

# Forging a Clearer Path Forward for Assessing Cumulative Impacts on Aboriginal and Treaty Rights

June 13, 2019

CELF Jasper Seminar



# Overview

- **The Role of Cumulative Impacts in the Duty to Consult**
- **Treaty Infringement Claims based on Cumulative Impacts**
- **The Role of Cumulative Impacts in Environmental Assessments**
- **Developing a Better Path Forward & Guidance for Proponents**



# The Role of Cumulative Impacts in the Duty to Consult

- Past Impacts
- Future Impacts
- Accommodation Requirements

# Cumulative Impacts of Past Activities

## **Rio Tinto v. Carrier Sekani Tribal Council**

**2010 SCC 43**



## **West Moberly v. BC (Chief Inspector of Mines)**

**2011 BCCA 247**



*“Past wrongs, including prior breaches of the DtC” do not suffice to trigger the DtC: “An underlying or continuing breach, while remedial in other ways, is not an adverse impact” for triggering the DtC. There must be a potential “novel adverse impact” arising from the current decision*

*“The duty to consult is confined to the adverse impacts flowing from the current government conduct or decision, not to larger adverse impacts of the project of which it is a part.”*

*“I do not understand Rio Tinto to be authority for saying that... what has gone before is irrelevant. Here...the historical context is essential to a proper understanding of the seriousness of the potential impacts on the petitioners’ treaty right to hunt.”*

To consider those matters “is not to attempt the redress of past wrongs” but “simply to recognize an existing state of affairs, and to address the consequences of what may result” from the activities

# Cumulative Impacts of Past Activities

## **Adams Lake Indian Band v. BC**

**2013 BCSC 877**



*“Applied to [this] case, West Moberly suggests that the loss of additional treed areas on Mount Morrissey must be considered in the context of the overall area already lost to resort development. This is quite different from considering all past impacts.”*

*“If the damage has already occurred, it cannot by definition be prevented. Past wrongs are to be addressed in other ways.”*

## **Chippewas of the Thames v. Enbridge Pipelines**

**2017 SCC 41**



*“The duty to consult is not triggered by historical impacts. It is not the vehicle to address historical grievances” or the “broader claims that transcend the scope of the proposed project.”*

*“That said, it may be impossible to understand the seriousness of the impact of a project on s. 35 rights without considering the larger context... Cumulative effects of an ongoing project, and historical context, may therefore inform the scope of the duty to consult.”*

# Future Cumulative Impacts



- The SCC has endorsed an incremental approach to consultation, in which future cumulative impacts are generally not considered beyond impacts of the current decision
- *Taku River* (2004 SCC 74)
- *Rio Tinto, Chippewas of the Thames*

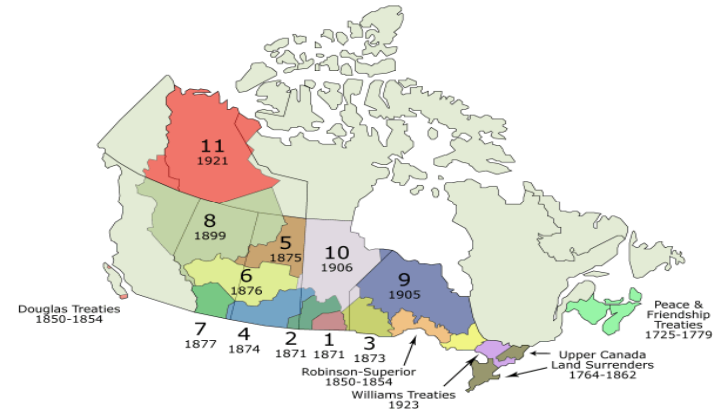
- Exceptions in which some consideration of future impacts is deemed necessary for consultation to be meaningful:
  - *West Moberly*: Re: caribou: “I do not see how one could ignore at least the possibility of a full mining operation” (as a relevant factor)
  - *Adams Lake*: “In the instant case, the licences...are an end in themselves, not merely a necessary step before a resource can be exploited.”
- Impacts of other reasonably anticipated projects are outside scope

## Accommodation of Cumulative Impacts

- As with consultation, accommodation need not remedy past impacts or matters outside the scope of the current project
- However, recent NEB decisions have required accommodation to avoid/offset (vs. simply minimize) additional impacts, if project will materially magnify existing adverse impacts:

<b><i>Westcoast Energy (2017)</i></b>	<b><i>Manitoba Hydro (2018)</i></b>	<b><i>Trans Mountain (2019)</i></b>
<p>NEB required proponent to ensure pipeline expansion in northeastern BC will have a net neutral impact on caribou population and habitat:</p> <p><i>“[G]iven the already substantial ongoing cumulative effects on the landscape and on caribou... all residual effects on caribou habitat should be considered and fully compensated.”</i></p>	<p>NEB required proponent to develop a Crown Land Offset Plan for new power line and modifications in response to Aboriginal concerns. Right of way area was small, but Crown land was limited:</p> <p><i>“[T]he proponent must establish a plan to offset or compensate the loss of Crown lands available for traditional use by Aboriginal people.”</i></p>	<p>NEB reconsideration decision recommended that the federal government (as Crown and proponent) develop and implement a long-term regional cumulative effects management plan to assess the environmental state of and cumulative effects on the Salish Sea, including addressing impacts beyond the project.</p>

# Treaty Rights Infringement Claims

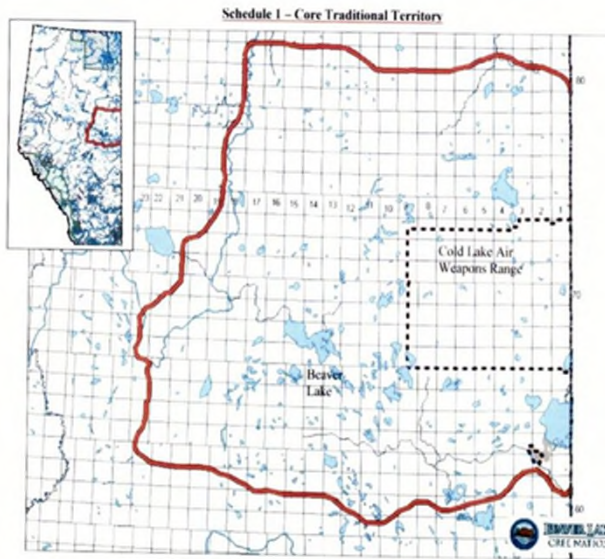


- *Beaver Lake Cree Nation v. Province of Alberta and the Attorney General of Canada* (May 14, 2008) (Treaty 6)
- *Blueberry River First Nations v. Province of British Columbia* (March 3, 2015) (Treaty 8)
- *Carry the Kettle First Nation v. Province of Saskatchewan and Attorney General of Canada* (December 21, 2017) (Treaty 4)



# Treaty Rights Infringement Claims

Beaver Lake Cree Nation - Alberta



Blueberry River First Nations – British Columbia

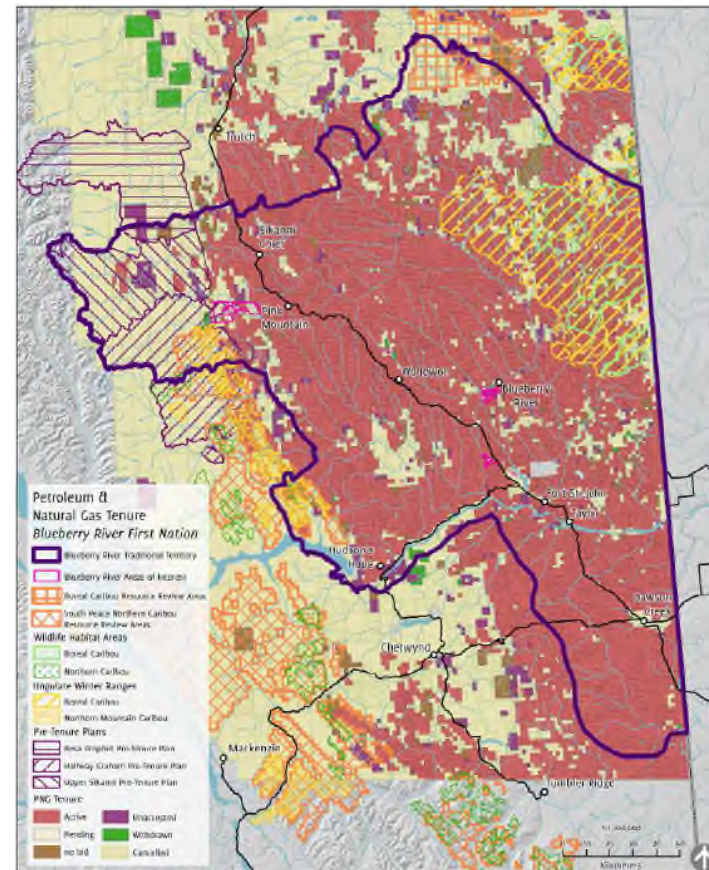


Carry the Kettle First Nation - Saskatchewan



# Treaty Rights Infringement Claims

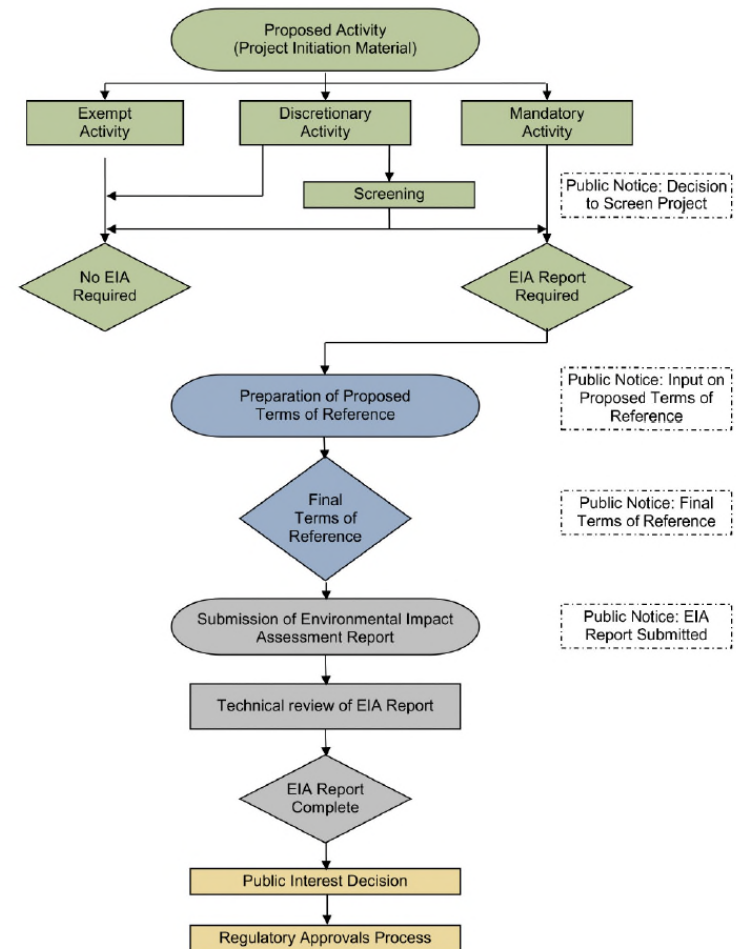
- 2016 land-use study by Ecotrust concluded that 73% of Blueberry River First Nations traditional territory is within 250 m of industrial disturbance
- 83% within 500 m of industrial disturbance
- Includes roadways, transmission lines, pipelines & 19,974 oil and gas wells of which 36% active



# Cumulative Environmental Effects

- Cumulative environmental assessments (“**EAs**”) require consideration of certain impacts on Aboriginal interests to varying degrees
- EAs have significant limitations in addressing cumulative impacts

Alberta’s Environmental Assessment Process



# Cumulative Environmental Effects

- **Assessment of Aboriginal interests**
  - The duty to consult is focused on impacts to Aboriginal or treaty rights whereas Environmental Assessments are focused on environmental effects
  - Only the current federal CEAA 2012 regime prescribes specific Aboriginal interests that need to be addressed, however this does not specifically include an assessment of impacts to rights

Duty to Consult	Existing EA Processes
DtC is a constitutional duty that exists outside and independent of legislation and statutory mandates	EA requirements are prescribed by legislation
DtC may be triggered for a range of decisions without the requirement for an EA	Typically, if an EA is triggered, there will also be a DtC with potentially affected Aboriginal groups
Focus of inquiry is the effect of cumulative impacts to asserted or established Aboriginal and treaty rights	Focus is cumulative environmental effects (not rights-based assessments), may include considerations re: Aboriginal interests and peoples
Past cumulative impacts & historical context do not trigger, but may inform the scope of the DtC (and may either deepen or lessen scope)	Impacts of a project are considered in the context of past impacts and impacts of the current project
Limited consideration of future cumulative impacts of the broader project (incremental consultation)	All reasonably anticipated future cumulative impacts of the project as a whole are considered
Consideration of other reasonably anticipated projects is outside of scope of consultation	Cumulative impacts of all existing and reasonably anticipated <i>other</i> projects is within scope of an EA
Accommodation need not remedy past impacts or impacts outside project scope (some exceptions). However, DtC may require greater accommodation of incremental impacts and avoid/offset measures	Mitigation measures must generally identify feasible measures to mitigate significant adverse cumulative environmental effects
Adequacy of consultation may be held to a stricter standard	Adequacy of consultation held to a lesser standard on EA review

# Cumulative Environmental Effects

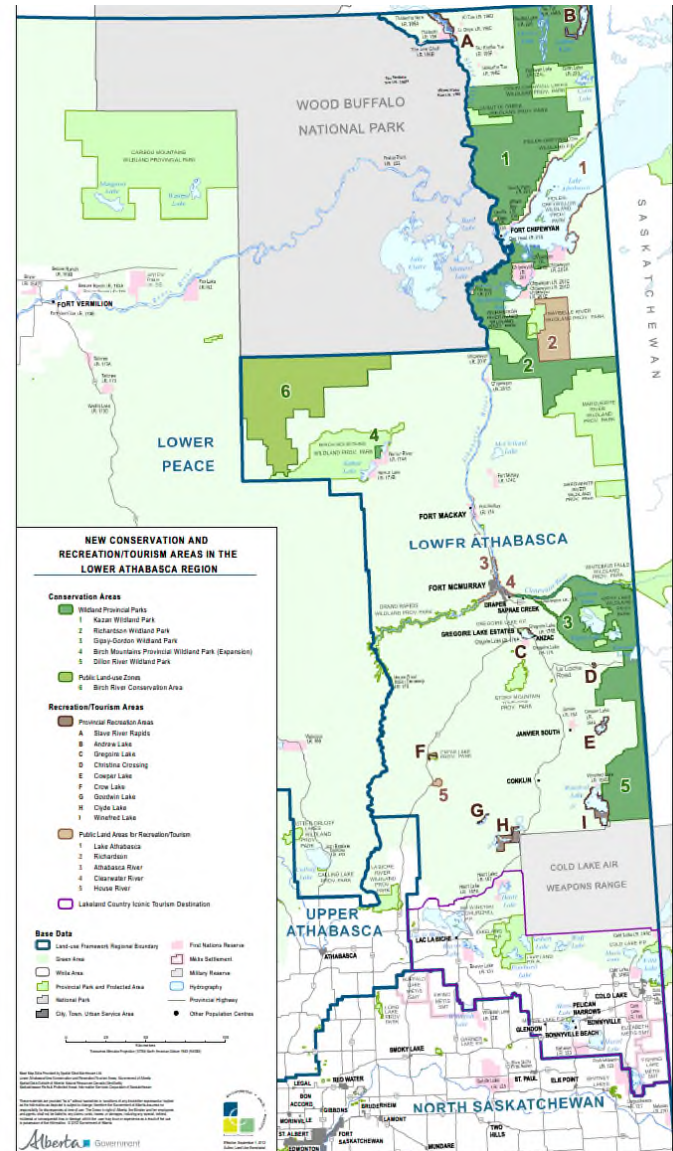
## → **Strategic Assessments**

- Unlike the duty to consult, regional assessments consider past, present, and future anticipated projects within an entire region rather than in the context of a more localized individual project or government decision

# Cumulative Environmental Effects

## Case Study: *Alberta Land Stewardship Act*

- Regional land-use plans have not yet been developed in a way that sufficiently considers cumulative impacts on Aboriginal and treaty rights as part of land-use decision making



# Forging a Better Path Forward



- More effective land-use planning and strategic and regional assessments outside of individual project reviews
- Creation of separate fora/off-ramps to address common cumulative impact concerns of Aboriginal groups outside the project review setting
- Clearer policy or regulatory guidance to address areas of uncertainty



# Issues for Proponents to Consider

- Some questions to consider when faced with cumulative impact concerns:
  - ↪ What rights are currently being exercised in the project area and how has the ability to exercise rights been affected by cumulative impacts?
  - ↪ What are the resources needed to meaningfully exercise rights that may be impacted by the project and what are specific impacts?
  - ↪ Is the area/resources impacted of particular significance? What other areas are still available to exercise rights?
  - ↪ What additional incremental impact will the project have on Aboriginal and treaty rights during all phases?
  - ↪ How can this incremental impact be avoided, offset, or minimized?
  - ↪ What monitoring may be required to assess ongoing cumulative impacts?

# Questions? Comments?

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