

Case Brief – *Lameman v. Alberta*, 2013 ABCA 148

In a surprising decision, the Alberta Court of Appeal ruled that the cumulative adverse effects of tar sands development on the exercise of Treaty rights is a legitimate issue for trial.

The Beaver Lake Cree Nation (“BLCN”) brought a civil claim against Canada and Alberta in 2008, litigating the issue of whether the cumulative effect of many government decisions violated the First Nation’s Treaty rights. BLCN, as an adherent to Treaty No. 6, seeks damages for alleged breaches of obligations imposed on the Province and Canada pursuant to the Treaty. Those obligations focused on the duty to manage certain lands within Alberta, and to ensure that members of the BLCN could exercise their treaty rights to fish, hunt, and trap. The civil claim referred to the cumulative adverse effects of over 300 development projects related to oil, gas, forestry, and mining on the First Nation’s ability to exercise its Treaty rights.

Both Canada and Alberta sought to strike out certain portions of the BCLN Statement of Claim. The chambers judge dismissed the motion to strike, and the Crown governments appealed. Although when combined, these projects required over 19,000 individual government authorizations, the Court of Appeal rejected Canada’s argument that this rendered the action too large to be manageable. The Court of Appeal held that each of the 19,000 authorizations did not need to be inspected at any length, the focus should be the cumulative effect, and that through proper case management the litigation could proceed.

Canada also argued that the claim for damages should be struck because BLCN did not specify the purpose of the hunting, fishing, and trapping activities that it alleged had been infringed; that the constitutional right to engage in these practices was limited to “cultural, social and spiritual needs” and not for commercial purposes. However, the Court found that this was an issue for trial and that there was “no obligation on a plaintiff to acknowledge every possible defence or limitation on a claim in the pleadings”.

Notably, Canada made two arguments the Court of Appeal rejected due to this area of law being “an unsettled area” and “fluid”. These included the argument that a successful claim for permanent injunctive relief against the Crown was unprecedented, and that ongoing post-trial supervision conducted by the courts over the parties’ relationship was rare (these two remedies were sought by BLCN). Regarding these arguments, the Court of Appeal deferred to the case management judge: “it was within the discretion of the case management judge to conclude that a declaration for such relief would not obviously fail”.

The action is now before its case management judge, with a clear direction from the Court of Appeal to proceed to trial of the merits. This decision likely changes the risk-assessments of not only governments but also resource developers, as liability for cumulative effects on the exercise of Aboriginal and Treaty rights is held to be actionable before the courts. It also sets the stage for a unique show-down, pitting the environmental

effects of the mammoth tar sands industry against the meaningful exercise of Treaty rights in northern Alberta.