

The Full Implications of Demonstrable Integration: A Roundtable Discussion on West Moberley

By Nigel Bankes, Jonnette Watson Hamilton and Jennifer Koshan

Cases Considered:

[*West Moberly First Nations v. British Columbia*](#), 2011 BCCA 247

Summer at the law school provides faculty members with the opportunity to get on with some research and writing and, in particular, the larger projects that there isn't the opportunity to tackle during the teaching terms. Law school is also a quieter place at this time with fewer LLB/JD students around. But there is always a good number of summer students — some employed by Student Legal Assistance (SLA) for clinical duties and others employed by faculty members, the Alberta Law Reform Institute, the Alberta Civil Liberties Research Centre and Canadian Institute of Resources Law on various research projects. One of the other things that we try and do over the summer to enrich the research environment for summer students, graduate students and faculty members alike is to hold a number of roundtable discussions on recent important judicial decisions. Last year, for example, we had a discussion of Supreme Court of Canada freedom of expression decisions (*R. v. National Post*, 2010 SCC 16; *Toronto Star v. Canada*, 2010 SCC 21; *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, 2010 SCC 23) and a discussion of the [*Advisory Opinion of the International Court of Justice on Kosovo*](#). Our first roundtable discussion this year focused on the British Columbia Court of Appeal's decision in *West Moberly First Nations v. British Columbia*, [2011 BCCA 247](#), a recent Treaty 8 consultation case which also deals with a SARA (*Species at Risk Act*, SC 2002, c 29) listed species (woodland caribou). The Attorney General of Alberta appeared as an intervenor on the appeal, undoubtedly because much of northern Alberta is covered by Treaty 8.

Jennifer Koshan hosted the event in her role as Associate Dean (Research) and Nigel Bankes and Jonnette Watson Hamilton led the discussion attended by faculty members, summer students, graduate students and a few visitors from the downtown bar.

Nigel led off by providing a framework: (1) What's important about the case?; (2) A summary of the decision, including (a) result, (b) key differences between the majority judgment of Chief Justice Finch (and concurring reasons of Justice Hinkson) and the dissenting judgment of Justice Garson, and (c) key similarities in the judgments; (3) treaty interpretation issues; (4) the scope of the duty to consult; and (5) the relevance of international law. Nigel's comments focused on Chief Justice Finch's judgment, Jonnette's on Justice Garson's judgment. This blog is organized around these headings. It concludes with some of the questions and comments made by those in attendance.

(1) What's important about the case?

There are three reasons for thinking that this decision is important. First, the case involves the hunting/lands taken up clause of a numbered treaty and is thus important across western Canada and through to Northern Ontario. It is the most important numbered treaty decision since the Supreme Court of Canada's decision in *Mikisew Cree First Nation v. Canada (Minister of Heritage)*, [2005 SCC 69](#).

Second, the case involves a significant resource use conflict, between coal mining and woodland caribou. The conflict in this case is much sharper and more obvious than in earlier decisions such as *Mikisew Cree* or *Beckman (Beckman v Little Salmon/Carmacks First Nation)*, [2010 SCC 53](#) (on the latter see Nigel Bankes, [Little Salmon and the juridical nature of the duty to consult and accommodate](#)). While the case involves coal the reasoning can be readily applied to fact patterns involving Alberta's oil sands, whether mining or *in situ*.

Third, the case provides an important discussion of treaty interpretation in the context of Treaty 8 and the scope of the duty to consult.

(2) What does the case decide?

The case involved an application for judicial review of three decisions: (1) a decision to issue an amended permit allowing First Coal to obtain a 50,000 tonne bulk sample of coal (the bulk sample permit), (2) a decision to issue an amended permit allowing First Coal to engage in a drilling and trenching program (the advanced exploration amending permit), and (3) a decision to allow First Coal to clear 41 hectares of woodland to facilitate the exploration. The sampling program as originally authorized also allowed the use of an access road, Spine Road, which cut across high ground that provided important winter habitat for the threatened woodland caribou:

[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.

The petitioner was the West Moberly First Nation, a Treaty 8 First Nation and part of the Mountain Dunne-Za. The bulk sampling site was about 50 km from the West Moberly Lake 168A Reserve.

[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. ...

[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.

One caribou herd harvested by the West Moberly people was the Burnt Pine herd, reduced by the time of the litigation to 11 animals. The First Nation had imposed a ban on harvesting the herd in the 1970s.

The chambers judge issued an order suspending the effect all three decisions and as part of his order prescribed that:

3.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
(*West Moberly First Nations v. British Columbia (Chief Inspector of Mines)*, 2010 BCSC 359, Victoria Docket No. 09-4823)

On appeal the majority of the B.C. Court of Appeal (Chief Justice Finch and Justice Hinkson) affirmed/varied the trial judgment, confirming the continued suspension of the permits but striking clause 3 of the order. Finch C.J. struck the clause on the grounds that it was premature pending the outcome of continuing consultation. Hinkson J. (at paras. 169 – 185) struck the clause on the grounds that the chambers judge was effectively prescribing a recovery program that was a response to previous resource activities in the area (including the Bennett Dam and Williston Reservoir) and thus went far beyond any duty to accommodate in relation to this resource activity: *Rio Tinto Alcan Inc v. Carrier Sekani Tribal Council*, [2010 SCC 43](#) (commented on in Nigel Bankes, [The Supreme Court of Canada clarifies the role of administrative tribunals in discharging the duty to consult](#)). Justice Garson, dissenting, would have allowed the appeal and dismissed the petition.

What were the principal differences between the majority and the dissent? The principal differences were two: first, Chief Justice Finch and Justice Garson differed profoundly on the interpretation of Treaty 8, and second, they differed in equally important ways on the implications of triggering the duty to consult in this case. But there was also some common ground. In particular both the majority and the dissent agreed that *Rio Tinto* was distinguishable from the facts of this case. *Rio Tinto* stands for the proposition that historical wrongs against a First Nation cannot generate a duty to consult; the duty to consult can only be triggered if the current decision will have an impact on the claimed right. But here there was an impact on a claimed right and in such a case it was permissible to take into account the historical context to develop “a proper understanding of the seriousness of the potential impacts on the petitioners’ treaty right to hunt” (at para. 117 per Finch C.J., and see also para. 181 per Hinkson J. and para. 237 per Garson J.).

(3) The interpretation of the Treaty 8 right to hunt

Reading the Treaty text along with the Treaty Commissioners’ report (at para. 54) and other elements of the record that described the way of life of the Mountain Dunne Za, Chief Justice Finch substantially accepted the petitioner’s argument that the Treaty protected more than just a right to hunt for food (although it should be noted that in the Treaty 8 area of BC, *R. v. Badger*, [1996] 1 SCR 771 and the Natural Resources Transfer Agreements (NRTAs) cannot be used to limit what is potentially a commercial right to hunt) and protected a claim that can be variously

framed as a right to a livelihood derived from the land, a right to a way of life, a right to culture or a right to pursue a seasonal round (i.e. harvesting different resources in different areas over the different seasons of the year and for spiritual and cultural reasons as well as physical sustenance reasons.) If this was a generous and historically grounded interpretation of the right to hunt, Chief Justice Finch took a similar historically rooted approach to the Crown's liberty to take up lands — although in this case the result is a narrow construction of that liberty. Thus Chief Justice Finch states that the liberty to take up lands must be grounded in:

.... 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. (at para. 135)

Furthermore there could be no assumption that the liberty to take up lands would always trump the right to hunt:

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” [First Coal's proposed mining system] (at para. 150).

Overall, Chief Justice Finch seemed inclined to favour the idea that embedded in the Treaty are limits on the Crown's liberty to take up lands, both as to the *purposes* for which lands may be taken (which does not have much support in the case law: for example, *Mikisew Cree* and taking up lands for National Park purposes) or the total amount of lands that may be taken up (which has rather more support; see the quotation from *Mikisew Cree* at para 138 of Finch C.J.'s judgment).

Justice Garson by contrast favoured a much narrower construction of the right to hunt. For her the Treaty right is little more than a right to hunt for food that can be satisfied so long as there are at least some animals to hunt. Borrowing heavily (at para. 127) from Justice Slatter's judgment in *R. v. Lefthand*, 2007 ABCA 206, she held that the right is fungible in the sense that there is no right to harvest any particular species; all species are substitutable. Thus, in her view, there is little or no cultural component to the treaty right to hunt. Justice Garson did not comment on the scope of the Crown's liberty to take up lands but, implicitly, she must have concluded that First Coal's activities fell within the scope of that liberty.

Additional points were made in the discussion that followed. It was pointed out, for example, that the Crown's position in these cases differs depending upon whether the right at stake is a treaty right or an Aboriginal right. In treaty rights cases the Crown insists that the right is a right at large and not a right to harvest a particular species; in Aboriginal rights cases the Crown and the Court insist that the right must be framed specifically: *R. v. Van der Peet*, [1996] 2 S.C.R. 507; *R. v. Pamajewon*, [1996] 2 S.C.R. 821.

(4) The scope of the duty to consult

Both the majority and the dissent accepted the Crown's position in this case which was to the effect that the duty fell towards the more demanding end of the spectrum. This was a logical position for Chief Justice Finch – less obviously so for Justice Garson since it was not at all clear that the authorization of First Coal's activity really could be said to interfere with a generic right to hunt for food. But what did that mean in this case?

Chief Justice Finch framed the question this way:

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. (at para. 141)

This passage is beguiling. It suggests some idea of balancing but the core idea which Chief Justice Finch expounds on in the subsequent paragraphs is much more radical because it suggests that at the heart of the duty to consult is a duty to respect two different value systems, the value system of the settler society and also the value system of the First Nation. Consultation will never be adequate if it begins with the premise that, at the end of the day, the preferences of the settler society will always prevail (see para. 150). In this case the positions of the two parties were “completely irreconcilable” (at para 144). The Crown wished to permit coal recovery in this particular location; the First Nation took the view that the Crown's objectives could be achieved at another location. In such a case consultation does not “mandate success for the First Nations interest” (at para. 148) but neither can the result be automatic trumping:

[The Crown in this case] 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”. (at para. 149)

How then to proceed? The Crown must provide a reasoned basis for its conclusions and, specifically, the reasons for rejecting the position put forward by the First Nation:

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 [the Ministry of Energy, Mines and Petroleum Resources] 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. (at para. 148, emphasis added)

This demanding approach is not entirely without precedent. In particular, it builds upon Chief Justice Finch's own comments in *Halfway River First Nation v. British Columbia (Ministry of Forests)*, [1999 BCCA 470](#) (cited with approval in *Mikisew Cree* and also referred to here in para. 145) where he articulated the idea of demonstrable integration.

Justice Garson agreed that the positions of the two parties were incompatible (at para. 280). Like Chief Justice Finch, she talked about the “balancing of competing interests” (at paras. 246, 249). However, unlike the Chief Justice, she did not outline how incompatible interests should be balanced in the consultation process. Instead she construed the treaty right to hunt as a very general right to hunt (at paras. 218-222) and interpreted the scope of the duty to consult with a very narrow focus on the adverse effects directly attributable to the permits at issue (at para. 239). That combination allowed her to downplay the impact on the Burnt Pine caribou herd — on the one hand, there were lots of other animals to hunt in the area and, on the other hand, past wrongs, cumulative effects and potential future impacts were irrelevant. In the end Justice Garson’s test with its emphasis on balancing and the idea taken from *Beckman* that “somebody has to decide” is little more than a public interest test in which the public interest is represented by settler interests and values.

(5) The relevance of international law?

The judgment does not mention international law and likely counsel did not discuss it in their arguments but there were several ways in which counsel might have used international law to strengthen their arguments. First, the right to culture protected by Article 27 of the *International Covenant on Civil and Political Rights* (to which Canada is a party) might have been used to assist in the treaty interpretation argument. It would have bolstered the view that Treaty 8 protects more than a disaggregated right to hunt for food and instead protects a right to a livelihood and a culture based upon a seasonal round of access to specific resources in particular locations. Second, international law and particularly international human rights law supports an evolutive interpretation of treaties while Article 31(3)(c) of the *Vienna Convention on the Law of Treaties* suggests that in interpreting a treaty the interpreter should take account of other obligations (treaty and customary) binding on the parties to the treaty. These points might have been used to support the claim that in providing reasons responding to the First Nations as part of a dialogic consultation process prescribed by Chief Justice Finch, the decision maker should have been required to take account of the widespread acknowledgement of the duty to protect endangered species. Not only is this acknowledged in domestic law (*SARA*) but it is also acknowledged in international law (*Convention on Biological Diversity*) and even may be said to be part of general customary law.

(6) Comments and Questions

Clause 3 of the chambers judge’s order — requiring British Columbia, in consultation with the First Nation, to “proceed expeditiously to put in place a reasonable, active plan for the protection and augmentation of the Burnt Pine caribou herd” — was a notable victory for the Burnt Pine caribou herd and all those interested in their survival. All three Court of Appeal decisions represent a set back for the caribou. Both Justices Hinkson and Garson would have struck the clause on the grounds that the chambers judge was effectively prescribing a recovery program that was a response to previous resource activities in the area (including the Bennett Dam and Williston Reservoir) and thus went far beyond any duty to accommodate in relation to this resource activity. It therefore seems highly unlikely that the result of the continuing consultations ordered by the majority will result in a recovery plan for the herd. One question raised in the discussion was the extent to which consultations had occurred over the original granting of the mining permit, which was unclear from the BCCA decision.

The absence of any reference to evidence presented by the First Nation on the interpretation of the Treaty or the right to hunt was noted. The only evidence relied upon for Chief Justice Finch’s

historically grounded interpretation of the right to hunt was the text of the Treaty itself and the September 22, 1899 report of the Treaty Commissioners submitted to the Superintendent General of Indian Affairs (see para. 128). Justice Garson relied primarily on the text of Treaty 8 in her reasons (see e.g. para. 218), although participants wondered about the relevance and intent of her reference to other First Nations that had decided to take advantage of the economic opportunities associated with the project (see para. 264).

Chief Justice Finch’s “frozen rights” approach to the Crown’s liberty to take up lands for mining (at paras. 135 and 150) was also questioned. This type of approach has been much criticized when used to interpret treaty or Aboriginal rights. Is it helpful in construing the Crown’s liberty to take up? Perhaps the Chief Justice merely meant to invoke, for example, the devastating fragmenting effects that road construction has on wildlife when resources are mined using linear access routes, large vehicles, equipment and structures rather than pack animals and hand tools.

The government’s duty to give reasons — to provide “a satisfactory, reasoned explanation as to why [the First Nation’s] position was not accepted” (para 148) — was noted for being an onerous requirement on the officials making these types of decisions. The need to give substantive versus procedural reasons is a live issue. It was also noted that this fits with a trend on the part of the courts to require more and better reasons from trial judges and administrative decision makers (see for example [Cojocarú \(Guardian Ad Litem\) v. British Columbia Women’s Hospital and Health Center](#), 2011 BCCA 192). On the other hand, Chief Justice Finch was not particularly clear about the applicable standard of review in his reasons (see the passing references in paras 141 (“reasonable”) and 151 (referring to both error of law and reasonableness) of his judgment).

Overall, participants agreed that this was an important case, particularly in light of the Court’s interpretation of *Rio Tinto*. It is unclear at this point whether an appeal has been filed but ABlawg will monitor developments in the case. The question of who would have an interest in appealing was raised in the discussion. The government has avoided the order to put in place a reasonable, active plan for the protection and augmentation of the Burnt Pine caribou herd; would they want to risk this win? The First Nation has another opportunity for consultations that should be much more meaningful for them and more attentive to their position. Perhaps only the Burnt Pine caribou herd has a strong motivation to appeal.