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ABORIGINAL & TREATY RIGHTS PRACTICE Macaulay Release No. 2, December 2024
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This release features updates to the case law and commentary in Chapters 1 (Parties), 5 (Interlocutory Injunctions and the Duty to Consult), and 9 (Evidence).

Highlights

- **CHAPTER 5—INJUNCTIONS—CUMULATIVE EFFECTS**—*West Moberly First Nations v. British Columbia (Minister of Forests)*, 2024 CarswellBC 2544 (Giaschi J.) concerned the issue of whether the West Moberly First Nations (WMFN) would suffer irreparable harm if an injunction was not issued pending the hearing of their judicial review petition challenging the adequacy of the consultation undertaken by the Province in relation to forestry activities proposed by Canadian Forest Products Ltd. (Canfor) as well as the Province's decision to issue cutting and road permits to Canfor. Canfor applied to MOF for a cutting permit and associated road permit which would permit Canfor to cut timber at four specific locations, including within WMFN's traditional territory. Prior to the issuance of the permit, there had been a process of consultation with MOF. However, WMFN was not satisfied with the adequacy of this process. The MOF wrote to WMFN advising that it was closing consultation and proceeding to a decision on the cutting and road permits, which were thereafter issued. Justice Giaschi found that the evidence did not establish that decision to include old growth amongst the cut blocks was a tipping point in terms of the cumulative effects of development, and did not give rise to irreparable harm to the WMFN's treaty rights.
- **CHAPTER 9—EVIDENCE—EXPERT EVIDENCE—EXPERT'S CROSS EXAMINATION**—The scope of cross examination of an expert arose in *Six Nations of the Grand River Band of Indians v. The Attorney General of Canada et al*, 2024 CarswellOnt 13350. In this case the Six Nations of the Grand River Band of Indians (SNGR) sought an accounting and compensation for breaches of duty and treaty obligations by the defendants Canada and Ontario dating back to 1784, the time of the Haldimand Proclamation. SNGR claimed that the Haldimand Proclamation set aside lands along the Grand River, Ontario for the Haudenosaunee people who wished to settle there as compensation for the homes and property they lost after the American Revolution during which time the Haudenosaunee had been allies of the British Crown. The defendant Canada obtained leave to examine three of its expert witnesses before trial. During the plaintiff's cross examination of Professor Read, Canada and Ontario objected to several questions which the Chambers Judge was later asked to rule upon. The Chambers Judge held that some of the questions were within the scope of Prof. Read's expertise and must be answered; on the other hand, he upheld the objections made to some questions on grounds that it had not been established that Professor Read had the necessary expertise to provide the opinion sought. Chalmers J held that the use of the evidence from Professor Read was subject to any ruling by the trial judge respecting admissibility.