IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *West Moberly First Nations v. British Columbia (Chief Inspector of Mines),* 2010 BCSC 359

Date: 20100319
Docket: 09-4823
Registry: Victoria

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

Petitioners

And

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

Respondents

Before: The Honourable Mr. Justice Williamson

Reasons for Judgment

Counsel for the Petitioners:	C. Devlin T. Thielmann
Counsel for the Respondent, Her Majesty the Queen in Right of the Province of British Columbia:	K.J. Phillips E.K. Christie
Counsel for the Respondent, First Coal Corporation:	K.E. Clark
Place and Date of Hearing:	Victoria, B.C. February 1 – 4, 2010
Place and Date of Judgment:	Victoria, B.C. March 19, 2010

[1] This application is brought pursuant to the *Judicial Review Procedure Act*, R.S.B.C. 1996, c. 241. The petitioners, West Moberly First Nations ("West Moberly"), beneficiaries of Treaty No. 8, apply to quash three decisions of individuals appointed as statutory decision makers for the Crown.

[2] On September 1, 2009, Al Hoffman, Chief Inspector of Mines with the Ministry of Energy, Mines and Petroleum Resources, issued an amendment to an existing permit pursuant to the *Mines Act*, R.S.B.C. 1996, c. 293 [*Mines Act*] permitting the respondent, First Coal Corporation ("First Coal"), to obtain a 50,000 ton bulk sample of coal from lands referred to as the Goodrich Properties.

[3] On September 14, 2009, the Inspector of Mines, Victor Koyanagi, issued an amendment to an existing permit approving a 173 drill hole, five trench advanced exploration program on the same land, also pursuant to the *Mines Act*. This has been referred to as the advanced exploration program.

[4] On October 8, 2009, Dale Morgan, the District Manager for the Ministry of Forests and Range, issued a licence to cut permitting First Coal to cut and clear up to 41 hectares of the land to facilitate the advanced exploration.

[5] The land affected by these three decisions is territory the petitioners claim is subject to their Treaty No. 8 guaranteed traditional right to hunt caribou.

[6] The petitioners say that these officers of the Crown failed to consult adequately and meaningfully with the petitioner West Moberly concerning their Treaty No. 8 hunting rights. Further, they say that these officers of the Crown failed to accommodate reasonably West Moberly's rights when they issued the permit amendments and the licence to cut. They submit, therefore, that these three decisions should be declared invalid and set aside.

[7] Finally, the petitioners say the District Manager for the Ministry of Forests and Range breached his administrative law obligations when issuing the licence to cut by wrongly fettering his discretion.

[8] It is not disputed by the respondents that in these circumstances there is a duty upon the Crown to consult with representatives of West Moberly. The Crown says it has discharged that duty.

[9] Similarly, First Coal concedes that the Crown has such a duty, but says that duty is to balance First Nations' rights and societal interests when making decisions that may impact upon treaty rights. It submits the Crown has done so.

Standard of Review

[10] 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.

Treaty No. 8

[11] Treaty No. 8 is dated September 22, 1899. It includes the following:

> ... 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 track 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 excepting such tracks as made be required or taken up from time to time for settlement, mining, lumbering, trading, or other purposes.

[12] It can be seen, therefore, that the Treaty contemplated that portions of the surrendered land would be "taken up" for purposes such as mining.

[13] Although the Treaty contemplates the taking up of land for activities such as mining, the Supreme Court of Canada has stated that the interpretation of such treaties must take into account the fact that the Native people at the time they entered into these agreements recorded their history orally and, importantly, received oral promises from the Crown's negotiators. The material filed discloses that the commissioners who negotiated these treaties on behalf of the Crown made oral promises to the Native peoples. These officers of the Crown recorded many of

these oral promises. Their reports survive and have been considered by the Supreme Court of Canada.

[14] 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:

> 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 Furmoleau, O.M.I., As Long As This Land Shall Last, at p. 90, stated:
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> > 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.
>
> 56. 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.

[15] 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.
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> [Emphasis in original.]

Background Facts

[16] Here, the affidavit evidence discloses that 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.

[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.

The Petitioners' Submissions

[19] The petitioners submit that not only has the Crown failed to consult adequately, it has failed to accommodate reasonably their hunting rights guaranteed by Treaty No. 8.

[20] The petitioners say that from 2005 to 2008 they regularly communicated with various Crown officials raising concerns about their hunting rights and in particular the need to put in place a plan to protect and increase the Burnt Pine caribou herd. I conclude that the diminished state of the Burnt Pine caribou herd is at the heart of the West Moberly concerns. They submit the Crown was unresponsive, or that

responses were mere “standard form referral letters” devoid of any meaningful content.

[21] The petitioners say that other employees of the Crown have also raised concerns about the Burnt Pine caribou herd, given First Coal’s activities, but that these concerns were ignored by the decision makers in this instance.

[22] The petitioners point to the comments of Dr. Dale Seip, a wildlife ecologist with the Crown’s Northern Interior Forest Region. On September 25, 2008, commenting on First Coal’s planned operations, he noted:

> The proposed activities occur directly on core winter range of this Threatened caribou herd and will result in the destruction of critical caribou habitat. The total amount of core habitat that will be destroyed by the Bulk Sampling Program may be relatively small, but the impacts could be more widespread. Activity in the sampling area may deter caribou movement along the ridge and preclude their use of the large block of core habitat on the northern end of the ridge. The disturbance may also deter caribou from using much of the core habitat further south on the ridge. Caribou have been found to avoid areas up to 6 km away from mining activity (Weir et al. 2007).
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> 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.

[23] On December 16, 2008, Pierre Johnstone, an eco-system biologist with the Ministry of Environment, wrote to the respondent Victor Koyanagi, raising specific concerns about the First Coal project. Among other things, Mr. Johnstone wrote:

> The proposed window for work is given as of November 15 2008 to December 31 2009. This time period includes the high risk periods of winter, late winter, and calving for Caribou, as well as the high risk window for vegetation clearing for songbirds. More detail in the proposed work is necessary to determine whether potential impacts can be mitigated.
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> In past correspondence, we have requested that applications include any measures the proponent can propose to avoid, mitigate, or compensate any potential negative impacts of their activities, such as avoiding the use of high elevation ponds, planning for lichen re-establishing on disturbed areas, avoiding clearing pockets of older lichen-bearing spruce, specifying discrete work windows for discrete aspects of exploration, etc. For example, when are the trenches planned to be dug? Will this include the use of explosives?

> These are important questions with respect to disturbance of wintering Caribou.

[24] In June 2009 the West Moberly forwarded to the Crown a 98 page document entitled “I Want to Eat Caribou Before I Die”. This document was the initial extensively researched and written submission of the West Moberly people concerning First Coal’s Goodrich property. A principle concern in that document was that there was no recovery plan for the caribou which they described as a species at risk. At page 71, the petitioners noted:

> With respect to species considered to be “threatened”, such as the Burnt Pine herd, under the federal *Species at Risk Act* (“SARA”) the development of a proposed recovery strategy was required no later than June 5, 2007. Yet the Crown (federal and provincial) to date has developed no such recovery plan which includes the Burnt Pine caribou herd or for the other caribou herds in our traditional territory. In point of fact, the Province suspended the governmental process that was initiated and thus responsible for upholding its obligations under the Accord. A website maintained by the Recovery Initiatives for Caribou of British Columbia, which relates directly to the caribou in our traditional territory reads:
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> > “This Recovery Implementation Group (RIG) met informally once during the spring of 2003. Shortly thereafter most caribou RIGs were temporarily suspended pending direction from the provincial Species at Risk Coordination Office (SARCO). The herds that will be addressed by this RIG include: Moberly, Burnt Pine, Kennedy Siding, Quintette, Graham, Belcourt, and Narraway.” (RICBC, 2009)
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> On March 25, 2009, we sent a letter to the Minister of Environment Barry Penner with respect to the suspension. The Minister has not responded to our enquiries into this matter; thus, we have yet to be provided with a justification for the suspension. Given the state of affairs with respect to caribou herd populations, we consider the suspension itself to be unreasonable and unacceptable on the part of British Columbia.

Response to Proposed Accommodations

[25] West Moberly proposed a number of accommodations. These include the implementation of a recovery strategy for the Burt Pine and other caribou herds within their preferred treaty territory, the development of information regarding cumulative impacts on caribou in the territory, and other matters including a request that the Crown reject First Coal’s amended bulk sample and advanced exploration programs.

[26] On July 20, 2009, the acting manager for the aboriginal relations branch of the Ministry of Energy, Mines and Petroleum Resources, sent to the petitioner, Chief Roland Willson, a document entitled “Considerations to Date”. He stated that this document represented the information the Ministry was considering currently with respect to the First Coal operation. A meeting was set for August 5, 2009, to discuss this document and the acting manager requested that West Moberly respond to the “Considerations to Date” document before or at that meeting. This gave West Moberly a maximum of 15 days to respond.

[27] The document notes, at paragraph 6.2.3, that maintaining or increasing the population of the Burnt Pine caribou herd is not currently planned.

[28] Referring to the petitioners Treaty No. 8 rights as expressed in the written Treaty, the document quotes the “take up” provisions without referring to the Supreme Court of Canada’s comments, noted above, concerning the impact of the oral promises made to the Native signatories of that Treaty by Crown representatives.

[29] In this “Considerations” document, the Ministry takes the position that as the Burnt Pine caribou herd constitutes a very small portion of the total population of nine caribou herds in the territory, the opportunity for the petitioners to hunt caribou in their traditional territory will “not be significantly reduced”.

[30] Further, the document notes that the issue of the cumulative impacts of Crown approved development on the caribou herds is “beyond the scope of the review of this project to fully assess”.

[31] At page 15, the report states:

> It is generally recognized that even without further development, in order the Burnt-Pine Caribou Herd to maintain or increase its current numbers, a recovery plan is required. Recovery plans typically include some of the following measures: closure of access roads, predator control such as killing of wolves, and re-location of viable caribou from neighbouring populations. However, as Pierre Johnstone explains in his June 19, 2009 letter, maintaining or increasing the population of the Burnt-Pine Caribou Herd is currently not planned:

> While northern ecotype herds within the Southern Mountain National Ecological Area require a recovery plan and associated action plans, there are currently no recovery or action plans in place for the recovery of this herd.

[32] At the August 5, 2009, meeting mentioned above, representatives of the Ministry of Energy, Mines and Petroleum Resources met with members of the petitioners. Chief Willson, who attended the meeting, deposed that the Crown representatives would not discuss the accommodation measures purposed earlier because it was their view that the petitioners were able to hunt other animals besides caribou and that the First Coal project posed minimal adverse effects to the harvesting rights provided by Treaty No. 8.

[33] The petitioner Chief Willson deposes that at the end of the meeting the petitioners were informed that the decision whether to grant the permit would be made the following week. The bulk sample permit was issued September 1st.

[34] The petitioners were particularly troubled by a letter dated August 8, 2009, in which the Ministry said further stages of development would not be considered in the permit amendment decisions. It is the submission of the petitioners that while the Crown refers to further economic benefits as justification for this activity, in considering whether the amended permit should be granted, the Crown takes the expressed position that only the circumstances existing at the present time are to be considered. The Petitioners submit that position precludes consideration of the future impacts of the project upon their Treaty rights, a factor they say should be taken in to account.

The Crown's Submission

[35] The Crown accepts the existence of a duty to consult meaningfully with West Moberly and accepts that it is 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 Crown further submits that the mining decision makers considered the issues raised during the consultation with

West Moberly and as a result of this consultation made various changes to the project which would mitigate the impacts of it upon the Burnt Pine herd.

[36] The Crown accepts that it delegated some of the procedural aspects of the consultation to First Coal. It points to the Supreme Court of Canada decision in *Haida Nation v. British Columbia (Minister of Forest)*, 2004 SCC 73, [2004] 3 S.C.R. 511, at para. 53 for support for this delegation. The propriety of that delegation not contested significantly by the petitioners. However, they point to the statement in the same paragraph that "the ultimate legal responsibility for consultation and accommodation rests with the Crown".

[37] The Crown submits that what the petitioners are attempting to do in this matter is convert a right to hunt for meat in the area subject to Treaty No. 8 into a specific right to hunt for caribou in the smaller area impacted by the First Coal operations. It relies upon *Lax Kw'alaams Indian Band v. Canada (Attorney General)*, 2009 BCCA 593. In that case, the court stated at para. 33, quoting *R. v. Powley*, 2003 SCC 43, para. 20, that:

> the periodic scarcity of moose does not in itself undermine the respondents' claim. The relevant right is not to hunt moose but to hunt for food in the designated territory.
>
> [Emphasis in original.]

[38] Accepting their duty to consult, the Crown submits that it identified those Treaty No. 8 First Nations who might be affected and commenced a consultative process with each of them.

[39] In this case, the Crown originally thought that a lower level of consultation was adequate because the impact of the First Coal operation was limited to a small area of West Moberly's traditional territory. The Crown's affidavit material discloses that after discussing the matter with West Moberly's representatives, it concluded it would be more appropriate to engage with West Moberly at the higher, or deeper, as that word is used in the authorities, end of the spectrum. The Crown submits that its characterization of the right of the West Moberly to hunt is subject to the Crown's right to "take up" for the purposes specified in the Treaty itself.

[40] Further, they submit that with respect to the first permit at issue, the bulk sample amendment, the Chief Inspector of Mines considered a number of documents before making his decision. These included letters and memorandums from Dale Seip and Pierre Johnstone mentioned above, the submission of West Moberly, mentioned in para. 25 above, and other documents. The Chief Inspector, along with the Inspector of Mines, attended a meeting with West Moberly by tele-conference on August 12, 2009. The Inspector of Mines also considered a similar list of documents.

[41] Both decision makers had before them an analysis of the West Moberly submission prepared by employees of the Ministry of Energy, Mines and Petroleum Resources.

[42] The affidavit material filed by the Crown notes that because of the concern with respect to caribou raised by West Moberly, consultation was increased. The material also shows that the decision makers knew West Moberly was opposed to the First Coal project because of their concerns with the Burnt Pine herd, and as a result the Crown accepted certain accommodation measures. These included taking into account a study commissioned by First Coal entitled “Caribou Mitigation and Monitoring Plan for the Bulk Sample and Advanced Exploration 2009/2010 Program at the Central South Property”.

[43] The Crown also notes that the bulk sample was reduced from 100,000 tons to 50,000, that a controversial access road, the Spine Road, which the Crown concedes was constructed in a place that would interfere significantly with the Burnt Pine herd, was closed and rehabilitated, and finally that First Coal adopted a different mining system, the ADDCAR system, said to be less disruptive to the environment.

[44] With respect to the Ministry of Forestry and Range granting of a permit to First Coal to cut timber in the area, the Crown disputes the suggestion that the district manager fettered his discretion. The Crown takes the position that s. 9 of the *Coal Act*, S.B.C. 2004 c. 15 (“*Coal Act”)* provides that a holder of a coal licence is

entitled, subject to entering into an agreement in the form of a licence to cut under the *Forest Act*, R.S.B.C. 1996, c. 157 [*Forest Act*] to use and remove timber at the location.

First Coal's Submission

[45] First Coal agrees with the submissions of the Crown. However, First Coal emphasizes, relying upon *Haida Nation*, that while the Crown may delegate procedural aspects of the consultation process to industry proponents of a particular project, the duty to consult and accommodate remains with the Crown. That duty is characterized by First Coal as a duty to balance treaty rights and societal interests.

[46] First Coal submits that the Crown discharged its duties to consult and to accommodate. It also submits that while it may be under no legal duty to consult with West Moberly, it in fact did so to a considerable extent and as a result took several steps to assuage West Moberly's concerns. These included retaining consultants, providing funds to assist in monitoring caribou, and retaining a wildlife biologist to develop a plan to restore altered landscapes and to monitor the caribou population.

[47] First Coal agreed to close the Spine Road mentioned above, and participated in a number of meetings with provincial wildlife biologists and First Nations groups to discuss the caribou population. It took steps to inform its employees and visitors to the area about procedures and practices that would ensure the impact upon the caribou was as minimal as possible.

[48] I need not review all of the steps taken by First Coal in detail, as I am satisfied, subject to some comments below, that First Coal has taken reasonable steps to meet West Moberly's concerns.

Analysis

[49] I am satisfied that the Crown recognized that it had a duty to consult with West Moberly before issuing the two permits and the licence to cut. I am satisfied

that it did consult. I am not satisfied, however, that the consultation was meaningful in the circumstances.

[50] First, I note the Crown was extremely slow in providing West Moberly with its initial assessment of the potential adverse effects of the project upon West Moberly's treaty rights. While the Crown submits consultation commenced in 2005, a substantial assessment was not provided until August of 2009, shortly before the first permit issued.

[51] Second, the submission of the petitioners that the Crown issued "standard form referral letters", while perhaps an exaggeration, has some merit. 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.

[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.

[56] The Crown's September 4, 2009, "rationale for decision" forwarded to West Moberly outlined four measures said to respond to West Moberly's concerns. One was the reduction of the Bulk Sampling program from 100,000 tons to 50,000 tons. The evidence demonstrates, however, as West Moberly representatives were told at a meeting on April 30, 2009, that a key reason for that reduction was the current economic downturn.

[57] The second expressed justification was the implementation of First Coal's Caribou Mitigation and Monitoring Plan. A government wildlife ecologist with the Northern Interior Forest Region, Dale Seip, considered that plan. In a report dated March 9, 2009, he wrote:

> The mitigation plan does an excellent job of attempting to reduce the environmental impacts of the bulk sampling and exploration program on caribou. However, the program will still destroy or compromise substantial amounts of core winter and summer habitat for a small threatened caribou herd. It will also compromise previous management actions by the Ministry of Forests and Range to protect habitat for this caribou herd.
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> If the government intends to conserve and recover the Burnt Pine caribou herd, habitat conditions need to be maintained or improved. Allowing addition habitat destruction is incompatible with efforts to recover the populations.

[58] The plan was also reviewed by Pierre Johnstone, a biologist with the Ministry of the Environment. On June 19, 2009, he wrote to the Inspector of Mines stating that if the project proceeds "...core winter and summer habitat will be directly and indirectly negatively impacted". He also noted that there are no action plans in place for the recovery of the herd. He concluded:

> Though the current draft plans provide significant measures for avoiding and minimizing impacts to the Burnt Pine Caribou, mine development in this [Ungulate Winter Range] and [Wildlife habitat area] would be inconsistent with maintaining or increasing Woodland Caribou numbers and distribution in the South Peace, which require that habitat be conserved and/or improved.

[59] 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.

[60] The third accommodation measure claimed in the rationale was the closure of the "Spine Road", an access road to the site. However, that road was built in 2006 before concerns raised by the Ministry of the Environment and West Moberly about the impact upon caribou. Once these concerns were raised, First Coal agreed to abandon the road and reclaim the area. While this reconsideration of steps taken after they were executed is a recognition of a mistaken action, even if it can be regarded as a response to West Moberley's proposed accommodations, it was not implemented as part of a concerted rehabilitative plan for the threatened caribou herd.

[61] The fourth accommodation was said to be the adoption of a less destructive method of mining, described as the ADDCAR system. However the material indicates the decision to move to this method of mining was taken in 2007, before significant consultation with West Moberly had taken place. It is not a response to West Moberly's concerns.

[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] In *Lax Kw'alaams Indian Band,* the Court of Appeal observed, at para. 35, that each case "will determine the nature and breadth of the practice, custom or tradition in question and at the end of the analysis, of the right to be accorded constitutional status". 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 to hunt caribou in the traditional seasonal round in the territory effected by the First Coal Operation.

[64] I conclude that the rationale set out for the issuing of the permits and the licence to cut does not manifest reasonable accommodation to West Moberly's prime concern about the violation of its treaty right to hunt caribou.

Fettering Discretion

[65] The petitioners submit that the District Manager for the Ministry of Forest and Range improperly fettered his discretion when he decided to issue the occupants licence to cut on October 8, 2009. They say that in issuing this permit, the District Manager misinterpreted s. 9 of the *Coal Act* when he concluded that that section removed the discretion which was exercised pursuant to the *Forest Act* with respect to such licences.

[66] It is the *Forest Act* which gives the District Manager the power to issue a licence to cut. However, s. 9 of the *Coal Act* states the following:

> (2) A licensee is entitled to explore for and develop only the coal that is inside the boundaries, continued vertically downward, of the licence location.
>
> (3) The holder of a licence is entitled
>
> (a) to enter, occupy and use the surface area of the location for the purpose of exploring for and developing coal on the location,
>
> (b) subject to entering into an agreement in the form of a free use permit under the Forest Act or a licence to cut under that Act, to use and remove timber that, at the time the holder of the licence enters into the agreement, is on the location, and

> (c) to the non-exclusive right to use sand, gravel and rock from the location for use on the location for a construction purpose approved under the Mines Act, without the necessity of obtaining under the Land Act a licence, lease, permit or other authorization.

[67] I am not persuaded that the District Manager fettered his discretion. It is apparent upon a reading of the above subsections that the object of this particular piece of legislation is to ensure that those who hold permits for the purpose of exploring for and developing a coal mine are entitled to remove timber subject to conditions set out in an occupant's licence to cut. The subsection requires that would be miners obtain such a licence before cutting timber necessary for their exploration or development.

[68] It is not disputed here that First Coal was a licencee pursuant to the *Coal Act,* nor that First Coal entered into an agreement in the form of a licence to cut under the *Forest Act.* The District Manager recognized that pursuant to the *Forest Act* he has a discretion whether to approve licences to cut. However, he noted, in para. 8 of a memorandum prepared October 8, 2009, that:

> Because this is a coal tenure holder, the *Coal Act* entitles FCC to an OLTC [Occupiers Licence to Cut] and limits my decision to whether or not to add conditions to the OLTC.

[69] He went on to determine that there was a need for conditions. In issuing the licence to cut, he required that First Coal adhere to their Caribou and Mitigation Monitoring Program during operations and that, to the extent practicable, they limit their harvesting of timber to that required to conduct operations safely.

[70] In the result, I am unable to conclude that the District Manager improperly fettered his discretion.

Remedy

[71] I have found that although the Crown undertook consultation, the consultation was not sufficiently meaningful, and the accommodation put in place was not reasonable.

[72] West Moberly seeks a declaration that the two permit amendments and the licence to cut are invalid and should be set aside because the Crown failed to consult West Moberly adequately and meaningfully, and failed to accommodate reasonably West Moberly's articulated concerns. Alternatively, West Moberly seeks an order staying the permits and licence to cut until adequate consultation and accommodation has occurred.

[73] As set out above, the Crown says that it has not breached its duty to West Moberly, that it has consulted adequately and accommodated West Moberly's concerns reasonably, and has balanced the rights of West Moberly with the interests of other First Nations and the public at large, including First Coal.

[74] First Coal submits that the consultation was extensive and reasonable in the circumstances. It further submits that even if the Crown did meet a duty to accommodate, any remedy should not prejudice First Coal or impair its ability to continue with the project.

[75] I am satisfied that the Crown recognized that it had a duty to consult with and accommodate reasonably, the concerns of West Moberly. I am not satisfied however, that in the circumstances the Crown consulted meaningfully, nor that the Crown reasonably accommodated West Moberly's concerns about their traditional seasonal round of hunting caribou for food, for cultural reasons, and for the manufacture of practical items.

[76] I observe that the fashioning of an appropriate remedy in these circumstances is most difficult. It is not appropriate to ignore the fact that the Bulk Sample Program subject to the first decision has in effect been completed. The Advanced Exploration Program, subject of the second decision, is not to begin until sometime this spring. With respect to the licence to cut, I am informed that although some land has been cleared, not all of the clearing permitted by that licence has been completed.

[77] I also observe that while the Caribou Mitigation and Monitoring Plan put in place by First Coal is a step in the right direction, it is not an active plan for the preservation and augmentation of the Burnt Pine herd.

[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.

[80] This accommodation should be the expeditious implementation of a reasonable, active, program for the protection and augmentation of the Burnt Pine herd. Given the research and information available, it would appear that such a program could be in place within a period of months.

[81] In attempting to balance the various rights, I am aware of the potential economic impact upon First Coal, its employees and contractors, of this decision. However, I also note that the material discloses that the Ministry of Energy, Mines and Petroleum Resources has argued that the future economic impacts of a potential coal mine were not relevant to the permit amendment decisions. Further, First Coal was asked by the petitioner to cease voluntarily its operations until this matter was determined. It declined to interrupt its operations. I note also that when it declined to suspend operations, First Coal took the position that the advanced exploration portion of their work would not commence before the second quarter of 2010.

[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. The Crown, in consultation with West Moberly, should proceed expeditiously to put in place within that period a reasonable, active plan for the protection and augmentation of the Burnt Pine herd, a plan that takes into account the views of West Moberly, including the reports of the Crown's wildlife ecologists and biologists with the Ministry of Environment referred to by West Moberly.

Costs

[84] Given this result, I am inclined to award costs to the petitioners against the Crown respondent, and make no order of costs with respect to First Coal. The parties will have liberty to apply with respect to costs.

"The Honourable Mr. Justice Williamson"