaranteed certain rights, it did not promise continuity of nineteenth century patterns of land use (*Mikisew* at para. 27):

> ... none of the parties in 1899 expected that Treaty 8 constituted a finished land use blueprint. Treaty 8 signalled the advancing dawn of a period of transition. The key, as the Commissioners pointed out, was to "explain the relations" that would govern future interaction "and thus prevent any trouble"...

[246] The actual balancing of these competing interests, informed by a correct understanding of the interpretation of the Treaty, is part of the task of the statutory decision makers.

[247] In the "Considerations to Date" document, Mr. Anderssen provided his interpretation of Treaty 8. He said:

> Treaty 8 sets out the right of the signatory First Nations "*to pursue their usual vocation of hunting, trapping and fishing through the tract surrendered* ..." Aboriginal rights and title to lands were surrendered in exchange for these

> Treaty rights and other benefits set out in the treaty (such as entitlement to specified quantum of land for reserves). Treaty 8 rights to hunt, trap and fish are subject to express limitations set out in Treaty 8. Specifically, these rights are "*subject to such regulations as may from time to time be made by the government of the country...*". In addition, the Crown maintained the authority to take up land "*from time to time for settlement, mining, lumbering, trading or other purposes.*" [Emphasis in original.]

[248] In *Mikisew,* the Crown took an unreasonable position that express limitations to the Treaty 8 right to hunt removed its duty to consult as it related to a particular taking up. Here, the statutory decision makers acknowledged the importance of caribou to WMFN and, in light of this, they approached consultation toward the deeper end of the spectrum. The fact that the "taking up" had already occurred and the decimated state of the Burnt Pine caribou herd was not causally related to the permits under consideration did not prevent MEMPR from engaging directly with WMFN to address their concerns.

[249] The statutory decision makers were entitled to, and did, balance the competing interests in the context of a modern culture and environment. In my view this is a correct interpretation of the Treaty in question. This interpretation informed the consultations and the statutory decision makers' assessment of the adequacy of consultation.

iv. Conclusion on the second *Taku* question

[250] The second *Taku* question – as to the scope and extent of the duty to consult and to accommodate WMFN – was was in my view considered correctly by the statutory decision makers. They correctly interpreted the Treaty in respect to the important factors: the contours of the right to hunt; the context in which the Treaty was signed and in which it operates today; and the relevance of past Crown conduct and future potential development.

[251] In his review of the decisions of the statutory decision makers, the chambers judge found, as noted above, that the treaty protected right was the right to hunt caribou in the territory affected by First Coal's operation. He did not otherwise

explicitly address the question of the scope and extent of the duty to consult, and if indicated, accommodate. That is, he did not explicitly discuss the questions of whether past wrongs, cumulative effects and future impacts were matters that factored into the scope and extent of the duty to consult. But implicit in his conclusion, that the Crown's refusal to put in place a rehabilitation plan for the Burnt Pine caribou herd amounted to a failure to reasonably accommodate, is a finding that the statutory decision makers were bound to consider past wrongs, cumulative effects and future development, because the near extirpation of the herd that had occurred could not have been caused by the prospective granting of the permits in issue in this case. In my view, the chambers judge erred in construing the Crown's duty to consult and accommodate so broadly.

Did the Crown fulfill its duty to consult and accommodate in this case?

[252] As noted at the outset of these reasons, the third question – whether the consultation and accommodation measures were adequate – should be reviewed on a standard of reasonableness. The reasonableness standard was defined in *Dunsmuir v. New Brunswick,* 2008 SCC 9, [2008] 1 S.C.R. 190 at para. 47. Bastarache and LeBel JJ. speaking for the majority held that the decision under review must fall "within a range of possible, acceptable outcomes which are defensible in respect of the facts and law":

> Reasonableness is a deferential standard animated by the principle that underlies the development of the two previous standards of reasonableness: certain questions that come before administrative tribunals do not lend themselves to one specific, particular result. Instead, they may give rise to a number of possible, reasonable conclusions. Tribunals have a margin of appreciation within the range of acceptable and rational solutions. A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

[253] The chambers judge determined that the consultation in this case was not sufficiently meaningful and that the Crown's failure to put in place a protection and rehabilitation plan for the Burnt Pine caribou herd rendered the accommodation unreasonable.

[254] Section 35(1) of the *Constitution Act*, *1982* dictates that "the Crown must act honourably, in accordance with its historical and future relationship with the Aboriginal peoples in question": *Taku* at para. 24.

[255] The judgment in *Mikisew* reminds us that, "[t]he fundamental objective of the modern law of Aboriginal and treaty rights is the reconciliation of Aboriginal peoples and non-Aboriginal peoples and their respective claims, interests and ambitions" (at para. 1).

[256] In *Taku*, the Chief Justice said (at para. 2):

> ... Where consultation is meaningful, there is no ultimate duty to reach agreement. Rather, accommodation requires that Aboriginal concerns be balanced reasonably with the potential impact of the particular decision on those concerns and with competing societal concerns. Compromise is inherent to the reconciliation process...

[See also *Haida Nation* at para. 50.]

[257] And as Binnie J. noted in *Beckman*, at para. 84: "*Somebody* has to bring consultation to an end and to weigh up the respective interests ... The Director is the person with the delegated authority to make the decision whether to approve a grant ... The purpose of the consultation was to ensure that the Director's decision was properly informed" (emphasis in original).

[258] In *Taku* the Supreme Court of Canada reviewed the consultation that had occurred in that case and found it adequate. I find it helpful to compare the consultation in *Taku* to that in the case at bar. (Recognizing that the Aboriginal right in that case was asserted, but yet unproven; I consider that this distinguishing feature is not particularly important because the Aboriginal rights claim in *Taku* was

relatively strong and the potential negative impact of the contemplated Crown conduct was significant.)

[259] The consultation process in *Taku* took place over three and one-half years. The First Nation was invited to, and did, participate in a committee to review the project at issue, the reopening of an abandoned mine. The project sponsor, Redfern, met several times with the First Nation to discuss the project and its concerns about the impact of the project. Redfern engaged an independent consultant to conduct archaeological and ethnographic studies to identify possible effects of the project. Financial assistance was provided to the First Nation to enable it to participate in meetings.

[260] I note the following features of the consultation which took place in *Taku*:

- The process of project approval ended more hastily than it began. Nonetheless, the Court concluded that the consultation provided by the Province was adequate (para. 39);
- In the opinion of the decision maker, by the time the assessment was concluded, the positions of all the Project Committee members, including the affected First Nation, had crystallized (para. 41);
- The concerns of the First Nation were well understood and reflected in the Recommendations Report (para. 41);
- Mitigation strategies were adopted in the terms and conditions of certification (para. 44);
- Project approval certification was simply one stage in the process by which development moved forward. The First Nation would have further opportunity for input and accommodation at subsequent stages (paras. 45-46);
- The Project Committee concluded that some outstanding First Nation concerns could be more effectively considered at later

> stages or at the broader stage of land use strategy planning (para. 46).

[261] In my view, the consultation in the present case was comparable to that undertaken in *Taku* in all of the above-mentioned respects.

[262] I turn now to examine the consultation that took place in this case in order to determine if that consultation was adequate, bearing in mind that it is not the task of this Court nor the court below to substitute its own view for that of the decision makers.

[263] The evidentiary record that was before the chambers judge discloses an extensive record of consultation. As the chambers judge found, the Crown was entitled to delegate some of the procedural aspects of consultation to First Coal; however, the "ultimate legal responsibility for consultation and accommodation rests with the Crown" (*Haida Nation* at para. 53).

[264] The consultation process was managed on behalf of First Coal by Debra Stokes, Director of Environment for First Coal. Since about January 2008, she has devoted a "significant amount of [her] time" to working with First Nations in connection with the consultation process related to these applications. She consulted all Treaty 8 First Nations including WMFN. Ultimately she identified four First Nations with an interest in consultation concerning First Coal's applications. She deposed that of those four, two entered into memoranda of understanding to govern their ongoing relationship with First Coal and a third First Nation was engaged in negotiations in connection with such a memorandum. Those agreements included economic opportunities for the First Nations. Ms. Stokes indicated that to date WMFN had declined to enter into a memorandum. She said that she became aware of WMFN's opposition to the First Coal project because of concerns related to caribou on June 13, 2008. She noted that she was aware that caribou had much earlier been identified by First Coal as requiring special attention as it developed the project.

[265] First Coal provided funding in Sept 2008 to purchase radio collars to help with the long term monitoring of the caribou. First Coal also retained an independent wildlife biologist to develop a detailed plan to address the concerns raised by WMFN over the potential impact of the project on the caribou. The first iteration of the Caribou Mitigation and Monitoring Plan ("CMMP") was developed in October 2008 and that document was subject to several revisions to address concerns of the Crown and WMFN before it was finalized on May 1, 2009. Ms. Stokes recounted the numerous meetings with WMFN. She also deposed to the fact that environmental site managers were on site 24 hours a day, 7 days a week during construction to monitor implementation of the CMMP.

[266] The mitigation and monitoring requirements under the CMMP include, but are not limited to the following:

- short term monitoring including an incidental observation program, a winter monthly aerial survey program, a series of ground tracking surveys, noise level monitoring, and monitoring of reclamation efforts;
- long-term caribou monitoring and research using GPS radio collars;
- reclamation of the areas affected by First Coal's mining activities with a particular focus on maximizing caribou foraging habitat and minimizing habitat for predators;
- avoidance of work in core range areas during seasons when caribou are present;
- immediate cessation of activities upon sight of caribou;
- increased security as well as access, use, and speed restrictions;
- education and awareness programs for employees and visitors; and
- establishment of a "Burnt-Pine Caribou Task Force" in conjunction with the local First Nations and reporting of results and suggestions to regulators.

[267] The consultation record discloses that WMFN has been involved in consultation since about 2005 on the earlier First Coal Notices of Work related to the

same project, not the subject of this judicial review. Of relevance to these particular permits, the Crown consultation record documents communications commencing on May 14, 2008, onward, involving all stakeholders, including WMFN, the Crown, and First Coal. In July 2008, the proposed ADDCAR system was explained to those interested stakeholders at a meeting. Wildlife biologists were an integral part of all the significant consultations. The reports of the Crown biologists were provided to WMFN, throughout the consultation process. In October 2008, First Coal committed to modifying the project to avoid the windswept areas so critical to the caribou. The Spine Road reclamation plan was discussed at numerous meetings. The Spine Road had been built in an area that was windswept.

[268] In December 2008, WMFN complained about the lack of meaningful consultation.

[269] In January 2009, a meeting was attended by representative of WMFN to discuss the first Draft CMMP.

[270] In February 2009, WMFN expressed concerns about the lack of time they had been given to respond to the CMMP. Their legal counsel became involved on February 4, 2009. He explained WMFN's concerns about caribou habitat. In subsequent correspondence WMFN also expressed concern about the Spine Road work, done without permits.

[271] In the ensuing months, numerous meetings were conducted and information was exchanged. On June 23, 2009, WMFN submitted their document "I want to Eat Caribou Before I Die", detailing the historical importance of caribou to the First Nations as well as the threat to the caribou posed by the First Coal project.

[272] On July 20, 2009, MEMPR released its "Considerations to Date" document. In the covering letter to WMFN, Mr. Anderssen explained that the purpose of the document was to "provide ... the 'Considerations to Date' that represent the information that [MEMPR] is currently considering in regards to ... [the] proposed 50,000 tonne Bulk Sample application and the proposed 173 drill hole advanced

exploration application ...". He also noted that Section 7.0 of the document responded to the issues raised by WMFN's initial submissions contained in the document, "I want to Eat Caribou Before I Die". Lastly he noted that a meeting was scheduled for August 5, 2009.

[273] The document notes that MEMPR had been engaged in consultations with the four affected Treaty 8 First Nations for over four years. Six face-to-face consultation meetings had taken place between Sept 2008 and July 2009. After summarizing MEMPR's understanding of the importance of caribou as gleaned from WMFN's initial submissions, the document attempts to quantify the adverse effects of First Coal's applications on caribou generally and on WMFN's treaty right specifically. It notes that there are nine herds of caribou in WMFN's traditional territory, totalling approximately 1599 animals. The affected Burnt Pine Herd consists of 11 animals and represents 0.69% of the caribou population in WMFN's traditional territory. Based on this, the document concludes that "the opportunity for WMFN to hunt and trap caribou in their traditional territory will not be significantly reduced".

[274] The document notes the possible extirpation of the Burnt Pine caribou herd, relying on the comments of Mr. Pierre Johnstone of the Ministry of Environment. Until recently, the Burnt Pine herd was considered to be part of the larger, Moberly Herd. In Mr. Johnstone's opinion, fragmentation of this sort "may be an early sign of extirpation". One of the accommodation measures sought by WMFN was a recovery plan for the Burnt Pine caribou herd. The "Considerations to Date" document states that it is generally recognized that even without further development, and regardless of whether mining activity occurs in the area, a recovery plan would be necessary to maintain or increase herd numbers. However, presumably for fiscally-related reasons, the Crown did not currently have a recovery plan in place for the Burnt Pine herd.

[275] WMFN also requested that the Crown engage in land use planning. The document states that this request is met by the Economic Benefits Agreement, to

which WMFN is a party, and for which extensive funding had been provided to WMFN. MEMPR's understanding was that the EBA provided a mechanism for addressing WMFN's concerns regarding cumulative impacts and efforts to recover caribou populations. First Coal's proposed "Caribou Task Force" was seen as another venue in which these issues could be addressed on an ongoing basis.

[276] The document goes on to list the accommodation measures proposed by WMFN and the measures taken or proposed by MEMPR:

> Accommodation Measures proposed by WMFN
>
> The following are drawn from statements from the Initial Submissions that could be considered as proposed accommodation measures.
>
> - Accommodation should include rejection of First Coal's application;
> - WMFN should be given the opportunity to participate in the decision making process;
> - Consultation as a form of accommodation;
> - Recovery of the Burnt-Pine Caribou Herd; and
> - Re-location of First Coal's activities.
>
> Accommodation Measures Taken or Proposed by MEMPR
>
> - Consultation at the higher end of the spectrum;
> - Application of the CMMP;
> - Reduction of the Bulk Sample permit by 50%;
> - Closure of the Spine Road;
> - Use of ADDCAR system;
> - Consideration of WMFN's extensive input including the Initial Submissions in the decision making process;
> - Through promotion, facilitation and participation in planning processes flowing from the EBA as well as through the Caribou Task Force, MEMPR will work towards addressing the issues of:
>   - cumulative impacts;
>   - a Caribou Recovery Plan;
>   - land use planning; and
>   - the location of First Coal and other companies activities.

[277] The "Considerations to Date" document contains no decisions by the lead Ministry, MEMPR, but it chronicles the consultation process, the technical information, and the positions so far taken by the Ministry and the First Nations in respect to the approval process and accommodations. It notes that WMFN proposed that First Coal's applications be rejected and that WMFN's input would be considered in the decision making process.

[278] Meetings took place on August 5 and 12, 2009. A lengthy letter hand-delivered to the Ministry representatives, expresses the frustration of WMFN at what they saw as intransigence in the position of the Ministries involved. The letter illustrates that the consultation had come to the point where the positions of the parties had crystallized. On the one hand, the WMFN characterized their treaty right as specifically protecting the right to hunt the Burnt Pine caribou herd; they complained that the Ministry failed to examine impacts from prior activities; and, they expressed concern that, despite the Crown's recognition that the herd may face extirpation, there was no recovery plan in place. WMFN concluded that First Coal's applications should be rejected and its operation re-located, and that "a real recovery plan" should be implemented, as well as legal protection for the Burnt Pine caribou herd. On the other hand, the Ministry maintained that the scope and extent of consultations were limited and that WMFN's treaty right to hunt was not significantly impacted, as I have previously discussed.

[279] In his affidavit, Chief Roland Willson describes the final consultation meeting of August 12, 2009:

> 94. We also voiced concerns that MEMPR had not told us how they would weigh our interests with the competing interest of others when making decisions on First Coal's proposed activities. We told them that they should give our interests and rights a lot of weight, given the fact that we have Treaty rights and First Coal has only interests. We also said that they were not giving proper weight to the honour of the Crown and the goal of reconciliation. We also asked MEMPR to think about the fact that the broader public interest supported preserving the habitat of endangered species such as caribou.
>
> 95. At this meeting of August 12, 2009, West Moberly representatives including myself encouraged MEMPR to look at the bigger picture. We said that we were worried about the cumulative impacts of industrial development

> on our Treaty rights which had prevented us from hunting caribou in our preferred Treaty territory. We explained that the impacts of the proposed mining activities on our right were serious because of how few caribou were now left within our preferred Treaty territory.

[280] It was evident that by this time a decision had to be made. Dr. Dale Seip had described the CMMP as doing "an excellent job of attempting to reduce the environmental impacts of the bulk sample and exploration program on caribou". But he also concluded that "...if the government intended to conserve and rehabilitate this small caribou herd" granting the permits was "incompatible with efforts to recover the population". The statutory decision makers were thus faced with two incompatible positions. After years of consultation, in which the competing interests were fully explored, "[*s*]*omebody* [had] to bring consultation to an end and weigh up the respective interests" (*Beckman* at para. 84). The statutory decision makers did just that. They made their decisions to approve the permits on the basis of the generality of the treaty right in question, the limited impact of the proposed permits on that right, and the incorporation of accommodation and mitigation measures into the project.

[281] The permits were issued shortly thereafter: the Bulk Sample permit, on September 1, 2009, the Advanced Exploration Permit on September 14, 2009 and the Licences to Cut on October 13, 2009.

[282] The Rationale for Decision on the first two permits was issued by Mr. Al Hoffman of MEMPR on Sept 4, 2009, and a Rationale for the Licences to Cut was issued by Mr. Dale Morgan of MOFR, on October 8, 2009.

[283] The mining permit contained the following conditions:

> Environmental Management Programs
>
> (a) Caribou Mitigation and Monitoring Plan
>
> (i) The Permittee shall implement and ensure all activities on the mine site adhere to, the AECOM Canada Ltd. report "First Coal Corporation, Caribou Mitigation and Monitoring Plan for the Bulk Sample and Advance Exploration 2009 / 2010 Program at the Central South Property", dated May 1, 2009 and the AECOM Canada

> Ltd. report "First Coal Corporation, Reclamation Plan for Existing Disturbance at the Central South Project Site", dated May 2009.
>
> (ii) The Permittee shall continue to participate in the Peace Region Shared Stewardship Working Group.
>
> (iii) If a species recovery plan for woodland caribou is developed and approved through the Committee on the Status of Endangered Wildlife in Canada, the conditions of this permit will be reviewed and revised as necessary to ensure compliance with the recovery plan.

[284] Undoubtedly it would have been preferable for the MEMPR Rationale to do more than chronicle the background and considerations by explicitly describing the basis of the opinion. But notwithstanding the absence of an explicit explanation for the decision, it is apparent that MEMPR rejected the main accommodations requested by WMFN (rejection of the permits, implementation of a caribou recovery plan, and re-location of First Coal's activities) and, when read in conjunction with the "Considerations to Date" document, the reasons for rejecting the requested accommodations are clear – that the accommodation measures proposed by MEMPR were an adequate compromise, which attempted to balance the competing interests of WMFN, First Coal, and society at large.

[285] The Ministry of Forests and Range Rationale provided a fuller explanation for the decision of Mr. Morgan, for that Ministry. Mr. Morgan noted that his authority was limited to adding (or not) conditions to the license to cut timber. He reviewed the question of the adequacy of consultation and accommodation. He reviewed the consultation record and concluded that consultation had been adequate to address WMFN's concerns. He noted that WMFN disputed the adequacy of consultation and objected to the project. In approving the permit he added the following conditions:

> 1. FCC must adhere to the Caribou Mitigation and Monitoring Plan during operations.
> 2. FCC must, to the extent practicable, limit their harvesting of timber to the amount required to safely conduct operations.

[286] Overall, the consultation process was directly responsive to the concerns raised by WMFN, insofar as those concerns related to the permits under consideration. In light of WMFN's treaty protected right and particular interest in hunting caribou, significant accommodations were made to protect the existing caribou herd. It is true that the outcome of the consultation process was not that which WMFN desired. But it cannot be said that the outcome, given all the factors listed by the decision makers, was unreasonable.

[287] It is not for a court on judicial review to mandate specific accommodation measures (*Musqueam Indian Band v. British Columbia (Minister of Sustainable Resource Management)*, 2005 BCCA 128, 37 B.C.L.R. (4th) 309 at paras. 99-100, 104-105; *Wii'litswx v. British Columbia (Minister of Forests)*, 2008 BCSC 1620, [2009] 1 C.N.L.R. 359 at para. 23) nor specific outcomes to the process. Provided that the Crown proceeds on a correct understanding of the scope and extent of the treaty rights and its duty to consult (as I say it did), and provided that consultation proceeds in a reasonably thorough, responsive fashion, a court ought not to interfere. In my view the decision makers acted reasonably and, as the foregoing description of the extent of the consultation illustrates, the consultation was more than adequate in fulfilling the Crown's duties. The consultation appears broadly similar to that which was found adequate in *Taku*. What is required is not perfection but reasonableness (*Haida Nation* at para. 62). I therefore conclude that the Crown has discharged its duty and that the chambers judge erred in finding that consultation was inadequate and that a specific form of accommodation was required.

[288] I would allow the appeal and dismiss the petition.

"The Honourable Madam Justice Garson"