Beaver Lake Cree Nation: Cumulative Effects of Resource Development May Violate Treaty 6 Rights

Introduction

The Beaver Lake Cree Nation's precedent-setting claim against the Governments of Alberta and Canada can proceed to trial due to a recent judgment from the Alberta Court of Appeal.[1]

In May 2008, the Beaver Lake Cree Nation, a First Nations band in Alberta, filed a lawsuit against the Governments of Alberta and Canada. The statement of claim[2] alleged that the cumulative effects from oil, gas, forestry, and mining activities violated the Beaver Lake Cree Nation's Treaty 6 rights to hunt and fish.[3]

In May and June of 2009, the Governments of Alberta and Canada requested that the case management judge[4] strike[5] the portions of the statement of claim that would allow the Beaver Lake Cree Nation to argue that cumulative effects violated their Treaty 6 rights to hunt and fish. The Governments argued that if the Beaver Lake Cree Nation was permitted to argue cumulative effects, the amount of evidence required for a trial would be unmanageable.[6]

A case management judge can strike portions of a statement of claim if the claim is frivolous or doomed to fail at trial.[7] On March 28, 2012, the case management judge ruled that it was not "plain and obvious" that the Beaver Lake Cree Nation's claim would fail at trial; therefore, she declined to strike portions of the statement of claim.[8] The Governments of Alberta and Canada appealed this decision to the Alberta Court of Appeal.

On April 30, 2013, the Alberta Court of Appeal upheld the case management judge's decision, and it ruled that the size of an evidentiary pool is an insufficient reason to force the Beaver Lake Cree Nation to amend its statement of claim.[9] The Alberta Court of Appeal decision permits the Beaver Lake Cree Nation to argue at trial that the cumulative effects from oil, gas, forestry, and mining activities have violated its Treaty 6 rights to hunt and fish.[10]

Cumulative Effects from Energy Sector Activities

Currently, approximately 300 projects are underway in the territory covered by Treaty 6.[11] Approximately 560,000 barrels of oil, nearly 30 percent of the oil sands' daily total,

are produced on the Beaver Lake Cree Nation's traditional territory.[12] The Beaver Lake Cree Nation's traditional territory, an area roughly the size of Switzerland, straddles the Alberta-Saskatchewan border near the hamlet of Lac La Biche.[13]

The Governments of Alberta and Canada are responsible for granting permits for projects related to the oil sands and other activities associated with extracting natural resources.[14] While the permits for the projects were lawfully granted,[15] the Beaver Lake Cree Nation alleges that the combined effects of the projects limit its treaty rights to hunt and fish.[16] Specifically, the Beaver Lake Cree Nation is claiming that the oil sands projects, in addition to other energy sector activities, pollute the air and water, destroy the land, and disrupt the surrounding wildlife, thereby eliminating or greatly reducing its ability to hunt and fish.[17]

Remedy for the Beaver Lake Cree Nation

When the Beaver Lake Cree Nation first launched its lawsuit in May 2008, it wanted to have all 300 projects, and the 19,000 individual authorizations related to them, revoked.[18] The case management judge dismissed this part of the lawsuit, and the Beaver Lake Cree Nation did not appeal the decision.[19] As a result, the Beaver Lake Cree Nation is only seeking damages for the Governments' refusal to acknowledge treaty rights and a declaration that the cumulative effects of development projects have unjustifiably limited its treaty rights.[20]

Overview of Post-Confederation Treaties

Treaties, which are binding agreements between the Government and Aboriginal Peoples, contain mutual promises, obligations, and benefits. The Canadian Government began signing treaties with Aboriginal Peoples shortly after Confederation. Treaties signed between 1871 and 1921 are numbered 1 to 11, and are collectively referred to as the "Numbered Treaties." The Numbered Treaties cover portions of Northern Ontario, Manitoba, Saskatchewan, Alberta, British Columbia, the Northwest Territories, and the Yukon. The Government entered into these treaties in order to acquire the land necessary for natural resource development and settlement. The treaties stipulated that the Aboriginal Peoples would give up the land they lived on in exchange for benefits, such as reserve land, annual payments, and rights to hunt and fish.[21]

Treaty 6 Rights

The Government of Canada, Cree bands, and other First Nations signed Treaty 6 on September 9, 1876.[22] Treaty 6 covered the central area of present day Alberta and Saskatchewan.[23] The land covered by Treaty 6 extended from the Rocky Mountains to the Saskatchewan-Manitoba border and was situated between the Athabasca and South Saskatchewan Rivers.[24] Like the other Numbered Treaties, Treaty 6 contained provisions which required the Aboriginal Peoples to surrender land rights in exchange for government assistance in the form of farm equipment, reserve lands, and annual payments.[25] Additionally, the Treaty stated that "Indians" "shall have [the] right to pursue their

avocations of hunting and fishing."[26]

Section 35 of the *Constitution Act, 1982*

Treaties are solemn promises between the Government and the Aboriginal Peoples. Section 35 of the *Constitution Act, 1982* provides constitutional protection for existing Aboriginal and treaty rights.[27] Prior to 1982, the Crown had the authority to singlehandedly eliminate Aboriginal and treaty rights.[28] While section 35 of the *Constitution Act, 1982* does not make Aboriginal and treaty rights absolute, it does limit the Government's ability to unilaterally extinguish them.[29] In *R v Sparrow*, a Supreme Court of Canada decision dealing with the scope of section 35 of the *Constitution Act, 1982*, the Court ruled that the Government can limit Aboriginal and treaty rights, provided the Government can demonstrate that it was acting in accordance with its fiduciary duty.[30]

The Beaver Lake Cree Nation's lawsuit against the Governments of Alberta and Canada alleged that Government action had prevented it from exercising its treaty rights, thus violating section 35 of the *Constitution Act, 1982*.[31]

What is Next?

The Alberta Court of Appeal judgment of April 30, 2013, is a significant victory for the Beaver Lake Cree Nation because it can argue, for the first time, that cumulative effects violate its treaty rights. If the Beaver Lake Cree Nation is successful at trial, the Government will be forced to change the consultation and permit-granting processes currently in place. The Government will be required to consider the long term and combined effects of the natural resource development projects, as opposed to examining each project individually.[32] Media reports speculated that changes to the consultation process may slow the growth of the oil sands,[33] and the economic repercussions of limiting the development of a major natural resource would be felt in Alberta and across Canada.[34]

Henry Gladue, the Chief of the Beaver Lake Cree Nation, does not view the lawsuit as attempting to stifle development. Speaking on behalf of the Beaver Lake Cree Nation, Chief Henry Gladue said he is not opposed to working with developers who understand and respect the Beaver Lake Cree Nation's values and traditional way of life.[35] Importantly, the Beaver Lake Cree Nation's lawsuit does not name any developers; it is only directed at the Governments of Alberta and Canada.[36] Chief Henry Gladue believes that the upcoming trial will ensure that the Government upholds the commitments it made to the Beaver Lake Cree Nation's ancestors in Treaty 6.[37]

Drew Mildon, the lawyer representing the Beaver Lake Cree Nation, expects the trial to begin in the fall of 2013, but no date has been set.[38]

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[1] *Lameman v Alberta (AG)*, 2013 ABCA 148 < http://www.albertacourts.ab.ca/jdb_new/public/ca/2003-NewTemplate/ca/Civil/2013/2013a

bca0148.pdf>.

[2] A statement of claim is a document submitted to the court which details the facts of a plaintiff's case.

[3] *Lameman*, supra note 1 at para 3.

[4] Case management is a legal process whereby a judge monitors and manages the progress of a case through the legal system.

[5] A defendant can file a motion to strike portions of a statement of claim. A motion to strike may lead to portions of the statement of claim being eliminated. If sections of the statement of claim are struck, they can no longer be used as the basis for a legal action.

[6] *Lameman*, *supra* note 1 at para 24.

[7] See *Lameman v Alberta (AG)*, 2012 ABQB 195 at para 1 < http://www.canlii.org/en/ab/abqb/doc/2012/2012abqb195/2012abqb195.html>.

[8] *Ibid* at para 79.

[9] *Lameman*, *supra* note 1 at para 25.

[10] *Ibid* at para 59.

[11] Sheila Pratt, "Appeal court paves way for Cree nation's oilsands case to go to trial", *The Edmonton Journal* (4 June 2013), online: The Edmonton Journal.

[12] *Ibid*.

[13] *Ibid*.

[14] Carrie Tate & Kelly Cryderman, "Alberta's First Nations band wins right to trial over oil sands' effect on treaty rights", *The Globe and Mail* (4 June 2013), online: The Globe and Mail < http://www.theglobeandmail.com/report-on-business/industry-news/energy-and-resources/alberta-first-nations-band-wins-right-to-trial-over-oil-sands-effect-on-treaty-rights/article12353571/>.

[15] Pratt, *supra* note 11.

[16] *Ibid*.

[17] *Tar sands: Supporting the Beaver Lake Cree*, online: The Co-operative.

[18] Pratt, *supra* note 11 (thousands of authorizations have been granted over the years for a variety of activities related to the large scale projects, such as constructing pipelines, withdrawing water, and building roads).

[19] *Lameman QB*, *supra* note 7 at para 84.

[20] *Ibid* at para 11.

[21] Aboriginal Affairs and Northern Development Canada, *Treaties with Aboriginal people in Canada*, online: AANDC-AADNC.

[22] *Treaty 6*, online: The Encyclopedia of Saskatchewan [Encyclopedia].

[23] John Leonard Taylor, *Treaty research report: Treaty 6 (1876)*, online: AANDC-AADNC.

[24] Encyclopedia, *supra* note 22.

[25] *Ibid*.

[26] Roger Duhamel, *Copy of Treaty no. 6 between Her Majesty the Queen and the Plain and Wood Cree Indians and other tribes of Indians at Fort Carlton, Fort Pitt and Battle River with adhesions*, online: AANDC-AADNC <https://www.aadnc-aandc.gc.ca/eng/1100100028710/1100100028783>.

[27] *Constitution Act, 1982*, s 35, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 <http://laws-lois.justice.gc.ca/eng/Const/page-16.html#h-52>.

[28] Alan C Cairns, *First Nations and the Canadian State: In Search of Coexistence* (Kingston: Institute of Intergovernmental Relations School of Policy Studies, Queen's University, 2002) at 26 ; Treaties between the Crown and Aboriginal Peoples are *sui generis* (unique). The Federal Government could unilaterally extinguish Aboriginal and treaty rights prior to 1982 because section 91(24) of the *Constitution Act, 1867* gave the Federal Government jurisdiction over "Indians and the lands reserved for Indians."

[29] Cairns, *supra* note 28 at 26; *Constitution Act*, supra note 27.

[30] *R v Sparrow*, [1990] 1 SCR 1075 <http://scc.lexum.org/decisia-scc-csc/scc-csc/scc-csc/en/item/609/index.do>; *Constitution Act*, *supra* note 27; a fiduciary duty is a relationship between two parties where one party is obliged to act in the best interests of the other person.

[31] See *Lameman*, *supra* note 1; *Constitution Act*, *supra* note 27.

[32] Tate & Cryderman, *supra* note 14.

[33] *Ibid*.

[34] *Ibid*.

[35] Letter from Henry Gladue to Stat Oil Canada's Board of Directors (14 May 2013), online: Stat Oil Canada.

[36] *Ibid*.

[37] *Ibid*.

[38] Tate & Cryderman, *supra* note 14.