

## **Supreme Court of Canada Denies Leave to Appeal in West Moberly Case**

Feb 27, 2012 By [Shawn Denstedt Q.C.](#), [Katherine M. Murphy](#)

On February 23, 2012, the Supreme Court of Canada denied leave to appeal the British Columbia Court of Appeal's decision in *West Moberly First Nations v. British Columbia (Chief Inspector of Mines)*.<sup>1</sup> *West Moberly* holds that historical context, including the cumulative impacts of past activities, is relevant when determining the scope of consultation required in a given case. It also suggests that potential impacts of future events, such as a full scale mining operation, may be relevant to the scope of consultation required, even if the Crown action sought is limited to the authorization of exploration activities. Given that the Supreme Court has declined leave to appeal, these issues are likely to remain uncertain for the foreseeable future.

### **The British Columbia Court of Appeal's Decision**

The Court of Appeal upheld an Order of a chambers judge declaring the Crown to be in breach of its duties to consult and accommodate the West Moberly First Nations concerning permits granted to First Coal Corporation in connection with an advanced exploration program. The West Moberly First Nations argued that proper consultation was not carried out with respect to their Treaty 8 right to hunt caribou, and without adequate provision for the protection and restoration of the caribou herd at issue. The Court of Appeal's decision primarily focused on whether the chambers judge erred in:

- interpreting the Treaty 8 right to hunt as a species-specific right; and
- considering the cumulative impacts of past events which led to the depletion of the caribou herd and future events, namely the impact of a full mining operation, when determining the scope of the duty to consult.

Regarding the first issue, the majority of the Court held that, under certain circumstances, Treaty 8 protects the right to hunt a specific herd of animals and not merely a general right to hunt for food. For more detail on this aspect of the Court's decision and its potential impacts for resource developers, please refer to our previous [Osler Update](#), dated July 19, 2011, on this issue.

Regarding the second issue, the British Columbia government and First Coal Corporation argued that the subject matter of consultation was limited to the potential impact of the challenged permits and did not extend to potential impacts of past or future events. The Supreme Court of Canada's

decision in *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*<sup>2</sup> was relied on in support of this position.

Three separate judgments were rendered. Mr. Justice Finch held that *Rio Tinto* was distinguishable on the basis that the Supreme Court of Canada held that the activity at issue in that case would have no adverse impacts. Where the decision under consideration *will have* an adverse impact on a First Nations' right, the cumulative impacts of prior actions are not irrelevant. Further, to the extent that the Crown failed to consider the impact of a full mining operation, it failed to provide meaningful consultation.

Mr. Justice Hinkson agreed that a proper understanding of the seriousness of the potential impacts on the West Moberly First Nations' treaty rights, and hence the scope of consultation required, must take into account the historical context. However, he held that the duty to *accommodate* in this case does not require the Crown to rehabilitate the caribou herd to accommodate for its reduction as a result of past activities; rather, the focus is on the protection of what remains of the herd.

Madam Justice Garson (dissenting in the result) concurred on the issue of historical context, but disagreed that the potential impacts of a possible full-scale mining operation were relevant, as they would be the subject of a full environmental review in the future.

## **Implications for Resource Developers**

One clear principle emerges from *West Moberly*, which is that historical context is likely to inform the assessment of the seriousness of potential impacts on Aboriginal and treaty rights, and hence the scope of consultation required. Beyond this, further judicial direction will be required to confirm whether potential future activities are relevant to the duty to consult, and what constitutes appropriate accommodation in circumstances such as those in *West Moberly*. As the Supreme Court of Canada has declined leave to appeal, certainty on these issues is unlikely to be obtained in the near future. It is therefore important for resource developers to take these issues into consideration when engaging in consultation for a proposed project, regardless of whether the project is preliminary or advanced in nature.

If you have any questions on the implications of the subject matter of this Osler Update, or you wish to discuss further, please contact Shawn Denstedt or Katherine Murphy.

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<sup>1</sup> 2011 BCCA 247.

<sup>2</sup> 2010 SCC 43.