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## The Oil Sands of Time: Pipelines and Promises

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THE OIL SANDS OF TIME: PIPELINES AND PROMISES  
BY:  
ANTHONY MOFFA

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## ABSTRACT

The Albertan oil sands provide the battlegrounds for the most recent iteration of the centuries-old conflict between the rights of indigenous peoples and the economic priorities of colonizing Europeans in North America. In the Pacific Northwest United States, that conflict has played out in a series of federal court cases stretching back to the 1970s. In the “Culverts Case” of 2016, the Ninth Circuit Court of Appeals upheld a grant of injunctive relief against the state of Washington, which had been found to violate several tribes’ treaty-protected fishing rights by constructing and maintaining culverts that impede river flow. After comparing the treatment of, and protection for, indigenous rights in the United States and Canada, this work examines how the Culverts Case can provide a model for the resolution of the ongoing conflicts between indigenous rights and oil sands development in Canada.

## KEY TERMS

Indian Law; Environmental Law; Water Rights; Oil Sands; Tar Sands; Pipeline; Indigenous; Boldt; Salmon; Culverts; Caribou; Canada; Alberta; First Nations; Treaty; Reserved Rights

## I. INTRODUCTION

Like arteries connecting the heart to the extremities that contact the outside world, pipelines stretch from the economic engine of Alberta to international ports to the west, east, and south, putting increasingly more crude oil on the global market and more greenhouse gases (GHGs) in the global atmosphere. “Oil sands” (or “tar sands”<sup>1</sup>) development, and the associated pipelines, have become one of Canada’s fastest growing industries<sup>2</sup> and sources of GHG emissions,<sup>3</sup> generating a conflict of remarkable significance between economic growth and environmental preservation.

Oil sands consist of a tar-like mixture of sand, clay, and heavy crude oil called bitumen and underlie 140,000 square kilometers of boreal forest in Alberta, an area as vast as the entire state of Florida.<sup>4</sup> Thanks to their existence, Alberta ranks as the second largest source of oil in the world behind only Saudi Arabia, currently producing 1.5 million barrels of crude oil daily, and expected to produce 5 million barrels daily by 2030.<sup>5</sup>

The impacts on land, particularly from surface mining extraction operations,<sup>6</sup> are quite significant. Every barrel of crude oil produced through surface mining requires up to four barrels of freshwater<sup>7</sup> and produces about one-and-a-half barrels of waste held in tailing ponds.<sup>8</sup> Between the tailing ponds and the surface extraction itself, over nine hectares of land are consumed for each million barrels of oil mined.<sup>9</sup> Though industry groups and the government of Alberta continue to assert that restoration presents a viable

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<sup>1</sup> There is some debate concerning the competing use of the terms “tar sands” and “oil sands” in popular and academic discussion. I have elected to use “oil sands” throughout because that is how the official documents of the Canadian government refer to the bitumen deposits discussed herein. *But see* Jen Preston, *Neoliberal Settler Colonialism, Canada and the Tar Sands*, 55 RACE & CLASS 42, 55 en. 1 (2013) for an explanation of why “tar sands” might nonetheless be used.

<sup>2</sup> Daniel Tencer, *Canada's Fastest-Growing Jobs In The Next Five Years*, THE HUFFINGTON POST (CANADA) (June 11, 2015), [http://www.huffingtonpost.ca/2015/06/11/canadas-fastest-growing-jobs\\_n\\_7557066.html](http://www.huffingtonpost.ca/2015/06/11/canadas-fastest-growing-jobs_n_7557066.html).

<sup>3</sup> C. S. Mantyka-Pringle, C. N. Westman, A. P. Kythreotis, & D. W. Schindler, *Honouring Indigenous Treaty Rights for Climate Justice*, 5 NATURE CLIMATE CHANGE 798, 798 (2015); Marc Huot, Danielle Droitsch & P.J. Partington, *Canadian Oilsands and Greenhouse Gas Emissions*, PEMBINA INSTITUTE (July 30, 2010), <http://www.pembina.org/pub/2057> (reporting that oil sands operations produced 37.2 megatonnes of GHG emissions in 2008 and are projected to triple the production of such emissions by 2020 to 108 megatonnes).

<sup>4</sup> *See* Indigenous Env'tl. Network, *Tar Sands and Indigenous Rights*, POWER SHIFT NETWORK (2010), [http://powershift.org/sites/wearepowershift.org/files/resources/IENFactsheet\\_2.pdf](http://powershift.org/sites/wearepowershift.org/files/resources/IENFactsheet_2.pdf); Simon Dyer & Marc Huot, *Mining vs. In Situ*, PEMBINA INSTITUTE (May 27, 2010), <http://www.pembina.org/pub/2017>.

<sup>5</sup> *See* Indigenous Env'tl. Network, *supra* note 4; Dyer & Huot, *supra* note 4.

<sup>6</sup> Two prevailing methods exist for the extraction of crude oil from these deposits – in situ and surface mining. In situ extraction involves a similar process to hydraulic fracturing (“fracking”) of natural gas - several wells are drilled deep into the oil sands and high-pressure steam is injected to heat the bitumen so it can flow to a well and be pumped to the surface. Surface mining simply involves shoveling bitumen-laden oil sands into trucks and then crushing and mixing the sands with water at a preparation facility before transporting the result to an extraction plant. *See* Dyer & Huot, *supra* note 4.

<sup>7</sup> Currently, tar sands operations divert up to 652 million cubic meters of fresh water each year, 80% of which comes from the Athabasca River in Alberta. Indigenous Env'tl. Network, *supra* note 4.

<sup>8</sup> Simon Dyer, *Oilsands and Water*, PEMBINA INSTITUTE (May 13, 2009), <http://www.pembina.org/pub/1830>; *see also* Indigenous Env'tl. Network, *supra* note 4 (“About 1.8 million cubic metres of this water becomes highly toxic tailings waste each day”), Huot, Droitsch, & Partington, *supra* note 3.

<sup>9</sup> Indigenous Env'tl. Network, *supra* note 4, at 3.

option, only 0.16% of the land destroyed by surface mining has been certified as reclaimed.<sup>10</sup>

Getting the crude oil to market has proven just as, if not more, environmentally, politically, and economically contentious. The industry-preferred method for getting the oil to international ports (on the Pacific Ocean, the Gulf of Mexico, and the Great Lakes) has, and continues to be, the construction and operation of pipelines. The debate over these pipeline projects has played out very publicly in both Canada and the United States. Recently, the administration of newly-elected Prime Minister of Canada, Justin Trudeau, approved two pipeline projects and rejected one other.<sup>11</sup> The two approved pipeline projects will expand the production capacity of Albertan oil sands by an estimated million barrels daily. With the Trans Mountain pipeline the number of tankers bound for Asia from the Vancouver area will also increase from five monthly to thirty-four monthly.<sup>12</sup> In the United States, during his first week in office, President Donald J. Trump reopened and streamlined the permitting processes for two major pipelines – Keystone XL and Dakota Access.<sup>13</sup>

The oil sands of Alberta sit amidst the traditional, and present-day, territory of Canada's indigenous peoples, or "First Nations."<sup>14</sup> Distinct tribes existed throughout Canada prior to European contact and settlement,<sup>15</sup> and it is the descendants of these original inhabitants that fight on the front lines against oil sands development in an effort to preserve what is left of their land.<sup>16</sup> This struggle marks only the most recent in a string of politically -- and literally -- violent conflicts that have defined the post-contact history of First Nations.<sup>17</sup>

Of the 617 recognized First Nations, 364 have treaties with the Canadian government (or "the Crown") reserving and protecting various rights in land and resources,

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<sup>10</sup> *Id.*

<sup>11</sup> The Northern Gateway pipeline, which would have carried oil from Edmonton, Alberta, to a port in Kitimat, British Columbia was not approved due to environmental concerns. The expansion of Kinder Morgan's Trans Mountain pipeline from Edmonton to a port near Vancouver will proceed, as will the replacement and expansion of Enbridge's Line 3 pipeline to Superior, Wisconsin. See John Paul Tasker, *Trudeau cabinet approves Trans Mountain, Line 3 pipelines, rejects Northern Gateway Projects will pump nearly a million more barrels of oil a day from Alberta's oilsands to global markets*, CBC NEWS (Nov. 29, 2016, 3:14 PM), <http://www.cbc.ca/news/politics/federal-cabinet-trudeau-pipeline-decisions-1.3872828>.

<sup>12</sup> *Id.*

<sup>13</sup> See Presidential Memorandum Regarding Construction of the Dakota Access Pipeline (January 24, 2017); Presidential Memorandum Regarding Construction of the Keystone XL Pipeline (January 24, 2017); Executive Order Expediting Environmental Reviews and Approvals for High Priority Infrastructure Projects (January 24, 2017); see also Presidential Memorandum Regarding Construction of American Pipelines (January 24, 2017).

<sup>14</sup> See Preston, *supra* note 1, at 43.

<sup>15</sup> See OLIVE DICKASON, *CANADA'S FIRST NATIONS: A HISTORY OF FOUNDING PEOPLES FROM EARLIEST TIMES* 45-47 (3d ed. 2002) (including a map depicting the distribution of tribes in Canada at the time of European contact).

<sup>16</sup> Indigenous Env'tl. Network, *supra* note 4, at 6-7.

<sup>17</sup> See generally DICKASON, *supra* note 15 (describing how Aboriginal peoples fought in colonial wars; were hunted and decimated by European diseases; had their cultures legislated out of existence; and have been forced to respond to persistent colonial pressure in various ways, including attempts at cooperation, resistance, and preservation).

covering nearly half of Canada's land mass and over 600,000 tribal members.<sup>18</sup> Some of these treaty nations lie in the heart of oil sands country in Alberta.<sup>19</sup> In addition to the land, water, and greenhouse gas impacts described briefly above (and of particular significance to the argument at the heart of this piece), the caribou populations that some nations have treaty-protected right to hunt have been decimated by oil sands development.<sup>20</sup>

The legal force of treaties with indigenous peoples is recognized by both international and domestic law. The United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)<sup>21</sup> has at its core the principle of “free, prior and informed consent,” which should govern actions that involve diminishing the lands or resources of indigenous peoples.<sup>22</sup> The UNDRIP also specifically requires states to “honour and respect” treaties with indigenous peoples.<sup>23</sup> Though both Canada and the United States objected to the declaration at the time of its initial adoption in 2007, both nations have recently recalled those objections and announced support for it.<sup>24</sup>

Domestically, both the United States and Canada have laws and regulations requiring consultation with tribal nations in matters that affect them.<sup>25</sup> Both countries also recognize treaties with tribal nations as federal law. Indeed, Canada went one step further and constitutionalized the recognition and affirmation of “Aboriginal [and] treaty rights” in 1982.<sup>26</sup> Nevertheless, the content of those treaty rights and the extent of the protections

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<sup>18</sup> Aboriginal Affairs and Northern Development Canada, *Historic treaties and treaty First Nations in Canada* (2013), [http://epe.lac-bac.gc.ca/100/201/301/weekly\\_checklist/2014/internet/w14-22-U-E.html/collections/collection\\_2014/aadnc-aandc/R32-274-2013-eng.pdf](http://epe.lac-bac.gc.ca/100/201/301/weekly_checklist/2014/internet/w14-22-U-E.html/collections/collection_2014/aadnc-aandc/R32-274-2013-eng.pdf).

<sup>19</sup> See Indigenous Env'tl. Network, *supra* note 4 (listing the the Mikisew Cree First Nation, Athabasca Chipewyan First Nation, Fort McMurray First Nation, Fort McKay Cree Nation, Beaver Lake Cree First Nation, and Chipewyan Prairie First Nation as some of those whose rights are affected by oil sands development in Alberta).

<sup>20</sup> The Co-operative & Beaver Lake Cree First Nation, *Save the Cariboo – Stop the Tar Sands* (July 2010), <http://www.coop.co.uk/upload/ToxicFuels/docs/caribou-report.pdf> (“The Beaver Lake Cree First Nation has experienced a 74% decline of the Cold Lake herd since 1998 and a 71% decline of the East Side Athabasca River herd since 1996. Today, just 175 – 275 caribou remain. By 2025, the total population is expected to be less than 50 and locally extinct by 2040.”).

<sup>21</sup> United Nations Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, U.N. Doc. A/RES/61/295 (Sept. 13, 2007), 46 I.L.M. 1013 (2007) (hereinafter “UNDRIP”).

<sup>22</sup> See UNDRIP Art. 10 (“Indigenous peoples shall not be forcibly removed from their lands or territories. No relocation shall take place without the free, prior and informed consent of the indigenous peoples concerned and after agreement on just and fair compensation and, where possible, with the option of return.”); see also Arts. 25, 29.

<sup>23</sup> UNDRIP Art. 37 (“Indigenous peoples have the right to the recognition, observance and enforcement of treaties, agreements and other constructive arrangements concluded with States or their successors and to have States honour and respect such treaties, agreements and other constructive arrangements.”).

<sup>24</sup> See Announcement of U.S. Support for the United Nations Declaration on the Rights of Indigenous Peoples (Dec. 16, 2010); Statement of Indigenous Affairs Minister Carolyn Bennett, UN General Assembly (May 10, 2016).

<sup>25</sup> See, e.g., *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73 (“The government’s duty to consult with Aboriginal peoples and accommodate their interests is grounded in the principle of the honour of the Crown, which must be understood generously . . . The duty to consult and accommodate is part of a process of fair dealing and reconciliation that begins with the assertion of sovereignty and continues beyond formal claims resolution. The foundation of the duty in the Crown’s honour and the goal of reconciliation suggest that the duty arises when the Crown has knowledge, real or constructive, of the potential existence of the Aboriginal right or title and contemplates conduct that might adversely affect it.”).

<sup>26</sup> Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11 (hereinafter “Constitution Act”), Sec. 35.

afforded them remain in doubt, requiring continued reasoned adjudication.<sup>27</sup> It is such adjudication that this piece seeks to inform.

In the Pacific Northwest of the United States, Indian tribes similarly have treaty-protected rights to harvest resources, in particular, fish. These rights are protected in a series of treaties known as the “Stevens Treaties”<sup>28</sup> and extend beyond tribal reservations to land and rivers throughout the states of Washington, Oregon, Idaho, and Montana.<sup>29</sup> Unlike the treaty rights threatened by oil sands development, the fishing rights enshrined in the Stevens Treaties have been extensively litigated over the last seventy-five years.<sup>30</sup> Most recently, the tribes successfully claimed that government infrastructure projects infringe upon treaty-protected rights when they obstruct fish passage and thereby decrease the population of fish available for harvest.<sup>31</sup> This piece argues that analogous reasoning should compel the Canadian courts (or administrative adjudicative bodies) to halt oil sands development to the extent that it negatively affects caribou populations, a similar treaty-protected resource.

The comparative argument put forth herein will begin in Part II with a more-detailed examination of the law of treaties with indigenous peoples in both the United States and Canada. It will then proceed in Part III to paint a fuller picture of the treaty rights at issue in Alberta. Part IV will introduce the case study from the State of Washington that serves as the proposed model for the future adjudication of treaty rights disputes. Part V will then apply the model to the facts of oil sands development and its effect on caribou.

## II. TREATY LAW

As described at the outset, the UNDRIP purports to provide a myriad of international legal protections for the rights of indigenous peoples – those enshrined in treaties, as well as those simply inherent as aspects of indigenous sovereignty and personhood.<sup>32</sup> With regards specifically to treaty rights, Article 37 of the UNDRIP requires states to “recogni[ze], observ[e] and enforce” treaties that they, or their predecessors, have entered into with indigenous populations.<sup>33</sup>

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<sup>27</sup> See C. S. Mantyka-Pringle, Westman, Kythreotis, & Schindler, *supra* note 3 (“Any Aboriginal or treaty rights that existed in 1982 should therefore enjoy constitutional protection. Instead those rights remain largely undefined and subject to interpretations by the courts, leaving Aboriginal people in limbo.”).

<sup>28</sup> Named for Governor of the Washington Territory, Isaac Stevens.

<sup>29</sup> “The right of taking fish, at all usual and accustomed grounds and stations, is further secured to said Indians, in common with all citizens of the Territory, and of erecting temporary houses for the purpose of curing, together with the privilege of hunting, gathering roots and berries, and pasturing their horses on open and unclaimed lands: Provided, however, That they shall not take shell fish from any beds staked or cultivated by citizens.” Art. III of the Treaty of Medicine Creek, 10 Stat. 1132. (Identical, or almost identical, language is included in each of the other Stevens Treaties.).

<sup>30</sup> For a fairly comprehensive account of that historical, and still ongoing, litigation see *United States v. Washington*, 2017 U.S. App. LEXIS 3816 (9th Cir. Mar. 2, 2017).

<sup>31</sup> See *United States v. Washington*, 20 F. Supp. 3d 986 (W.D.W. 2013), *aff’d* No. 13-35274 (9th Cir. June 27, 2016).

<sup>32</sup> See UNDRIP, *supra* note 21 and associated text.

<sup>33</sup> *Id.* at art. 37.

Canada, having recently removed its objector status and committed to the UNDRIP without reservation,<sup>34</sup> would seem to be bound by international law to honor all treaties with First Nations in all of its activities, including its permitting of oil sands extraction and pipeline construction projects. But the matter is not that simple. In Canada, as in the United States and many other nations, the implementation of international agreements often requires domestic legislation to make those international commitments enforceable. Since committing to the UNDRIP, initially spirited efforts to incorporate the UNDRIP wholesale into domestic law have stalled of late.<sup>35</sup> In the United States, no such efforts to pass implementing legislation have been reported.

As a result, despite an end to the embarrassingly long holdout on the parts of both Canada and the United States, the UNDRIP provides little more than an aspirational statement of policy when it comes to the conflicts between treaty rights and oil sands development happening right now. The pre-existing law regarding the interpretation and enforcement of treaties with indigenous peoples instead provides the real teeth of the analysis in resource conflicts like those discussed herein. United States and Canadian courts have considered the force and effect of such treaties many times and will likely continue to look to the precedents established by those cases, rather than discern new legal obligations flowing from the UNDRIP.

This piece proposes that the adjudication of treaty fishing rights in the Pacific Northwest of the United States serve as a model for the analysis of persisting Alberta oil sands issues. Hence, a brief comparative study of the treatment of treaties under United States and Canadian law will provide a necessary foundation for later discussion.

According to the United States Constitution, treaties, including those with Native American tribes, are the “supreme Law of the land,” with the same (but no greater) legal force as federal statutes.<sup>36</sup> Consequently, the government is strictly bound to adhere to treaty provisions unless a conflicting, later-in-time federal statute exists (i.e. the treaty, or a part thereof, is abrogated). The Supreme Court has also made it clear that abrogation of a treaty by federal statute is not to be found lightly. Indeed, the Court has held that abrogation must be effectuated by an act of Congress and requires that said act “clearly express intent to do so.”<sup>37</sup> The first step in any treaty rights analysis under United States law is the search for a federal statute expressly abrogating the right in question; finding no such statute, one moves on to the more difficult question of interpretation.

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<sup>34</sup> See Tim Fontaine, *Canada officially adopts UN declaration on rights of Indigenous Peoples*, CBC NEWS, (May 10, 2016, 1:16PM), <http://www.cbc.ca/news/indigenous/canada-adopting-implementing-un-rights-declaration-1.3575272>.

<sup>35</sup> See Kristy Kirkup, *Government supports Indigenous declaration without reservation: Wilson-Raybould*, THE GLOBE AND MAIL, (July 20, 2016, 9:15AM) <http://www.theglobeandmail.com/news/national/government-supports-indigenous-declaration-without-reservation-wilson-raybould/article31007436/> (reporting that Justice Minister Jody Wilson-Raybould called such wholesale adoption of UNDRIP into domestic law “simplistic” and “unworkable,” but that the government nonetheless supports all articles of the UNDRIP “without reservation.”).

<sup>36</sup> U.S. Const. art. VI (“This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.”).

<sup>37</sup> *Minn. v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 202 (1999).



The Supreme Court has developed certain canons of construction that apply when interpreting treaties with Indian tribes and other federal laws that affect those tribes.<sup>38</sup> The principal canon of construction for treaty interpretation requires that provisions be construed liberally in favor of tribes, giving effect to the terms as tribes would have understood them at the time of signing and construing ambiguous terms to their benefit.<sup>39</sup> These principles guided the judicial decisions protecting tribal fishing rights explained *infra*.

In Canada, the treaties with First Nations enjoy similar status under federal law; though such status was enshrined much more recently.<sup>40</sup> The Canadian Charter of Rights and Freedoms, in Sections 25 and 35, explicitly “recognize[s] and affirm[s]” the treaty rights of aboriginal peoples as part of the law of Canada and protects a broad group of aboriginal rights from abrogation or derogation.<sup>41</sup> Implicit in this law is the recognition that, like the United States Congress, the Canadian Parliament had the power to abrogate aboriginal rights, which had been recognized at common law.<sup>42</sup> Section 35 of the Charter limited that power, such that, according to the Supreme Court of Canada, “[t]he government is required to bear the burden of justifying any legislation that has some negative effect on any aboriginal right protected under s. 35(1).”<sup>43</sup> This equates to a higher burden than simply showing a clear intent to abrogate the treaty right in question.

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<sup>38</sup> See generally *Id.*

<sup>39</sup> See *Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 675–76 (1979) (“[I]t is the intention of the parties, and not solely that of the superior side, that must control any attempt to interpret the treaties. When Indians are involved, this Court has long given special meaning to this rule. It has held that the United States, as the party with the presumptively superior negotiating skills and superior knowledge of the language in which the treaty is recorded, has a responsibility to avoid taking advantage of the other side.”); *Jones v. Meehan*, 175 U.S. 1, 11 (1899) (“[T]he treaty must therefore be construed, not according to the technical meaning of its words to learned lawyers, but in the sense in which they would naturally be understood by the Indians.”); see also *United States v. Winans*, 198 U.S. 371 (1905); *Seufort Bros. Co. v. United States*, 249 U.S. 194 (1919); *Tulee v. Washington*, 315 U.S. 681 (1942); *Washington v. Yakima Indian Nation*, 439 U.S. 463, 484 (1979).

<sup>40</sup> The Constitution Act of 1982 enshrined the Canadian Charter of Rights and Freedoms. See also 1990 Métis Settlements Accord Implementation Act; *Calder v. Attorney General of British Columbia*, [1973] S.C.R. 313.

<sup>41</sup> Constitution Act, Sec. 35 (“(1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed. (2) In this Act, ‘aboriginal peoples of Canada’ includes the Indian, Inuit and Métis peoples of Canada. (3) For greater certainty, in subsection (1) ‘treaty rights’ includes rights that now exist by way of land claims agreements or may be so acquired. (4) Notwithstanding any other provision of this Act, the aboriginal and treaty rights referred to in subsection (1) are guaranteed equally to male and female persons.”) and Sec. 25 (“The guarantee in this Charter of certain rights and freedoms shall not be construed so as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada including (a) any rights or freedoms that have been recognized by the Royal Proclamation of October 7, 1763; and (b) any rights or freedoms that now exist by way of land claims agreements or may be so acquired.”).

<sup>42</sup> See *R. v. Van der Peet* [1996] 2 S.C.R. 507, ¶ 28 (Can.) (“[Section] 35(1) did not create the legal doctrine of aboriginal rights; aboriginal rights existed and were recognized under the common law. . . . At common law aboriginal rights did not, of course, have constitutional status, with the result that Parliament could, at any time, extinguish or regulate those rights. . . . Subsequent to s. 35(1) aboriginal rights cannot be extinguished and can only be regulated or infringed consistent with the justificatory test laid out by this Court in *Sparrow*, *supra*.”).

<sup>43</sup> *R. v. Sparrow*, [1990] 1 S.C.R. 1075 (Can.); see also *id.* (explaining further that abrogation might be justified by: a “valid legislative objective;” “as little infringement as possible in order to effect the desired result;” fair compensation; and “consultation.”).

With respect to interpretation, the Supreme Court of Canada employs similar guiding principles to those of the United States Supreme Court and focuses on the aboriginal understanding of certain treaty rights, as evidenced by historical practice.<sup>44</sup> In determining the meaning of treaty provisions,<sup>45</sup> and the meaning of federal law as it applies to aboriginal peoples,<sup>46</sup> Canadian courts employ “a generous and liberal interpretation in favor of aboriginal peoples.”<sup>47</sup> In determining whether a specific activity falls within a treaty or aboriginal right, Canadian courts look to whether that activity was “an element of a practice, custom or tradition integral to the distinctive culture of the aboriginal group claiming the right.”<sup>48</sup>

In addition to the federal constitutional and interpretive protections, treaty rights in Canada may be further protected through provincial action (unlike the United States where the federal government exclusively treats with tribes). Of particular note to the issue of oil sands, there exists a protocol agreement between Treaty 8 First Nations and the government of Alberta.<sup>49</sup> That Protocol Agreement established a number of “tables” designed to be “forums to hold discussions with the objective of determining joint courses of action.”<sup>50</sup> Of note for the purposes of this piece is the table on “consultation, development, and the environment.”<sup>51</sup> The Protocol Agreement specifically recognizes and purports to protect the treaty and aboriginal rights of the First Nations signatories.<sup>52</sup>

### III. TREATY RIGHTS AT ISSUE

Throughout Canada’s history there have been a number of treaty-making periods. The treaties most relevant to oil sands exploration and extraction are some of the so-called “Numbered Treaties,” in particular those that deal with First Nations in modern-day Alberta. During the period 1871 to 1921, the British Crown entered into a series of eleven such Numbered Treaties.<sup>53</sup> The Numbered Treaties covered much of the territory of Canada and served the governmental purpose of effectuating legal surrender of aboriginal

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<sup>44</sup> See, e.g., *Van der Peet*, ¶¶ 46- 60.

<sup>45</sup> *R. v. Simon*, [1985] 2 S.C.R. 387, para. 402 (Can.); *Nowegijick v. R.*, [1983] 1 S.C.R. 29, para. 36 (Can.); *R. v. Horseman*, [1990] 1 S.C.R. 901, ¶. 907 (Can.); *Sioui v. Quebec (Attorney General)*, [1990] 1 S.C.R. 1025, ¶. 1066 (Can.).

<sup>46</sup> *Van der Peet* [1996] 2 S.C.R. at ¶ 23.

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*, ¶ 46.

<sup>49</sup> See Protocol Agreement between Treaty 8 First Nations of Alberta and the Province of Alberta (April 26, 2016); see also Otiena Ellwand, *Alberta signs agreement with Treaty 8 First Nations for better co-operation on environment, education and health*, EDMONTON SUN (April 26, 2016), [www.edmontonsun.com/2016/04/26/alberta-signs-agreemen-with-Treaty-8-First-nations-for-better-co-operation-on-environment-education-and-health](http://www.edmontonsun.com/2016/04/26/alberta-signs-agreemen-with-Treaty-8-First-nations-for-better-co-operation-on-environment-education-and-health) (“We haven’t really felt like we’ve been benefiting out of our natural resources that have been coming from our territories. Why should we have second class education when Treaty 8 territory has been feeding and educating thousands of people? There should be equality,” - Deputy Grand Chief Isaac Laboucan-Avirom of Treaty 8.)

<sup>50</sup> Protocol Agreement, *supra* note 49.

<sup>51</sup> Protocol Agreement, *supra* note 49.

<sup>52</sup> Protocol Agreement, *supra* note 49 (“nothing in this Protocol shall be interpreted to abrogate or derogate from the protection provided for existing or aboriginal treaty rights”).

<sup>53</sup> Aboriginal Affairs and Northern Development Canada, *supra* note 18.

land claims<sup>54</sup> in exchange for some reserved lands,<sup>55</sup> cash payments,<sup>56</sup> and agricultural, hunting, and fishing supplies.<sup>57</sup> From the perspective of First Nations, who signed the documents with generally limited English or French literacy, the treaties represented sacred oral agreements to share the land with newcomers “to the depth of a plow” and thereby enter a kin-like relationship with them; the technical written terms were of less importance.<sup>58</sup> Despite the two differing perspectives, both the First Nations and the Canadian government acknowledge that the treaties recognize and protect certain traditional livelihood rights (e.g., hunting, fishing, gathering, and trapping).<sup>59</sup>

Covering most of northern Alberta (prime oil sands territory), Treaty 8 was signed in 1899 between the Cree and Athapaskans (or Dene) peoples and the Canadian government (represented by Commissioner David Laird).<sup>60</sup> Forebodingly, the treaty process began as a result of a discovery by the Geological Survey of Canada that petroleum existed in the region.<sup>61</sup> From approximately 1870 leading up to the treaty signing, the Canadian government consulted with various experts to devise a strategy that took into

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<sup>54</sup> See, e.g., Treaty No. 8, Indigenous and Northern Affairs Canada, <http://www.aadnc-aandc.gc.ca/eng/11001000288131/1100100028853>. (“the said Indians DO HEREBY CEDE, RELEASE, SURRENDER AND YIELD UP to the Government of the Dominion of Canada, for Her Majesty the Queen and Her successors for ever, all their rights, titles and privileges whatsoever, to the lands included within the following limits”).

<sup>55</sup> See, e.g., *id.* (“And Her Majesty the Queen hereby agrees and undertakes to lay aside reserves for such bands as desire reserves, the same not to exceed in all one square mile for each family of five for such number of families as may elect to reside on reserves, or in that proportion for larger or smaller families; and for such families or individual Indians as may prefer to live apart from band reserves, Her Majesty undertakes to provide land in severalty to the extent of 160 acres to each Indian, the land to be conveyed with a proviso as to non-alienation without the consent of the Governor General in Council of Canada, the selection of such reserves, and lands in severalty, to be made in the manner following, namely, the Superintendent General of Indian Affairs shall depute and send a suitable person to determine and set apart such reserves and lands, after consulting with the Indians concerned as to the locality which may be found suitable and open for selection.”).

<sup>56</sup> See, e.g., *id.* (“Her Majesty also agrees that next year, and annually afterwards for ever, She will cause to be paid to the said Indians in cash, at suitable places and dates, of which the said Indians shall be duly notified, to each Chief twenty-five dollars, each Headman, not to exceed four to a large Band and two to a small Band, fifteen dollars, and to every other Indian, of whatever age, five dollars, the same, unless there be some exceptional reason, to be paid only to heads of families for those belonging thereto.”).

<sup>57</sup> See, e.g., *id.* (“FURTHER, Her Majesty agrees that each Band that elects to take a reserve and cultivate the soil, shall, as soon as convenient after such reserve is set aside and settled upon, and the Band has signified its choice and is prepared to break up the soil, receive two hoes, one spade, one scythe and two hay forks for every family so settled, and for every three families one plough and one harrow, and to the Chief, for the use of his Band, two horses or a yoke of oxen, and for each Band potatoes, barley, oats and wheat (if such seed be suited to the locality of the reserve), to plant the land actually broken up, and provisions for one month in the spring for several years while planting such seeds; and to every family one cow, and every Chief one bull, and one mowing-machine and one reaper for the use of his Band when it is ready for them; for such families as prefer to raise stock instead of cultivating the soil, every family of five persons, two cows, and every Chief two bulls and two mowing-machines when ready for their use, and a like proportion for smaller or larger families. The aforesaid articles, machines and cattle to be given once for all for the encouragement of agriculture and stock raising; and for such Bands as prefer to continue hunting and fishing, as much ammunition and twine for making nets annually as will amount in value to one dollar per head of the families so engaged in hunting and fishing”); Mantyka-Pringle, Westman, Kythreotis, & Schindler, *supra* note 3.

<sup>58</sup> Mantyka-Pringle, Westman, Kythreotis, & Schindler, *supra* note 3, at 798.

<sup>59</sup> *Id.*

<sup>60</sup> Preston, *supra* note 1, at 47.

<sup>61</sup> *Id.*

account the potential for settlement, resource extraction, and economic development in the treaty area, as well as the condition and traditions of the Aboriginal population.<sup>62</sup> Consequently, among many provisions ultimately negotiated, Treaty 8 guarantees First Nations people the right to a subsistence livelihood, while at the same time divesting them of large swaths of potentially resource-rich land.<sup>63</sup> Specifically, Treaty 8 reserved the right of the First Nation signatories to “pursue their usual vocations of hunting, trapping and fishing throughout the tract surrendered” with some conditions to allow for government resource extraction (including, importantly, an allowance for the Crown to take tracts necessary for mining).<sup>64</sup>

Treaties 6 and 7, covering the middle and lower portions of Alberta where oil sands extraction and pipeline construction also occur, have very similar structures with regards to the protection of the traditional lifeways of First Nations. Indeed, Treaty 6 includes a nearly identical provision reserving hunting and fishing rights while establishing the government’s overriding right to pursue, inter alia, mining.<sup>65</sup> One Treaty 6 tribe, the Beaver Lake Cree, have described their understanding of the oral and written reserved rights in litigation challenging governmental authorizations to extract resources from the treaty area.<sup>66</sup> The tribe claimed that their rights had been essentially rendered meaningless in critical parts of traditional territory.<sup>67</sup>

In light of concerns over the above-described treaty rights, forty-four First Nations from Treaty 6, 7, and 8 communities in Alberta recently demanded a moratorium on oil sands authorizations by the Canadian government until comprehensive land management planning can occur.<sup>68</sup> Despite the explicit exception for mining activities on ceded lands in the treaties, some legal scholars and commentators agree with the tribes’ perspective and maintain that the current extent of development, especially in northern Alberta, constitutes a de facto breach of treaty rights guaranteeing First Nations the ability to maintain their traditional lifeways.<sup>69</sup>

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<sup>62</sup> Jennifer Huseman and Damien Short, *‘A slow industrial genocide’: tar sands and the Indigenous Peoples of Northern Alberta*, 16 INT’L. J. HUMAN RIGHTS 216, 217 (2012).

<sup>63</sup> Monique Passelac-Ross & Verónica Potes, *Consultation with Aboriginal Peoples in the Athabasca Oil Sands Region: Is it Meeting the Crown’s Legal Obligations?*, 98 CAN. I. RESOUR. LAW 1 (2007); Treaty 8.

<sup>64</sup> Treaty 8 (“And Her Majesty the Queen HEREBY AGREES with the said Indians that they shall have right to pursue their usual vocations of hunting, trapping and fishing throughout the tract surrendered as heretofore described, subject to such regulations as may from time to time be made by the Government of the country, acting under the authority of Her Majesty, and saving and excepting such tracts as may be required or taken up from time to time for settlement, mining, lumbering, trading or other purposes.”).

<sup>65</sup> Treaty 6 (“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 therefor by the said Government.”).

<sup>66</sup> Complaint at 20-21, *Beaver Lake Cree v. Alberta and Canada*, Court of Queen’s Bench of Alberta, case no. 0803 06718, (Can.).

<sup>67</sup> *Id.*

<sup>68</sup> Danielle Droitsch & Terra Simieritsch, *Canadian Aboriginal Concerns With Oil Sands*, PEMBINA INSTITUTE (Sep. 1, 2010), <https://www.pembina.org/reports/briefingnoteosfntoursep10.pdf>.

<sup>69</sup> See Passelac-Ross & Potes, *supra* note 69, at 1–8; see also Kristin Moe, *Alberta Tar Sands Illegal under Treaty 8, First Nations Charge*, YES! MAGAZINE, Oct. 17, 2012, available at <http://www.yesmagazine.org/planet/alberta-tar-sands-illegal-treaty-8-first-nations-shell-oil> (“When the

The United States also entered into numerous treaties with indigenous populations. The treaties that provide the focus of our comparison case study, however, represent a small subset called the “Stevens Treaties.” These treaties derive their name from the United States representative, Governor Isaac I. Stevens of the Washington Territory, and were entered into in 1854 and 1855 to extinguish the last group of conflicting land claims west of the Cascade Mountains and north of the Columbia River.<sup>70</sup> Similar to the Canadian story told above, the Indians surrendered any interest or claim to vast quantities of land in exchange for monetary payments, small parcels of reserved lands, and guarantees for the protection of certain rights.<sup>71</sup> Most importantly, the treaties acknowledge and reserve the “right of taking fish, at all usual and accustomed grounds and stations . . . in common with all citizens of the Territory.”<sup>72</sup>

At the time the Stevens Treaties were agreed to, anadromous fish were vitally important to the population of western Washington, where about three-fourths of the approximately 10,000 inhabitants were Indians.<sup>73</sup> The dependence on fishing proved a unifying element of an otherwise diverse group of tribes; the protection of this right was vital to treaty negotiations.<sup>74</sup> Indeed, the contemporaneous records of the United States government indicate that the negotiators, including Stevens himself, recognized the importance of the fisheries and sought to enshrine in the treaties protections against the risk of non-Indian settlers seeking to monopolize them.<sup>75</sup> The tribes understood the treaties to be providing such protections in perpetuity.<sup>76</sup> Naturally, those fishing rights, and the protection of them, became the center of a nearly century-long series of legal battles.

#### IV. CULVERTS CASE STUDY

In the 1970s, the famous “Boldt decision,”<sup>77</sup> and subsequent Supreme Court case,<sup>78</sup> firmly established the continued legal and practical significance of the fishing rights secured in the Stevens Treaties. Judge Boldt, of the Western District of Washington, held that the phrase “the right of taking fish . . . in common with all citizens” protected the

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threats to health and traditional ways of life associated with tar sands mining are lamented, what’s often missing is the recognition that the mining is also in violation of Treaty 8.”).

<sup>70</sup> *Fishing Vessel*, 443 U.S. at 661-62.

<sup>71</sup> *Id.*

<sup>72</sup> *See, e.g.*, Treaty of Medicine Creek, *supra* note 22 (“The right of taking fish, at all usual and accustomed grounds and stations, is further secured to said Indians in common with all citizens of the Territory, and of erecting temporary houses for the purpose of curing, together with the privilege of hunting, gathering roots and berries, and pasturing their horses on open and unclaimed lands: Provided, however, That they shall not take shellfish from any beds staked or cultivated by citizens . . .”). Identical, or almost identical, language is included in each of the Stevens Treaties.

<sup>73</sup> *Fishing Vessel*, 443 U.S. at 664-68.

<sup>74</sup> *Id.*; *Winans*, 198 U.S. at 381 (salmon was “not much less necessary to the existence of the Indians than the atmosphere they breathed.”).

<sup>75</sup> *Fishing Vessel*, 443 U.S. at 664-68.

<sup>76</sup> *Id.* (“[T]he District Court found: ‘At the treaty council the United States negotiators promised, and the Indians understood, that the Yakimas would forever be able to continue the same off-reservation food gathering and fishing practices as to time, place, method, species and extent as they had or were exercising. The Yakimas relied on these promises and they formed a material and basic part of the treaty and of the Indians’ understanding of the meaning of the treaty.’”).

<sup>77</sup> *United States v. Washington*, 384 F. Supp. 312 (W.D. Wash. 1974).

<sup>78</sup> *Fishing Vessel*, 443 U.S. 658.

signatory tribes' right to take up to fifty percent of the harvestable fish, subject to the right of non-treaty fishers to do the same.<sup>79</sup> The Supreme Court agreed with Judge Boldt that the fishing clause guaranteed “so much as, but no more than, is necessary to provide the Indians with a livelihood—that is to say, a moderate living.”<sup>80</sup> Pursuant to the canons of interpretation described above, the Court determined that, the Indians, and in all likelihood Governor Stevens, would have understood that the treaty promised protection for the supply of fish as a viable source of food and commerce, not merely the proportionate share of the available fish at any given time.<sup>81</sup>

In subsequent litigation, the tribes attempted to establish a broad obligation on the part of the government to prevent environmental degradation and thereby protect the treaty resource (fish) from depletion in practical derogation of the treaty.<sup>82</sup> The Ninth Circuit, however, declined to find the existence of such a general environmental protection obligation, deciding not that the Stevens Treaties were silent as to protection of the fishery, but rather that alleged harm to the fishery should be resolved in the context of particularized disputes (“Requests for Determination”), rather than a generalized request for a declaratory judgment.<sup>83</sup> The case that provides the point of comparison here – the so-called “Culverts Case” - arises from one of such particularized disputes.

The issue confronting the court was the State of Washington's construction and maintenance of a number of “barrier culverts” under its roads.<sup>84</sup> The state constructed culverts to allow roads to traverse streams while also allowing the stream to continue to flow under the road; unfortunately, many culverts constructed and maintained by the State of Washington did not allow *fish* to pass with the water under the road - thus the moniker “barrier culvert.”<sup>85</sup> Specifically, the barrier culverts in question block approximately 1,000 linear miles of streams suitable for salmon habitat, comprising almost five million square meters, which, if the culverts were replaced or modified, would produce several hundred thousand additional mature salmon annually.<sup>86</sup> The United States, along with several tribes,<sup>87</sup> filed a Request for Determination of whether the State Washington's actions regarding the culverts violated the Stevens Treaties. The district court concluded that they did and ordered the state to repair and/or remove the culverts on a prescribed schedule.<sup>88</sup>

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<sup>79</sup> United States v. Washington, 384 F. Supp., at 343.

<sup>80</sup> *Fishing Vessel*, 443 U.S. at 686.

<sup>81</sup> *Id.* at 676.

<sup>82</sup> See United States v. Washington, 759 F.2d 1353 (9th Cir. 1985) (en banc).

<sup>83</sup> *Id.* at 1357 (“We choose to rest our decision in this case on the proposition that issuance of the declaratory judgment on the environmental issue is contrary to the exercise of sound judicial discretion. The legal standards that will govern the State's precise obligations and duties under the treaty with respect to the myriad State actions that may affect the environment of the treaty area will depend for their definition and articulation upon concrete facts which underlie a dispute in a particular case.”).

<sup>84</sup> United States v. Washington, No. 13-35474, 2017 U.S. App. LEXIS 3816, at \*18, \*19 (9th Cir. Mar. 2, 2017).

<sup>85</sup> *Id.* at \*18,

<sup>86</sup> *Id.* at \*39.

<sup>87</sup> Specifically, the Suquamish Indian Tribe, Jamestown S'Klallam, Lower Elwha Band of Klallams, Port Gamble Clallam, Nisqually Indian Tribe, Nooksack Tribe, Sauk-Suiattle Tribe, Skokomish Indian Tribe, Squaxin Island Tribe, Stillaguamish Tribe, Upper Skagit Tribe, Tulalip Tribes, Lummi Indian Nation, Quinault Indian Nation, Puyallup Tribe, Hoh Tribe, Confederated Tribes and Bands of the Yakama Indian Nation, Quileute Indian Tribe, Makah Indian Tribe, Swinomish Indian Tribal Community, and the Muckleshoot Indian Tribe.

<sup>88</sup> United States v. Washington, 20 F. Supp. 3d 986 (W.D.W. 2013).

Before the Ninth Circuit, it was well-established and undisputed that the treaties guarantee to the tribes the right to take up to fifty percent of the fish available, but the state maintained that the treaties impose no obligation to ensure that any fish will, in fact, be available.<sup>89</sup> The Ninth Circuit displayed rather frank contempt for this position. Applying the Indian canons of construction,<sup>90</sup> the court succinctly found that “Indians did not understand the Treaties to promise that they would have access to their usual and accustomed fishing places, but with a qualification that would allow the government to diminish or destroy the fish runs.”<sup>91</sup> Finding also that Governor Stevens had made an explicit promise to provide fish,<sup>92</sup> and an implicit promise to “support the purpose”<sup>93</sup> of the treaties, the Ninth Circuit had no trouble concluding that an obligation existed on the part of the state to maintain a number of fish sufficient to provide a “moderate living” to the tribes.<sup>94</sup>

Because the consequence, but not the primary purpose, of building and maintaining the barrier culverts has been to diminish the supply of fish, the court analyzed the facts found by the district court to determine if a treaty violation was occurring (i.e. whether there was harm to the treaty resource that could be attributed to the culverts construction and maintenance).<sup>95</sup> The record revealed, as described above, that hundreds of thousands more fish would be available for harvest if not for the barrier culverts and that the fish currently available for harvest are not sufficient to provide a “moderate living” to the tribes.<sup>96</sup> Therefore, the Ninth Circuit held that “in building and maintaining barrier culverts [within the Case Area] Washington has violated, and continues to violate, its obligation to the Tribes under the . . . Treaties.”<sup>97</sup>

The Ninth Circuit then went on to determine that the remedy ordered by the district court was likewise sound and just. The district court’s order, which was affirmed in full, required Washington to correct “high-priority” culverts — those blocking 200 linear meters or more of upstream habitat — within seventeen years and “low-priority” culverts — those blocking less than 200 linear meters of upstream habitat — only at the end of the useful life of the existing culvert, or when an independently undertaken highway project would require replacement.<sup>98</sup> The court’s order additionally permitted Washington to defer correction of some high-priority culverts on cost effectiveness grounds.<sup>99</sup> Nonetheless, the

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<sup>89</sup> *United States v. Washington*, No. 13-35474, U.S. App. LEXIS 3816, at \*35 (9th Cir. Mar. 2, 2017) (“The Indians reasonably understood Governor Stevens to promise not only that they would have access to their usual and accustomed fishing places, but also that there would be fish sufficient to sustain them. They reasonably understood that they would have, in Stevens’ words, “food and drink . . . forever.”).

<sup>90</sup> *See generally id.*

<sup>91</sup> *Id.* at \*35.

<sup>92</sup> *Id.* (“During negotiations for the Point-No-Point Treaty, Stevens said, ‘This paper is such as a man would give to his children and I will tell you why. This paper gives you a home. Does not a father give his children a home? . . . This paper secures your fish. Does not a father give food to his children?’” (quoting *Fishing Vessel*, 443 U.S. at 667 n.11 (ellipsis in original)).

<sup>93</sup> *Id.* (quoting *Winters v. United States*, 207 U.S. 564, 577 (1908)).

<sup>94</sup> *Id.* at \*37.

<sup>95</sup> *Id.* at \*35.

<sup>96</sup> *Id.* at \*37.

<sup>97</sup> *Id.* at \*40, 44 (the court further noted that, unlike *City of Sherrill v. Oneida Indian Nation of N.Y.*, 544 U.S. 197 (2005), the Tribes have done nothing to relinquish their rights under the Treaties or authorize the State to construct and maintain barrier culverts).

<sup>98</sup> *Id.* at 48.

<sup>99</sup> *Id.*

United States, or at least the Ninth Circuit, has thus provided a model for the adjudication of situations where government projects come into conflict with indigenous rights to natural resources.

## V. COMPARISON TO ALBERTAN OIL SANDS SITUATION

Looking north to Alberta's First Nations and the oil sands that threaten their way of life, a great conflict between treaty rights and government-sanctioned destruction wages on. First Nations and their passionate advocates have brought the struggle to protect treaty rights to various administrative, political, and judicial fora<sup>100</sup> at the provincial, national, and international levels.<sup>101</sup> Their efforts have been met with mixed results.<sup>102</sup> No Canadian court, or other tribunal, has yet gone so far as the Western District of Washington and the Ninth Circuit. Some of the treaty rights issues with oil sands extraction and pipeline construction do not neatly fit the model offered by United States courts in the adjudication of tribal fishing rights. But the fight to protect one particular treaty-guaranteed resource being harmed by oil sands activity certainly does – the caribou.

As outlined in detail above,<sup>103</sup> Treaties 6, 7, and 8, which cover Alberta, guarantee to the First Nation signatories the right to hunt caribou on ceded lands to maintain their traditional way of life.<sup>104</sup> Like the salmon and other anadromous fish in the rivers of Washington were for the tribes residing in that area, the caribou herds have for centuries been vitally important to the First Nations of Northern Alberta. One could quite confidently surmise that those nations similarly would not have entered into the Numbered Treaties if not for the protections for this important resource enshrined within. To borrow the words of the Supreme Court of Canada, the traditional hunting of caribou was “integral to the distinctive culture of the aboriginal group claiming the right [to do so].”<sup>105</sup> Consequently, the right of Alberta's First Nations to hunt caribou is constitutionally protected by Section 35.<sup>106</sup> Giving that right, as Canadian legal institutions must, “a

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<sup>100</sup> See, e.g., Droitsch & Simieritsch, *supra* note 68; Beaver Lake Cree v. Alberta and Canada, Court of Queen's Bench of Alberta, case no. 0803 06718; Letter from Jack Woodard, Attorney, Woodward & Co., to Hon. Jim Prentice, Minister of Env't (July 15, 2010) (petition for emergency order under the Species at Risk Act to protect woodland caribou in northeastern Alberta on behalf of Beaver Lake Cree Nation, Enoch Cree Nation, Chipewyan Prairie Dene First Nation and Athabasca Chipewyan First Nation demanding administrative action to protect caribou populations).

<sup>101</sup> See, e.g., Elizabeth McSheffrey, *First Nations across North America sign treaty alliance against the oilsands*, NATIONAL OBSERVER, Sept. 22, 2016, available at <http://www.nationalobserver.com/2016/09/22/news/first-nations-across-north-america-sign-treaty-alliance-against-oilsands>

<sup>102</sup> See Tasker, *supra* note 11; see generally Lower Athabasca Regional Plan Review Panel, Review Panel Report 2015, available at <https://open.alberta.ca/publications/review-panel-report-2015-lower-athabasca-regional-plan>.

<sup>103</sup> See *supra* Part IV.

<sup>104</sup> See, e.g., Treaty 8 (“And Her Majesty the Queen HEREBY AGREES with the said Indians that they shall have right to pursue their usual vocations of hunting, trapping and fishing throughout the tract surrendered as heretofore described, subject to such regulations as may from time to time be made by the Government of the country, acting under the authority of Her Majesty, and saving and excepting such tracts as may be required or taken up from time to time for settlement, mining, lumbering, trading or other purposes.”).

<sup>105</sup> *Van der Peet* [1996] 2 S.C.R. 507 at ¶ 46.

<sup>106</sup> See *supra* Part II and III.



generous and liberal interpretation in favor of aboriginal peoples,” one would be hard-pressed not to adopt a similar view to that of the Ninth Circuit in its interpretation of Washington tribes’ treaty rights.<sup>107</sup> That is to say, applying the Ninth Circuit’s words (and reasoning) to this situation, “[First Nations] did not understand the Treaties to promise that they would have [the right to pursue their usual vocation of caribou hunting throughout the tract surrendered], but with a qualification that would allow the government to diminish or destroy the [caribou population and habitat].”<sup>108</sup> Accordingly, a Canadian tribunal considering whether oil sands activity violates the Numbered Treaties with respect to its effect on caribou hunting rights should follow the Ninth Circuit’s line of analysis and simply determine the extent of the factually attributable harm and fashion an appropriate remedy.

On the point of harm, the evidence is substantial, as it was in the Culverts Case. In 2008, the Canadian Department of Environment and Climate Change (“Environment Canada”) undertook to identify the critical habitat of the Woodland Caribou in furtherance of recovery efforts pursuant to the caribou’s Species at Risk Act (SARA)<sup>109</sup> listing of “threatened” in 2003.<sup>110</sup> Among many complicated and detailed findings, the Scientific Review concluded that all woodland caribou local populations in Alberta were “not self-sustaining.”<sup>111</sup> Another scientist, performing a study at the request of the Beaver Lake Cree Nation, specifically found that two herds had declined 71% since 1996 and 74% since 1998 respectively.<sup>112</sup> Today, just 175 to 275 caribou remain in those herds, with the total population expected to decline to less than 50 by 2025 and drop below 10 (or even go extinct) by mid-century.<sup>113</sup>

Environment Canada observed multiple “disturbance” events that contribute to the poor outlook for caribou populations, comprising both natural and anthropogenic disturbance regimes.<sup>114</sup> Among the anthropogenic risk factors oil extraction and associated infrastructure notably feature.<sup>115</sup> Other studies have been even more explicit in connecting oil sands activity with the declining availability of caribou for First Nations hunters, concluding that oil sands development acts as “the most prominent human-caused habitat

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<sup>107</sup> *Van der Peet* [1996] 2 S.C.R. 507 at ¶ 23.

<sup>108</sup> *United States v. Washington*, U.S. App. LEXIS 3816, at \*35.

<sup>109</sup> S.C. 2002, c. 29. This is the analog to the Endangered Species Act in the United States. Under SARA, the Minister of the Environment and Climate Change is responsible for the development of a National Recovery Strategy, including the identification of critical habitat.

<sup>110</sup> Listed in 2002 as threatened by the Committee on the Status of Endangered Wildlife in Canada (Environment Canada, *Scientific Review for the Identification of Critical Habitat for Woodland Caribou (Rangifer tarandus caribou), Boreal Population, in Canada* (2008), at 71 [hereinafter “Scientific Review” or “EC 2008”]); Added to Schedule 1 of SARA in 2003 (Environment Canada, *Scientific Assessment to Inform the Identification of Critical Habitat for Woodland Caribou (Rangifer tarandus caribou), Boreal Population, in Canada: 2011 update*, at 1 [hereinafter “Scientific Update” or “EC 2011”]).

<sup>111</sup> See *Scientific Review* at p. vi (Executive Summary Figure 2) and at pp. 32 and 35-37 (table 6); *Scientific Update* at p. vii (Executive Summary Figure 1).

<sup>112</sup> Stan Boutin, *Expert Report on woodland caribou [Rangifer tarandus caribou] in the Traditional Territory of the Beaver Lake Cree Nation*, iv (July 5, 2010) <http://caid.ca/ExpWooCar2010.pdf>.

<sup>113</sup> See *Id.*; Indigenous Env’tl. Network, *supra* note 4, at 2; Co-operative & Beaver Lake Cree First Nation, *supra* note 20.

<sup>114</sup> See *Scientific Review* at 68.

<sup>115</sup> *Id.*

change in caribou range” and thus “the primary contributor to the declines in caribou.”<sup>116</sup> Dr. Boutin describes the situation thusly:

Extensive oil and gas deposits underlie most caribou ranges in Alberta and very high levels of petroleum and natural gas exploration and development have taken place on most of Alberta’s caribou ranges . . . [t]he majority of the well sites, seismic lines, and pipelines created by the energy sector remain in place on caribou range because of continued industrial use, slow forest regeneration, and/or high levels of recreational vehicle use.<sup>117</sup>

As a result of these features, 51% and 66%, respectively, of the two study herds’ ranges have been functionally lost.<sup>118</sup> In sum, the combined effects of numerous extractive projects has led to “total industrial activity exceeding the levels that can support viable caribou herds,” and, if no conservation action is taken, caribou will be extinct from northeastern Alberta in fairly short order.<sup>119</sup>

The plight of the caribou is perhaps even more dire than the situation facing Washington’s salmon – and those fish were literally swimming up against a brick wall. The Ninth Circuit had no trouble finding a treaty violation on the basis of evidence that thousands of fish were rendered unavailable by the culverts and that the fish currently available for harvest could not support tribes’ traditional lifeways.<sup>120</sup> Here, the evidence suggests that caribou may soon be completely unavailable to First Nations in Northern Alberta, let alone available at a level sufficient to support their livelihood as contemplated by the Numbered Treaties. Thus, confronted with the scientific evidence, a Canadian tribunal would be compelled to conclude, as the United States courts did, that by participating in and authorizing the continued construction and maintenance of oil sands extraction operations the Albertan government “has violated, and is continuing to violate, its obligation to the [First Nations] under the [Numbered] Treaties.”<sup>121</sup> Indeed, a recent decision by the Supreme Court of Canada suggests that such a result would be likely.<sup>122</sup>

On the question of remedy, the elegant solution to the culverts issue again should prove illustrative. There, the courts recognized the economic concerns of the state and the inefficiency of removing certain culverts, providing a long timeline and some flexibility in ultimately achieving the desired goal of free fish passage. With caribou, as some have observed, the best first step is to halt any future habitat change, thereby not creating any new boundaries to the detriment of herd movement and sustainability.<sup>123</sup> From there, Alberta could be ordered, as Washington was, to compile a list of the most disruptive oil

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<sup>116</sup> Boutin, *supra* note 112, at iv; *see also* Carol Linnitt, *Alberta to Sell More Oil and Gas Leases in Endangered Caribou Habitat*, *Desmog Canada*, (June 11, 2014), <https://www.desmog.ca/2014/06/09/alberta-sell-more-oil-and-gas-leases-endangered-caribou-habitat>.

<sup>117</sup> Boutin, at iv.

<sup>118</sup> *Id.* at v.

<sup>119</sup> *Id.*

<sup>120</sup> *United States v. Washington*, U.S. App. LEXIS 3816, at \*35.

<sup>121</sup> *Id.* at 33, 36.

<sup>122</sup> *Grassy Narrows v. Ontario (Natural Resources)*, 2014 SCC 48 (“If the taking up [of land for forestry] leaves the Ojibway with no meaningful right to hunt, fish or trap in relation to the territories over which they traditionally hunted, fished, and trapped, a potential action for treaty infringement will arise.”).

<sup>123</sup> Boutin, *supra* note 112.

sands projects and begin restoration activities at those sites. Like in the Culverts Case, Alberta could be given flexibility to delay intervention at some of the most recently constructed sites, so as to not lose all economic benefit from them and remedy the treaty violation most efficiently.

One might cringe at the lost revenues and the decline in economic activity, particularly in a region that has little else, but, as one commentator aptly put it,

[W]hat's at stake here isn't just a few hundred people's ability to hunt [caribou] and conduct ceremonies in a particular spot. Both the U.S. and Canada share a history of colonizing what is essentially stolen land; our societies were built on a common system of disenfranchisement. Honoring the treaties means honoring the most basic of agreements: the protection of a way of life—and, by extension, life itself.<sup>124</sup>

As both Canadian and United States judicial systems have already recognized, treaties with indigenous peoples are the law of the land and must be respected as such by the institutions that protect the rule of law in our societies.

## VI. CONCLUSION

Battles over oil sands activity in the face of treaty rights will continue to be waged in various fora across Canada, and perhaps even the United States, running the gamut from federal courts to local administrative bodies. For example, the Alberta Land Stewardship Act (ALSA) permits directly affected Albertans, including First Nations, to request a review, by a panel selected by the Stewardship Minister, of any land-use plan approved by the Government of Alberta.<sup>125</sup> The Lower Athabasca Regional Plan (LARP), which was implemented in response to criticism with the stated purpose of balancing economic activity with social and environmental needs,<sup>126</sup> was the subject of such a request from six First Nations.<sup>127</sup> Among other arguments, the First Nations asserted that the plan infringed upon their constitutionally protected treaty rights.<sup>128</sup> The Review Panel, in concluding that it had jurisdiction to consider such rights in making its determination,<sup>129</sup> has thus become an active forum where the arguments contained herein can be heard. The Review Panel's initial decision reflects a line of thinking consistent with the analysis proposed by this article.<sup>130</sup>

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<sup>124</sup> Moe, *supra* note 69.

<sup>125</sup> Alberta Land Stewardship Act, S.A. 2009, c. A-26.8, subsection 19.2(2).

<sup>126</sup> Mantyka-Pringle, Westman, Kythreotis, & Schindler, *supra* note 3, at 3.

<sup>127</sup> Panel Review of Lower Athabasca Regional Plan, 4 (Executive Summary).

<sup>128</sup> *Id.*

<sup>129</sup> Panel Review of Lower Athabasca Regional Plan, 242-43 (Appx. 3, Jurisdiction ruling) (“The Review Panel’s role is primarily to review the written submissions from the Applicants alleging the direct and adverse effects set out in section 5(1)(c) of the ALSR and, if the Review Panel finds those effects to be credible and probable, to provide recommendations to the Stewardship Minister . . . Notably, there is nothing in the ALSA, the ALSR or the Rules that would prevent the Review Panel from considering constitutionally protected First Nation rights in its review of the Applications and the LARP.”).

<sup>130</sup> Panel Review of Lower Athabasca Regional Plan, 6 (Executive Summary) (“The Review Panel suggests to the Minister that[:] . . . a [Traditional Land Use] Management Framework must be developed and included as an important component of the LARP . . . [to] recognize and honour the “constitutionally-protected rights”

Similar to the “fish wars” that preceded the Boldt decision and the much-later Culverts Case discussed herein,<sup>131</sup> the court of public opinion has already begun to hear the vociferous arguments in defense of treaty rights and in opposition to oil sands and pipeline projects. For a highly publicized example, one need look no further than the thousands of people recently encamped on the Standing Rock Indian Reservation<sup>132</sup> who claimed that the construction of the Dakota Access Pipeline should not go forward because, inter alia, it would violate the Fort Laramie Treaty of 1851.<sup>133</sup> In light of these arguments, the Army Corps of Engineers initially withheld approval of the project as proposed and “concluded that a decision on whether to authorize the Dakota Access Pipeline to cross Lake Oahe at the proposed location merits additional analysis, more rigorous exploration and evaluation of reasonable siting alternatives, and greater public and tribal participation . . . .”<sup>134</sup> However, in response to President Trump’s presidential memorandum,<sup>135</sup> the Corps apparently dismissed its prior concerns and granted the final easement for the project in early 2017.<sup>136</sup>

These are just two live examples of many ongoing and future confrontations with the question of how treaty obligations limit the government’s ability to permit oil sands development and pipeline construction. The Trudeau and Trump administrations, as well as the courts of the United States and Canada, should follow the model work of the Ninth Circuit when adjudicating treaty rights disputes, particularly when discreet treaty-protected resources, such as caribou, face real risk.

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of the First Nation communities[;] . . . an equalization must be achieved to find a balance between industrial activity and the “constitutionally-protected rights” of the First Nation Applicants[;] . . . the province has a constitutional obligation to manage lands in a way that respects Treaty rights, regardless of the division of powers.”).

<sup>131</sup> During the 1960s and early 1970s, members of Stevens’ Treaty tribes participated in “fish-ins” (i.e. fishing without state permits) to protest and draw attention to the State’s prohibitions against off-reservation fishing and licensing regulations. See, e.g., Associated Press, *Shots Fired, 60 Arrested in Indian-Fishing Showdown*, SEATTLE TIMES, Sept. 9, 1970, p. A-1; Alex Tizon, *The Boldt Decision / 25 Years — The Fish Tale That Changed History*, SEATTLE TIMES, Feb. 7, 1999, available at <http://community.seattletimes.nwsourc.com/archive/?date=19990207&slug=2943039> (describing the State’s “military style campaign,” utilizing “surveillance planes, high-powered boats and radio communications,” and deploying “tear gas,” “billy clubs,” and “guns” against Native American fishermen).

<sup>132</sup> See Charlie Northcott, *Standing Rock: Are pipeline protest camp days numbered?* BBC NEWS (Dec. 2, 2016), <http://www.bbc.com/news/world-us-canada-38087180> (describing “as many as 6,000 people in three distinct groups”).

<sup>133</sup> See Jenni Monet, *At Standing Rock, activists dig in on historic treaty land ‘Water protectors’ say they won’t move on a Dec. 5 eviction notice*, HIGH COUNTRY NEWS, (Dec. 1, 2016), <http://www.hcn.org/articles/thanksgiving-at-standing-rock-activists-dig-in>.

<sup>134</sup> Memorandum for Commander, U.S. Army Corps of Engineers, from Jo-Ellen Darcy, Assistant Secretary of the Army (Dec. 4, 2016).

<sup>135</sup> Presidential Memorandum Regarding Construction of the Dakota Access Pipeline (January 24, 2017).

<sup>136</sup> Press Release, Army Corps. Of Engineers, Corps grants easement to Dakota Access, LLC (Feb. 8, 2017).