

BEAVER LAKE CREE NATION'S RIGHT TO TAR SANDS TRIAL UPHeld BY ALBERTA COURT OF APPEAL

Tuesday, April 30, 2013
Edmonton, Alberta

Link to judgment: http://www.albertacourts.ab.ca/jdb_new/public/ca/2003-NewTemplate/ca/Civil/2013/2013abca0148.pdf

The Beaver Lake Cree Nation's claim against the Crown for breaching Treaty 6 is proceeding to trial. The historic, precedent-setting judgment issued in March 2012 has been upheld by the Alberta Court of Appeal.

In a judgment issued today, April 30, 2013, the Court dismissed Alberta and Canada's appeal of Justice Browne's decision, stating in its conclusion: "The appeals are therefore dismissed in their entirety. The parties will be well-served by returning to their case management judge for the imposition of a litigation plan to advance this litigation through trial."

The judgment issued some plainly spoken comments on Canada's persistence in delaying the case by claiming there isn't enough evidence to write a statement of defence, saying the band has provided sufficient information and "the demand for particulars should not be permitted to turn into a delaying tactic... Otherwise, litigation will be stonewalled at an early stage through excessive particularization." It has been almost five years since BLCN commenced their case against the expansion of the tar sands into their traditional territories.

The essence of the BLCN's claim is that in failing to manage the overall cumulative environmental effects of development on core Traditional Territory, Alberta and Canada have breached the solemn commitment in Treaty 6 that the BLCN could hunt, fish and trap in perpetuity. On March 28, 2012, Alberta Court of Queen's Bench Justice B.A. Browne rejected Alberta and Canada's efforts to have the case dismissed as "frivolous", an "abuse of court process" and "unmanageable." In a historic first for Canada, the Court instead upheld the right of BLCN to challenge widespread tar sands exploration and extraction based on the cumulative effects these activities may have on the band's constitutionally protected treaty rights.

In appealing the March judgment, one of the central arguments by the Crown was that the BLCN's claim was an abuse of process because it challenged over 19,000 authorizations for development in one single claim. It was submitted that instead, the BLCN should have applied to judicially review each authorization. This argument was dismissed. The Court recognized that the BLCN's claim is based on Treaty rights violation as a result of the *cumulative effects* of development, not as a result of the effect of each individual development. The Court went on to acknowledge that a claim based on *cumulative effects* does not require an investigation into each authorization, and through case management, a discernable shape to the litigation will emerge.

Similarly, the Court preserved the BLCN's request for a court supervised cumulative effects consultation regime in the event the claim is successful. The Court noted that while this remedy

is controversial, the current fluidity of the law on this point means that it too cannot be rejected out of hand.

In refraining from overturning the decision of the Chambers Judge, the Court of Appeal also maintained the BLCN's right to argue at trial that the Crown owes them a fiduciary duty as a result of the Treaty process, and that they have a right to hunt, fish and trap for purposes beyond food.

The traditional territory of BLCN spans an area about the size of Switzerland and produces 560,000 barrels per day, roughly 30% of tar sands' daily total. Exxon's Cold Lake project alone produces more than 140,000 barrels per day. Canada, Alberta and oil companies have plans to expand production on Beaver Lake Cree lands to more than 1.6 million barrels daily.

BLCN's territorial lands are already peppered with approximately 35,000 oil and gas sites, each with a development footprint of 1 hectare (2.5 acres). Traditional hunting and fishing grounds are already criss-crossed by more than 21,700 km of seismic lines, 4,028 km of pipelines and 948 km of roads. With state-sanctioned plans to accelerate the pace of tar sands development, the Beaver Lake Cree have reason to fear that destruction of habitat and wildlife and industrial contamination will mean the end of their ancestral way of life.

The case will now continue through the case management process to advance the litigation through to trial.