

GAME CHANGER

The Beaver Lake Cree have gone to court to challenge oil sands development. What if they win?

By ARNO KOPECKY
Photos JASON FRANSON

Lameman v. Alberta alleges that the cumulative effects of development are infringing on the Cree's constitutional right to hunt and fish.



“The Plaintiffs claim that under Treaty 6, the Crown has an obligation to manage the cumulative effects of developments.”
—Lameman v. Alberta, 2011 ABQB 40

IF YOU WANT TO SEE THE BEAVER LAKE Cree Nation’s traditional territory in the light of modern day, try driving the 245 km stretch of Highway 881 linking Lac La Biche to Anzac. You will behold a rolling landscape of boreal forest, lakes, low-lying peatlands and a great many trucks: dump trucks and semi-trailers, 18-wheelers strapped with fuel tanks or tractors or pipes of various diameter, and fleets of pickup trucks with company logos half covered in grime.

What you won’t see is the reason all those trucks are here: two of Alberta’s three big bitumen troves, the Athabasca and Cold Lake deposits. About a third of Alberta’s bitumen is produced in Beaver Lake territory. Cenovus, Statoil, ConocoPhillips, Nexen, Enbridge, CNRL and others all have their names posted at access roads that branch off the highway and disappear into the rumpled boreal. Far away, the white smoke of their endeavours puffs out of the forested horizon like industrial whale spouts.

On the cold, clear February day that I made the drive to Anzac, a mellow hamlet of fewer than 1,000 people, I was kindly refused a glass of water at the fast food joint because of “seepage.” The water supply had been contaminated by industrial chemicals, the waitress explained; no one knew from exactly where, they just knew not to drink from the tap. So I bought a can of apple juice and drove back to Lac La Biche, the closest town to Beaver Lake itself, slowing only when I passed the wide clear-cuts where tractors and cranes and tougher men than I beetled around hundreds of segments of green pipe big enough to slouch through.

By the time you read this, those lengths have probably been welded together and buried, joining over 12,000 km of oil and gas pipeline already sunk beneath the surrounding trees. The bitumen itself is farther down, so deep that instead of open pit mines of the sort near Fort Mac, where the deposits lie closer to the surface, here the treasure is sucked out through in situ, or “huff and puff,” technology—superheated steam is pumped underground to melt the bitumen, which is then sucked back up to the surface. This is the future of oil sands extraction in Alberta, since roughly 80 per cent of oil sands reserves are recoverable only through in situ. The good news is that in situ leaves many more trees on the ground than does an open pit mine. But before you get too excited, consider that in addition to all that pipeline and a further 12,000 km of roads, the Beaver Lake Cree’s hunting grounds have been criss-crossed by some 70,000 km of seismic lines. A 2013 report by Natural Resources Canada stated that the “linear features” of the oil and gas industry are now causing three times more deforestation across Canada than logging is responsible for.

You can get a feel for the scope by zooming in on Google Earth or poring over the exquisitely detailed maps and charts that various provincial departments are now producing. You can read the government reports identifying habitat



Crystal Lameman and a relative gather wood in their yard. Left: Highway 36, just off-reserve, near the intersection with 881. Right: Natural gas pipe on the land of one of Lameman’s relatives. Some 12,000 km of pipelines, 12,000 km of roads and 70,000 km of seismic lines criss-cross BLCN land.

fragmentation as the key factor in Alberta’s caribou collapse, and if you dig a little further you can find peer-reviewed articles documenting the invisible spread of carcinogens such as polycyclic aromatic hydrocarbons into northern Alberta’s water table. What you can’t do, what almost none of us can do without breaking the law, is much of anything about it.

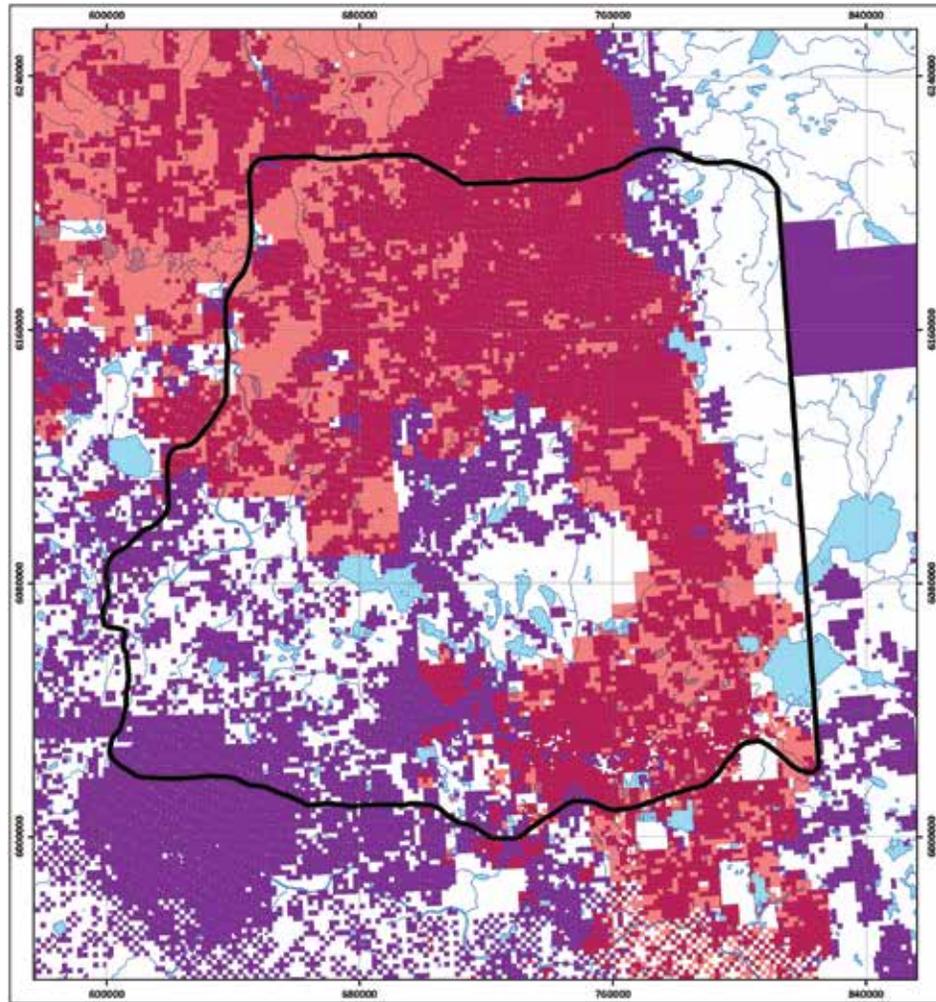
Unless, that is, you belong to a Treaty nation like the Beaver Lake Cree.

IN 2008 THE BEAVER LAKE CREE’S CHIEF councillor, Alphonse Lameman, filed a court action against the governments of Canada and Alberta, alleging that the cumulative effects of industrial development were infringing on his people’s right to hunt and fish. “The animals are starting to deplete,” he told reporters on the day he launched his case. The lawsuit encompasses 321 “projects” with over 19,000 individual “developments”—everything from wellheads and pipelines to the Cold Lake air weapons range—but no single company is being sued. Instead, Lameman asked the court to hold the Crown responsible for industry’s collective environmental impact.

The resulting litigation’s complexity is overwhelming in many ways (that was in fact one of the grounds on which Canada and Alberta sought to have the case dismissed), but the outcome is likely to hinge on proving Lameman’s six simple words true. Are the animals starting to deplete? And if so, is that a consequence of oil and gas development? If the Beaver Lake Cree can establish those two facts, then, according to our constitution, they will be owed much more than damages; they will be owed a brake on new development in the oil sands.

The First Nation’s right to hunt and fish is spelled out in Treaty Six, which the Beaver Lake Cree signed in 1876. Treaties, of course, are the subject of no small acrimony; in the late 19th century most of Canada’s First Nations were on the verge of annihilation, and the Cree, suffering from the twin calamities of the buffalo’s disappearance and smallpox epidemics, were easy partners to exploit at the negotiating table. Translations were poor, and in some cases crucial terms such as the actual size of a square mile went unexplained. By signing Treaty Six, the Cree agreed to “cede, release, surrender and yield up to the Government of the Dominion of Canada” their ancestral territory (roughly 40,000 km² spanning present-day northeastern Alberta and a sliver of northwestern Saskatchewan); in exchange, the government promised that “they, the said Indians, shall have the right to pursue their avocations of hunting and fishing throughout the tract surrendered... 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...”

Canada and Alberta were listed as separate defendants in the Lameman action, and both sought to have the case dismissed. To appreciate the spirit of their approach, consider that one argument Canada advanced was that it was Alberta that issued industrial permits in the oil sands and therefore the federal government should not be held accountable; meanwhile, Alberta argued that treaty rights were a federal matter and therefore not the province’s responsibility. Such



Beaver Lake Cree Nation's Core Traditional Territory Boundary in Alberta
 Bitumen leases
 Conventional oil and gas leases
 Bitumen leases and conventional oil and gas leases

Data sources:
 Boundaries of Beaver Lake Cree Nation's Core Traditional Territory taken from Schedule 1 to the Amended Statement of Claim for Alberta Court of Queen's Bench Action No. 0603/06/718, filed 23 October 2009.
 Bitumen leases and conventional oil and gas leases from Global Forest Watch Canada (based on Alberta and Saskatchewan governments datasets circa 2012 for Alberta and 2013 for Saskatchewan).

Transverse Mercator - 307M
 North American Datum 1983
 0 10 20 30 40 50
 km
 Map produced by Global Forest Watch Canada, March, 2014.



Catch-22s dragged on for five years, and it was only thanks to the financial intervention of outsiders that the plaintiffs managed to hold on until April of 2013, when Alberta's Court of Appeal finally ruled that the case deserved to be heard on its own merits and ordered everyone to get ready for trial. One year later the parties are still in case management, with no start date set for the trial as of this writing.

"It's a white man's legal system," Susan Smitten, executive director of a non-profit called RAVEN, which raised \$950,000 for Beaver Lake, told me. "It's so stacked against First Nations on so many levels."

Robert Janes, Beaver Lake's new lead counsel, compared the case to "being involved in a Russian winter campaign outside of Stalingrad." Before Janes took over the file this year, Beaver Lake was represented by renowned Aboriginal-law expert Jack Woodward. "There's a huge pent-up demand for justice that is not being satisfied," Woodward told me, "because the First Nations can't afford to go to court."

Another group that has raised money for Beaver Lake is the seven-million-member Co-operative Bank. The UK co-op funnels a portion of its profits into a climate change campaign fund, and in 2008, while researching the oil sands, they learned about the Beaver Lake case and decided to get involved, ultimately raising some £300,000 for the band. "One of the best ways to dramatically slow down the [oil sands] expansion plan is through First Nation fights," said Colin Baines, who led the co-op's efforts. "Unless you're going to rip up the constitution, people like the Cree will win when it gets to court."

Jack Woodward said that the simple fact of this case making it to trial sets an important legal precedent. "What was previously in doubt was whether or not a First Nation could bring a lawsuit to challenge the cumulative effects of industrial development because they would impact the meaningful exercise of their treaty rights," he said. "And the Alberta Court of Appeal has upheld that, yes, that is a cause of action." That precedent pertains to every numbered treaty in Canada, covering everything east of the Rockies and south of the 60th parallel. With respect to Beaver Lake, Woodward said, what's left now is "the factual question: Is there in fact so much industrial development that it's going to affect the meaningful right to hunt?"

ALPHONSE LAMEMAN RETIRED IN 2011 after 33 years as Beaver Lake's proactive chief councillor, and he no longer speaks to reporters. "He told me, 'I've done my time, it's your turn now,'" Crystal Lameman, Alphonse's niece, recounted the day after I drove to the Beaver Lake reserve. There was a hint of resignation in her voice. The new chief, William Gladue, and his band council have inherited *Lameman v. Alberta*, but they are no quicker to speak to journalists about a high-stakes matter currently before the courts than are the governments of Canada or Alberta, and rebuffed my request for an interview. And so, notwithstanding her insistence that she "can only offer a grassroots perspective," Crystal Lameman, 32-year-old single mother of two, climate and energy campaigner for the Sierra Club Prairie Chapter and a registered teacher with an after-

degree in education from the University of Alberta, is about the only person in Beaver Lake willing to talk to outsiders about her band's re-enactment of David and Goliath.

She took me for a drive through the land abutting the white expanse of Beaver Lake, 17 km from Lac la Biche and two hours northeast of Edmonton. It was -27°C and we agreed to stay in the car. "Too bad you're here in the middle of winter," Lameman said.

"No kidding."

"If you come back in the summer I'll show you where we collect medicine from the muskeg." She gestured at what was now a featureless white depression between two thickets of poplar. "Wasn't it too swampy to walk through in summertime?" I asked. "No," she said, "it's like a squishy carpet."

Although a number of natural gas pipelines do run through Beaver Lake, no oil or gas deposits lie directly beneath the reserve itself. Therefore the Beaver Lake Cree don't earn nearly as much from profit-sharing schemes as other First Nations whose reserve territory happens to encompass valuable resources. "We don't have anything they want," Lameman said. Nevertheless, she allowed that many of the 500-some residents of Beaver Lake do work for oil and gas companies.

That context is often brought up by critics of indigenous activists such as Lameman, who see hypocrisy in the act of criticizing an industry they depend on. I asked how she responded to that sentiment. "What my uncle said about the litigation was, we are not against industry. But it needs to happen in a sustainable way that involves Aboriginal consultation and respect for our treaty rights."

SO, ARE THE ANIMALS DEPLETING? AND IS industry responsible? Lawyers for the defence are likely to point, as industry has, to a 2013 report by the Alberta Biodiversity Monitoring Institute (ABMI), which found that biodiversity intactness throughout the Athabasca oil sands area (which includes most of the Beaver Lake Cree's core territory plus all of Fort McMurray's oil sands) stands at 94 per cent. This means that only 6 per cent of the plants and animals you'd expect to find are missing from the region. However, the report also evaluated two Athabasca sub-regions—the active in-situ region and the surface mineable region (where 87 oil sands extraction projects collectively produce 1.6 million barrels a day)—and found biodiversity intactness to be 91 per cent and 86 per cent respectively.

Created in 2007 and headquartered at the University of Alberta, ABMI is an independent science organization dedicated to monitoring the state of Alberta's biodiversity. Jointly funded by the Alberta government and industry to the tune of \$12-million a year, the organization prides itself on providing value-neutral data to the public. More than one scientist I spoke to described it as the "Switzerland" of Alberta's highly politicized ecological monitoring scene.

ABMI's guiding document is a map of Alberta, overlaid with a grid of 1,656 field stations spaced 20 km apart. Each year biologists are dispatched (by helicopter if necessary) to a

portion of those stations, where they collect plant and animal samples that are then brought back to the lab. Over 2,000 species are being tracked this way, and though ABMI is not yet at full operational capacity, the plan is to visit each station every five years, creating a database that quantifies long-term trends.

One of ABMI's co-chairs is populations biologist Stan Boutin. Boutin, an expert on Alberta's boreal caribou, is also the author of a report on that species' impending demise, commissioned by Beaver Lake's legal team. In it, Boutin noted that the population of the two caribou herds within the Beaver Lake Cree's territory have declined by 71 per cent and 74 per cent respectively since 1996 and 1998, and are now estimated to total no more than 275 individuals. "The ultimate cause of the decline," he wrote, "is human-caused changes in vegetation and the creation of linear features such as seismic lines, pipelines and roads." In other words, the oil and gas industry.

When I visited his office at the U of A's Centennial Centre for Interdisciplinary Science, I asked Boutin about ABMI's 94 per cent biodiversity calculation. "The reason the number comes out so high is that it's measured across a very large area and considers many, many species," he said. "It doesn't just look at rare species."

Did that mean, I asked, that a species such as caribou could disappear entirely without much affecting the overall percentage, so long as other species stayed abundant?

"Absolutely," Boutin explained that whereas caribou are disappearing fast, along with a number of migratory birds and songbirds, some other species thrive in a fragmented forest environment. Deer, for instance, are growing in numbers because they eat the shrubs and bushes that pop up in forest clearings (by contrast, caribou eat lichens, which require mature forests). With more deer come more wolves; GPS collars show that wolves actually hunt better when linear features are present, running farther and faster into their prey's territory. Deer breed fast enough to compensate for the increased predation, but caribou are much slower to reproduce and thus are far more affected by the rise in wolf numbers. That is why, so far, the only action that government has taken to protect the boreal caribou is to institute a cull that now claims roughly 200 wolves a year. Even so, caribou numbers keep plummeting.

Boutin himself is an advocate of the wolf cull. But when I asked if he thought government was taking caribou conservation seriously, he said no. "They've never restricted industrial development or activity. The linear footprint is growing rather than declining. Government and industry have a very clear plan of how much they want to expand, and good for them. But there's no corresponding plan in place for how they're going to manage cumulative impacts. Well, you can't have your cake and eat it too!"

A spokesperson for Environment Canada told me by email that the *Recovery Strategy for the Woodland Caribou*, published by his department in 2012, "set a deadline of three to five years for provinces/territories to develop range plans for each caribou range... Range plans will outline how critical habitat in a given range will be protected, and how ranges will be managed to maintain or attain a minimum of 65 per cent

undisturbed habitat over time." Yet time is of the essence, and the strategy itself was five years late in coming. According to Boutin's report, the current trajectory has Beaver Lake's caribou herds falling below 50 individuals by 2025–2030, placing them "at extreme risk of extirpation."

BOUTIN ALLOWED THAT REMOVING caribou from the boreal forest would not profoundly affect the rest of the ecosystem. To truly appreciate the scope of the oil and gas industry's impact on northern Alberta's environment, then, a better place to look might be at the one thing every living organism needs to stay alive.

"The groundwater effects probably concern most people more," said Bill Donahue, director of science and policy with Canmore-based non-profit Water Matters. "If our lakes are contaminated, if our streams are contaminated, especially for First Nations, then that wipes out a huge part of their connection to the land and their reliance on the land."

According to Donahue, the ongoing spill at CNRL's Cold Lake project—an in situ site that lies within Beaver Lake's traditional territory—offers a prime example of why fears over groundwater contamination are well founded. Among the more publicized of oil sands debacles, CNRL's Cold Lake saga began in 2009 when bitumen was found oozing from a crack in the forest floor near Cold Lake. Since then, a number of other leaks have been identified without the company being able to find the source. It's estimated that 12,000 barrels of bitumen have spilled into the forest and local surface water, but nobody can say how much more might be leaking into underground aquifers. "Who knows where else that same kind of problem is happening?" Donahue said.

Donahue also sits on the advisory committee to the controversial Joint Oil Sands Monitoring (JOSM) program, a multi-stakeholder group established by government in 2012 to monitor the oil sands' environmental impacts. One of the problems with JOSM, Donahue said, is that it doesn't monitor groundwater around in situ operations like Cold Lake, but focuses only on the minable oil sands. "The CNRL spill was discovered by someone just walking through the bush who noticed this bitumen bubbling up out of the ground. It wasn't because of a science monitoring program. So if we're going to rely on the ability to detect major industrial accidents simply on the chance that someone will be walking by and notice something bubbling up out of the ground, well, I would suggest that that's a pretty non-existent program."

Donahue acknowledged that the mere existence of JOSM, which has a \$50-million annual budget derived primarily from industry, represents a big step forward. Until recently, virtually no independent environmental monitoring was happening in the oil sands at all. "Is \$50-million a lot of money? Absolutely, it's a huge number," he said. "But if you're talking about an industry where the value of the resource is in the trillions of dollars, what's \$50-million then? Fifty million is nothing. If you're looking at somewhere between three and five million barrels a day being produced in the not too

distant future, 50 million dollars a year is pennies per barrel. The cost of a real program that would give us the information we need would still be undetectable to the overall costs or profits associated with the oil sands."

For many close observers of the industry, that not too distant future is the true concern. Barely 3 per cent of the exploitable bitumen has been touched, after all. Just about everything that remains will be accessed by unproven, poorly monitored in situ methods of the sort on display at Cold Lake.

"Anyone who's talking about current impacts is actually missing the boat," Simon Dyer, the Pembina Institute's regional director for Alberta and the North, told me. "We're currently at 2.2 million barrels per day, but we've already approved over five. It's what's coming that's the problem."

Aboriginal-law expert Jack Woodward says the fact of this case making it to trial sets an important legal precedent—one that pertains to every numbered treaty in Canada.

THE BEAVER LAKE CREE, OF COURSE, ARE NOT the only First Nation who've taken what's coming to court. "If you took a protractor and drew a circle around the oil sands, you would encounter six or seven First Nations who are in court going for the jugular," said Bill Gallagher, an Ontario-based lawyer, industry consultant and author of *Resource Rulers: Fortune and Folly on Canada's Road to Resources*. Gallagher described the rise of Aboriginal litigation in Canada's resource sector as "the biggest winning streak in Canadian legal history." That streak, he argued, is already transforming how development proceeds from BC to Newfoundland. "The notion that 'Hey, they got the reserves but we got everything else'—Canadians have to understand that that's not what the treaties say," said Gallagher. "[First Nations] have to be consulted and accommodated in the spirit of the honour of the Crown in all these treaty areas."

Crystal Lameman had said much the same thing that day we drove through her reserve. "They could settle there, they could use the land, but they had to consult us," she said. "And they didn't consult us. That's why my uncle Al filed the litigation."

Robert Janes, Beaver Lake's lawyer, said, "The government doesn't dispute that there's a duty to consult. The fight is what's in the duty to consult." That duty doesn't give First Nations a veto over development, he said, but "the Crown likewise doesn't have an unlimited power just to run over the treaty rights." As part of her 2012 decision ordering Canada and Alberta to trial, Justice B. A. Browne agreed, declaring: "Consultation does not mean 'listening' and then doing what one pleases; consultation must be more than that." The nature of the duty to consult, she wrote, "is a trial issue which the court will address."

In the past three years, by Gallagher's count, First Nations have racked up 40 major resource-sector court battles across

the country. In northern Ontario's mineral-loaded Ring of Fire district—reputedly comparable to the oil sands for economic potential—the Matawa Tribal Council recently forced a halt to development until government and industry raise the bar on environmental protection and Aboriginal involvement. In British Columbia last year, the Tsilhqot'in Nation successfully blocked Taseko Mines from developing what would have been the tenth-largest gold/copper deposit in the world, after it came out that the company planned to turn a sacred Tsilhqot'in lake into a tailings pond. "The era of my-way-or-the-highway, of corporations ruling the roost on these outcomes, that era is over," Gallagher said.

When I asked him why it has taken so long for the courts to enforce the treaties, Gallagher pointed out that until the 1960s the Indian Act prohibited First Nations from retaining lawyers to press their land rights. After that, treaty rights remained legally toothless until the Constitution Act, 1982. Under s. 35 of that Act, "aboriginal" and "treaty" rights were given constitutional protection for the first time in Canadian history. Defining and enforcing those rights has been the challenge ever since. The process is painstaking but inexorable, and with each new court-won precedent it gains momentum. "It's like a popcorn maker," Gallagher said. "They start one kernel at a time, with long waits between them, but now it's on full tilt."

AND IF, SOME YEARS FROM NOW, Beaver Lake actually wins this case—what then?

Ultimately the band has two demands: compensation for past damages and a meaningful say in future developments. "What Beaver Lake at the very least would like as a starting point after any court decision is rendered," Janes told me, "is that the government of Alberta and the government of Canada sit down and have a real discussion with the leadership of Beaver Lake about how consultation should be done in the future."

Janes said it was too early to say how much the band stands to win in damages, adding that the cash settlement is nobody's paramount issue. "There's no doubt that money is important in the modern economy," he said, "but money can't buy you back your land and it can't buy you back your culture."

When I suggested government might be more concerned than he let on about having to pay out hundreds of millions in such a precedent-setting case, Janes insisted that the principle matters more than any payout. "Let's say the number is \$200-million. That's peanuts compared to what the government is hoping to get out of these areas, where you're potentially talking about billions. The governments have largely viewed the areas underneath the numbered treaties as being open for pretty well unfettered business. It would be hugely disturbing to their vision of the world to have the court tell them that there is some limit to what they can do."

That threshold, Janes said, was the point of this whole case. "There is a limit," he said. "And the government's at it." ■

Arno Kopecky is an Edmonton-born, Vancouver-based journalist and travel writer. His latest book is The Oil Man and the Sea.