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Cumulative Impacts on Treaty Rights: Update on the Beaver Lake Cree Nation Litigation

John Olynyk and JoAnn P. Jamieson

John Olynyk
403.781.9472
jolynyk@lawsonlundell.com

JoAnn P. Jamieson
403.218.7514
jjamieson@lawsonlundell.com

In May, 2008, the Beaver Lake Cree Nation ("BLCN") filed a lawsuit in the Alberta Court of Queen's Bench against the governments of Canada and Alberta (*Lameman v. Alberta)* claiming that the cumulative impacts of development within their core traditional territory had left them with no meaningful way to exercise their treaty rights. BLCN is a Treaty 6 First Nation whose asserted traditional territory stretches across east central Alberta through the *in situ* oil sands area and the Cold Lake Air Weapons Range.

In a recent interim decision, the Court narrowed the BLCN litigation to focus on the Crown's duty to consult and accommodate and how it applies to alleged cumulative effects on BLCN's treaty rights. Significantly, over 19,000 tenures and approvals (authorizations) alleged to have contributed to the cumulative effects are, as a result of the decision, no longer subject to possible revocation.

The BLCN Lawsuit

The BLCN lawsuit seeks several orders regarding the duty of the Governments of Alberta and Canada to consult and accommodate BLCN about the cumulative effects of development on the BLCN's treaty rights. The BLCN claim also seeks damages (compensation) from the two governments for the resulting infringement of their rights. More significantly for private resource developers, the lawsuit also asks the Court to order Alberta and Canada to revoke the 19,000 authorizations held by over 300 companies, tied to projects BLCN claims have caused the cumulative impacts on their treaty rights.

The case is proceeding slowly through the courts. Four preliminary procedural applications have been heard by the Court so far, and, four years since the filing of the statement of claim by BLCN, the governments of Alberta and Canada have not yet filed their statements of defence.

Motion to Strike

Recently, in an attempt to focus the issues before the Court, Alberta and Canada brought applications to have the Court strike those parts of the BLCN claim regarding the governments' duty to revoke the 19,000 authorizations. That application was heard over four days in late January and early February, 2012, and the decision was released by the Court on March 28.

The Government of Alberta argued that the order sought against the 19,000 authorizations was a collateral attack on those authorizations, one which should have been brought by judicial review applications on a case-by-case basis as the authorizations were granted. As that did not happen, and as the time for bringing such applications had passed, Alberta argued that the case should be limited to assessing whether the BLCN's treaty rights were unjustifiably infringed by the cumulative effect of the authorizations, and, if so, whether the BLCN is entitled to compensation from the governments.

Canada argued that it should not be a party to the litigation, as it was involved in authorizing only seven of the thousands of developments at issue. Canada also argued that its authorizations, as decisions of federal agencies, could only be challenged in the Federal Court or the Federal Court of Appeal.

The BLCN argued that they were not challenging the validity of the authorizations. Nor were they trying to apportion responsibility among individual developments. Instead, they were trying to put the entire picture of overall development before the Court. BLCN argued that there is no other way to address the fundamental flaw in the governments' land management regime, because there is no other mechanism for cumulative effects review at the regional level.

Court Strikes Request for Revocation of Authorizations

The Court held that Canada is a proper party to the action, even though the action is not proceeding in the federal courts. The Court stated that, as a signatory to Treaty 6, Canada has fiduciary duties to First Nations arising from the treaty making process. As the BLCN claim raises issues with respect to that duty, Canada is properly a party to the action.

With respect to the 19,000 authorizations, the Court held that it would be unworkable if the trial had to consider the circumstances of each of the authorizations. The relief sought by BLCN invited the Court to make declarations about those authorizations; this would not serve to address the central issue of the cumulative effect of development on the BLCN's treaty rights.

As a result, the Court struck the part of the BLCN claim implicating the 19,000 authorizations. The remainder of the action, now focussed on the Crown's duty to consult and accommodate BLCN about cumulative effects of development on their treaty rights, and the Crown's obligation to compensate BLCN for infringements of those rights, will proceed. The Court noted that, if consultation on cumulative effects is required, as alleged by BLCN, it must be between the governments and BLCN, and may involve negotiations for training, jobs and other benefits.

Implications of the Decision

The Court's decision means that the validity or legality of the 19,000 authorizations is no longer at issue in this case. The authorizations provide the context for the BLCN claim, but are no longer the subject of potential court orders. The focus is now on the central issue: Alberta's and Canada's obligations to consult and accommodate in the context of cumulative effects on treaty rights, and their responsibility to compensate BLCN for infringements of their rights that are found to be unjustified.

The decision is only an interim procedural step in this action. As noted above, Canada and Alberta have not yet filed their statements of defence. It will be some time before the case proceeds to trial and a decision is rendered on the merits. This remains an important case, the result of which will have a significant bearing on oil sands development as well as developments in other areas where cumulative effects have become a major issue.

In addition, the Court's comment that consultations on cumulative effects must be between the Crown and First Nations provides welcome direction for developers who currently are faced with requests from First Nations to consult about cumulative effects in the context of individual project applications. The Court's comment suggests a recognition that project-specific consultations between proponents and First Nations are not the appropriate forum for consultations on cumulative effects, and that governments must be directly involved in the latter consultations.

For more information about this decision, please contact John Olynyk at 403.781.9472 or JoAnn P. Jamieson at 403.218.7514.

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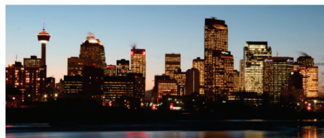

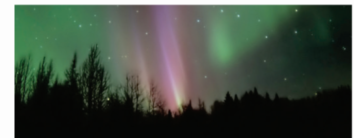

Vancouver
Suite 1600, Cathedral Place
925 West Georgia Street
Vancouver, British Columbia
Canada V6C 3L2
(T) 604.685.3456
(F) 604.669.1620

Calgary
Suite 3700, 205-5th Avenue S.W.
Bow Valley Square 2
Calgary, Alberta
Canada T2P 2V7
(T) 403.269.6900
(F) 403.269.9494

Yellowknife
P.O. Box 818
Suite 200, 4915 – 48 Street
Yellowknife, Northwest Territories
Canada X1A 2N6
(T) 867.669.5500 Toll Free: 888.465.7608
(F) 867.920.2206