

**Aboriginal Rights and Cumulative Effects:**

**Are Woodland Caribou the new Canaries in the Not-So-Proverbial Coal Mine?**

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## 1.0 INTRODUCTION<sup>1</sup>

Caribou appear to have become the new “canary in the coal mine” species with respect not only to the cumulative effects of environmental degradation but also to the erosion of Aboriginal and Treaty rights.<sup>2</sup>

Woodland caribou thrive in climates such as northern Canada. Their hooves allow them to walk on snow and ice unlike deer and moose. Hollow hairs not only provide insulation but allow the caribou to float when swimming. They survive in winter by eating lichens.<sup>3</sup>

However, Canada listed the boreal woodland caribou as a “threatened species” in 2002.<sup>4</sup>

According to David Suzuki and Faisal Moola,

Biologists estimate that global caribou populations are less than half of what they were 50 years ago. Canada is no exception. A 2009 federal study by a blue-ribbon panel of caribou biologists found that 29 of the 57 remaining herds of boreal caribou in Canada are not self-sustaining, and in some places, like northeastern British Columbia, are on the verge of collapse. The scientific evidence points to two leading factors: expanding industry in the caribou’s boreal forest home—including forestry, mining, and oil and gas development—and climate change, which is putting caribou populations under enormous additional strain. ....

The decline of the boreal caribou is both an ecological and social problem. Not only do caribou play a primary role in the ecology of Canada’s boreal forest, they are also important to Aboriginal and Métis people who live in the North. Caribou meat is hearty and rich with calories, and their bones and hides are commonly used for tools and clothing. Many Aboriginal groups also have longstanding spiritual connections with caribou, so the continued persistence of caribou is critical to the ongoing health and well-being of indigenous communities in the North.<sup>5</sup>

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<sup>1</sup> I thank Tim Thielmann, an associate at Devlin Gailus, for reviewing this paper and offering as always his thoughtful contributions.

<sup>2</sup> Both the Globe and Mail and Maclean’s magazine have reported on these issues recently: “Labrador’s quandary of the caribou”, The Globe and Mail, Friday, December 24, 2010, p. A14; “On a deadly trail”, Maclean’s, November 29, 2010, p. 22 (“Maclean’s article”)

<sup>3</sup> Jeff Wells, “Caribou Survival Depends on Ancient Cultural Knowledge”, published by National Geographic on November 29, 2010, accessed at <http://blogs.nationalgeographic.com/blogs/news/chiefeditor/2010/11/caribou-survival-depends-on-ancient-cultural-knowledge.html> on January 12, 2011 (“Wells article”)

<sup>4</sup> Wells article

<sup>5</sup> David Suzuki and Faisal Moola, “Canada’s caribou crisis call for collaboration”, published at “Straight.Com” on December 7, 2010, accessed at <http://www.straight.com/article-363333/vancouver/canadas-caribou-crisis-calls-collaboration> on January 12, 2011 (“Suzuki and Moola article”)

Caribou are inextricably linked with many First Nations. Not only are the animals a source of meat and sustenance for Aboriginal peoples, caribou are used for a variety of traditional purposes including clothing, tool-making and medicine. For several First Nations, caribou have cultural significance in oral histories, indigenous laws and spirituality.<sup>6</sup>

In October 2010, there was a North American Caribou Workshop held in Winnipeg, at which over 400 people discussed traditional Aboriginal knowledge and perspectives about caribou alongside western-science based research. First Nation representatives made up over half of the participants.<sup>7</sup> The discussions focussed on ensuring the long-term persistence of caribou in North America.<sup>8</sup> As Suzuki and Moola noted:

Scientists tell us that protecting large, interconnected expanses of boreal habitat is crucial to preventing further losses and to eventually recovering caribou populations. But we can only develop a plan to solve the caribou crisis with full participation of and collaboration with Aboriginal people and their governments.<sup>9</sup>

Perhaps not surprisingly, the record does not show much collaboration between Aboriginal peoples and governments as each try to come to terms with the decline of caribou in their regions and territories. How First Nations and governments have responded to the decline of the caribou varies considerably. This paper examines litigation that has resulted from such responses in British Columbia, Alberta, and the NWT.

## **2.0 BRITISH COLUMBIA**

### **2.1 Northern Woodland Caribou**

In the north-eastern part of British Columbia, the woodland caribou are classified under the federal *Species At Risk Act*<sup>10</sup>. In 2002, this population was listed under *SARA* as “threatened”,

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<sup>6</sup> Wells article

<sup>7</sup> Maclean’s article

<sup>8</sup> Wells article; see also the conference’s website at <http://www.nacw2010.ca/> accessed on January 12, 2011.

<sup>9</sup> Suzuki and Moola article; *see also* Well article: “Traditional western science might be helpful in determining which herds might be most susceptible or resilient, but may fail to incorporate the needs of local communities. Many of these communities have historical knowledge of the herds that extends far beyond recent studies, having been passed down verbally for millennia. The relationships of indigenous people with the land and environment are ancient, their observations and perspectives are crucial, and it is their input upon which this most adaptable of creatures, and the boreal itself, depends.”

<sup>10</sup> *Species at Risk Act* S.C. 2002, c. 29 (“SARA”), Schedule 1

which means they are likely to face imminent extirpation or extinction if nothing is done to reverse the factors leading to their decline.<sup>11</sup>

Under the provincial system, the woodland caribou in north-eastern British Columbia are identified as northern caribou ecotype which is blue-listed (i.e. “special concern”). However the northern caribou ecotype within the South Peace region (i.e. south of the Peace River) has been recommended for red-listing (“threatened”) by the BC Conservation Data Centre.<sup>12</sup>

In recognition of the threatened nature of the caribou, the provincial environment and forestry ministries adopted policy to preserve core winter habitat areas from resource development. Ministerial orders are in place to protect caribou habitat from forestry activities in the range of the woodland caribou in this region.<sup>13</sup> Core winter habitats are designated as ungulate winter ranges (“UWR”) and wildlife habitat areas (“WHA”). These areas are designed to mitigate forest development impacts on critical caribou habitat through “general wildlife measures”. General wildlife measures include prohibitions against road building, removal of forest cover and trail development. These ministerial orders specifically exempt mining activities, including exploration, from the legal restrictions imposed by the UWR and WHA designations. Nevertheless, general wildlife measures under UWRs and WHAs are often communicated as non-binding best management practices for mining and other non-forestry industrial activities.

## **2.2 Coal Exploration, Burnt-Pine Caribou and the West Moberly First Nations**

In 2005, a mining exploration company, First Coal Corporation, received permission to explore for coal deposits in an area in the north-east of British Columbia. At the advanced stage of exploration, First Coal applied to the provincial Ministry of Energy, Mines and Petroleum Resources (“MEMPR”) for permit amendments to extract a 100,000 tonne bulk sample and to drill an additional 173 bore holes from the anticipated mine site.

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<sup>11</sup> SARA, section 2

<sup>12</sup> BC Conservation Data Centre, *BC Species and Ecosystems Explorer and Species Summary: Rangifer tarandus*, BC Ministry of Environment, Victoria BC, available at <http://a100.gov.bc.ca/pub/eswp>

<sup>13</sup> See, for example, Ministerial Orders 9-055 and U-9-022 (SPC-008)

These advanced exploration activities, indeed the anticipated mine site as a whole, are located on core winter habitat for a small herd of woodland caribou known as the Burnt Pine herd. This herd has been reduced to a population of approximately 11 animals.<sup>14</sup>

The province required consultation about First Coal's permit amendments with the local First Nations. One of them is West Moberly First Nations, an adherent to Treaty No. 8. This consultation gave rise to the case of *West Moberly First Nations v. British Columbia*, the appeal of which was argued earlier this month in the BC Court of Appeal. The case is the first of its kind in British Columbia, directly considering the linkage between Treaty rights and caribou, in the context of proposed mining activities and historic cumulative effects.

During the consultation process respecting First Coal's for advanced mining exploration, West Moberly asserted that its members have existing harvesting rights to hunt, fish and trap pursuant to Treaty No. 8, as recognized and affirmed under section 35(1) of the *Constitution Act, 1982*.<sup>15</sup>

West Moberly advised the province and First Coal that these harvesting practice and mode of life are rooted in a traditional seasonal round practiced by their Mountain Dunne-za ancestors. The Mountain Dunne-za hunters traveled to particular preferred areas within the Treaty territory during certain times of the year based on their knowledge of animal behaviour and distribution. Caribou and other preferred ungulate species were abundant in the traditional territory of the Mountain Dunne-za. Caribou are a valued source of food, providing for a varied diet. The meat and marrow are cherished for their nutritional value and for the unique and sweet taste. Parts of caribou are used as cures for cancer. Caribou are also utilized to make tools, clothing and many other important items. Caribou have deep cultural and spiritual significance to the Mountain Dunne-za and for the West Moberly members today.<sup>16</sup>

West Moberly linked the decline of 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

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<sup>14</sup> *West Moberly First Nations v. British Columbia (Chief Inspector of Mines)*, 2010 BCSC 359 ("West Moberly") at para. 18. In the interest of full disclosure, Tim Thielmann and I are counsel of record for West Moberly in this litigation.

<sup>15</sup> *West Moberly*, paras. 11-16

<sup>16</sup> *West Moberly*, para. 17

Williston Reservoir.<sup>17</sup> Shortly after the construction of the WAC Bennett Dam, West Moberly's elders instituted a moratorium on hunting caribou until population levels were restored. However, caribou have continued to decline. West Moberly has not harvested caribou in its Treaty territory since the 1970's.

The province did not accept that West Moberly has a Treaty right to harvest caribou according to its traditional seasonal round but did recognise that West Moberly's concerns about the Burnt Pine caribou herd required deeper consultation than the province had initially believed was required.<sup>18</sup>

MEMPR also referred out First Coal's application to other line ministries. Both Environment ("MOE") and Forestry and Range ("MOFR") provided comments to the effect that the proposed exploration activities would destroy core winter habitat for the Burnt Pine caribou herd. Such habitat destruction would be inconsistent with existing provincial efforts to preserve caribou winter habitat and protect caribou herds generally.<sup>19</sup>

As a result, First Coal retained a caribou biologist who developed a caribou monitoring and mitigation plan.<sup>20</sup> While the MOE and MOFR biologists agreed that the plan was better than nothing, they strongly noted that the plan would not protect critical caribou habitat from destruction from the proposed exploration activities. The Bulk Sample permit would result in a large pit being dug in the area within the UWR and WHA designations, and the Advanced Exploration permit would see a road and access trails built to service 173 bore-hole locations. The plan would not prevent the extirpation of the Burnt Pine caribou herd.<sup>21</sup>

By the spring of 2009, West Moberly responded substantively to First Coal's application. In June 2009, the First Nation produced a 90 page document outlining its views on the nature and scope of its Treaty right with respect to the Burnt Pine caribou herd, and the accommodation measures that it wanted to discuss with the province.<sup>22</sup>

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<sup>17</sup> *West Moberly*, para. 17

<sup>18</sup> *West Moberly*, paras. 37-39, and 42

<sup>19</sup> *West Moberly*, paras. 22 and 23

<sup>20</sup> *West Moberly*, paras. 42 and 46

<sup>21</sup> *West Moberly*, paras. 57 and 58

<sup>22</sup> *West Moberly*, para. 24

MEMPR responded with written comments at the end of July 2009.<sup>23</sup> The parties then met in early August. That was the first time in a four year process that the parties actually met face to face to discuss the nature and scope of West Moberly's Treaty rights as well as the extent of the Crown's obligation to consult. It did not go well. MEMPR representatives maintained that West Moberly only had a right to hunt for food and that the cumulative effects which resulted in the state of crisis for the Burnt Pine herd were irrelevant to consideration of the proposed permit amendments.<sup>24</sup> Although the parties exchange further correspondence and met again, nothing substantial changed. The mining exploration permits were approved one month later in September 2009, and a related forestry permit was approved in mid-October 2009.<sup>25</sup>

### 2.3 First Nation Litigation

At the end of October 2009, West Moberly brought a petition in BC Supreme Court seeking judicial review of the permit approvals, on the basis of a failure of consultation.

The matter was heard in early February 2010 and judgment was rendered on March 19, 2010. As part of his assessment of the consultation process, Mr. Justice Williamson found that the nature and scope of West Moberly's Treaty right included the right to harvest caribou according to the traditional seasonal round.<sup>26</sup> He held that it was unreasonable for the statutory decision-makers to have ignored the oral promises of the Treaty Commissioners in 1899 that the Treaty would not result in "any forced interference" with the Indians' "mode of life."<sup>27</sup> The statutory decision-makers were wrong to conclude that the Treaty right was one only "for food".

The chambers judge then assessed the scope of the Crown's duty to consult and found that, while the caribou monitoring and mitigation plan was a step in the right direction, it did not address West Moberly's concerns about the recovery of the Burnt Pine herd.<sup>28</sup> Given the danger to the caribou herd and its relationship to West Moberly's Treaty rights, he held that the province's failure to put in place an active plan for the protection and rehabilitation of the Burnt Pine herd

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<sup>23</sup> *West Moberly*, para. 26

<sup>24</sup> *West Moberly*, para. 32

<sup>25</sup> *West Moberly*, paras. 1- 4

<sup>26</sup> *West Moberly*, paras. 63 -64

<sup>27</sup> *West Moberly*, paras. 11-15, 28, 32, 63 and 71

<sup>28</sup> *West Moberly*, para. 77

was a failure to accommodate those Treaty rights reasonably.<sup>29</sup> Clearly the cumulative effects of resource development had brought the herd, and the exercise of West Moberly's Treaty right, to a tipping point, such that the consultation process had to address the incremental effects of the proposed mine exploration in the context of those cumulative effects. As it did not, the accommodation measures relied up by British Columbia were unreasonable.<sup>30</sup>

However, the chambers judge did not quash the permit, because he found that would not achieve the purpose of reconciliation required by consultation.<sup>31</sup> Instead he ordered a 90-day suspension of the mining exploration and forestry permits, in order that the province, in further consultation with West Moberly, to put in place a "reasonable, active program for the protection and augmentation of the Burnt Pine" caribou herd.<sup>32</sup> In this way he attempted to reconcile the interests of First Coal, British Columbia and West Moberly.

British Columbia has appealed that order to the BC Court of Appeal.<sup>33</sup> Chief Justice Finch and Justices Garson and Hinkson heard the appeal from January 4 to 6, 2011. In addition to the parties, three interveners also made submissions: the Government of Alberta, the Treaty 8 First Nations of Alberta and the Grand Council of Treaty No. 3. The court reserved judgment which means that the court may not issue its decision about the appeal for several months.

## 2.4 Caribou Regional Recovery Planning Process

Notwithstanding its appeal, British Columbia undertook a process to develop a recovery plan for the Burnt Pine caribou herd following the lower court's decision. The province, in consultation with West Moberly, formed a Knowledge Team to provide scientific knowledge on which the plan would be built. The Knowledge Team included one of the scientists on whose letters Mr. Justice Williamson relied in his decision.<sup>34</sup>

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<sup>29</sup> *West Moberly*, para. 51

<sup>30</sup> *West Moberly*, paras. 55-61

<sup>31</sup> *West Moberly*, para. 78

<sup>32</sup> *West Moberly*, para. 79-80, and 83

<sup>33</sup> *West Moberly First Nations v. British Columbia (Chief Inspector of Mines)*, Court of Appeal File No. CA038048. Electronic copies of the factums filed by the parties and by three interveners may be found at <http://www.devlingailus.com/litigation/Westmoberly/westmoberly.html>

<sup>34</sup> Petition to the BC Supreme Court, filed June 25, 2010 by the West Moberly First Nations, in the matter of *Chief Roland Willson et al v. British Columbia et al*, S.C.B.C. Victoria Reg. No. 10 2786, ("West Moberly's 2d Judicial

The Knowledge Team then reported out to a Planning Team, consisting of senior officials from various line ministries and agencies. The Planning Team was to provide recommendations to the provincial cabinet on the measures necessary to protect and augment the herd. The Planning Team sent four options to the provincial cabinet on June 8, 2010.<sup>35</sup> In turn, the provincial cabinet adopted the first option from the Planning Team's report on June 18, 2010.<sup>36</sup>

West Moberly did not accept that the option adopted by British Columbia was a "reasonable, active program for the protection and augmentation of the Burnt Pine herd" as required by Mr. Justice Williamson.<sup>37</sup> In July 2010, West Moberly filed another petition seeking judicial review of the province's decision to adopt the option it did. West Moberly asserts that the plan adopted by the province is deficient, such that the province did not comply with the court order. West Moberly alleges that the plan will not prevent the extirpation of the Burnt Pine caribou herd, and wrongly relies on the promise of a future regional planning process to protect the six adjacent caribou herds.<sup>38</sup> By agreement of the parties, this second judicial review will not be heard until the appeal of the first judicial review is decided.

First Coal has not completed the Bulk Sample work due to complications with the new technology it is testing to extract coal without sending people underground. In addition, First Coal has not undertaken any of the advanced exploration activities (i.e. the building trails to, and the drilling of, 173 drill holes) whilst the appeal has been underway. Mine exploration activities may start up again later in 2011 after the spring thaw.<sup>39</sup>

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Review") at para. 12. An electronic copy of this petition may also be found at <http://www.devlingailus.com/litigation/Westmoberly/westmoberly.html>.

<sup>35</sup> West Moberly's 2d Judicial Review, paras. 12-15

<sup>36</sup> West Moberly's 2d Judicial Review, para. 16

<sup>37</sup> *West Moberly*, para. 80

<sup>38</sup> West Moberly's 2d Judicial Review, paras. 18-19

<sup>39</sup> These are my understandings based on First Coal's oral submission at the hearing of the appeal.

### 3.0 ALBERTA

#### 3.1 Woodland Caribou

Just as in British Columbia, woodland caribou in Alberta are federally designated as “threatened” under *SARA*. The province of Alberta has also designated woodland caribou as a “threatened” species under the provincial *Wildlife Act*.<sup>40</sup>

Woodland caribou in northern Alberta are found in mature or old growth conifer or forested peat-lands. Ground and tree lichen is the primary source of food in the winter and tends to delineate caribou habitat. Woodland caribou avoid shrub-rich habitats that support higher densities of moose and deer, which tend to support higher wolf populations. Caribou avoid areas with high wolf densities as caribou productivity cannot match mortality rates caused by wolves in such areas.<sup>41</sup>

The historical southern distribution of caribou has moved north over the last thirty to fifty years, due to the disappearance of up to 60% of the caribou’s historical range.<sup>42</sup> Causes of this reduction in range include agricultural development in the south, forest harvesting, energy sector development and road building. These changes reduce lichen cover and enhance moose and deer habitat, which leads to increased predator densities.<sup>43</sup>

While a recovery plan under *SARA* was tabled in 2005 and a recovery strategy was developed by the provincial government in 2004, nothing has been implemented to date.<sup>44</sup> This may be due to the fact that there is disagreement between scientists and policy-makers over whether critical habitat for the woodland caribou in Alberta has yet to be identified.<sup>45</sup>

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<sup>40</sup> Stan Boutin, *Expert Report on Woodland caribou in the Traditional Territory of the Beaver Lake Cree Nation*, July 5, 2010, accessed at <http://www.woodwardandcompany.com/media/pdfs/BLCTT - Stan Boutin Report - 5 July 2010 final.pdf> on January 11th, 2011 (“Boutin report”), p. 1.

<sup>41</sup> Boutin report, pp. 1-3

<sup>42</sup> Boutin report, p. 5

<sup>43</sup> Boutin report, p. 6

<sup>44</sup> Boutin report, p. 18

<sup>45</sup> Boutin report, p. 18

### 3.2 First Nation Litigation

In 2009, three First Nations in northern Alberta filed a petition in Federal Court seeking relief against the federal Minister of Environment.<sup>46</sup> The Athabasca Chipewyan First Nation, the Beaver Lake Cree Nation and the Enoch Cree Nation have asked the Federal Court to order the Minister to recommend that the federal cabinet make an emergency order for the protection of woodland caribou in north eastern Alberta.<sup>47</sup>

The three petitioners rely extensively<sup>48</sup> on an expert report by Dr. Stan Boutin, the NSERC Industrial Research Chair (Integrated Landscape Management), Department of Biological Sciences at the University of Alberta.<sup>49</sup> Dr. Boutin concluded that the population in the two caribou herds within the traditional territories of the petitioners has shrunk tenfold from historic levels to a present population of 175 to 275 animals.<sup>50</sup> Dr. Boutin measured recent population decline in one herd at 71% since 1996, and 74% in the other since 1998. He estimated that at these rates of decline, the two herds combined would have only 50 animals by 2025-30 and then only 10 animals by 2041-46.<sup>51</sup> He characterized this rate of decline as “dramatic”, requiring immediate action to prevent extirpation of the caribou from the area.<sup>52</sup>

Dr. Boutin attributed this decline of caribou population to several sources. Ultimately, human-caused habitat changes affect habitat use, movements and the abundance of predators and alternative prey. As industrial activity increase, so too does predation. Human-caused habitat changes include alteration of vegetation and creation of linear disturbances such as seismic lines and roads. These lead to both increases in moose and deer, and therefore too in wolves, and also increased ability of wolves to penetrate into caribou range.<sup>53</sup> Dr. Boutin also noted that it is combined disturbances of these human-caused habitat changes i.e. cumulative effects that create the potential negative effects on caribou.<sup>54</sup> He attributed the most serious human-caused habitat

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<sup>46</sup> A copy of the petition may be found at [http://www.woodwardandcompany.com/media/pdfs/Caribou\\_JR\\_-\\_Filed\\_Notice\\_of\\_Application\\_-\\_colour.pdf](http://www.woodwardandcompany.com/media/pdfs/Caribou_JR_-_Filed_Notice_of_Application_-_colour.pdf) (“Petition”)

<sup>47</sup> Petition, p. 3

<sup>48</sup> See Petition, paras. 8 to 14

<sup>49</sup> Boutin report, p. 41.

<sup>50</sup> Boutin report, pp.6-7

<sup>51</sup> Boutin report, p.9

<sup>52</sup> Boutin report, p. 7

<sup>53</sup> Boutin report, pp. 9-10

<sup>54</sup> Boutin report, p. 15

change in the traditional territories of the petitioners to the creation of linear features due to energy sector developments.<sup>55</sup>

The three petitioners have pleaded that they are the beneficiaries under Treaty No. 6 and Treaty No. 8, respectively. As a result, they have a constitutionally protected right to hunt woodland caribou for sustenance on all unoccupied Crown lands within their traditional territories.<sup>56</sup> They argue that they have a direct interest in the survival and recovery of the woodland caribou in their territories.<sup>57</sup>

However, this does not appear to be a Treaty-rights case or a “duty to consult” case. The three petitioners rely extensively on the statutory interpretation of *SARA* to say that the Minister was required to prepare a recovery strategy for the caribou, failed to do so, and now must recommend that the federal cabinet make an emergency order for the protection of the caribou.<sup>58</sup> This would result in an immediate halt to landscape disturbances in the petitioners’ traditional territories.<sup>59</sup> Although reference is made in the Petition to Treaty rights and the honour of the Crown,<sup>60</sup> the Petition relies on *SARA* and the report of Dr. Boutin for the grounds of the relief sought.<sup>61</sup>

The federal government has apparently not filed any responding evidence to the report of Dr. Boutin.<sup>62</sup> The petition is not expected to be heard until the late spring or summer of 2011.<sup>63</sup>

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<sup>55</sup> Boutin report, p. 16

<sup>56</sup> Petition, para. 3

<sup>57</sup> Petition, para. 5

<sup>58</sup> Petition, paras. 15 to 21

<sup>59</sup> Petition, para. 24

<sup>60</sup> Petition, para. 22(a) and (b)

<sup>61</sup> Petition, paras. 23 to 31

<sup>62</sup> Personal communication with Sean Nixon, counsel for the petitioner – December 22, 2010.

<sup>63</sup> This case raises other novel or untested issues too. Quite apart from the issues respecting the statutory interpretation of *SARA*, the distinction between purely administrative decisions (contemplated in *Haida Nation v. British Columbia*, 2004 SCC 73) from legislative decisions (per *R. v Sparrow* [1990] 1 S.C.R. 1075) and from executive action (*Cook v. The Minister of Aboriginal Relations and Reconciliation*, 2007 BCSC 1722) is not always neat and tidy. The theory for the different ways Crown action may be constrained by section 35(1) rights in each instance has not been subject to much judicial commentary, if any, by a higher court. I am grateful for Tim Thielmann’s observations on this.

## **4.0 NORTHWEST TERRITORIES**

There are two pieces of First Nation litigation related to caribou recently from the Northwest Territories. The first involved a hunting ban on the Bathurst caribou herd and the second involved protection of the Horn Plateau.

### **4.1 Bathurst Caribou Herd**

#### **4.1.1 NWT Ban on Caribou Hunting**

The Bathurst caribou herd of the central barrens is one of the largest caribou herds in the Northwest Territories. Biologists studying the herd in 2009 discovered that it had suffered a decline from 120,000 animals to 32,000 since 2006. Researchers suspected that the adjacent Beverly herd may be extirpated, notwithstanding that the herd numbered 280,000 animals fifteen years ago.<sup>64</sup> The NWT Minister of Environment cited concerns that the Bathurst herd would suffer the same fate if nothing were done.<sup>65</sup>

As a result, the government of the NWT imposed a ban on the hunting of the Bathurst caribou herd in its winter range, effective January 1, 2010. The no-hunting zone stretched from the north shores of Great Slave Lake to Nunavut. The ban was anticipated to create hardship on Aboriginal hunters who rely on caribou for sustenance.<sup>66</sup>

#### **4.1.2 First Nation Litigation**

The Dene Nation took issue with the fact that they had not been consulted about the ban, and asserted further that NWT had no jurisdiction to limit the Dene's Treaty-based hunting rights. Dene hunters continued to take caribou from the no-hunting zone and the government seized the meat.<sup>67</sup> One of the hunters cited with a hunting violation was the Grand Chief of the Dene Nation, Bill Erasmus, who did not acknowledge the territorial government's authority to ban

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<sup>64</sup> The Star.com article, "Shrinking herds Push NWT to ban caribou hunt" published December 18, 2009, accessed at <http://www.thestar.com/news/canada/article/740504--shrinking-herds-push-n-w-t-to-ban-caribou-hunt> on January 11, 2011 ("The Star.com article, December 18, 2009")

<sup>65</sup> CBC News story, "Dena taking NWT caribou hunting ban to court", January 25, 2010, accessed at <http://www.cbc.ca/canada/north/story/2010/01/25/dene-caribou-challenge.html#ixzz0yykLWbLi> on January 11, 2011 ("CBC News Story, January 25, 2010")

<sup>66</sup> The Star.com article, December 18, 2009

<sup>67</sup> CBC News Story, January 25, 2010

hunting.<sup>68</sup> Dene leaders argued that the ban violated their Treaty right to hunt for subsistence purposes.<sup>69</sup> They also questioned the accuracy of the government's caribou count.<sup>70</sup>

In February 2010, the territorial government sought to refer the matter to the N.W.T. Supreme Court, to rule on whether the government had the legislative authority to regulate the Aboriginal caribou hunt.<sup>71</sup> The court was also asked whether the government's authority to regulate caribou hunting super-cedes the hunting rights of the Dene Nation and other Aboriginal groups.<sup>72</sup> The government relied on its statutory authority to regulate caribou harvesting.<sup>73</sup>

However, before the matter was heard by the court, the territorial government and the Yellowknives Dene came to an agreement. Dene hunters were allowed to take 50 Bathurst caribou in the no-hunting zone over one weekend and, in exchange, government officials took samples from the harvested animals for research purposes respecting the decline of the herd.<sup>74</sup>

## **4.2 Edézhíe (a.k.a. Horn Plateau)**

### **4.2.1 Protected Area Strategy**

In the south-west part of the Northwest Territories, there is an area known as the Horn Plateau or the Edézhíe by the nine Dene communities and two Métis communities represented by the Dehcho First Nations tribal council.<sup>75</sup> The area is a 25,000-square kilometre tract of land<sup>76</sup> west

<sup>68</sup> CBC News Story, "Erasmus cited for violating NWT caribou hunting ban", published February 1, 2010, accessed at <http://www.cbc.ca/canada/north/story/2010/02/01/dene-caribou-erasmus.html#ixzz0yyjs17Zw> on January 11, 2011

<sup>69</sup> CBC News story, "NWT urged to consult Dene over caribou hunting ban", published February 4, 2010, access at <http://www.cbc.ca/canada/north/story/2010/02/04/nwt-caribou-meet.html#ixzz0yyjVyeqb> on January 11, 2011.

<sup>70</sup> CBC News story, "Debate over NWT caribou hunting ban goes public", published February 9, 2010, accessed at <http://www.cbc.ca/canada/north/story/2010/02/09/nwt-caribou-debate.html#ixzz0yyiqdMMO> on January 11, 2011 ("CBC News story, February 9, 2010")

<sup>71</sup> CBC News story, February 9, 2010. Please note the following caveat - I have not had the opportunity at the time of writing to review the territorial government's filed materials before the court, and rely solely on the media articles describing the proceeding for this paper.

<sup>72</sup> CBC News story, "NWT, Dene prepare for caribou court date" published February 23, 2010, accessed at <http://www.cbc.ca/canada/north/story/2010/02/23/nwt-caribou-court.html> on January 11, 2011 ("CBC News story, February 23, 2010")

<sup>73</sup> CBC News story, February 23, 2010

<sup>74</sup> CBC News story, "Deal allows controlled Dene caribou hunt", published March 30, 2010, accessed at <http://www.cbc.ca/canada/north/story/2010/03/30/north-caribou-bathurst-dene-hunt.html#ixzz0yykoWy2c> on January 11, 2011.

<sup>75</sup> Dehcho First Nations Press Release, December 15, 2010, accessed at [http://www.dehcho.org/documents/press/10\\_12\\_15\\_dehcho\\_fn\\_accuse\\_canada\\_of\\_bad\\_faith.pdf](http://www.dehcho.org/documents/press/10_12_15_dehcho_fn_accuse_canada_of_bad_faith.pdf) on January 11, 2011 ("Dehcho Press Release, December 15, 2010")

of Great Slave Lake<sup>77</sup> composed of boreal forests, uplands and wetlands, home to several endangered species including woodland caribou.<sup>78</sup>

In 1998, the Dehcho First Nations, Canada and the Northwest Territories began working on a protected areas strategy for the Edézhíe. Since 2002, the area has been a candidate for designation as a national wildlife park.<sup>79</sup> During that process, the federal government has protected the area from development through a series of interim land withdrawals.<sup>80</sup> That protection was renewed every two years until this fall when, on November 1, 2010, protection for the surface was renewed but not for the subsurface.<sup>81</sup>

The area is reported to have significant potential for diamonds, base metals, uranium and oil and gas deposits.<sup>82</sup>

#### 4.2.2 First Nation Litigation

On November 29, 2010 the Dehcho First Nation filed a judicial review application in Federal Court seeking an order re-instating the protections on the subsurface resource below the Edézhíe while the proposed Edézhíe National Wildlife area awaits final designation.<sup>83</sup>

The Dehcho First Nation assert the Edézhíe is an area of significance for the Dehcho and Tlicho peoples who rely on it for hunting, trapping and harvesting, particularly during times of food scarcity in the Mackenzie Valley.<sup>84</sup> The area also figures prominently in Dené legends.<sup>85</sup>

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<sup>76</sup> CBC News, “N.W.T. First Nations wants Arctic mining ban back”, published December 7, 2010, accessed at <http://www.cbc.ca/canada/north/story/2010/12/07/artic-mining-ban-lawsuit.html> on January 11, 2011 (CBC News story, December 7, 2010”)

<sup>77</sup> Dehcho Press Release, December 15, 2010

<sup>78</sup> Siku News, “Canada Opens Northwest Territories plateau to mineral exploration”, posted December 9, 2010, accessed at <http://www.sikunews.com/News/Canada-Northwest-Territories/Canada-opens-Northwest-Territories-plateau-to-mineral-exploration-8320> on January 11, 2011 (“Siku News article, December 12, 2010”)

<sup>79</sup> CBC News story, December 7, 2010; Dehcho Press Release, December 15, 2010

<sup>80</sup> Dehcho Press Release, December 15, 2010

<sup>81</sup> Siku News article, December 12, 2010; The Globe and Mail article, “Natives blast Ottawa’s ‘betrayal of trust’”, December 15, 2010, accessed at <http://m.theglobeandmail.com/news/politics/ottawa-notebook/natives-blast-ottawas-betrayal-of-trust/article1839656/?service=mobile> on January 11, 2011 (“Globe and Mail article, December 15, 2010”)

<sup>82</sup> Siku News article, December 12, 2010; CBC News story, December 7, 2010

<sup>83</sup> CBC News article, December 7, 2010; Dehcho Press Release, December 15, 2010. Please note the following caveat - I have not had the opportunity at the time of writing to review the filed petition, and rely solely on the media articles describing the petition for this paper.

<sup>84</sup> Dehcho Press Release, December 15, 2010

In the petition, the Dehcho First Nation said the federal government's decision to remove the subsurface mining ban breaches an agreement made through the Protected Areas Strategy. Specifically, the Dehcho First Nation alleges that the Minister of Indian and Northern Affairs promised to renew protection for the area at a meeting with the Dehcho Grand Chief in May 2010.<sup>86</sup> Furthermore, the Dehcho First Nation alleges that the federal government's decision was made without consultation as required by law.<sup>87</sup>

The First Nation believes that the decision leave the subsurface of the Edézhzhíe vulnerable to prospecting, staking and recording of mineral claims by resource developers.<sup>88</sup> This is particularly so given the geological information gathered during the protection process.<sup>89</sup> Allowing the staking of claims could create third party interests that would make the designation of the proposed Edézhzhíe National Wildlife area more difficult to achieve.<sup>90</sup>

To my knowledge, the matter has not yet been heard or decided by the Federal Court.<sup>91</sup>

## 5.0 SUMMARY AND CONCLUSIONS

There does not appear to be a consistent approach taken by First Nations in response to the threatened or endangered status of caribou in their respective territories.

- In British Columbia, a First Nation has used its Treaty right to harvest caribou according to its traditional seasonal round to delay advanced exploration for a coal mine until a meaningful caribou recovery plan could be implemented by the province.

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<sup>85</sup> Dehcho Press Release, December 15, 2010

<sup>86</sup> Siku News article, December 12, 2010

<sup>87</sup> CBC News story, December 7, 2010

<sup>88</sup> CBC News story, December 7, 2010

<sup>89</sup> Siku News article, December 12, 2010

<sup>90</sup> Siku News article, December 12, 2010

<sup>91</sup> The situation in the NWT is somewhat similar to that in Labrador. There, the Red Wine, Joir River, and other caribou herds in Labrador are endangered. In February 2010, the Government of Labrador and Newfoundland reached an agreement with the Labrador Innu which in exchange for impacts from energy development projects, the Labrador Innu were permitted to hunt a certain quota of caribou from specified herds (though not certain endangered ones such as the Red Wine). This agreement angered the Innu of Quebec, who claim Aboriginal rights to harvest caribou in both Quebec and Labrador. Members of the Quebec Innu are reported to have travelled to Labrador and killed a number of caribou to protest the Red Dawn Agreement and to assert their rights to the caribou harvest. The Labrador Innu have also been reported to be hunting caribou herds which are endangered, contrary to the agreement and endangered species legislation. However, to my knowledge, no litigation has resulted from these activities. The CBC covered this story extensively – see, for example CBC News story, “No apologies over Labrador caribou slaughter: Quebec Innu chief”, published April 1, 2010, accessed at <http://www.cbc.ca/canada/newfoundland-labrador/story/2009/04/01/caribou-innu-chief.html#ixzz0yycjrVqH> on January 12, 2011

- In Alberta, three First Nations are attempting to use the *Species At Risk Act* to force the federal government to issue an emergency protection order for the woodland caribou, thereby halting further industrial development until a recovery strategy was in place.
- In the NWT, several First Nations are suing the federal government for lifting a ban on subsurface exploration to an area awaiting designation as a national wildlife park without consulting them.

These are three very different approaches (assertion of Treaty rights, statutory interpretation, and consultation about park status) to addressing the protection and recovery of caribou in the context of litigation.<sup>92</sup> What is clear in all three cases is that caribou are a critical species indicative of the ill-health of the environment in many parts of Canada. Aboriginal peoples appear to be inextricably linked to the recovery of the caribou due to their cultural use and knowledge of these animals. As the caribou signal environmental decline due to the cumulative effects of industrial development, so too do they signal the decline of Aboriginal ways of life. The endangered status of caribou across the country negatively affects the practice of Aboriginal and Treaty rights to hunt these animals pursuant to traditional harvesting practices.

Crown consultation about these impacts is mixed. In some jurisdictions like the NWT,<sup>93</sup> the cumulative effects are obvious and the government responded with a hunting ban. In other jurisdictions, such as British Columbia and Alberta, public officials dispute the relevance of cumulative effects on caribou populations and the Aboriginal peoples who depend on them.

More interesting, perhaps, is the pervasive reluctance by governments to arrest the causes leading to further decline, notwithstanding that they are widely understood by scientists and First Nations. Cases like those in British Columbia and the NWT may signal a growing push to recognize the Crown's duty to conserve, founded in both Treaty rights and statutory interpretation.

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<sup>92</sup> Other non-litigious initiatives include not only major conferences like the one in Winnipeg in October 2010, but also legislative initiatives, such as new habitat regulations under Ontario's 2007 *Endangered Species Act*: Suzuki and Moola article; see also Ontario, Ministry of Natural Resources website: <http://www.mnr.gov.on.ca/en/Business/Species/2ColumnSubPage/268554.html> accessed on January 12, 2011. Habitat for woodland caribou have yet to be included in the regulations but the province has developed a Caribou Conservation plan ( a critique of which must be left for another paper): <http://www.mnr.gov.on.ca/stdprodconsume/groups/lr/@mnr/@species/documents/document/277783.pdf>, also accessed on January 12, 2011.

<sup>93</sup> Labrador and Ontario too.