

**THE REGULATION AND LITIGATION OF CUMULATIVE EFFECTS
ON INDIGENOUS RIGHTS FOLLOWING THE YAHEY DECISION
AND BLUEBERRY RIVER FIRST NATION SETTLEMENT
AND THE POTENTIAL EFFECTS ON THE ENERGY INDUSTRY**

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The British Columbia Supreme Court issued a groundbreaking decision in Yahey v. British Columbia: the Crown had failed to uphold its treaty obligations due to the cumulative effects of over 100 years of development. In response to the 2021 decision, British Columbia and Blueberry River First Nation have reached a multi-million dollar investment agreement which includes joint decision-making powers regarding future development.

Yahey's novel reasoning has significant implications for energy and resource development, treaty relations, and litigation across Canada. Similar claims have now been filed in Alberta, Saskatchewan, and Ontario, including Duncan's First Nation seeking to apply Yahey's reasoning in northwest Alberta. If courts across Canada adopt Yahey, land management decision-making could fundamentally change across much of the country.

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I. INTRODUCTION

The British Columbia Supreme Court sent shockwaves across the Canadian legal community in June 2021 when it issued its groundbreaking decision in *Yahey v. British Columbia*,¹ finding that the Province of British Columbia had infringed Blueberry River First Nation’s (Blueberry) treaty rights by authorizing the cumulative effects of developments across Blueberry’s traditional territories for more than one hundred years.

The result in *Yahey* led to several questions of significant importance to Indigenous communities, governments, project proponents, and stakeholders in land use planning across Canada, including:

1. Did this case represent a step change in how courts view Indigenous rights and cumulative effects?
2. How would British Columbia satisfy the Court’s directions in *Yahey* and Blueberry’s concerns with cumulative effects while still allowing critical resource development projects to proceed?
3. Would provincial governments elsewhere in Canada adopt similar co-management frameworks?
4. Would Indigenous groups in other parts of Canada bring similar claims seeking to achieve similar results?

Now roughly two years post-*Yahey*, we have some answers to these questions; however, many uncertainties remain.

We now know how British Columbia has resolved the dispute with Blueberry, although the effectiveness of this arrangement, and whether it will prompt further claims from other First Nations, remains to be seen.

We also know that Indigenous groups across Canada are seeking to replicate *Yahey* with almost identical claims seeking similar results.² While it remains to be seen whether courts outside of British Columbia will follow *Yahey*, and whether Indigenous groups outside of

¹ 2021 BCSC 1287 [*Yahey*].

² See e.g. *Gladue v R* (18 July 2022), Edmonton, 2203 10939 (Alta QB) [*Gladue*] (Statement of Claim); Erik White, “3 Northern First Nations Take Ontario to Court over Environmental Protection, Treaty Rights,” *CBC News* (6 October 2022), online: [perma.cc/R6EF-FD9T].

northeast British Columbia will be able to establish similar facts to achieve a similar result, it is clear that these types of claims have the potential to significantly impact the future of resource development across the country — in particular, who will decide how (or if) development will occur.

In this article, we explore these important issues and identify opportunities for governments and individual companies to: (1) mitigate the risks posed by treaty rights infringement claims; and (2) advance reconciliation with Indigenous communities outside of lengthy and adversarial court proceedings.

II. THE LEGAL CONTEXT: TREATIES AND THE PROBLEM OF CUMULATIVE EFFECTS

A. TREATY RIGHTS, OBLIGATIONS, AND RESTRICTIONS

The historic treaties between Indigenous peoples and the Crown are foundational to the Canadian Constitution and Canada itself.

In 1701, the British Crown began to enter into “Treaties of Peace and Neutrality” and “Treaties of Peace and Friendship” with Indigenous communities that British traders and settlers encountered during colonization. Through these treaties, the British formed alliances against competing European powers and established trading relationships.³

In 1763, the British Crown, in an effort to establish a colonial governance system following the British conquest of New France, issued a Royal Proclamation recognizing and affirming the sovereignty of Canada’s First Peoples in all land west of the Appalachian Mountains.⁴ Under the Proclamation, title to as-yet-unceded land in all of North America could only be obtained through a treaty formally ceding title from one sovereign nation to another.⁵ As affirmed by the Supreme Court of Canada in *Tsilhqot’in Nation v. British Columbia*, the doctrine of *terra nullius*, under which the land in the “New World” was presumed to have no sovereign prior to European arrival and was thus subject to capture by a conquering nation, “never applied in Canada.”⁶

Beginning in 1871, the nascent Canadian Confederation entered into a series of 11 land cessation treaties with the Indigenous peoples located in modern-day northwestern Ontario to northeast British Columbia and into the Northwest Territories.⁷ The Crown’s sovereign title over these lands, and therefore its constitutional lawmaking authority, derives from these treaties. While the treaties differ slightly in their terms as they move from east to west, each contains a provision recognizing the surrender of sovereign title to the lands of a First

³ Crown-Indigenous Relations and Northern Affairs Canada, “Treaties of Peace and Neutrality (1701–1760)” (4 June 2013), online: [perma.cc/5MS6-56UX]; Crown-Indigenous Relations and Northern Affairs Canada, “Peace and Friendship Treaties (1725–1779)” (4 June 2013), online: [perma.cc/T5Z3-GEMS].

⁴ Thomas Isaac, *Aboriginal Law*, 5th ed (Toronto: Thomson Reuters Canada, 2016) at 151; Anthony J Hall, “Royal Proclamation of 1763” (7 February 2006), online: *The Canadian Encyclopedia* [perma.cc/D5SP-3WFA].

⁵ Isaac, *ibid* at 151–52; Hall, *ibid*.

⁶ 2014 SCC 44 at para 69 [*Tsilhqot’in*].

⁷ Isaac, *supra* note 4 at 156.

Nation's traditional territories in exchange for the Crown's solemn promise to administer the land with honour. Additionally, the treaties covering most of the Prairies, northeast British Columbia, and the Northwest Territories recognize the surrender of lands in exchange for the First Nation's continued right to hunt, fish, and trap in the surrendered territory.⁸

The Crown's obligation in the numbered treaties to administer the land with "honour" is consistent with the constitutional principle of the "honour of the Crown," which derives from the Crown's assumption of sovereignty from Indigenous peoples.⁹ The "honour of the Crown is always at stake" in the Crown's dealings with Indigenous peoples.¹⁰ Among other things, Canadian courts have recognized that the honour of the Crown gives rise to a duty to consult Indigenous peoples whenever "the Crown has knowledge, real or constructive, of the potential existence of [an] Aboriginal right or title and contemplates conduct that might adversely affect it."¹¹

The terms of the treaties and their historical context, along with the honour of the Crown, make the treaties relevant each time the Crown makes a land management decision anywhere within the treaty territory.¹² Indeed, the courts have recognized that the land First Nations surrendered through the numbered treaties was a "hefty purchase price" that entitles them to significant respect in the implementation of treaty rights guaranteed in exchange for that surrender.¹³ Accordingly, the numbered treaties established a governance system whereby Crown sovereignty coexists with pre-existing Aboriginal¹⁴ rights.¹⁵

⁸ For example, Treaties 1 and 2 (covering parts of southern Manitoba and Saskatchewan), which predate most of the other Western treaties, did not contain provisions specifying an ongoing right to hunt and fish, whereas later treaties, including Treaty 8 (covering northeastern British Columbia, northern Alberta, northwestern Saskatchewan, and part of the Northwest Territories), provide for specific rights to hunt, fish, and trap within the surrendered territory (*Treaties 1 and 2 Between Her Majesty The Queen and the Chippewa and Cree Indians of Manitoba and Country Adjacent*, August 1875, Government of Canada, online: *Government of Canada* [perma.cc/6XCH-V855]. See also *Yahey*, *supra* note 1 at para 1165, citing *Manitoba Métis Federation Inc v Canada (Attorney General)*, 2013 SCC 14 at para 79 [*Manitoba Métis*]; Isaac, *ibid.*

⁹ *Clyde River (Hamlet) v Petroleum Geo-Services Inc*, 2017 SCC 40 at para 19 [*Clyde River*]. The courts have recognized the Crown's assumption of sovereignty, and therefore the underlying title to all lands in Canada, as establishing de facto Crown sovereignty throughout contemporary Canada, regardless of whether there is an established cessation treaty governing the land (see e.g. *R v Sparrow*, [1990] 1 SCR 1075 at 1103 [*Sparrow*]). See also Maria Morellato, ed, *Aboriginal Law Since Delgamuukw* (Aurora, Ont: Cartwright Group, 2009) at 378–81).

¹⁰ *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73 at para 16 [*Haida*].

¹¹ *Ibid* at para 35.

¹² *Mikisew Cree First Nation v Canada (Governor General in Council)*, 2018 SCC 40 at paras 21, 26. The Supreme Court held that the duty to consult and the honour of the Crown binds the Crown and prevents it from acting unilaterally with respect to treaty lands. See also *Mikisew Cree First Nation v Canada (Minister of Canadian Heritage)*, 2005 SCC 69 at para 57 [*Mikisew*]. But see *Manitoba Métis*, *supra* note 8 at para 82: the Crown is not required to act with perfection when upholding its historic treaty bargains, but a "persistent pattern of errors and indifference that substantially frustrates the purposes of a solemn promise may amount to a betrayal of the Crown's duty to act honourably in fulfilling its promise."

¹³ *Mikisew*, *ibid* at paras 48–49, 52.

¹⁴ For greater clarity, the terms "Indigenous" and "First Nation(s)" will be used throughout to refer to communities, people, traditions, and cultures; the term "Aboriginal" will be used exclusively to refer to legal concepts established in Canadian jurisprudence such as Aboriginal title or Aboriginal rights.

¹⁵ An Aboriginal right is determined on the basis of whether historical evidence indicates that the claimed right is an "element of a practice, custom or tradition integral to the distinctive culture of the [A]boriginal group claiming the right" (*R v Van der Peet*, [1996] 2 SCR 507 at para 46). These rights are distinct from treaty rights, which are the rights established by examining the terms of a particular treaty between the Crown and a First Nation, as well as historical evidence about the rights promised in a treaty (*R v Badger*, [1996] 1 SCR 771 at para 39 [*Badger*]). Both Aboriginal and treaty rights are protected by section 35(1) of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

Of particular importance to land use planning, the historic treaties guarantee First Nations signatories a continuity of their traditional way of life free from unjustifiable interference from the Crown.¹⁶ However, each treaty also contains “taking up” provisions, which the courts have interpreted as confirming that all treaty signatories agreed and anticipated that “settlement, mining, lumbering, trading,” and other developments would be necessary in treaty territory.¹⁷ Together, these treaty terms reveal a bargain to balance the Crown’s development of the Canadian nation-state while protecting Indigenous peoples’ traditional ways of life (practised long before the arrival of Europeans).

Interpreting these treaty provisions, the Supreme Court of Canada has recognized that treaty rights are circumscribed in the following manners necessary for the administration of a functioning Canadian democratic nation-state: (1) a geographic restriction; (2) a legislative restriction; and (3) a Crown decision-making restriction.¹⁸

The geographic restriction limits the legal assessment of Indigenous peoples’ “meaningful ability” to exercise their treaty rights to the traditional territories of their ancestral nation.¹⁹ This restriction has been historically and legally justified by the vast geographic areas covered by the historic treaties. Treaty 8, for example, covers a geographic area of 840,000 square kilometers across three provinces and territories and includes the traditional territories of 39 First Nations.²⁰ In assessing whether the Crown has taken up so much land that no meaningful treaty right remains, courts consider the area in which the nation traditionally hunted, fished, and trapped, and continues to do so today.²¹

The corollary of this is that courts have protected the “core or preferred area of [a First Nation’s] territory” by assessing their meaningful ability to continue to exercise their rights in respect of that core area, regardless of whether the treaty right meaningfully remains in other areas of the traditional territory or the treaty territory as a whole.²²

The legislative restriction requires that the Crown adequately consider treaty rights when making laws and regulating land use.²³ While treaty rights are preserved and protected under section 35(1) of the *Constitution Act, 1982*, they are limited, as are all constitutional rights, by the Crown’s power to justifiably infringe those rights in the public interest.²⁴ Legislation that infringes treaty rights must therefore be justified in accordance with the test for treaty infringement, discussed below.

¹⁶ *Delgamuukw v British Columbia*, [1997] 3 SCR 1010 at para 165, citing *R v Gladstone*, [1996] 2 SCR 723 at para 73. See also *R v Marshall*, [1999] 3 SCR 456 at para 47; *R v Marshall*, [1999] 3 SCR 533 at para 19 [*Marshall No. 2*]; *Guerin v the Queen*, [1984] 2 SCR 335 at 387.

¹⁷ *Yahey*, *supra* note 1 at para 20, citing *Treaty No. 8 Made June 21, 1899*, online: *Government of Canada* [perma.cc/KJ3A-CU7H] [*Treaty 8*].

¹⁸ *Mikisew*, *supra* note 12 at para 56.

¹⁹ *Badger*, *supra* note 15 at para 40; *Mikisew*, *ibid* at paras 47–48.

²⁰ *Mikisew*, *ibid* at para 2; Treaty Tribal Association, “Treaty 8 Agreement Between Nations of Alberta, Saskatchewan, and Northwest Territories,” online: [perma.cc/A2QE-5VP4].

²¹ *Yahey*, *supra* note 1 at para 24; *Mikisew*, *ibid* at para 48.

²² *Yahey*, *ibid* at paras 594–96. The British Columbia Supreme Court recognized that “[s]pecific areas have significant value,” and this makes a difference to the level of the infringement (*ibid* at para 594). This finding is supported by the Supreme Court of Canada’s decision in *Mikisew*, where Justice Binnie noted that “[m]ore significantly for [A]boriginal people, as for non-[A]boriginal people, location is important” (*Mikisew*, *ibid* at para 47).

²³ *Marshall No. 2*, *supra* note 16 at para 37. See also *R v Sundown*, [1999] 1 SCR 393 at para 46.

²⁴ *Badger*, *supra* note 15 at para 13; *Constitution Act, 1982*, *supra* note 15, s 35(1).

Finally, the decision-making restriction requires the Crown, when contemplating taking up land, first “inform itself of the impact” on Indigenous peoples’ rights through consultation with potentially affected groups and accommodation of rights that may be adversely affected.²⁵ However, since taking up of land is specifically provided for in the historic treaties, not every taking up will trigger the duty to consult. The Crown’s obligations in the context of a taking up are informed primarily by jurisprudence on the duty to consult, discussed below.

B. LEGAL DOCTRINES TO PROTECT RIGHTS: THE DUTY TO CONSULT AND TREATY INFRINGEMENT

The duty to consult is a procedural right that Indigenous communities and groups have relied upon to protect their rights against Crown decision-making with the potential to adversely affect Aboriginal and treaty rights.²⁶ In particular, the doctrine is the procedural basis upon which Indigenous communities and groups have a constitutional right to engagement with the Crown on decisions regarding the approval of energy resource projects. By way of example, the Federal Court of Appeal set aside the Federal Cabinet’s approval of major energy infrastructure projects such as the Northern Gateway Project²⁷ and the Trans Mountain Expansion Project²⁸ based on inadequate consultation.

The duty to consult exists upon a spectrum, where the level of consultation required is proportional to the strength of the Aboriginal treaty right or claim and the potential severity of infringement.²⁹ If consultation reveals that an Aboriginal treaty right or claim will be infringed by the Crown’s actions, the Crown has a duty to accommodate the Indigenous group.³⁰ The Crown holds the ultimate responsibility for ensuring that consultation and accommodation are adequate, but may rely on the processes of a regulatory body to fulfil its consultation obligations in whole or in part.³¹

However, the duty to consult has its limitations. Canadian courts have traditionally held that the duty to consult is meant to resolve claims relating to a specific Crown decision (such as the approval of a specific project) and cannot be applied to resolve larger claims such as the cumulative effects of numerous projects over time.³² The duty to consult also cannot be applied to demand rectification of a past unjustified infringement where current contemplated conduct does not eventuate any new or changed infringement.³³ Past infringements may be considered at the accommodation stage, but ultimately the Crown will decide whether they warrant advanced considerations.³⁴

²⁵ *Mikisew*, *supra* note 12 at para 55. See also *Yahey*, *supra* note 1 at para 189. The Court reviewed evidence that “Indigenous signatories and adherents understood [that signing Treaty 8] would interfere with their freedom to move, as they referred to a ‘broken up’ and fragmented country” (*ibid*).

²⁶ *Mikisew*, *ibid* at para 57.

²⁷ *Gitxaala Nation v Canada*, 2016 FCA 187 at paras 325, 333.

²⁸ *Tsleil-Waututh Nation v Canada (Attorney General)*, 2018 FCA 153 at paras 767–68.

²⁹ *Haida*, *supra* note 10 at paras 39, 43.

³⁰ *Ibid* at para 47.

³¹ *Clyde River*, *supra* note 9 at paras 22–23.

³² *Chippewas of the Thames First Nation v Enbridge Pipelines Inc*, 2017 SCC 41 at para 2 [*Chippewas*].

³³ *Rio Tinto Alcan Inc v Carrier Sekani Tribal Council*, 2010 SCC 43 at para 45; *Clyde River*, *supra* note 9 at para 40.

³⁴ *Chippewas*, *supra* note 32 at para 59.

If treaty rights holders believe that the accommodations provided have been insufficient to remedy the Crown's infringement of their rights, they may advance a legal claim for infringement. The Supreme Court of Canada first set out a test for establishing a prima facie infringement of an Aboriginal right in *Sparrow*.³⁵ There, the Supreme Court held that "[t]he first question to be asked is whether the [Crown action] in question has the effect of interfering with an existing [A]boriginal right."³⁶ To answer this question, courts should look to three separate requirements: whether the limitation imposed by the Crown's legislation or decision is unreasonable; whether the Crown decision imposes undue hardship on the rights-holders; and, finally, whether the Crown decision denies the rights-holders of their "preferred means of exercising that right."³⁷ In *Badger*, the Supreme Court held that the *Sparrow* test also applied in the context of a treaty right but clarified that there could be "no limitation on the method, timing and extent of Indian hunting under a Treaty" apart from the three restrictions summarized above.³⁸

The Supreme Court of Canada clarified the extent of these restrictions in *Mikisew* where the Supreme Court held that a taking up of land within an area used by a treaty First Nation to hunt which triggered the duty to consult would give rise to a prima facie infringement if there was no longer a "meaningful right to hunt" within the relevant traditional territories of the claimant First Nation.³⁹

When litigating a claim for rights infringement, rights claimants are only required to prove a prima facie infringement; the onus shifts thereafter to the Crown to demonstrate that the infringement is justified on the basis of the "compelling and substantial public objective" test laid out in *Sparrow*.⁴⁰ There, the Supreme Court of Canada established that an Aboriginal or treaty right could be justifiably infringed by a valid legislative objective that did not violate the honour of the Crown.⁴¹

For example, in *R. v. Adams*,⁴² the Supreme Court of Canada found that a compelling and substantial public objective had not been made out by the Crown and that the Crown was therefore unjustifiably infringing the rights of the appellant to fish. There, the appellant had been charged for fishing without a licence under the provincial *Quebec Fishery Regulations*.⁴³ The Supreme Court first established that the right to fish in the St. Lawrence River and Lake St. Francis was an Aboriginal right held by the appellant and had been prima facie infringed by the regulatory regime.⁴⁴ The public objective underlying the licencing regime advanced by the Crown in this case (the "enhancement of sports fishing") was accepted by the Supreme Court as an "important economic activity in some parts of the country," but ultimately rejected as a justifiable infringement.⁴⁵

³⁵ *Supra* note 9.

³⁶ *Ibid* at 1111.

³⁷ *Ibid* at 1112.

³⁸ *Supra* note 15 at paras 37, 90.

³⁹ *Supra* note 12 at paras 48, 55.

⁴⁰ *Yahey*, *supra* note 1 at paras 97–98; *Sparrow*, *supra* note 9 at 1113–14.

⁴¹ *Sparrow*, *ibid* at paras 71, 75. *Mikisew* applies this test to the treaty rights context (*supra* note 12 at para 31).

⁴² [1996] 3 SCR 101 [*Adams*].

⁴³ *Ibid* at para 5; *Quebec Fishery Regulations*, CRC, c 852.

⁴⁴ *Adams*, *ibid* at paras 47, 49, 52.

⁴⁵ *Ibid* at para 58.

Until *Yahey*, a First Nation had never succeeded in litigating against an entire regulatory regime, and the host of historic land use decisions made thereunder, on the basis of rights infringement.⁴⁶

III. YAHEY V. BRITISH COLUMBIA: THE BLUEBERRY CASE

A. BACKGROUND: IMPACTS OF DEVELOPMENT AND PRE-LITIGATION PROCEEDINGS

Blueberry is a community with historic Dane-zaa and Cree roots.⁴⁷ Ancestrally adherent to Treaty 8 in 1900 (after the initial signing at Lesser Slave Lake in 1899), Blueberry was given reserve land in the northeast corner of British Columbia directly over what was later discovered to be the Montney natural gas play.⁴⁸ Its traditional territories extend over an area of 38,000 square kilometres; this area forms the “Blueberry Claim Area,” the subject of the litigation in *Yahey*.⁴⁹

Blueberry’s path to civil litigation flows from over 80 years of increasing development in the Blueberry Claim Area. The Alaska Highway, built in the 1940s, bisects the Blueberry Claim Area.⁵⁰ Since its construction, various other projects have proceeded throughout most of Blueberry’s traditional territory, such as forestry, mining, seismic, oil and gas extraction, hydroelectric, infrastructure, and agricultural projects.⁵¹ The British Columbia Supreme Court accepted evidence in *Yahey* that there is “little intact forest remaining” and found, as fact, that by September 2018, 85 percent of the Blueberry Claim Area was within 250 metres of an industrial “disturbance”⁵² and 91 percent of the Blueberry Claim Area was within 500 metres of a disturbance.⁵³

The litigation that stemmed from this increasing degree of disturbance in the Blueberry Claim Area was the first time that a court in Canada considered whether the cumulative effects of development could give rise to a finding of unjustifiable infringement of treaty rights.⁵⁴ It was a significant undertaking of time, expense, and effort by each of the parties to the litigation and judicial resources by the Court, with six years passing from the date the

⁴⁶ See e.g. *Tsilhqot’in*, *supra* note 6 at para 126. The Supreme Court considered the compelling and substantial legislative objective of the Province’s decision to grant logging licences within a specific claim area, not of the forestry regulatory regime as a whole.

⁴⁷ *Yahey*, *supra* note 1 at para 10.

⁴⁸ *Ibid* at paras 1, 11, 19. The Montney gas basin, also known as the Montney play or the Montney shale play, is an area of significant importance to oil and gas exploration and extraction in British Columbia (*ibid* at para 13).

⁴⁹ *Ibid* at para 14.

⁵⁰ *Ibid* at para 12.

⁵¹ *Ibid* at para 813.

⁵² *Ibid* at paras 812–17 for the definition of “disturbance.” The Court’s definition and understanding of “disturbance” is very broad as it does not differentiate between disturbances that result in different levels of impacts. For example, and in the authors’ experience, “low impact” seismic lines (2–3 metres wide), and features that have been reclaimed since their original construction, would both result in relatively minimal impacts. Nonetheless, they would be considered a “disturbance” under the Court’s definition of the term.

⁵³ *Ibid* at paras 813, 906.

⁵⁴ *Ibid* at paras 1078–79.

claim was filed (in March 2015) to the date the Court issued its decision on the merits (in June 2021).⁵⁵

After filing its claim, Blueberry filed for two interim injunctions and a judicial review against British Columbia. The first injunction application, filed in June 2015, sought to prevent British Columbia from auctioning timber sale licences for logging within a small section of the Blueberry Claim Area.⁵⁶ The Court dismissed the application as an attempt to enjoin all industrial activity in the area on the basis of cumulative effects. However, the Court encouraged Blueberry to make “an application that frankly seeks that result and allows the court to fully appreciate the implications and effects of what it is being asked to do.”⁵⁷

Next, Blueberry sought to prevent development in the North Montney area by seeking judicial review of British Columbia’s decision to enter into a long-term royalty agreement with five companies focused on natural gas extraction in the region.⁵⁸ The Court dismissed the application because the issues Blueberry raised were not “separate and discrete” from the issues raised in Blueberry’s civil claim, which the Court considered to be the appropriate forum to adjudicate cumulative effects.⁵⁹

In August 2016, Blueberry filed its second injunction application, “seeking to enjoin the Province from allowing a broader array of further industrial development, including oil and gas development, processing, and transportation, as well as logging in segments of its territory.”⁶⁰ Like the first, the Court dismissed Blueberry’s broader, second injunction application. The Court found that, while Blueberry had shown there was a serious issue to be tried, the balance of convenience weighed in favour of British Columbia because the issues Blueberry raised were a matter for trial, not an injunction application.⁶¹

B. THE BRITISH COLUMBIA SUPREME COURT’S DECISION CHANGED THE CUMULATIVE EFFECTS ANALYSIS

When Blueberry’s claim finally reached the British Columbia Supreme Court, the decision that resulted was the first Canadian case to make a finding of unjustifiable treaty rights infringement on the basis of a cumulative effects argument. The decision, issued by Justice Burke, was based on an analysis of the promises made at the time that Treaty 8 was signed, evidence of the specific impacts in the Blueberry Claim Area, and an analysis of the way of life of the Blueberry people, both historic and contemporary. The Court’s decision modified the test set out by the Supreme Court of Canada for a treaty rights infringement: rather than an infringement being unjustifiable at the point at which no “meaningful” right to hunt, fish, or trap exists within the treaty territory, the British Columbia Supreme Court found that an infringement could be unjustifiable at the point of “significant diminishment” of the treaty

⁵⁵ *Ibid* at para 27.

⁵⁶ *Ibid* at para 33.

⁵⁷ *Yahey v British Columbia*, 2015 BCSC 1302 at para 64.

⁵⁸ *Yahey*, *supra* note 1 at para 38.

⁵⁹ *Ibid* at para 39, citing *Blueberry River First Nations v British Columbia (Natural Gas Development)*, 2017 BCSC 540 at paras 83–84, Skolrood J.

⁶⁰ *Yahey*, *supra* note 1 at para 36.

⁶¹ *Ibid* at para 37.

right.⁶² Furthermore, the Court assessed the adequacy of British Columbia's regulatory regime to assess and accommodate cumulative effects and found that the lack of such mechanisms constituted a breach of the honour of the Crown in British Columbia.⁶³

The trial for *Yahey* took over 160 days.⁶⁴ The British Columbia Supreme Court made highly contextualized findings of fact in determining the level of disturbance in the Blueberry Claim Area to be substantial. For example, the Court considered expert opinion and lay witness evidence from community members relating to the decline of four species of significance to Blueberry culture: caribou; moose; marten; and fisher.⁶⁵ The Court found, on the basis of this evidence, that “anthropogenic disturbance, including industrial disturbance” had largely caused or contributed to the decline of caribou and moose, and had likely had a “negative impact on populations of marten and fisher due to loss of canopy cover.”⁶⁶

The Court heard from nine expert witnesses, seven Blueberry members, representatives from five provincial ministries or agencies (including: the Ministry of Forests, Lands, Natural Resources Operations and Rural Development; the Ministry of Indigenous Relations and Reconciliation; the Ministry of Environment; the Ministry of Energy, Mines and Petroleum Resources; and the British Columbia Oil and Gas Commission (OGC)) and two industry representatives over the course of 70 days of evidence.⁶⁷ Expert evidence tendered by Blueberry included that of Dr. Robin Ridington, a professor emeritus at the University of British Columbia, who has extensive anthropological experience with Blueberry dating back to the late 1950s⁶⁸ — something that could potentially differentiate Blueberry from other cumulative effects claims, where the Indigenous party may not have the same strength and depth of expert testimony. For Blueberry, written submissions spanned some 2,000 pages and the evidentiary record was in the tens of thousands of pages.⁶⁹ Blueberry undertook numerous studies and presented the Court with a significant collection of atlases, maps, and data to demonstrate the extent of disturbances caused by development in the Blueberry Claim Area.⁷⁰ Final oral arguments took 25 days.⁷¹

Blueberry's community members testified to the impact that this level of disturbance had on the exercise of their treaty rights: while some members of the community remember spending whole summers ensconced in the bush, younger members have no memory of a time where development was not a constant, persistent presence in the woods around their reserve.⁷² Community members claimed to be barred from harvesting in some areas because industry “road monitors” kept them off the roads created for industry use if they were not carrying the proper radio.⁷³ Chief Marvin Yahey (as he then was) testified that he was no

⁶² *Ibid* at paras 515, 541.

⁶³ *Ibid* at paras 1628, 1630.

⁶⁴ *Ibid* at para 43.

⁶⁵ *Ibid* at paras 670–671.

⁶⁶ *Ibid* at paras 737, 782, 806.

⁶⁷ *Ibid* at paras 44–49.

⁶⁸ See e.g. Robin Ridington, *Trail to Heaven: Knowledge and Narrative in a Northern Native Community* (Iowa City: University of Iowa Press, 1988).

⁶⁹ *Yahey*, *supra* note 1 at para 50.

⁷⁰ *Ibid* at para 816.

⁷¹ *Ibid* at para 50.

⁷² *Ibid* at paras 355–357, 1065–68, 1099–102, 1110.

⁷³ *Ibid* at paras 1064–65.

longer able to peacefully enjoy 80 percent of the Yahey trapline because of the effects of forestry and oil and gas development.⁷⁴

All of this is relayed, not only to underscore the significant undertaking that this litigation represented, but to demonstrate the cost of pursuing such a matter to trial. Litigating the highly complex issues surrounding treaty rights and obligations takes years — sometimes decades — and millions of dollars. The sheer complexity and resources required to resolve such a dispute judicially raise the question of whether other, earlier, and more collaborative solutions might better reconcile the interests of Indigenous communities, the Crown, and the public.

Blueberry's civil claim against British Columbia was that the cumulative effects of provincially-authorized development had damaged the forests, lands, waters, fish, and wildlife within the Blueberry Claim Area such that they had "had significant adverse impacts on the meaningful exercise of their treaty rights, and that the Province [had] breached the Treaty and infringed Blueberry's treaty rights."⁷⁵

Justice Burke found in Blueberry's favour, finding British Columbia unjustifiably infringed Blueberry's treaty rights. Justice Burke characterized the scale of development that had occurred in the Blueberry Claim Area as "fundamentally not what was agreed to at [the time of the] Treaty."⁷⁶

Justice Burke reasoned that the treaty rights to hunt, fish, and trap are not an exclusive and discrete description of the rights of Indigenous treaty adherents. Rather, as the Supreme Court of Canada recognized in *Mikisew*, they describe the constitutionally-protected right of Indigenous peoples in Canada to "continue to be as free to live off the land after the treaty as before."⁷⁷ Justice Burke described these rights as the ability to "continue a way of life based on hunting, fishing and trapping" without interference from the Crown such that "the Crown will not significantly affect or destroy the basic elements or features needed for that way of life to continue."⁷⁸

Justice Burke opined further that Treaty 8 does not promise "continuity of nineteenth century patterns of land use"; rather, it ensures that the First Nation adherents' "way of life," defined by each community's traditional patterns of occupation and economic activity, will not suffer "forced interference" by the Crown as those traditional patterns of living evolve to meet contemporary demands.⁷⁹

However, Justice Burke's decision took British Columbia's obligations further than this. For example, Justice Burke held that "[i]t is not simply a quantitative analysis of the number of times members hunt, fish or trap, but about the quality and meaning of Blueberry's experience on the lands."⁸⁰ Relying on Justice Greckol's concurring decision in *Fort McKay*

⁷⁴ *Ibid* at para 1111.

⁷⁵ *Ibid* at para 27.

⁷⁶ *Ibid* at para 1077.

⁷⁷ *Mikisew*, *supra* note 12 at para 25.

⁷⁸ *Yahey*, *supra* note 1 at para 175.

⁷⁹ *Yahey*, at paras 280, 282. See also *Mikisew*, *supra* note 12 at paras 32, 47.

⁸⁰ *Yahey*, *ibid* at para 1111.

First Nation v. Prosper Petroleum Ltd.,⁸¹ Justice Burke agreed that the Crown’s promises in Treaty 8 may have been easy to make in 1899, but “difficult to *keep* as time goes on and development increases,” implying that the Crown has a positive obligation to preserve at least some aspects of the landscape to allow Blueberry to hunt, trap, and fish in the same manner as it could in the nineteenth century.⁸²

Justice Burke also departed from the Supreme Court of Canada’s findings in *Mikisew* in two other important respects. In *Mikisew*, the Supreme Court of Canada found that Treaty 8 protects the guarantees made by the Crown in 1899 by establishing a process, governed by the honour of the Crown, whereby the duty to consult and accommodate is engaged whenever the Crown takes up land in a manner which it has reason to believe might adversely affect treaty rights.⁸³ When the duty to consult is engaged in a treaty rights context, the Crown has an honourable obligation to ensure that it does not unjustifiably infringe the continued exercise of the treaty-protected rights. Consistent with this decision, British Columbia advanced the argument that consultation is the “route to protect treaty rights,” but Justice Burke rejected this argument, finding instead that the Crown’s consultation processes “do not consider the impacts on the exercise of treaty rights or implement protections other than occasional site specific mitigation measures.”⁸⁴

The threshold of infringement in the treaty rights context is the second area where Justice Burke diverged from Justice Binnie’s decision in *Mikisew*. In *Mikisew*, the Supreme Court described an infringement as one where the Crown has taken up so much land, in a specific First Nation’s traditional territories within the treaty area, that “‘no meaningful right to hunt’ remains.”⁸⁵ Justice Burke modified this test to find that a treaty infringement claim may be brought at the point of “significant diminishment,” without waiting for the point approaching “extinguishment.”⁸⁶ Justice Burke interpreted Blueberry’s treaty rights broadly, using its “way of life” to define the scope of the rights inhered in the “hunt, fish and trap” clause of Treaty 8.⁸⁷

Justice Burke further held that courts should take the cumulative effects of previous developments into account when considering whether a First Nation’s way of life had been significantly diminished.⁸⁸ Justice Burke found that while the Crown may be able to justify the effects of an individual project, that project may still be unjustified on the basis of its contribution to the cumulative effects of prior development in a First Nation’s traditional territories.⁸⁹ Ultimately, Justice Burke found that the Provincial Crown had unjustifiably

⁸¹ 2020 ABCA 163 [*Prosper Petroleum 2020*].

⁸² *Yahey*, *supra* note 1 at para 1728, citing *Prosper Petroleum 2020*, *ibid* at para 80 [emphasis in original]. See also *Yahey*, *ibid* at paras 1782, 1805, 1809 (positive obligation).

⁸³ *Mikisew*, *supra* note 12 at paras 32–34.

⁸⁴ *Yahey*, *supra* note 1 at para 1735.

⁸⁵ *Mikisew*, *supra* note 12 at para 48, citing *Mikisew Cree First Nation v Canada (Minister of Heritage)*, 2004 FCA 66 at para 18.

⁸⁶ *Yahey*, *supra* note 1 at paras 496, 512–14, 1115–16.

⁸⁷ *Ibid* at paras 87–88, 175, 180, 434. The Court dealt extensively with oral evidence, anthropological evidence from the 1850s to the 1930s, and contemporary records of hunting and camping grounds going back as far as the 1970s (*ibid* at paras 5, 44, 382–83, 620–21, 624, 1086–88).

⁸⁸ *Ibid* at para 516.

⁸⁹ *Ibid* at para 533.

infringed Blueberry's treaty rights by virtue of the cumulative effects of the various development projects the Crown had approved within its traditional territories.⁹⁰

This leads to another significant impact of the decision in *Yahey*: Justice Burke held that the Court may assess whether the regulatory regimes for managing natural resources and taking up lands in the province sufficiently account for cumulative effects, and make a finding of inadequate consultation on that basis alone.⁹¹

Justice Burke also considered whether British Columbia's regulatory regimes demonstrated that British Columbia had "acted diligently to address Blueberry's concerns about the impacts of industrial development on the exercise of their treaty rights and to implement the Treaty promise, more generally."⁹² Justice Burke found that there was a significant disconnect between the various regulatory regimes in the province regarding the role each was to take in assessing cumulative effects, and that, as a result, British Columbia "scarcely considers treaty rights" in administering those regimes.⁹³

While Blueberry was unsuccessful in obtaining injunctive relief before the British Columbia Supreme Court's ultimate decision in *Yahey*, the outcome in *Yahey* may increase the likelihood of successful injunction applications pending litigation in future cases. The Courts have found that an interlocutory injunction may be an appropriate remedy where an Indigenous person can establish evidence showing that their treaty rights may be unjustifiably infringed by a state action and that irreparable harm may result from the action proceeding before the treaty infringement claim is resolved.⁹⁴ However, never before has an application succeeded on the grounds that the irreparable harm of cumulative effects outweigh the public interest in the balance of convenience test of an injunction application.⁹⁵ Justice Burke's finding in the 2016 Blueberry injunction application was made prior to her subsequent precedent-setting decision establishing cumulative effects as a means of establishing treaty rights infringement: future applications may therefore rely on *Yahey* as the grounds to justify such a future injunction as being in the public interest.

⁹⁰ *Ibid* at paras 1076–77, 1132, 1857.

⁹¹ *Ibid* at para 543.

⁹² *Ibid* at para 1178.

⁹³ *Ibid* at paras 1386, 1404, 1564.

⁹⁴ See e.g. *Nunavut Tunngavik Inc v Canada (Attorney General)*, 2003 NUCJ 1 at para 45; *Th, ch Government v Canada (Attorney General)*, 2015 NWTSC 9 at paras 70–71, 105.

⁹⁵ See e.g. *Yahey v British Columbia*, 2017 BCSC 899 at paras 54–59, 95, 98, 109–10. See *The Ahousaht First Nation, the Ehattesaht First Nation, the Hesquiaht First Nation, the Mowachaht/Muchalaht First Nation, and the Tla-o-qui-aht First Nation v The Minister of Fisheries and Oceans and Canadian Coast Guard and al*, 2019 FC 1116, where the Federal Court dismissed an application for an interlocutory injunction made on the grounds that the Minister of Fisheries and Oceans and Canadian Coast Guard were unjustifiably infringing the Aboriginal rights of the applicants by approving a regulatory regime governing commercial salmon fishing. The Federal Court held that the applicants had failed to establish that the Minister's decision, which resulted in an incremental decrease to the First Nations' annual allocation of salmon, resulted in an allocation which would "not provide a viable fishery or a meaningful exercise of their rights" (*ibid* at paras 8, 30, 93). The federal government's allocation formula accounted for competing demands on salmon resources, including conservation, recreational, commercial, and Aboriginal fishing (*ibid* at paras 33–36). The Court held that it was inappropriate for the First Nations to bring an injunction application to prohibit the Crown to continue to operate according to the Crown's planned allocation because it had not adequately provided for a viable fishery for the Nations (*ibid* at para 56); in other words, the Crown failed to remedy the cumulative effects of generations of overfishing and the demands of "conservation and protection of various competing rights and interests" in favour of the Indigenous applicants (*ibid* at para 126).

C. DECLARATORY RELIEF GRANTED

After finding the infringement of Blueberry's treaty rights unjustifiable, Justice Burke went on to award Blueberry extensive declaratory relief.⁹⁶ Justice Burke declared that:

- By permitting the cumulative effects of development and failing to account for them in its regulatory regime, British Columbia had failed to uphold the honour of the Crown;⁹⁷
- British Columbia had unjustifiably "taken up" lands under Treaty 8 by approving industrial development in the Blueberry River First Nation traditional territories in the manner that it did;⁹⁸
- British Columbia was barred from authorizing any new development which might contribute to the cumulative effects and result in a continued breach of the Treaty;⁹⁹ and
- The parties must consult and negotiate to establish a new mechanism to manage the cumulative effects of industrial development on Blueberry's treaty rights going forward.¹⁰⁰

Justice Burke suspended the third declaration for a period of six months so that the parties could "negotiate changes that recognize and respect Blueberry's treaty rights."¹⁰¹

IV. POST-BLUEBERRY DEVELOPMENTS

Yahey's findings surprised many in industry and government. Given the significant precedent that the case established in British Columbia, as well as the practical impacts the decision could have on important resource development projects in the region (including the Site C dam), many anticipated British Columbia would appeal the decision. However, British Columbia ultimately chose not to appeal, stating that "negotiation, rather than litigation," was necessary to achieve its reconciliation goals and renew the Crown-Indigenous relationship.¹⁰² This position may have been influenced by the relatively recent enactment in British Columbia of the *Declaration on the Rights of Indigenous Peoples Act*¹⁰³ — the first province in Canada to enact such legislation — which establishes the *United Nations Declaration on the Rights of Indigenous Peoples*¹⁰⁴ as British Columbia's framework for reconciliation.

Despite Justice Burke's six-month suspension regarding the prohibition on new authorizations in the Blueberry Claim Area, the impacts of *Yahey* were felt immediately.

⁹⁶ *Yahey*, *supra* note 1 at para 1875.

⁹⁷ *Ibid* at para 1884.

⁹⁸ *Ibid*.

⁹⁹ *Ibid* at para 1888.

¹⁰⁰ *Ibid* at para 1888.

¹⁰¹ *Ibid* at para 1895.

¹⁰² British Columbia, Ministry of Attorney General, News Release, 25029, "Attorney General's Statement on *Yahey v British Columbia*" (28 July 2021), online: [perma.cc/UQ66-JGAY].

¹⁰³ SBC 2019, c 44.

¹⁰⁴ GA Res 61/295, UNGAOR, 61st Sess, Supp No 53, UN Doc A/RES/61/295 (2007) 1.

Within days of the *Yahey* decision being released, the OGC (now the British Columbia Energy Regulator, or BCER) suspended all pending permit applications (including minor applications to drill new wells on existing pads on Crown and private land, technical engineering amendments to existing gas processing facility permits, and even applications for temporary work space to complete revetment work necessary to maintain pipeline integrity).¹⁰⁵ In consideration of *Yahey*, British Columbia's Ministry of Energy, Mines, and Low Carbon Innovation also cancelled pending petroleum and natural gas tenure dispositions.¹⁰⁶

British Columbia commenced negotiations with Blueberry to establish the new cumulative effects mechanism contemplated in Justice Burke's fourth declaration. However, before Blueberry would entertain negotiations on a long-term forward-looking framework, it required British Columbia to negotiate with it on how to address permits that had already been issued by the OGC and threatened to further infringe on Blueberry's treaty rights. Such negotiations were not mandated by *Yahey*, but they consumed the first few months of discussions between British Columbia and Blueberry after the Court issued the decision.¹⁰⁷

A. THE INITIAL AGREEMENT

On 7 October 2021, three months after *Yahey*, British Columbia and Blueberry reached an initial agreement.¹⁰⁸ Under the initial agreement, British Columbia agreed to provide Blueberry a total of \$65 million in funding, comprised of:

- (1) \$35 million to establish a fund for Blueberry to undertake activities to restore the land, create jobs for Blueberry members, and provide business to service providers in northeastern British Columbia; and
- (2) \$30 million to support Blueberry to protect their Indigenous way of life, including funding for: (1) work on cultural areas, traplines, cabins, and trails; (2) education activities and materials, such as teaching traditional skills and language; (3) expanding Blueberry's resources and capacity for land management; and (4) wildlife management and habitat enhancement, including prescribed burning and research. British Columbia stated that it would participate only in a non-decision making role to ensure that region-wide restoration activities are coordinated.¹⁰⁹

¹⁰⁵ "No New Wells Approved Last Month in B.C.; Province and BRFN Continue to Work on Interim Decision-Making Plan," *Daily Oil Bulletin* (15 September 2021), online: [perma.cc/A3W7-AEUI].

¹⁰⁶ Carter Haydu, "B.C. Cancels Summer PNG Tenure Dispositions," *Daily Oil Bulletin* (16 July 2021), online: [perma.cc/3A4U-QH33].

¹⁰⁷ British Columbia, Ministry of Indigenous Relations and Reconciliation, News Release 25437, "Joint Statement on Negotiations Related to B.C. Supreme Court Decision" (1 October 2021), online: [perma.cc/X3YK-BJ2F].

¹⁰⁸ British Columbia, Ministry of Indigenous Relations and Reconciliation, News Release, 25498, "B.C., Blueberry River First Nations Reach Agreement on Existing Permits, Restoration Funding" (7 October 2021), online: [perma.cc/G8Z5-8X8W].

¹⁰⁹ British Columbia, Ministry of Indigenous Relations and Reconciliation, News Release, 25501, "Initial Agreement Between Blueberry River First Nations and the Province of B.C." (7 October 2021), online: [perma.cc/9SB3-FL4J].

In exchange for the funding, the initial agreement confirmed that the 195 forestry and oil and gas projects that were permitted or authorized prior to *Yahey*, but which had not yet begun activities, would be allowed to proceed. However, 20 authorizations that related to development activities in “areas of high cultural importance” would remain suspended, pending further negotiation and agreement with Blueberry.¹¹⁰ As noted above, this agreement was not mandated by *Yahey*.

B. THE BLUEBERRY RIVER FIRST NATIONS IMPLEMENTATION AGREEMENT

After the initial agreement was executed, pending permit applications remained suspended for over 15 months, with select exceptions for emergency, environmental protection, or public safety reasons.¹¹¹ Petroleum and natural gas tenure dispositions also remained suspended.

On 18 January 2023, British Columbia and Blueberry arrived at an agreement (the *Implementation Agreement*).¹¹² Like the *Yahey* decision before it, this agreement is precedent-setting and has wide-ranging implications for industry in northeast British Columbia.

The *Implementation Agreement* covers five key areas: wildlife co-management; land-use plans; petroleum and natural gas (PNG); forestry; and “honouring Treaty 8.”¹¹³ The particulars of each are:

- (1) Wildlife co-management will include measures to improve information on wildlife populations through the use of Indigenous knowledge and western science, cultural burning, community stewardship, monitoring and guardian programs, as well as special focus on moose and caribou populations.¹¹⁴
- (2) British Columbia will work with Blueberry to collaborate on a series of land-use plans. These plans will determine where certain activities can occur, as well as the expectations and requirements for activities in certain areas. In particular, British Columbia and Blueberry have committed to advance multiple watershed-level land use plans within the next three years. In the meantime, a series of operational level plans focusing on land restoration and PNG sector activities will also be developed, with a target completion date of sometime before February 2025.¹¹⁵

¹¹⁰ British Columbia Energy Regulator, News Bulletin, INDB 2021-28, “The Province and Blueberry River First Nations Are Working Together on a Path Forward in the Claim Area, Following the June 2021 B.C. Supreme Court Decision” (7 October 2021), online: [perma.cc/4PQW-VWKU].

¹¹¹ *Blueberry River First Nations Implementation Agreement*, 18 January 2023, online: *Government of British Columbia* [perma.cc/55JW-FZ9F][*Implementation Agreement*].

¹¹² British Columbia, Ministry of Water, Land, and Resource Stewardship, News Release, 28086, “Province, Blueberry River First Nations Reach Agreement” (18 January 2023), online: [perma.cc/LDF7-6BR5]; *Implementation Agreement*, *ibid*.

¹¹³ *Implementation Agreement*, *ibid*, art 16.1.

¹¹⁴ *Ibid*, art 4.

¹¹⁵ *Ibid*, art 5.

- (3) Specific to the PNG sector, the *Implementation Agreement* establishes areas where new PNG developments on Crown land are prohibited, and other areas in which new PNG disturbances are to be reduced by approximately 50 percent (to be discussed in detail below). It also introduces operational and strategic planning expectations for the PNG sector, which will apply to all new proposed PNG activities, as well as disturbance “caps,” or limits, for new PNG disturbances on Crown land. These disturbance limits may be lifted in the future as land use plans are finalized, but only if Blueberry agrees. Notable in the context of the investment made by British Columbia in the Site C dam, electricity transmission and distribution line rights-of-way outside of Area 1 or inside Area 1 with the consent of Blueberry are excluded from the definition of New Disturbance under the *Implementation Agreement*, and therefore from the disturbance caps.¹¹⁶
- (4) The *Implementation Agreement* also seeks to protect old growth forests and reduce timber harvesting in designated “high value 1” or “HVI” areas and traplines. There will be an approximate reduction in timber harvesting of 350,000 cubic metres per year in the Fort St. John Timber Supply Area, except for small, locally held woodlot tenures. Impacted tenure holders can expect to be compensated, although it is not clear how much compensation will be provided.¹¹⁷
- (5) Finally, British Columbia and Blueberry agreed to work together on measures to honour Treaty 8 through improved awareness and educational initiatives. The *Implementation Agreement* includes provisions for sustained communications, shared training, and awareness building, as well as support for communication with other Treaty 8 First Nations and local elected leaders.¹¹⁸

Other notable features of the *Implementation Agreement* include: Blueberry’s agreement that existing priority applications, set out in Schedule I, could proceed to determination by the BCER (discussed further below);¹¹⁹ the direct award to Blueberry of certain PNG tenures;¹²⁰ the requirement to develop a consultation process with Blueberry for new oil and gas applications;¹²¹ and a Revenue Sharing Agreement, where royalties and tenures from petroleum and natural gas activities will be paid to Blueberry by British Columbia.¹²² The Revenue Sharing Agreement provides that provincial royalties on oil, natural gas, and natural gas by-products are included as part of the calculation of British Columbia’s quarterly payments to Blueberry. In addition, Blueberry will receive \$87.5 million in direct payments over the next three years.¹²³ Beyond the above, the exact details and amounts of the Revenue Sharing Agreement are confidential.¹²⁴

¹¹⁶ *Ibid.*, arts 7–9, 14.

¹¹⁷ *Ibid.*, art 6.

¹¹⁸ *Ibid.*, art 16. See also British Columbia, Ministry of Water, Land, and Resource Stewardship, *supra* note 112.

¹¹⁹ *Implementation Agreement, ibid.*, Schedule I.

¹²⁰ *Ibid.*, art 15.3.

¹²¹ *Ibid.*, art 9.2.

¹²² *Ibid.*, Schedule L.

¹²³ British Columbia, Ministry of Water, Land, and Resource Stewardship, *supra* note 112.

¹²⁴ *Implementation Agreement, supra* note 111, Schedule L, Appendices 1A–1C.

British Columbia and Blueberry also agreed to establish a Blueberry-BC Restoration Fund (Blueberry Restoration Fund) on or before 31 March 2023.¹²⁵ Proponents of new disturbances in the Blueberry territory will be required to pay a disturbance fee of \$60,000 for each hectare on Crown land in HV1 areas and areas that are covered, or will be covered, by priority Watershed Management Basin Plans, into the Blueberry Restoration Fund, with the objective of the Blueberry Restoration Fund reaching \$200 million by 2025. For Trapline Areas not within HV1 areas or areas that are covered, or will be covered, by priority Watershed Management Basin Plans, the disturbance fees will be split and paid equally to the Blueberry Restoration Fund and the Treaty 8 Restoration Fund, which is to be separately established by British Columbia and other Treaty 8 First Nations in northeast British Columbia.¹²⁶ As opposed to industry contributions to the Treaty 8 Restoration Fund, which at this time are voluntary and incremental to British Columbia's contribution,¹²⁷ industry contributions to the Blueberry Restoration Fund by way of payment of the disturbance fee are credited to British Columbia's contribution and therefore reduce British Columbia's overall monetary obligation to the Fund.¹²⁸

The *Implementation Agreement* also provides a resolution plan should Blueberry, and only Blueberry specifically, take issue with an application for a new oil and gas activity under an approved HV1 Plan. Blueberry may meet with the BCER and a mediator to discuss disagreements. Failing that, Blueberry and the BCER may provide a written summary of the issues to the Blueberry Chief and the Commissioner of the BCER to request a determination about whether to: (1) make a joint recommendation to the provincial decision maker; or (2) provide direction back to the parties to guide further negotiations. If an agreement still cannot be reached, then Blueberry may challenge the decision by court process.¹²⁹

Notably, this resolution plan applies to any application for new oil and gas activity, even if there is no HV1 Plan, Watershed Management Basin (WMB) Plan, or other Treaty 8 First Nation restoration and development plan in place. Clause 9.2 provides that, should a concern be raised that requires issue resolution, the parties will follow the process under clause 7.14 "and in alignment with ARTICLE 14 where no approved HV1 Plan, WMB Plan, or Other Treaty 8 First Nation Restoration and Development Plan is in place."¹³⁰ Yet, clause 7.14 is an issue resolution plan for when an HV1 Plan is in place.¹³¹ It is unlikely that the parties intended such a discrepancy. Accordingly, the resolution plan will simply follow the steps laid out under clause 7.14, regardless of whether an HV1 Plan is in place.

In any case, Blueberry agreed that it would not advance or file any claims against British Columbia on the basis of the cumulative effects of development activities in the Blueberry

¹²⁵ *Ibid*, art 10.7. While it is unclear whether the Blueberry Restoration Fund has been established, the federal government and the British Columbia government recently paid \$800 million to the Blueberry River, Doig River, Halfway River, Sauteau, and West Moberly First Nations. Leyland Cecco, "Canada to Pay \$800m to Settle Land Dispute with Five First Nations," *The Guardian* (17 April 2023), online: [perma.cc/27C7-FUZ3].

¹²⁶ *Implementation Agreement*, *ibid*, art 14.2.

¹²⁷ *Letter of Agreement Between Fort Nelson First Nation and His Majesty in Right of the Province of British Columbia*, 18 January 2023, Schedule A at 3–7, online: *Government of British Columbia* [perma.cc/XZ8E-TZ9Q] [*Fort Nelson Agreement*].

¹²⁸ *Implementation Agreement*, *ibid*, art 10.4.

¹²⁹ *Ibid*, art 7.14.

¹³⁰ *Ibid*, art 9.2.

¹³¹ *Ibid*, art 7.14.

Claim Area resulting in treaty rights infringements — so long as British Columbia materially complies with its obligations under the *Implementation Agreement*. Even so, Blueberry's ability to seek judicial review of any specific decision remains intact.¹³²

Following the announcement of the *Implementation Agreement*, the BCER introduced early guidance to the PNG sector.¹³³ The “BRFN Agreement – Rules for Oil and Gas Development”¹³⁴ provides preliminary PNG industry-specific information about the *Implementation Agreement*.

The BCER Rules identify three key guiding principles to development planning and operational decision making moving forward. They are to: (1) limit “New Disturbances”¹³⁵ in HV1 areas by maximizing land protection and reducing New Disturbances in the Blueberry Claim Area by approximately 50 percent compared to previous years; (2) avoid New Disturbances for new wells and infrastructure in favour of previously disturbed sites, and use existing distances as much as possible; and (3) ensure overall limits, potential locations, and manner of New Disturbances are managed through a Cumulative Effects Management Regime.¹³⁶ The BCER will also implement a 750 hectare cap on New Disturbances (to be reviewed on an annual basis with Blueberry),¹³⁷ and consider other matters Blueberry identifies, such as the location of disturbances in certain wildlife areas, settlements, and other significant spaces.¹³⁸

The BCER Rules further clarify that current and future land use activities will be based on areas of cultural importance to the First Nations. The *Implementation Agreement* has already identified several areas for Blueberry. They are:

- (1) **HV1 Areas:** These areas are important places for Blueberry to practice their treaty rights. These are considered areas of critical importance to Blueberry, where limits will apply to developments planned within them.¹³⁹ Interestingly, the

¹³² *Ibid*, arts 18.2, 18.4.

¹³³ British Columbia Energy Regulator, Technical and Information Updates, IU 2023-02, “Guidance for Energy Industry Following the BFRN Agreement” (27 January 2023), online: [perma.cc/NJ9G-GCW4].

¹³⁴ British Columbia Energy Regulator, Information Bulletin, 20230126, “BRFN Agreement – Rules for Oil and Gas Development” (26 January 2023), online: [perma.cc/4TVU-HXF3] [BCER Rules].

¹³⁵ *Ibid* at 2. The BCER Rules define “New Disturbance” to mean all oil and gas activity related disturbances on Crown land outside of any permitted and existing PNG footprint identified in the Surface Land Use Data Layer, including restored wells with a certificate of restoration, but subject to certain exceptions. The BCER Rules further define an oil and gas activity to mean:

[T]hose activities related to conventional and unconventional oil and gas exploration and development (including coal bed gas, hydrogen development, developments aimed at capturing carbon and other forms of exploration and development that may evolve over time related to the presence of subsurface PNG deposits) on Crown land within the Claim Area for which the approval of a Provincial decision maker is required, and includes, but is not limited to, seismic operations and operations on or at well sites, access roads, pipelines and processing facilities (*ibid* at 3).

¹³⁶ *Ibid* at 1–2.

¹³⁷ *Ibid* at 9. The BCER Rules contain a reference map showing the locations of the three main areas (*ibid* at 19). It states that Area 1 covers Blueberry's core area of concern with a sub-cap of 200 hectares per year. Area A will have a default of 200 hectares per year, until replaced by a new area as negotiated between Blueberry and Halfway River First Nation. The third area is the remaining part of the Blueberry Claim Area, which will have the remainder of the cap per year (*ibid* at 9). However, contrary to what is set out in the BCER Rules (*supra* note 134), the cap for 2023 is 860 hectares (*Implementation Agreement, supra* note 111, art 14.1(a)).

¹³⁸ *Ibid* at 10–11.

¹³⁹ *Ibid* at 4.

Implementation Agreement includes a clause determining the parties that will be engaged in designing the HV1 Plans: British Columbia *will* include industry, and “[a]ll relevant tenure holders and proponents”; however, British Columbia *may* engage any other third party, including other Treaty 8 First Nations with overlapping traditional territories.¹⁴⁰ There are three categories of HV1 areas; some areas will receive 100 percent protection from New Disturbances, while others will receive 80 or 60 percent protection.¹⁴¹ The Ministry of Energy, Mines, and Low Carbon Innovation is the lead accountable provincial agency for each of the HV1 Plans.

- (2) **WMBs and WMB Plans:** The Ministry of Water, Land, and Resource Stewardship will oversee the advancement of three WMB Plans by 31 December 2025.¹⁴²
- (3) **Blueberry River First Nation Traplines:** These are areas where increased engagement expectations are required for oil and gas activities. More details will be released in the future.¹⁴³

Going forward, applications for new oil and gas activities will be expected to demonstrate that efforts were made to consolidate New Disturbances with any existing disturbances.

Existing applications were split into two categories: existing priority applications and existing applications.¹⁴⁴ The list of existing priority applications, which includes new oil and gas activities and amendments from companies like ConocoPhillips Canada, PETRONAS Energy Canada, and Canadian Natural Resources Limited, were determined in conjunction with companies and Blueberry.¹⁴⁵

Existing priority applications will have an expedited process to obtain a decision from the BCER. Under the *Implementation Agreement*, Blueberry shall not oppose the existing priority applications, and the existing priority applications do not have to address new application requirements.¹⁴⁶ Otherwise, all other existing applications will be reviewed consistent with the processes identified in the agreement, and following the new application process principles established to maintain the honour of the Crown and ensure administrative fairness to all parties.¹⁴⁷

The *Implementation Agreement* is precedent-setting for a treaty First Nation in Canada. Unlike other “co-management” regimes that have been established between governments and treaty First Nations in recent years (for example, the Moose Lake Access Management Plan in northeast Alberta, which was co-developed by Alberta and Fort McKay First Nation),¹⁴⁸ the *Implementation Agreement* bestows significant decision-making and ultimate control

¹⁴⁰ *Implementation Agreement*, *supra* note 111, art 7.9.

¹⁴¹ *Ibid.*, art 5.2.

¹⁴² BCER Rules, *supra* note 134 at 7.

¹⁴³ *Ibid.* at 8.

¹⁴⁴ *Ibid.* at 9.

¹⁴⁵ *Ibid.* at 13–18. The BCER Rules contain a full list of existing priority applications (*ibid.*).

¹⁴⁶ *Implementation Agreement*, *supra* note 111, arts 9.5(a)–(b).

¹⁴⁷ BCER Rules, *supra* note 134 at 11–12.

¹⁴⁸ Alberta, *Moose Lake Access Management Plan* (Edmonton: Environment and Parks, 2021), online (pdf): [perma.cc/GS8G-5J64].

over petroleum and natural gas resource development to Blueberry. For example, while the *Implementation Agreement* establishes strict criteria for new resource developments, Blueberry has the ability to grant waivers to any particular development.¹⁴⁹ This will allow Blueberry a significant role in selecting which developments will and will not proceed in the future, in conjunction with British Columbia. It will also give Blueberry decision-making powers over developments that directly impact other Treaty 8 First Nations in northeast British Columbia (including Nations that are highly dependent on jobs and business revenues from resource projects for their community well-being).

In effect, the *Implementation Agreement* gives Blueberry (a community of roughly 500 people) unprecedented power to essentially dictate, in part, how one of British Columbia's most resource-rich areas will be developed in the future, to the possible benefit or detriment of many thousands of other British Columbians, including other Treaty 8 First Nations.

C. AGREEMENTS WITH OTHER TREATY 8 FIRST NATIONS

Soon after the *Implementation Agreement* was announced, British Columbia reached consensus on a collaborative approach to land and resource planning (Consensus Agreements), along with a temporary revenue sharing agreement (Revenue Sharing Agreements), with five other Treaty 8 First Nations:¹⁵⁰ Fort Nelson First Nation;¹⁵¹ Sauleau First Nation;¹⁵² Halfway River First Nation;¹⁵³ Doig River First Nation;¹⁵⁴ and McLeod Lake Indian Band.¹⁵⁵

Like the *Implementation Agreement*, the Consensus Agreements include initiatives to: (1) co-manage wildlife; (2) implement new land-use plans and protection measures; (3) implement a "cumulative effects" management system linked to natural resource landscape

¹⁴⁹ See e.g., *Implementation Agreement*, *supra* note 111, arts 7.3, 7.6, 9.2, which provide that Blueberry must provide consent for disturbances in certain areas and circumstances, and further that Blueberry will review applications for new oil and gas activity. If Blueberry raises any concerns regarding the applications, the parties will have to engage in an extensive "issue resolution" process under clause 7.14, which may delay the application process.

¹⁵⁰ British Columbia, Office of the Premier, News Release, 28104, "B.C., Treaty 8 First Nations Build Path Forward Together" (20 January 2023), online: [perma.cc/QK3E-RMU2]; British Columbia, Ministry of Water, Land, and Resource Stewardship, News Release, 28699, "McLeod Lake Indian Band, Province Sign Agreements to Protect Treaty Rights" (3 May 2023), online: [perma.cc/TN44-JDAA].

¹⁵¹ *Fort Nelson Agreement*, *supra* note 127; *Revenue Sharing Agreement Between His Majesty the King in Right of the Province of British Columbia and Fort Nelson First Nation*, 18 January 2023, online: *Government of British Columbia* [perma.cc/6XFQ-4YWF] [*Fort Nelson RSA*].

¹⁵² *Letter of Agreement Between Sauleau First Nations and His Majesty the King in Right of the Province of British Columbia*, 18 January 2023, online: *Government of British Columbia* [perma.cc/5YHU-A7DM]; *Revenue Sharing Agreement Between His Majesty the King in Right of the Province of British Columbia and Sauleau First Nations*, 18 January 2023, online: *Government of British Columbia* [perma.cc/X636-RSDR] [*Sauleau RSA*].

¹⁵³ *Letter of Agreement Between Halfway River First Nation and His Majesty the King in Right of the Province of British Columbia*, 18 January 2023, online: *Government of British Columbia* [perma.cc/8LTU-AMRH]; *Revenue Sharing Agreement Between Halfway River First Nation and His Majesty in Right of the Province of British Columbia*, 18 January 2023, online: *Government of British Columbia* [perma.cc/MX9W-87XG] [*Halfway River RSA*].

¹⁵⁴ *Letter of Agreement Between Doig River First Nation and His Majesty in Right of the Province of British Columbia*, 18 January 2023, online: *Government of British Columbia* [perma.cc/CC3M-25C9]; *Revenue Sharing Agreement Between Doig River First Nation and His Majesty in Right of the Province of British Columbia*, 18 January 2023, online: *Government of British Columbia* [perma.cc/N9PX-D9ZQ] [*Doig River RSA*].

¹⁵⁵ As of this article's submission, the letter of agreement and revenue sharing agreement are not yet publicly available. For the latest updates regarding the agreements, see British Columbia, "McLeod Lake Indian Band," online: [perma.cc/75M4-4QVQ].

planning and restoration initiatives; (4) implement pilot projects to advance shared decision-making for planning and stewardship activities; (5) implement a multi-year, shared restoration fund to heal the land (called the Treaty 8 Restoration Fund, mentioned above); (6) implement a new revenue-sharing approach to support Treaty 8 First Nations communities; and (7) promote education about Treaty 8.¹⁵⁶

The Revenue Sharing Agreements establish that funds will be provided to each First Nation in the fiscal year, and will terminate on 31 March 2024. While the exact amounts paid to each First Nation remain confidential, funds will be comprised of a share of PNG royalties, tenure sales, and rents. The share of each participating First Nation will be calculated based on the following: (1) half the total shared amount will be an equal share for all eight Treaty 8 First Nations in northeast British Columbia (that is 1/8 of the halved amount, or 1/16 of the total amount); and (2) half the share will be calculated based on the relative population of the First Nation against the population of all Treaty 8 Nations.¹⁵⁷ The Revenue Sharing Agreements also require each First Nation to report on how the revenue was utilized,¹⁵⁸ and to agree that they will not initiate any new legal claims against British Columbia respecting the impact of cumulative effects on their treaty rights.¹⁵⁹

V. RECENT CUMULATIVE EFFECTS LITIGATION

A. CLAIMS ARISING POST-YAHEY

Blueberry's success in *Yahey* has encouraged a score of similar claims from First Nations in other Canadian provinces. The prospective success of these claims, however, rests on the specific circumstances of each claimant, the location of their traditional territories, and the extent of development authorized by the Crown in each case. Furthermore, even if an infringement on the basis of cumulative effects is made out in a future decision, the Crown may still be able to justify the infringement on the basis of a compelling and substantial public objective. In *Yahey*, British Columbia failed to advance any oral or written arguments on the question of justification, which Blueberry emphasized in its closing arguments and the Court found to be "surprising, given the pleadings, the evidence, and the fact that the issue of justification was not severed from the issue of infringement."¹⁶⁰ If a provincial Crown were to advance a sufficient justification argument in a subsequent proceeding, the result may vary from that in *Yahey*, even if the First Nation establishes treaty rights infringement.

One recent treaty infringement claim that is particularly relevant for the energy industry in Alberta is the claim commenced by Duncan's First Nation (DFN), a signatory to Treaty 8 whose traditional territory is in northern Alberta, directly across the provincial border from

¹⁵⁶ British Columbia, Office of the Premier, *supra* note 150.

¹⁵⁷ *Fort Nelson RSA*, *supra* note 151, ss 2.1, 2.4, and Schedule 1; *Saulteau RSA*, *supra* note 152, ss 2.1, 5.8, and Schedule 1; *Halfway River RSA*, *supra* note 153, s 2.3, Schedule 1; *Doig River RSA*, *supra* note 154, s 2.3, Schedule 1.

¹⁵⁸ *Fort Nelson RSA*, *ibid*, s 2.4; *Saulteau RSA*, *ibid*, s 5.8; *Halfway River RSA*, *ibid*, s 2.3; *Doig River RSA*, *ibid*, s 2.3.

¹⁵⁹ *Fort Nelson RSA*, *ibid*, s 5.1; *Saulteau RSA*, *ibid*, s 5.1; *Halfway River RSA*, *ibid*, s 5.1; *Doig River RSA*, *ibid*, s 5.1.

¹⁶⁰ *Yahey*, *supra* note 1 at para 1851. See also *Yahey*, *ibid* at paras 1821, 1831.

Blueberry. DFN filed a Statement of Claim against Alberta on 18 July 2022, relying on terminology from *Yahey*. Among other things, DFN alleges that Alberta failed to “[protect] DFN’s way of life” and “engaged in a pattern of conduct that, taken together, has significantly diminished DFN’s right to hunt, fish, trap, and gather as part of their way of life.”¹⁶¹ DFN claims that the “extensive non-Indigenous uses of the lands, waters, and natural resources in DFN’s Traditional Territory” that Alberta has authorized for industries such as agriculture, energy (including PNG and power line transmission), forestry, mining, transportation, settlement, and other forms of development such as peat bog harvesting, have “significantly and meaningfully [diminished] DFN’s ability to exercise the Treaty Rights.”¹⁶² DFN also alleges that Alberta had failed to “assess, monitor, or manage the cumulative impacts of the [authorized developments] in DFN’s Traditional Territory and the surrounding area” on the continued meaningful exercise of DFN’s Treaty rights.¹⁶³ DFN seeks the same remedies awarded in *Yahey*.¹⁶⁴

In its Statement of Defence, Alberta asserts that it “has always acted honourably in implementing the inherent balance of Treaty 8, including in taking up lands and protecting Treaty Rights.... The Plaintiffs are and have always been able to exercise their Treaty Rights in a meaningful way. Alberta denies any breaches of Treaty Rights through the cumulative impacts of development or otherwise.”¹⁶⁵ DFN’s use of the term “significant” compared to Alberta’s use of “meaningful” indicates that the proper legal threshold to establish treaty infringement is in issue in this case.

However, even if successful, DFN’s claim may not have the same transformative effect as Blueberry’s claim. Treaty infringement claims are highly contextual and require, as described above, extensive historic and anthropological evidence, expert witness opinions, and testimony from both community members and industry about the impacts of development in the specific region of the claim.

Furthermore, British Columbia did not advance a justification argument in *Yahey*, which the Court noted left British Columbia’s position on justification “evolving and somewhat unclear.”¹⁶⁶ Nevertheless, the justification of a prima facie infringement based on cumulative effects poses a unique challenge for the Crown. To show a justifiable infringement, the Crown must establish that it had a compelling and substantial government objective and that it acted in keeping with the honour of the Crown and its fiduciary duty toward Indigenous peoples.¹⁶⁷ This determination requires the assessment of a number of factors, including minimal infringement of the right, whether the government has prioritized Aboriginal rights, whether (in a case of expropriation) fair compensation was paid, and whether consultation took place with respect to the measures being implemented.¹⁶⁸ These same factors, however, contribute to the determination of whether a prima facie infringement can be found in a

¹⁶¹ *Gladue*, *supra* note 2 (Statement of Claim) at para 5 [emphasis added].

¹⁶² *Ibid* at paras 42, 45 [emphasis added].

¹⁶³ *Ibid* at para 44 [emphasis added].

¹⁶⁴ *Ibid* at para 53.

¹⁶⁵ *Gladue*, *supra* note 2 (Statement of Defence) at para 5 [emphasis added].

¹⁶⁶ *Yahey*, *supra* note 1 at para 1821.

¹⁶⁷ *Sparrow*, *supra* note 9 at 1113–19; *Badger*, *supra* note 15 at paras 75, 85, 96–98.

¹⁶⁸ *Sparrow*, *ibid* at 1119.

cumulative effects context.¹⁶⁹ Justifying an infringement on the same basis on which the infringement is found poses a unique challenge to provinces attempting to withstand this type of litigation in the future.

Further east, the Chapleau Cree First Nation, Missanabie Cree First Nation, and Brunswick House First Nation filed a claim against the Province of Ontario in September 2022, alleging that the cumulative impacts from development have infringed their treaty rights.¹⁷⁰ These First Nations focus their claim on forestry operations, although they argue that Ontario failed to put in place the proper mechanisms to address the cumulative effects of “industrial development in the boreal forest,” which they plead is central to their way of life.¹⁷¹ In addition to the relief granted in *Yahey*, these Nations are seeking additional payments from Ontario representing their “share” of the profits that Ontario has acquired from their traditional territories since 1905 and a declaration that recent legislative changes to the environmental regulation of the forestry industry represent an unjustifiable infringement of their Treaty 9 rights.¹⁷²

It is far from a foregone conclusion that courts outside of British Columbia will adopt the holding in *Yahey*. The British Columbia Supreme Court’s decision is not binding in other jurisdictions, and, because of the highly specific factual matrix upon which it was decided, may not prevail. Different provinces have different regulatory regimes and political climates, and the historic and contemporaneous relations between the provincial government, industry, neighbouring communities, and Indigenous groups are far from homogeneous.

The circumstances that gave rise to the finding of an infringement on the basis of cumulative effects in *Yahey* — statistical evidence establishing the prevalence of disturbance; the historic relations between the parties; the wording of Treaty 8 and the historic context of its negotiation (courts have emphasized that, in the negotiation of Treaty 8 in particular, the Crown’s commissioners made several “assurances of continuity in traditional patterns of economic activity”¹⁷³); the structure of British Columbia’s regulatory regimes and the lack of communication between them; and the lack of a comprehensive assessment of cumulative effects in any regulatory or consultation process — may not be made out on the facts of subsequent cases.

Further, on the threshold to establish treaty infringement, other courts may choose not to derogate so far from the Supreme Court of Canada’s holding in *Mikisew*, instead falling back on the Supreme Court of Canada’s test of “no meaningful right to hunt.”¹⁷⁴ For example, in its 2019 decision of *Fort McKay First Nation v. Prosper Petroleum Ltd.*,¹⁷⁵ the Alberta Court

¹⁶⁹ See e.g. *Yahey*, *supra* note 1 at paras 1847–57.

¹⁷⁰ *White*, *supra* note 2.

¹⁷¹ *Ibid.*

¹⁷² *Ibid.*

¹⁷³ *Mikisew*, *supra* note 12 at para 47. See also *Yahey*, *supra* note 1 at para 105: “Finding the common intention of the parties who entered into a treaty over 120 years ago is not an easy or straightforward task. The negotiations of historical treaties, including Treaty 8, were marked by significant differences in the signatories’ languages, concepts, cultures, modes of life, and world views” (*Yahey*, *ibid.*, citing *Quebec (Attorney General) v Moses*, 2010 SCC 17 at para 108, Lebel and Deschamps JJA, dissenting; *Restoule v Canada (Attorney General)*, 2018 ONSC 7701 at para 326).

¹⁷⁴ *Mikisew*, *ibid* at para 48 [emphasis added].

¹⁷⁵ 2019 ABCA 14.

of Appeal observed that the threshold set by the Supreme Court of Canada in *Mikisew* “still requires the adjudicator to ask whether a current project will have the effect of leaving no meaningful opportunities for exercise of treaty rights over traditional territory.”¹⁷⁶ In applying the *Mikisew* threshold, the Court found that the treaty right was not infringed because the project in question “would not render the First Nation’s Treaty 8 rights *meaningless*.”¹⁷⁷ This indicates a different standard than that set out by the British Columbia Supreme Court in *Yahey*.

B. ONGOING CUMULATIVE EFFECTS LITIGATION THAT PREDATES YAHEY

Yahey was also not the first cumulative effects case. Others were filed prior to it and remain in the court system.

For example, in 2008, the Beaver Lake Cree Nation (Beaver Lake) filed a claim against Alberta alleging that, by authorizing “oil and gas related activities, forestry activities, mining activities and other activities,” including leases of land to the Government of Canada for the Cold Lake Air Weapons Range, Alberta had infringed Beaver Lake’s treaty rights in Treaty 6 such that the Nation was left with “no meaningful way to exercise the Treaty Rights.”¹⁷⁸ The claim continues through the court system.

Similarly, in 2017, the Carry the Kettle First Nation (Carry the Kettle), located in Treaty 4 territory, commenced litigation against the Province of Saskatchewan. Carry the Kettle’s claim pleads the importance of the land and waters to their “way of life,” and alleges that Saskatchewan has “authorized and facilitated the taking up of land for agriculture, mining, oil and gas development, railways, roads, settlement and other activities largely without proper consultation with Carry the Kettle, consideration of the impact on current and future generations of Carry the Kettle members, or accommodation for the significant impacts caused by this settlement and development.”¹⁷⁹

While the success found by Blueberry in *Yahey* may have encouraged other First Nations to launch similar claims, the uncertainty of their success, particularly in jurisdictions outside of British Columbia, means that the litigation of an unjustifiable infringement claim on the basis of cumulative effects remains difficult to establish — and, even if successful, it does not guarantee an agreeable solution for either side. Together, these risks and difficulties indicate that litigating the fallout of poorly-managed environmental regulation and land use regimes is not an ideal solution for any party.

¹⁷⁶ *Ibid* at para 56 [emphasis omitted].

¹⁷⁷ *Ibid* at para 57 [emphasis added].

¹⁷⁸ *Lameman v Alberta* (14 May 2008), Edmonton 0803-06718 (Alta QB) (Statement of Claim) at paras 16–17, 20.

¹⁷⁹ *Jack v Saskatchewan* (21 December 2017), Regina, OBG 3225 (Sask KB) (Statement of Claim) at para 6.

VI. RISK MITIGATION

The Blueberry case study highlights the importance of managing cumulative effects, treaty rights, and Indigenous litigation. While such issues are within the primary responsibility of governments (namely, provincial governments), and there are practical limitations around how individual companies can meaningfully address these issues, in our view there are several steps that companies can take to mitigate risks posed by treaty rights infringement claims.

First, Justice Burke's decision in *Yahey* was heavily influenced by the finding that British Columbia had no regulatory framework in place to meaningfully consider and manage cumulative effects. Each province has managed these issues differently, some better than others. For example, Alberta established a land-use planning framework through the *Alberta Land Stewardship Act*¹⁸⁰ in 2008 to set landscape-level criteria and targets to guide future development decisions.¹⁸¹ This framework has been stalled for some time (only two of seven regional plans have been finalized), but the concept behind it is precisely what Justice Burke found to be lacking in British Columbia. Historically, many in industry have viewed land-use planning as an impediment to their business because land use plans often result in development restrictions. But robust land use plans are likely the most effective way to mitigate the risk of successful treaty rights infringement claims, so industry should encourage these types of plans from their provincial governments.

Second, while there are practical limits on how much individual companies can do to manage and address cumulative effects, companies would be well-advised to engage proactively about cumulative effects management with Indigenous groups that may be affected by their existing and planned operations. For example, companies should take a more holistic view when assessing and engaging on their projects and their potential impacts. Instead of considering only their individual projects, companies should consider how their individual projects fit into the broader context of existing and planned developments in the area. In our experience, if Indigenous groups see that they can achieve some of their key land-use goals (for example, having industry avoid certain sites, restoring legacy disturbance, or funding studies of cumulative effects on certain cultural indicators) through engagement and negotiations, without resorting to expensive and time-consuming litigation, they will prefer that outcome to fighting in court.

Similarly, if the provincial government proactively works with the Indigenous group to address their key land-use goals, they may be able to successfully avoid a treaty rights infringement claim (for example, what appears to have happened with Fort McKay First Nation in Alberta and the Moose Lake Access Management Plan).

Companies could also negotiate protective clauses in project agreements with Indigenous groups. For example, companies could negotiate to include clauses that prevent the signatory Indigenous group from bringing a cumulative effect claim against the project, or to include the project in future cumulative effects claims. Companies could also negotiate clauses that

¹⁸⁰ SA 2009, c A-26.8

¹⁸¹ Alberta, *Land-Use Framework* (Edmonton: Land Use Secretariat, 2008).

prevent the signatory Indigenous group from seeking damages or compensation against the project proponent. In either case, industry (and government) will have more control over the outcome than if the matter is decided by one or more judges.

Third, companies and provincial governments should develop litigation strategies for defending treaty rights infringement claims. This should involve seeking to proactively improve the underlying facts (by developing land use plans or regulatory frameworks that meaningfully address cumulative effects) but also preparing legal defences that reduce the likelihood of a court reaching the same conclusions as Justice Burke did in *Yahey* or, even with similar factual findings, avoiding the types of relief granted in *Yahey* that effectively froze development across a large part of a province for one and a half years and gave a single Indigenous group significant leverage to negotiate how — and if — development will occur in the future.

For example, while treaty rights infringement claims are typically brought against the provincial government, individual companies may also be sued in nuisance for cumulative effects caused by their projects. Already, the British Columbia Supreme Court has found that an Indigenous group's reserve interest and occupancy of reserve land is sufficient to found an action in private nuisance arising from any "substantial and unreasonable interference with their use or enjoyment of the reserve lands."¹⁸² In *Thomas and Saik'uz First Nation* the British Columbia Supreme Court found that the defendant company's construction of a dam had caused, or contributed to, a severe decline in fish population.¹⁸³ Ultimately, the Court held that the company could rely on the defence of statutory authority to avoid liability because the Crown had expressly authorized the company's construction of the dam, and the company had strictly complied with the terms of the authorizations.¹⁸⁴ However, such a defence may not always be available based on the facts.

Thomas and Saik'uz carries significant implications as private companies can be held liable for common law actions in torts, such as nuisance claims, where a company's activities interfere with Aboriginal rights, interests in reserve lands or Aboriginal title, and, presumably, treaty rights. Taken together with *Yahey*'s findings regarding cumulative effects, it is possible that the threshold for finding significant interference will be easier to meet in a nuisance claim regarding treaty rights because those rights have already been diminished by other or prior activities. Accordingly, it is now more prudent than ever that companies pre-empt litigation (and the impacts of a cumulative effects finding on such litigation) by proactively developing strategies that reduce the likelihood of an unfavourable finding in court.

VII. CONCLUSION

Yahey represents one way that the courts are attempting to reconcile historic promises made under the treaties alongside resource development, Crown sovereignty, and Indigenous

¹⁸² *Thomas and Saik'uz First Nation v Rio Tinto Alcan Inc*, 2022 BCSC 15 at para 366 [*Thomas and Saik'uz First Nation*]. The case has since been appealed to the British Columbia Court of Appeal, and was heard in June 2023.

¹⁸³ *Ibid* at para 493.

¹⁸⁴ *Ibid* at para 602.

rights. This case has led to a fundamental change in how resource decision-making will occur in northeast British Columbia. The ripple effect of the *Yahey* decision is already spreading, with similar cases being brought across Canada and many Indigenous groups advocating for similar outcomes.

Though *Yahey* is still only a British Columbia Supreme Court decision, it is likely only the start of a long line of litigation, ripe with potential to escalate up the levels of courts and toward the Supreme Court of Canada. For now, it would be prudent for industry and governments to take proactive approaches to manage these issues, including collaborating with Indigenous communities to pre-empt treaty rights infringement claims by seeking to effectively manage cumulative effects in a manner that respects treaty rights and advances reconciliation through negotiation and engagement.