

# **Tar Sands on Trial: The Beaver Lake Cree Nation v. the Crown**

## **Contents**

A. Introduction.....	2
B. Canada and Alberta's Roles in the Tar Sands.....	3
C. Constitutional Rights of First Nations in Canada.....	4
D. Treaty 6 Rights.....	5
E. Giving Meaning to Treaty 6 Rights.....	6
F. The Beaver Lake Cree Nation Lawsuit .....	8
G. Conclusion .....	10

Notes for a talk by Jack Woodward  
October 27, 2009  
George Ignatieff Theatre at Trinity College  
Sponsored by RAVEN Society

## A. Introduction

On May 14, 2008, Chief Al Lameman and the Beaver Lake Cree Nation started a lawsuit in the Alberta Court of Queen's Bench claiming that the cumulative impacts of tar sands developments are destroying their treaty rights.<sup>1</sup> The Beaver Lake Cree are a small First Nation of about 900 located 3 hour's drive north-east of Edmonton - on the border of the Alberta Lakeland district. Over the last ten years, they have watched as the forest around their ancestral home has been steadily cut up by seismic lines, criss-crossed by pipelines and fragmented by massive SAGD projects like those of Shell and Encana at Cold Lake.<sup>2</sup>

For the Cree people, this is a case about one thing - protecting the health and integrity of the land, land that includes forests, fens and bogs, lakes, rivers and streams, the ancient homeland where they practice the traditional activities that were promised to them in treaties with the Canadian government. For many people, developments of the sort seen in north-central Alberta are happening in a distant wilderness, far away. But for the Beaver Lake Cree it is happening in their home. They live there. For the rest of us, the Beaver Lake Cree's challenge of the Alberta and Canadian governments' rights to approval oil and gas activity is the only truly effective way to put the brakes on the destruction of the boreal forest, it is the only effective way to slow down this insane industry you've heard described here tonight.

In 1876, Chief Pay-ay-sis and his councillors from the area of Beaver Lake signed Treaty 6. He and the other chiefs purportedly gave up their ownership of approximately 195,000 square kilometres of land – or about a third the size of Alberta. In return for their land, they were promised that they would be able to hunt and fish to make a living from the land as they had always done and they were promised that each band member would be paid \$5.00 per year.<sup>3</sup> The promise to pay \$5.00 per year to each Cree person has been kept; though it is not indexed for inflation. The promise to preserve the right to hunt and fish is not being kept.

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<sup>1</sup> *Chief Al Lameman and the Beaver lake Cree Nation v. Alberta and Canada*, Court of Queen's Bench of Alberta, May 14, 2008, Action No. 0803 06718, Edmonton Registry.

<sup>2</sup> For a sense of the fragmentation that results from SAGD development, see page 2 of the second presentation of this file: <http://www.ercb.ca/docs/products/OSProgressReports/2005/2005ColdLakeImperialColdLakeCSS8558.pdf>.

<sup>3</sup> <http://www.ainc-inac.gc.ca/al/hts/tgu/pubs/t6/trty6-eng.asp>.

In 1982, Canada became the first country to enshrine the rights of indigenous peoples in the Constitution. As a result, the weakest player in this struggle is armed with the strongest tool – constitutionally guaranteed legal protection for the right to hunt and fish.

The law about constitutionally-protected treaty rights in Canada can be described in the following way:

*Where there is a treaty right to hunt, governments cannot destroy the meaningful opportunity to exercise the right. For a right to hunt or fish to be meaningful, there must remain a harvestable surplus of the species being hunted or fished. To have a harvestable surplus, there must be a healthy, productive wild population of those animals or those fish. To have a healthy wild population, there must be sufficient productive habitat to support that population – in other words, there must be a healthy natural environment. If the natural environment is degraded by industrial activity, and if the wild game populations are stressed and put into crisis by industry, and if there is no longer a population of animals healthy enough to support the hunt, then there has been an infringement of the treaty right.*

The Beaver Lake Cree Nation case therefore, is a case about infringement of treaty rights. The question the court will be asking is – Is the rampant pace and scale of tar sands development consistent with a meaningful right to hunt and fish forever over these same lands?

## **B. Canada and Alberta's Roles in the Tar Sands**

Canada's Constitution sets out a division of powers between the federal and the provincial governments - section 91 of the *Constitution Act of 1867*<sup>4</sup> lists what the federal government is responsible for and allowed to do and section 92 lists what provincial governments are responsible for and allowed to do. Under section 91 of the Constitution, the federal government is responsible for:

12. Sea Coast and Inland Fisheries.
24. Indians, and Lands reserved for the Indians.

The federal government is also responsible for overseeing Canada's obligations with other governments. For example, under various treaties, Canada is responsible for certain species of migratory birds that travel over international borders.<sup>5</sup> Canada's responsibility for inland

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<sup>4</sup> *Constitution Act, 1867* (U.K. 30 & 31 Vict. C. 3, s. 91, reprinted in R.S.C. 1985, App. II, No. 5.

<sup>5</sup> See for example the federal *Migratory Birds Convention Act*, S.C., c. 22.

fisheries means that the Federal government must be involved in any approvals or authorizations for tar sands activities that impact fish-bearing lakes, rivers and streams; this includes building of bridges that cross fish-bearing streams or the extraction of water for steam injection projects.<sup>6</sup> Canada claims to meet its responsibilities through the conduct of various environmental assessment processes.

The federal government has several other legal tools it could use to curtail or constrain rampant tar sands development; for example, the *Natural Resource Transfer Agreement* that gave Alberta powers over natural resources in the province, provides that Alberta must ensure a sufficient flow of water in rivers that flow into National Parks.<sup>7</sup> Wood Buffalo National Park is downstream of most open pit development and the Athabasca River forms a boundary to the park. As well, Canada has powers respecting interprovincial rivers and streams and the ability to protect them if it saw fit.<sup>8</sup> Canada also has a clear and direct responsibility for Indians and lands reserved for Indians and several downstream First Nations depend on the Athabasca for their water and food supply. In the United States, the Federal Government regularly sues state governments on behalf of Indian Tribes because they take their similar responsibility seriously.

Under the Canadian Constitution, Natural Resources are a matter of provincial jurisdiction.<sup>9</sup> Alberta issues virtually all leases and authorizations respecting oil and gas activity, timber cutting, road building, seismic lines and pipelines through a complex regulatory system.

## **C. Constitutional Rights of First Nations in Canada**

On April 17, 1982, Her Majesty Queen Elizabeth II proclaimed the *Constitution Act, 1982*,<sup>10</sup> into force - effectively patriating the Canadian Constitution. New provisions included s. 35(1) which reads:

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<sup>6</sup> The important Mikisew Cree Nation case, *infra* note 15, discussed below, involved a federal authorization for a winter road in a federal park.

<sup>7</sup> *Constitution Act, 1930*, 20-21 George V, c. 26 (U.K.).

<sup>8</sup> See Ecojustice submission "Tar Sands and Water" to the Standing Committee on Environment and Sustainable Development, May 7, 2009: <http://www.ecojustice.ca>.

<sup>9</sup> *Constitution Act, 1867*, *supra* note 4 at s. 92A.

<sup>10</sup> *The Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.

Section 52(1) of the *Constitution Act, 1982* says:

The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.

In Canada parliamentary supremacy has given way to Constitutional supremacy. That is, the Constitution is the highest law in the land, and if a law does not respect the terms of the Constitution, it is not a proper law and will be struck down by a court.

The courts have taken a "purposive" approach to section 35, seeking to determine what it is that the section is meant to protect. Ultimately, it has been described as having the goal of promoting reconciliation between First Nations and the broader Canadian settler culture. Post-1982 those Aboriginal and treaty rights cannot be extinguished; to do so would be unconstitutional. The Supreme Court of Canada pointed out that the constitutional changes of 1982 altered the landscape for Aboriginal and treaty rights:

[T]he framers of the Constitution Act, 1982 included in s. 35 explicit protection for existing aboriginal and treaty rights, and in s. 25, a non-derogation clause in favour of the rights of aboriginal peoples. The "promise" of s. 35, as it was termed in *R. v. Sparrow*, [1990] 1 S.C.R. 1075 at p. 1083 70 D.L.R. (4th) 385, recognized not only the ancient occupation of land by aboriginal peoples, but their contribution to the building of Canada, and the special commitments made to them by successive governments. The protection of these rights, so recently and arduously achieved, whether looked at in their own right or as part of the larger concern with minorities, reflect an important underlying constitutional value.<sup>11</sup>

Constitutional rights protect treaty rights from governments elected by majorities who may wish, for financial or other reasons, to trample those rights.

## **D. Treaty 6 Rights**

As noted above, the Ancestors of the Beaver Lake Cree signed Treaty 6 in 1976. The important text of the treaty is:

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<sup>11</sup> *Re Reference by the Governor General in Council Concerning Certain Questions Relating to the Secession of Quebec from Canada*, [1998] 2 S.C.R. 217 para. 82.

The Plain and Wood Cree Tribes of Indians, and all other the Indians inhabiting the district hereinafter described and defined, do hereby cede, release, surrender and yield up to the Government of the Dominion of Canada, for Her Majesty the Queen and Her successors forever, all their rights, titles and privileges, whatsoever, to the lands included within the following limits...

Her Majesty further agrees with Her said Indians that they, the said Indians, shall have right to pursue their avocations of hunting and fishing throughout the tract surrendered as hereinbefore described, subject to such regulations as may from time to time be made by Her Government of Her Dominion of Canada, and saving and excepting such tracts as may from time to time be required or taken up for settlement, mining, lumbering or other purposes by Her said Government of the Dominion of Canada, or by any of the subjects thereof duly authorized therefore by the said Government.<sup>12</sup>

Treaty 6 also includes a number of oral promises.<sup>13</sup>

We can see a balancing at work already in the original text of the treaty. The First Nations signatories are ceding the land, but they will continue to have rights upon those lands while, at the same time, Canada can take up those lands for the enumerated purposes. This balancing creates a tension between the Cree people's ability to practice their rights, and Canada's right to take up lands for settlement. Those two rights have to be balanced against each other, so that taking up land for development does not take away the right to hunt and fish.

## **E. Giving Meaning to Treaty 6 Rights**

Two important legal cases explain the protections that our courts will extend to treaty hunting and fishing rights – the *Tsilhqot'in Nation v. British Columbia and Canada*<sup>14</sup> decision and the Supreme Court of Canada decision in *Mikisew Cree Nation v. Canada*.<sup>15</sup>

In the *Tsilhqot'in* decision, Justice Vickers of the Supreme Court of British Columbia found that the *Tsilhqot'in* have an Aboriginal right to hunt and trap to make a moderate livelihood in an area

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<sup>12</sup> See Treaty 6, supra note 3.

<sup>13</sup> See, for example, Morris, A. *The Treaties of Canada with the Indians of Manitoba and the Northwest Territories (1880)*. Toronto: Willing & Williamson, 2000. Morris was a treaty Commissioner and he recorded the various oral promises he made in "selling" the treaty to various First Nations. There does seem to be some doubt with respect to Treaty 6 of whether the First Nations actually understood that the land was being ceded.

<sup>14</sup> *Tsilhqot'in Nation v. British Columbia and Canada*, 2007 BCSC 1700.

<sup>15</sup> *Mikisew Cree Nation v. Canada*, 2005 SCC 69.

of land covering 438,100 hectares. He found that this right included a requirement that the province ensure that this area was managed to provide that there would always be a harvestable surplus of the diverse species hunted and trapped by the Tsilhqot'in. This means that enough natural forest must exist to provide sufficient natural habitat such that a surplus population of these animals are able to exist. Now, if any forest company wants a permit to log any forest in this area, they must first find out how many animals are in the forest, and prove that they can carry out logging in such a way as to ensure that the animals will not only continue to exist but will actually thrive. So the Court has mandated a role for wildlife biology. There can be no industrial activity that is blind to the consequences on wildlife. We need to know ahead of time whether the species will be able to thrive once industry has been through.

In 2000, Alberta approved a 200 metre-wide, 23 km ice road along the boundary of the Mikisew Cree reserve. The Mikisew appealed the approval of the road to the Federal Court and had the decision to approve the road overturned on the basis that it would have a negative impact on their treaty rights.<sup>16</sup> In the end, the Supreme Court of Canada supported the decision of the lower court in quashing the road permit on the basis that there was not sufficient consultation about the road with the Mikisew Cree. Alberta argued that the road was a minor impact on the First Nation's treaty rights because they could go somewhere else in the province to hunt. The Court found that what mattered was where a treaty First Nation traditionally hunted, trapped and fished and that the road was a significant impact on those lands and the rights of the Mikisew.<sup>17</sup> Most importantly, the Court said that what the constitution protects is a meaningful exercise of treaty rights.

Industrial development cannot proceed if the fish and wildlife would be impacted to the point where there was no longer enough healthy habitat to support wildlife populations reasonably close to home.

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<sup>16</sup> The SCC noted earlier court findings that: "The Draft Environmental Assessment Report acknowledged the road could potentially result in a diminution in quantity of the Mikisew harvest of wildlife, as fewer furbearers (including fisher, muskrat, marten, wolverine and lynx) will be caught in their traps. Second, in qualitative terms, the more lucrative or rare species of furbearers may decline in population. Other potential impacts include fragmentation of wildlife habitat, disruption of migration patterns, loss of vegetation, increased poaching because of easier motor vehicle access to the area and increased wildlife mortality due to motor vehicle collisions." *Mikisew ibid.* at para. 44.

<sup>17</sup> The court wrote in *Mikisew, ibid.* at para. 48, that: "The "meaningful right to hunt" is not ascertained on a treaty-wide basis (all 840,000 square kilometres of it) but in relation to the territories over which a First Nation traditionally hunted, fished and trapped, and continues to do so today."

## **F. The Beaver Lake Cree Nation Lawsuit**

### **1. History of the Beaver Lake Cree Nation**

The Beaver Lake Cree Nation is a small group of indigenous Cree whose reserve is located in eastern Alberta about 3 hours north-north-east from Edmonton and just outside of the town of Lac La Biche. The local area is part of the Lakelands District. Prior to the 1876 treaty, local indigenous people and Métis people lived in and around these lakes, including Lac La Biche and Beaver Lake. In the early 1800s, the Hudson's Bay Company built a trading post at Lac La Biche, and the locals hunted and trapped fur and fish to sell to the HBC agents.

The Cree were one of the most populous and culturally successful First Nations. They thrived as middlemen and fur trappers working with the HBC. In the earliest periods of contact, their influence, fuelled by European guns and ammunition, spread west across the prairies and north into the Mackenzie Basin. In the 1870's the Canadian government was involved in a slow process of treaty making, aimed at addressing Aboriginal title and opening up the lands for settlement.<sup>18</sup> By the middle of the decade, food supplies for the plains Cree were running low with a rapid decline in buffalo, and geographical survey crews were running into tensions with the local inhabitants. In July of 1875, Cree warriors stopped a telegraph crew at the fork of the Saskatchewan River. In response, the Canadian government sent Treaty Commissioner Morris to meet with Cree, Chipewyan and Salteaux leaders at Fort Carleton on August 15, 1876.

Discussions lasted for several days and included many pipe ceremonies. The pipe ceremonies were a sacred exercise. In the presence of the pipe only the truth could be told and it was understood that promises made as part of such ceremonies would be kept.<sup>19</sup> For their part, the Commissioners invoked the name of the Queen, and made those promises in her name.<sup>20</sup> The treaty was signed on August 23, 1876. Beaver Lake's ancestors, Pey-ay-sis and his Councillors signed an adhesion to the treaty at Fort Pitt in September. There Morris gave a speech:

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<sup>18</sup> Taylor, J.L. "Treaty Research Report, Treaty 6." Ottawa: Indian and Northern Affairs Canada, 1985.

<sup>19</sup> *Ibid.*

<sup>20</sup> Morris announced: "I am the Queen's Councilor. I am her Governor of all these territories and I am here to speak from her to you." Taylor *supra* note 18 at 11.

... I cast my eyes down to the east and I see the great lakes, and I see a broad road leading from there to the Red River... Anyone can see it and on that road, taking for the Queen, the hand of the Governor and Commissioners, I see all the Indians. I see the Queen's Councillors taking the Indian by the hand saying we are brothers, we will lift you up, we will teach you, if you will learn, the cunning of the white man. All along the road I see Indians gathering, I see gardens growing and houses building; I see them receiving money from the Queen's Commissioners to purchase clothing for their children, at the same time I see them enjoying their hunting and fishing as before, I see them retaining their old mode of living with the Queen's gift in addition.<sup>21</sup>

The Cree signatories to the treaty gave up the land on which Alberta's wealth has been built, and in return were promised these rights to hunt and fish "as before."

## **2. Lameman case against Canada and Alberta**

Chief Lameman and his people are now going to court to force Canada and Alberta to keep their promises. The Beaver Lake Cree are asking the Court to declare that the industrial project authorizations in their territory (about 17,000 of them) infringe their treaty rights. In other words, the cumulative effects of those projects result in a fundamental violation of the treaty. If the Beaver Lake Cree are successful in this action, there will be a moratorium on any further expansion of tar sands projects in and around their traditional territory. In addition, the government would have to reduce the level of development in Beaver Lake Cree territory to the point that it is no longer threatening the continuing exercise of the treaty rights or the health of the natural systems, waters and forests that are required to sustain those rights in forever.

There is precedent for a drastic constitutional challenge to provincial actions. Alberta has violated the Constitution before. In 1939 the Supreme Court of Canada struck down all Premier William Aberhart's legislation concerning banking and "social credit". Several of Alberta's statutes were struck off the books, including the authority to issue "prosperity certificates" or "funny money."<sup>22</sup>

The consequence of a Beaver Lake Cree Nation victory will mean that the tar sands expansion projects will come to an abrupt halt, because the legal authority to carry on will be eliminated.

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<sup>21</sup> Morris, *supra* note 13 at 231.

<sup>22</sup> See, for example, *Attorney General of Alberta v. Attorney General of Canada (Bank Taxation)*, [1939] A.C. 117.

This is the danger of ignoring the treaty promises that were made in 1876. The consequences of ignoring treaty promises can lead to this kind of court decision. If the result of the court case seems disruptive to Alberta, it is because the treaties are constitutional rights, and constitutional rights trump the ordinary laws of Canada and Alberta.

## **G. Conclusion**

If we are to save our world from catastrophic climate change, we must all individually do many things – walk more, drive less, turn out the lights - but two of the most important steps we can take as a country are to 1) preserve the great boreal forest of North America, and 2) stop the escalating exploitation of the tar sands energy projects of Alberta. To stop the destruction of the boreal forest, and slow or curtail further development of the tar sands will be a formidable national and international project, because of the huge institutional, governmental and corporate investment in those projects.

Surprisingly, Canada's Aboriginal people will be the ones that rescue Canada from international embarrassment, and rescue all of the people of the world from the worst effects of tar sands exploitation. We rely on the poorest people in Canada to stand up, where no one else will, or perhaps where no one else can, and be the voice of reason in this struggle. Only the indigenous treaty peoples of Alberta have the legal power to curtail the reckless behaviour of the wealthiest, most powerful industry on the planet.