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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I. EXECUTIVE SUMMARY

The British Columbia Supreme Court ("BCSC")'s June 2021 decision in *Yahey v British Columbia* ("*Yahey*") is the first Canadian decision to find that the Crown infringed its treaty obligations to an Indigenous group as a result of the cumulative effects of development. In arriving at this novel finding, the BCSC modified the test for treaty infringement, lowering the bar to establishing these claims by asking only whether there is a significant or meaningful diminishment of treaty rights, rather than "no meaningful exercise of the rights" (the prior, and higher, standard).

As a remedy, the Court prohibited British Columbia ("BC") from continuing to authorize activities that breach Treaty 8 and ordered the Province and the Blueberry River First Nations ("Blueberry") to diligently consult and negotiate changes to the regulatory regime to better assess and manage cumulative effects.

Close to 18 months after the decision was issued, BC and Blueberry reached an agreement under which BC made multi-million dollar investments in the Blueberry Claim Area and agreed to joint decision-making powers with Blueberry regarding future development in the Area. The agreement has transformed the future of resource development in the Blueberry Claim Area, which covers much of northeastern BC, including the Montney shale play and the traditional territories

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of many other Indigenous groups who are not party to the Blueberry agreement.

The BCSC decision has significant implications for treaty relations and litigation across Canada. Similar claims have been filed in Alberta, Saskatchewan and Ontario. For example, in July 2022, the Duncan's First Nation ("DFN") filed a claim against the Province of Alberta mirroring the Blueberry claim and seeking to apply it to DFN's territory in northwest Alberta. If courts across Canada adopt the BCSC's reasoning in *Yahey* and grant additional claims like DFN's, land management decision-making could fundamentally change across much of the country, impacting not only resource development but all types of land use (agriculture, municipal expansion, etc.) and, of course, Indigenous economic development.

This paper explores the potential impacts of *Yahey*, the Blueberry agreement and the DFN claim on energy and resource developments and Indigenous relations across Canada.

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II. INTRODUCTION

The British Columbia Supreme Court ("BCSC") sent shockwaves across the Canadian legal community in June 2021 when it issued its groundbreaking decision in *Yahey v British Columbia* ("*Yahey*"), finding that the Province of British Columbia ("BC") 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 BC 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) And, 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 BC 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. While it remains to be seen whether courts outside of BC will follow *Yahey*, and whether Indigenous groups outside of northeast BC 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 paper, we explore these important issues and identify opportunities for governments and individual companies to: (i) mitigate the risks posed by treaty rights infringement claims; and (ii) advance reconciliation with Indigenous communities outside of lengthy and adversarial court proceedings.

III. 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 among the fundamental foundations of the Canadian constitution and Canada itself.

Beginning 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.[2]

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[2] See Government of Canada, "Treaties of Peace and Neutrality (1701-1760)" (last modified 04 June 2013), online: <www.rcaanc-cirnac.gc.ca/eng/1360866174787/1544619566736>; Government of Canada, "Peace and Friendship Treaties (1725-1779)" (last modified 04 June 2013), online: <www.rcaanc-cirnac.gc.ca/eng/1360937048903/1544619681681>.

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.[3] 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.[4] As affirmed by the Supreme Court of Canada in *Tsilhqot'in 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".[5]

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.[6] 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 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 BC 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

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[3] See Thomas Isaac, *Aboriginal Law,* 5th Ed. (Toronto, ON: Thompson Reuters Canada, 2016) at p. 151; The Canadian Encyclopedia, "Royal Proclamation of 1763" (last modified 30 August 2019), online: <www.thecanadianencyclopedia.ca/en/article/royal-proclamation-of-1763>.

[4] See Isaac, *supra* note 3, p. 151–152; The Canadian Encyclopedia, *supra* note 3.

[5] *Tsilhqot'in Nation v British Columbia,* 2014 SCC 44 at para 69 [*Tsilhqot'in*].

[6] See Isaac, *supra* note 3, p. 156.

surrendered territory.[7]

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.[8] The honour of the Crown is always at stake in the Crown's dealings with Indigenous peoples. 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."[9]

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.[10] Indeed, the courts have recognized that the land First Nations surrendered through the numbered treaties was a "hefty purchase price" that entitles them to

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[7] 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 BC, northern Alberta, northwestern Saskatchewan and part of the Northwest Territories), provide for specific rights to hunt, fish and trap within the surrendered territory (see Government of Canada, "The Numbered Treaties (1871-1921)" (last modified 15 March 2023), online: <www.rcaanc-cirnac.gc.ca/eng/1360948213124/1544620003549>). See also *Yahey v British Columbia,* 2021 BCSC 1287 at para 1165 [*Yahey*] citing *Manitoba Metis Federation Inc. v. Canada (Attorney General),* 2013 SCC 14 at para 79 [*Maintoba Metis*]; Isaac, *supra* note 3, p. 156.

[8] *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, p. 1103 [*Sparrow*]. See also Maria Morellato, ed., *Aboriginal Law Since Delgamuukw* (Aurora, ON: The Cartwright Group, 2009), p. 378-381).

[9] *Haida Nation v. British Columbia (Minister of Forests),* 2004 SCC 73 at paras 16, 35 [*Haida*].

[10] See *Mikisew Cree First Nation v Canada (Governor General in Council),* 2018 SCC 40 at paras 21, 26. The 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 Metis, supra* note 7 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" (*ibid*).

significant respect in the implementation of treaty rights guaranteed in exchange for that surrender.[11] Accordingly, the numbered treaties established a governance system whereby Crown sovereignty coexists with pre-existing Aboriginal[12] rights.[13]

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.[14] 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 development would be necessary developments in treaty territory.[15] Together, these treaty terms reveal a bargain to balance the Crown's development of the Canadian nation-state while protecting Indigenous peoples' traditional way 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: (i) a geographic restriction; (ii) a legislative

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[11] *Mikisew, supra* note 10 at paras 48–49, 52.

[12] 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.

[13] 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 Aboriginal group claiming the right" (see *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 (see *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 [*Constitution Act, 1982*].

[14] See *Delgamuukw v British Columbia,* [1997] 3 SCR 1010 at para 165 [*Delgmauukw*], 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.

[15] *Yahey, supra* note 7 at para 20, citing *Treaty No 8 Concluded on June 21, 1899,* online: *Government of Canada* <www.rcaanc-cirnac.gc.ca>.

restriction; and (iii) a Crown decision-making restriction.[16]

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.[17] 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.[18] 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.[19]

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.[20]

The legislative restriction requires that the Crown adequately consider treaty rights when making laws and regulating land use.[21] While treaty rights are preserved and protected under

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[16] See *Mikisew, supra* note 10 at para 56.

[17] See *Badger, supra* note 13 at para 40; *Mikisew, supra* note 10 at paras 47–48.

[18] See *Mikisew, supra* note 10 at para 2; Treaty Tribal Association, "Treaty 8 Agreement Between Nations of Alberta, Saskatchewan, and Northwest Territories" (last visited 13 March 2023), online: <treaty8.bc.ca/treaty-8-accord/#:~:text=the%20Commissioner's%20Report-,Treaty%20No.,8%20British%20Columbia%20First%20Nations>.

[19] See *Yahey, supra* note 7 at para 24; *Mikisew, supra* note 10 at para 48.

[20] *Yahey, supra* note 7 at paras 594–596. The BCSC 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 SCC'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, supra* note 10 at para 47).

[21] See *Marshall No. 2, supra* note 14 at para 37. See also *R v Sundown,* [1999] 1 SCR 393 at para 46.

section 35(1) of the *Constitution Act, 1982*, they are limited, as all constitutional rights, by the Crown's power to justifiably infringe those rights in the public interest.[22] Legislation that infringes treaty rights must therefore be justified in accordance with the test for treaty infringement, discussed below.

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. However, since taking up of land is specifically provided for in the historic treaties, not every taking up will trigger the duty the consult.[23] 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. 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 Project[24] and the Trans Mountain Expansion Project[25] based on

[22] See *Badger, supra* note 13 at para 13; *Constitution Act, 1982, supra* note 13, s. 35(1).

[23] See *Mikisew, supra* note 10 at para 55. See also *Yahey, supra* note 7 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*).

[24] See *Gitxaala Nation v Canada,* 2016 FCA 187 at paras 325, 333.

[25] See *Tsleil-Waututh Nation v Canada (Attorney General),* 2018 FCA 153 at paras 767–768.

inadequate consultation.

The duty to consult exists upon a spectrum, where the level of consultation required is proportional to the strength of the Aboriginal or treaty right or claim and the potential severity of infringement.[26] If consultation reveals that an Aboriginal or treaty right or claim will be infringed by the Crown's actions, the Crown has a duty to accommodate the Indigenous group.[27] 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.[28]

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.[29] 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.[30] Past infringements may be considered at the accommodation stage, but ultimately the Crown will decide whether they warrant advanced considerations.[31]

If treaty rights holders believe that the accommodations provided have been insufficient to

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[26] See *Haida, supra* note 9 at paras 39, 43.

[27] See *Haida, supra* note 9 at para 47.

[28] See *Clyde River, supra* note 8 at paras 22–23.

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

[30] See *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council,* 2010 SCC 43 at para 70; *Clyde River, supra* note 8 at para 40.

[31] See *Chippewas, supra* note 29 at para 59.

remedy the Crown's infringement of their rights, they may advance a legal claim for infringement. The SCC first set out a test for establishing a *prima facie* infringement of an Aboriginal right in *R v Sparrow*.[32] There, the 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."[33] 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".[34] In *R v Badger,* the 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.[35]

The SCC clarified the extent of these restrictions in *Mikisew Cree First Nation v Canada (Minister of Canadian Heritage)* ("*Mikisew*")*,* where the 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.[36]

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

[32] *Supra* note 8.

[33] *Ibid* at para 68.

[34] *Ibid* at para 70.

[35] *Badger, supra* note 13 at paras 37, 90.

[36] *Mikisew, supra* note 10 at paras 48, 55.

infringement is justified on the basis of the "compelling and substantial public objective" test laid out in *Sparrow*.[37] There, the SCC 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.[38]

For example, in *R v Adams,*[39] the SCC 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.*[40] The 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.[41] The public objective underlying the licencing regime advanced by the Crown in this case (the "enhancement of sports fishing") was accepted by the Court as an "important economic activity in some parts of the country" but ultimately rejected as a justifiable infringement.[42]

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.[43]

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[37] *Yahey, supra* note 7 at paras 97–98; *Sparrow, supra* note 8 at paras 71, 75.

[38] See *Sparrow, supra* note 8 at paras 71, 75. *Mikisew, supra* note 10 applies this test to the treaty rights context (*ibid* at para 31).

[39] [1996] 3 SCR 101 [*Adams*].

[40] *Ibid* at para 5; *Quebec Fishery Regulations,* CRC, c. 852.

[41] See *Adams, supra* note 39 at paras 47, 49, 52.

[42] *Ibid* at para 58.

[43] See e.g. *Tsilhqot'in, supra* note 5 at para 126. The 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.

IV. *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.[44] 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.[45] Its traditional territories extend over an area of 38,000 square kilometers; this area forms the "Blueberry Claim Area", the subject of the litigation in *Yahey*.[46]

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 Area.[47] 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.[48] The BCSC accepted evidence in *Yahey* that there is "little intact forest remaining" and found, as fact, that by September 2018, 85% of the Blueberry Claim Area was within 250 metres of an industrial "disturbance"[49] and 91% of the Blueberry Claim Area was within 500 metres of a disturbance.[50]

The litigation that stemmed from this increasing degree of disturbance in the Blueberry

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[44] See *Yahey, supra* note 7 at para 10.

[45] *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 11).

[46] *Ibid* at para 14.

[47] *Ibid* at para 12.

[48] *Ibid* at para 813.

[49] This term included all types of disturbance, including "low impact" seismic lines (2-3 metres wide), and features that have been reclaimed since their original construction.

[50] *Yahey, supra* note 7 at paras 813, 906.

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.[51] 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 claim was filed (in March 2015) to the date the Court issued its decision on the merits (in June 2021).[52]

After filing its claim, Blueberry filed for two interim injunctions and a judicial review against BC.

The first injunction application, filed in June 2015, sought to prevent BC from auctioning timber sale licences for logging within a small section of the Blueberry Claim Area.[53] 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."[54]

Next, Blueberry sought to prevent development in the North Montney area by seeking judicial review of BC's decision to enter into a long-term royalty agreement with five companies focused on natural gas extraction in the region.[55] The Court dismissed the application because the issues Blueberry raised were not "separate and discrete" from the issues raised in Blueberry's civil

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[51] *Ibid* at paras 1078–1079.

[52] *Ibid* at para 27.

[53] *Ibid* at para 33.

[54] *Yahey v British Columbia,* 2015 BCSC 1302 at para 64.

[55] See *Yahey, supra* note 7 at para 38.

claim, which the Court considered to be the appropriate forum to adjudicate cumulative effects.[56]

In August 2016, Blueberry filed its second injunction application, seeking to "enjoin the Province from allowing a broader array of industrial development, including oil and gas development, processing, and transportation, as well as logging in segments of its territory."[57] 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 favor of BC because the issues Blueberry raised were a matter for trial, not an injunction application.[58]

B. The BCSC's Decision Changed the Cumulative Effects Analysis

When Blueberry's claim finally reached the BCSC, 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 SCC 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 BCSC found that an infringement could be unjustifiable at the point of "significant diminishment" of the treaty right. Furthermore, the Court assessed the adequacy of BC'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

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[56] *Ibid* at para 39, citing Justice Skolrood in *Blueberry River First Nations v British Columbia (Natural Gas Development),* 2017 BCSC 540 at para 83.

[57] *Yahey, supra* note 7 at para 36.

[58] *Ibid* at para 37.

in BC.

The trial for *Yahey* took over 160 days.[59] The BCSC 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.[60] 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".[61]

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, Ministry of Indigenous Relations and Reconciliation, Ministry of Environment, Ministry of Energy, Mines and Petroleum Resources, and the BC Oil and Gas Commission ("OGC")), and two industry representatives over the course of 70 days of evidence.[62] 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 1950s[63] – something that could potentially differentiate Blueberry from other cumulative effects claims, where the Indigenous

[59] *Ibid* at para 43.

[60] *Ibid* at paras 670–671.

[61] *Ibid* at paras 737, 782, 806.

[62] *Ibid* at paras 44–49.

[63] See, for example, Robin Ridington, *Trail to Heaven: Knowledge and Narrative in a Northern Native Community* (Iowa City: University of Iowa Press, 1992).

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.[64] Blueberry undertook numerous studies and presented the Court with a significant collection of atlases, maps and data.[65] Final oral arguments took 25 days.[66]

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.[67] 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.[68] Chief Marvin Yahey (as he then was) testified that he was no longer able to peacefully enjoy 80% of the Yahey trapline because of the effects of forestry and oil and gas development.[69]

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

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[64] See *Yahey, supra* note 7 at para 50.

[65] *Ibid* at para 816.

[66] *Ibid* at para 50.

[67] See e.g. *Yahey,, supra* note 7 at paras 355–357, 1065–1068, 1099–1102, 1110.

[68] *Ibid* at paras 1064–1065.

[69] *Ibid* at para 1111.

reconcile the interests of Indigenous communities, the Crown, and the public.

Blueberry's civil claim against BC 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."[70]

Justice Burke found in Blueberry's favour, finding BC 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."[71]

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 SCC 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."[72] 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."[73]

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",

[70] *Ibid* at para 27.

[71] *Ibid* at para 1077.

[72] *Mikisew, supra* note 10 at para 25.

[73] *Yahey, supra* note 7 at para 1715.

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.[74]

However, Justice Burke's decision took BC'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."[75] Relying on Justice Greckol's concurring decision in *Fort McKay First Nation v Prosper Petroleum Ltd.*,[76] 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 as it was in the nineteenth century.[77]

Justice Burke also departed from the SCC's findings in *Mikisew* in two other important respects. In *Mikisew*, the SCC 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.[78] 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, BC

[74] *Ibid* at paras 280, 282. See also *Mikisew*, *supra* note 10 at para 47.

[75] *Yahey, supra* note 7 at para 1111.

[76] 2020 ABCA 163 [*Prosper Petroleum 2020*].

[77] *Yahey, supra* note 7 at para 1728, citing *Prosper Petroleum 2020, supra* note 76 at para 80. See also *Yahey, supra* note 7 at paras 1782, 1805, 1809 (positive obligation).

[78] See *Mikisew, supra* note 10 at paras 32–34.

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."[79]

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 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".[80] 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".[81] 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.[82]

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.[83] 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.[84]

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[79] *Yahey, supra* note 7 at para 1735.

[80] *Mikisew, supra* note 10 at para 48.

[81] See *Yahey, supra* note 7 at paras 512–514, 1115–1116.

[82] *Yahey, supra* note 7 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, 382–383, 620–621, 624, 1086–1088).

[83] *Ibid* at para 516.

[84] *Ibid* at para 533.

Ultimately, Justice Burke found that the Provincial Crown had unjustifiably infringed Blueberry's treaty rights by virtue of the cumulative effects of the various development projects the Crown had approved within its traditional territories.[85]

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.[86]

Justice Burke also considered whether BC's regulatory regimes demonstrated that BC 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."[87] 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, BC "scarcely considers treaty rights" in administering those regimes.[88]

While Blueberry was unsuccessful in obtaining injunctive relief before the BCSC'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

[85] *Ibid* at paras 1076-1077, 1132, 1857.

[86] *Ibid* at para 543.

[87] *Ibid* at para 1178.

[88] *Ibid* at paras 1386, 1404, 1564.

resolved.[89] 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.[90] 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.

C. Declaratory Relief Granted

After finding the infringement of Blueberry's treaty rights unjustifiable, Justice Burke went on to award Blueberry extensive declaratory relief.[91] Justice Burke declared that:

- By permitting the cumulative effects of development and failing to account for them in its regulatory regime, BC had failed to uphold the honour of the Crown;[92]
- BC had unjustifiably "taken up" lands under Treaty 8 by approving industrial development

[89] See e.g. *Nunavut Tunngavik Inc. v Canada (Attorney General),* 2003 NUCJ 1 at para 45; *Tli cho Government v Canada (Attorney General),* 2015 NWTSC 9 at paras 70–71, 105.

[90] See e.g. *Yahey v British Columbia,* 2017 BCSC 899 at paras 54–59, 95, 98, 109–110. See also *Ahousaht First Nation v Canada (Fisheries, Oceans and Coast Guard),* 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 its planned allocation because it had not adequately provided for a viable fishery for the Nations (*ibid* at para 56); or, in other words, to fail to remedy the cumulative effects of generations of overfishing and the demands of "conservation and protection of various competing rights and interests" in favor of the Indigenous applicants (*ibid* at para 126).

[91] See*Yahey, supra* note 7 at para 1875.

[92] *Ibid* at para 1884.

in the Blueberry River First Nation traditional territories in the manner that it did;[93]

- BC was barred from authorizing any new development which might contribute to the cumulative effects and result in a continued breach of the Treaty;[94] 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.[95]

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."[96]

V. POST-BLUEBERRY DEVELOPMENTS

Yahey's findings surprised many in industry and government. Given the significant precedent that the case established in BC, 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 BC would appeal the decision. However, BC ultimately chose not to appeal, stating that negotiation, rather than litigation, was necessary to achieve its reconciliation goals and renew the Crown-Indigenous relationship.[97] This position may have been influenced by the relatively recent enactment in BC of the *Declaration on the Rights of Indigenous Peoples Act*[98] – the first province in Canada to enact such legislation – which establishes the United Nations Declaration

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[93] *Ibid* at para 1884.

[94] *Ibid* at para 1888.

[95] *Ibid* at para 1888.

[96] *Ibid* at para 1895.

[97] See Ministry of Attorney General, News Release, "Attorney general's statement on Yahey v. British Columbia" (28 July 2021), online: *BC Gov News* <news.gov.bc.ca/25029>.

[98] SBC 2019, c 44.

on the Rights of Indigenous Peoples as BC'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. 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).[99] In consideration of *Yahey,* BC's Ministry of Energy, Mines and Low Carbon Innovation also cancelled pending petroleum and natural gas tenure dispositions.[100]

BC 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 BC 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 BC and Blueberry after the Court issued the decision.

A. The Initial Agreement

On October 7, 2021, over three months after *Yahey*, BC and Blueberry reached an initial

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[99] See DOB Staff, "No New Wells Approved Last Month in B.C.; Province and BRFN Continue to Work on Interim Decision-Making Plan" (15 September 2021), online: *Daily Oil Bulletin* <www.dailyoilbulletin.com/article/2021/9/15/no-new-wells-approved-last-month-in-bc-province-an/>.

[100] See "B.C. Cancels Summer PNG Tenure Dispositions" (16 July 2021), online: *Daily Oil Bulletin* <www.dailyoilbulletin.com/article/2021/7/16/court-rules-in-favour-of-blueberry-fn-bc-cancels-s/>.

agreement.[101] Under the initial agreement, BC 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 BC; and

(2) $30 million to support Blueberry to protect their Indigenous way of life, including funding for: (i) work on cultural areas, traplines, cabins and trails; (ii) education activities and materials, such as teaching traditional skills and language; (iii) expanding Blueberry's resources and capacity for land management; and (iv) wildlife management and habitat enhancement, including prescribed burning and research. BC stated that it would participate only in a non-decision making role to ensure that region-wide restoration activities are coordinated.[102]

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"[103] would remain suspended, pending further negotiation and agreement with Blueberry. As noted above, this agreement was not mandated by

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[101] See Ministry of Indigenous Relations and Reconciliation, News Release, "B.C., Blueberry River First Nations reach agreement on existing permits, restoration funding" (7 October 2021), online: *BC Gov News* <news.gov.bc.ca/25498>.

[102] See Ministry of Indigenous Relations and Reconciliation, News Release, "Initial Agreement between Blueberry River First Nations and the Province of B.C." (7 October 2021), online: *BC Gov News* <news.gov.bc.ca/25501>.

[103] British Columbia Energy Regulator, Industry and Information 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: *BCER* <www.bc-er.ca/news/b-c-blueberry-river-first-nations-reach-agreement-on-existing-permits-restoration-funding-indb-2021-28/>.

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.[104] Petroleum and natural gas tenure dispositions also remained suspended.

On January 18, 2023, BC and Blueberry arrived at an agreement (the "Implementation Agreement").[105] Like the *Yahey* decision before it, this agreement is precedent-setting and has wide-ranging implications for industry in northeast BC.

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

(i) 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.

(ii) BC 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

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[104] *Ibid.*

[105] See Ministry of Water, Land and Resource Stewardship, News Release, "Province, Blueberry River First Nations reach agreement" (18 January 2023), online: *BC Gov News* <news.gov.bc.ca/28086> ["MWLRS January 2023 News Release"]. See also The Province of British Columbia and Blueberry River First Nation, "Blueberry River First Nations Implementation Agreement" (18 January 2023), online (pdf): *Government of British Columbia* <www2.gov.bc.ca/assets/gov/environment/natural-resource-stewardship/consulting-with-first-nations/agreements/blueberry_river_implementation_agreement.pdf> ["Implementation Agreement"].

for activities in certain areas. In particular, BC 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.

(iii) 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% (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 BC 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.

(iv) The Implementation Agreement also seeks to protect old growth forests and reduce timber harvesting in designated "high value 1" or "HV1" 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.

(v) Finally, BC 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.[106]

Other notable features of the Implementation Agreement include: Blueberry's agreement that existing priority applications, set out Schedule "I", could proceed to determination by the BCER (discussed further below); the direct award to Blueberry of certain PNG tenures;[107] requirement to develop a consultation process with Blueberry for new oil and gas applications[108] and a Revenue Sharing Agreement, where royalties and tenures from petroleum and natural gas activities will be paid to Blueberry by BC. 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 BC's quarterly payments to Blueberry. In addition, Blueberry will receive $87.5 million in direct payments over the next three years.[109] Beyond the above, the exact details and amounts of the Revenue Sharing Agreement are confidential.[110]

BC and Blueberry also agreed to establish a Blueberry-BC Restoration Fund (the "Blueberry Restoration Fund") on or before March 31, 2023.[111] 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

[106] See MWLRS January 2023 News Release, *supra* note 105.

[107] See Implementation Agreement, *supra* note 105, clause 15.3 and Part A.

[108] *Ibid*, clause 9.2.

[109] See MWLRS January 2023 News Release, *supra* note 105.

[110] See Implementation Agreement, *supra* note 105, Schedule 1, Appendix 1A, 1B, and 1C.

[111] *Ibid*, clause 10. While it is unclear whether the Blueberry Restoration Fund has been established, the federal government and the BC government recently paid $800 million to the Blueberry River, Doig River, Halfway River, Saulteau, and West Moberly First Nations. See Leyland Cecco, "Canada to pay $800m to settle land dispute with five First Nations" (17 April 2023), online: *The Guardian* <www.theguardian.com/world/2023/apr/17/canada-first-nations-land-claims-dispute-settlement>.

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 Basic 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 BC and other Treaty 8 First Nations in northeast BC.[112] As opposed to industry contributions to the Treaty 8 Restoration Fund, which at this time are voluntary and incremental to BC's contribution,[113] industry contributions to the Blueberry Restoration Fund by way of payment of the disturbance fee are credited to BC's contribution and therefore reduce BC's overall monetary obligation to the Fund.[114]

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: (i) make a joint recommendation to the provincial decision maker; or (ii) 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.[115]

Notably, this resolution plan is applicable in respect to any application for new oil and gas

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[112] See Implementation Agreement, *supra* note 105, clause 14.2.

[113] See the Consensus Document appended to Fort Nelson First Nation and Province of British Columbia, "Letter of Agreement" (18 January 2023) p. 7, online (pdf): *Government of British Columbia* <www2.gov.bc.ca/assets/gov/environment/natural-resource-stewardship/consulting-with-first-nations/agreements/fnfn_-_letter_of_agreement_20230306.pdf>.

[114] See Implementation Agreement, *supra* note 105, clause 10.4.

[115] *Ibid*, clause 7.14.

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."[116] Yet, clause 7.14 is an issue resolution plan for when a HV1 Plan is in place.[117] 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 a HV1 Plan is in place.

In any case, Blueberry agreed that it would not advance or file any claims against BC on the basis of the cumulative effects of development activities in the Blueberry Claim Area resulting in treaty rights infringements – so long as BC materially complies with its obligations under the Implementation Agreement. Even so, Blueberry's ability to seek judicial review of any specific decision remains intact.[118]

Following the announcement of the Implementation Agreement, the BCER introduced early guidance to the PNG sector.[119] The *Rules for Oil and Gas Development*[120] (the "*Rules*") provide preliminary PNG industry-specific information about the Implementation Agreement.

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[116] *Ibid*, clause 9.2.

[117] *Ibid*, clause 7.14.

[118] *Ibid,* clauses 18.2, 18.4.

[119] British Columbia Energy Regulator, Technical and Information Updates, IU 2023-02, "In order to provide early guidance and information to the oil and gas sector, the Regulator has posted a summary of 'Rules for Oil and Gas Development'" (27 January 2023), online: *BCER* <www.bc-er.ca/news/guidance-for-energy-industry-following-the-brfn-agreement-iu-2023-02/>.

[120] Ministry of Energy, Mines and Low Carbon Innovation, *BRFN Agreement – Rules for Oil and Gas Development* (27 January 2023), online (pdf): *BCER* <www.bc-er.ca/files/documents/20230126_FINAL-PNG-Info-Bulletin-detailed-document.pdf > ["*Rules*"].

The *Rules* identify three key guiding principles to development planning and operational decision making moving forward. They are to: (i) limit "New Disturbances"[121] in HV1 areas by maximizing land protection and reducing New Disturbances in the Blueberry Claim Area by approximately 50% compared to previous years; (ii) avoid New Disturbances for new wells and infrastructure in favour of previously disturbed sites, and use existing distances as much as possible; and (iii) ensure overall limits, potential locations and manner of New Disturbances are managed through a Cumulative Effects Management Regime.[122] The BCER will also implement a 750 hectare cap on New Disturbances (to be reviewed on an annual basis with Blueberry),[123] and consider other matters Blueberry identifies, such as the location of disturbances in certain wildlife areas, settlements, and other significant spaces.[124]

The *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:

(a) <u>HV1 Areas:</u> These areas are important places for Blueberry to practice their treaty

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[121] *Ibid*, p. 3. The *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 *Rules* further define an Oil and Gas Activity to mean: "those 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*).

[122] *Ibid*, pp. 1–2.

[123] *Ibid*,p. 19. The *Rules* contain a reference map showing the locations of the three main areas. Contrary to what is set out in the *Rules*, the cap for 2023 is 860 hectares. 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 Claim area, which will have the remainder of the cap per year (*ibid*, p. 9).

[124] *Ibid,* pp. 10–11.

rights. These are considered areas of critical importance to Blueberry, where limits will apply to developments planned within them.[125] Interestingly, the Implementation Agreement includes a clause determining the parties that will be engaged in designing the HV1 Plans: BC *will* include industry, and all relevant tenure holders and proponents; however, BC *may* engage any other third party, including other Treaty 8 Frist Nations with overlapping traditional territories.[126] There are three categories of HV1 areas; some areas will receive 100% protection from New Disturbances, while others will receive 80% or 60% protection. The Ministry of Energy, Mines and Low Carbon Innovation is the lead accountable provincial agency for each of the HV1 Plans.

(b) WMBs and WMB Plans: The Ministry of Water, Land and Resource Stewardship will oversee the advancement of three WMB Plans by December 31, 2025.[127]

(c) 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.[128]

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

[125] *Ibid,* p. 4.

[126] See Implementation Agreement, *supra* note 105, clause 7.9.

[127] See *Rules*, *supra* note 120, p. 7.

[128] *Ibid,* p. 8.

existing applications.[129] 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.[130]

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.[131] 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.[132]

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), the Implementation Agreement bestows significant decision-making and ultimate control 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.[133] This will allow Blueberry a

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[129] *Ibid,* p. 9.

[130] *Ibid,* pp 13–18 contains a full list of existing priority applications.

[131] See Implementation Agreement, *supra* note 105, clause 9.5(a), (b).

[132] See *Rules*, *supra* note 120, pp. 11–12.

[133] See e.g., Implementation Agreement, *supra* note 105, clauses 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

significant role in selecting which developments will and will not proceed in the future, in conjunction with BC. It will also give Blueberry decision-making powers over developments that directly impact other Treaty 8 First Nations in northeast BC (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 that essentially gives them the ability to dictate, in part, how one of BC'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.

Agreements with Other Treaty 8 First Nations

Soon after the Implementation Agreement was announced, BC 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:[134] Fort Nelson First Nation,[135] Saulteau First Nation,[136] Halfway River First

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will have to engage in an extensive 'issue resolution' process under clause 7.14, which may delay the application process.

[134] Ministry of Indigenous Relations and Reconciliation, and Ministry of Water, Land and Resource Stewardship, News Release, "B.C., Treaty 8 First Nations build path forward together" (20 January 2023), online: *BC Gov News* <news.gov.bc.ca/28104> ["MIRR & MWLRS January 2023 News Release"]; Ministry of Water, Land and Resource Stewardship, "McLeod Lake Indian Band, Province sign agreements to protect treaty rights" (3 May 2023), online: *BC Gov News* <news.gov.bc.ca/releases/2023WLRS0025-000646>.

[135] Fort Nelson First Nation and the Province of British Columbia, "Letter of Agreement" (18 January 2023), online (pdf): *Government of British Columbia* <www2.gov.bc.ca/assets/gov/environment/natural-resource-stewardship/consulting-with-first-nations/agreements/fnfn_-_letter_of_agreement_20230306.pdf>; Fort Nelson First Nation and the Province of British Columbia, "Revenue Sharing Agreement" (18 January 2023), online (pdf): *Government of British Columbia* <www2.gov.bc.ca/assets/gov/environment/natural-resource-stewardship/consulting-with-first-nations/agreements/fnfn_-_revenue_sharing_agreement_20230306.pdf> ["Fort Nelson RSA"].

[136] Saulteau First Nations and the Province of British Columbia, "Letter of Agreement" (18 January 2023), online (pdf): *Government of British Columbia* <www2.gov.bc.ca/assets/gov/environment/natural-resource-stewardship/consulting-with-first-nations/agreements/saulteau_-_letter_of_agreement_20230306.pdf>; Saulteau First Nations and the Province of British Columbia, "Revenue Sharing Agreement" (18 January 2023), online (pdf): *Government of British Colubmia* <www2.gov.bc.ca/assets/gov/environment/natural-resource-

Nation,[137] Doig River First Nation[138] and McLeod Lake Indian Band.[139]

Like the Implementation Agreement, the Consensus Agreements include initiatives to: (i) co-manage wildlife; (ii) implement new land-use plans and protection measures; (iii) implement a "cumulative effects" management system linked to natural resource landscape planning and restoration initiatives; (iv) implement pilot projects to advance shared decision-making for planning and stewardship activities; (v) implement a multi-year, shared restoration fund to heal the land (called the Treaty 8 Restoration Fund, mentioned above); (vi) implement a new revenue-sharing approach to support Treaty 8 First Nations communities; and (vii) promote education about Treaty 8.[140]

The Revenue Sharing Agreements establish that funds will be provided to each First Nation in the fiscal year, and will terminate on March 31, 2024. While the exact amounts paid to each

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stewardship/consulting-with-first-nations/agreements/saulteau_-_revenue_sharing_agreement_20230306.pdf> ["Saulteau RSA"].

[137] Halfway River First Nation and the Province of British Columbia, "Letter of Agreement" (18 January 2023), online (pdf): *Government of British Columbia* <www2.gov.bc.ca/assets/gov/environment/natural-resource-stewardship/consulting-with-first-nations/agreements/hrfn_-_letter_of_agreement_20230306.pdf>; Halfway River First Nation and the Province of British Columbia, "Revenue Sharing Agreement" (18 January 2023), online (pdf): *Government of British Columbia* <www2.gov.bc.ca/assets/gov/environment/natural-resource-stewardship/consulting-with-first-nations/agreements/hrfn_-_revenue_sharing_agreement_20230306.pdf> ["Halfway River RSA"].

[138] Doig River First Nation and the Province of British Columbia, "Letter of Agreement" (18 January 2023), online (pdf): *Government of British Columbia* <www2.gov.bc.ca/assets/gov/environment/natural-resource-stewardship/consulting-with-first-nations/agreements/doig_-_letter_of_agreement_20230306.pdf>; Doig River First Nation and the Province of British Columbia, "Revenue Sharing Agreement" (18 January 2023), online (pdf): *Government of British Columbia* <www2.gov.bc.ca/assets/gov/environment/natural-resource-stewardship/consulting-with-first-nations/agreements/doig_-_revenue_sharing_agreement_20230306.pdf> ["Doig River RSA"].

[139] As of this paper's submission, the letter of agreement and revenue-sharing agreement are not yet publicly available. For the latest updates regarding the agreements, see "McLeod Lake Indian Band" (last visited 26 May 2023), online: *Government of British Columbia* <www2.gov.bc.ca/gov/content/environment/natural-resource-stewardship/consulting-with-first-nations/first-nations-negotiations/first-nations-a-z-listing/mcleod-lake-indian-band>.

[140] See MIRR & MWLRS January 2023 News Release, *supra* note 134.

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: (i) half the total shared amount will be an equal share for all eight Treaty 8 First Nations in northeast BC (*i.e.,* 1/8 of the total amount); and (ii) half the share will be calculated based on the relative population of the First Nation against the population of all Treaty 8 Nations.[141] The Revenue Sharing Agreements also require each First Nation to report on how the revenue was utilized,[142] and to agree that they will not initiate any new legal claims against BC respecting the impact of cumulative effects on their treaty rights.[143]

VI. 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*, BC 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

[141] See Fort Nelson RSA, *supra* note 135, ss. 2.1, 2.4, and Schedule 1; Saulteau RSA, *supra* note 136, ss. 2.1, 5.8, and Schedule 1; Halfway River RSA, *supra* note 137, s. 2.3 and Schedule 1; Doig River RSA, *supra* note 138, s. 2.3 and Schedule 1.

[142] See Fort Nelson RSA, *supra* note 135, s. 2.4; Saulteau RSA, *supra* note 136, s. 5.8; Halfway River RSA, *supra* note 137, s. 2.3; Doig River RSA, *supra* note 138, s. 2.3.

[143] See Fort Nelson RSA, *supra* note 135, s. 5.1; Saulteau RSA, *supra* note 136, s. 5.1; Halfway River RSA, *supra* note 137, s. 5.1; Doig River RSA, *supra* note 138, s. 5.1.

of infringement".[144] 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 Blueberry. DFN filed a Statement of Claim against Alberta on July 18, 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."[145] 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*."[146] DFN also alleges that Alberta had failed to "assess, monitor, or manage the *cumulative impacts* of the [authorized developments] in the Traditional Territory and the surrounding area on the continued meaningful exercise of DFN's Treaty rights."[147] DFN seeks the same remedies awarded in *Yahey*.[148]

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[144] *Yahey, supra* note 7 at para 1851. See also *Yahey, supra* note 7 at paras 1821, 1831.

[145] Statement of Claim of Virginia Martha Gladue on her own behalf and on behalf of all other Duncan's First Nation beneficiaries of Treaty No. 8 and Duncan's First Nation filed 18 July 2022 at para 5 (emphasis added).

[146] *Ibid* at paras 42, 45 (emphasis added).

[147] *Ibid* at para 44 (emphasis added).

[148] *Ibid* at para 53.

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."[149] 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, BC did not advance a justification argument in *Yahey*, which the Court noted left BC's position on justification "evolving and somewhat unclear".[150] 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.[151] 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

[149] Statement of Defence of His Majesty the King in right of Alberta filed 30 January 2023 at para 5.

[150] *Yahey, supra* note 7 at para 1821.

[151] See *Sparrow, supra* note 8, p.1113–1119; *Badger, supra* note 13 at paras 75, 85, 96–98.

compensation was paid, and whether consultation took place with respect to the measures being implemented.[152] These same factors, however, contribute to the determination of whether a *prima facie* infringement can be found in a cumulative effects context.[153] 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.[154] 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.[155] 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.[156]

It is far from a foregone conclusion that courts outside of BC will adopt the holding in *Yahey*. The BCSC'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

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[152] See *Sparrow, supra* note 8, p. 1119.

[153] See e.g. *Yahey, supra* note 7 at paras 1847–1857.

[154] See Erik White, "3 northern First Nations take Ontario to court over environmental protection, treaty rights" (6 October 2022), online: *CBC News* <www.cbc.ca/news/canada/sudbury/first-nations-ontario-court-1.6608276>.

[155] *Ibid.*

[156] *Ibid.*

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"[157]), the structure of BC'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 SCC's holding in *Mikisew*, instead falling back on the SCC's test of "*no* meaningful right to hunt." For example, in its 2019 decision of *Fort McKay First Nation v Prosper Petroleum Ltd.,*[158] the Alberta Court of Appeal observed that the threshold set by the SCC 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 territories."[159] In applying the *Mikisew* threshold, the Court found that the treaty right was not infringed because the

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[157] *Mikisew, supra* note 10 at para 47. See also *Yahey, supra* note 7 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" (*ibid*, citing also *Quebec (Attorney General) v Moses,* 2010 SCC 17 at para 108; *Restoule v Canada (Attorney General),* 2018 ONSC 7701 at para 326).

[158] 2019 ABCA 14.

[159] *Ibid* at para 56 (emphasis in original).

project in question "would not render the First Nation's Treaty 8 rights *meaningless*."[160] This indicates a different standard than that set out by the BCSC 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."[161] The claim continues through the court system and is expected to proceed to trial in 2024.

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

[160] *Ibid* at para 57 (emphasis added).

[161] Statement of Claim of Alphonse Lameman on his own behalf and on behalf of all other Beaver Lake Cree Nation beneficiaries of Treaty No. 6 and Beaver lake Creek Nation filed 14 May 2008 at paras 16–17, 20.

development."[162]

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 BC, means that the litigation of an unjustifiable infringement claim on the basis of cumulative effects remains a significant hurdle – and 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.

VII. RISK MITIGATION

A. Cumulative Effects in the International Context

Cumulative effects have been considered in other countries such as Australia, New Zealand, and Norway where, like Canada, resource development also plays a key role in the domestic economy. Based on a high-level review of these foreign jurisdictions, cumulative effects either: (i) have already been included in resource development legislation, such as in New Zealand and Norway; or, (ii) are currently being considered by governments for inclusion in existing legislations, as in Australia. We discuss the ways that cumulative effects are treated in the legal frameworks of Australia, New Zealand, and Norway below, before providing risk mitigation strategies for Canadian companies and governments to consider.

Ultimately, the international legal context indicates that the cumulative impacts of development are a growing concern for land management regimes in many countries. The frameworks being established abroad provide examples to assess how different collaborative and

[162] Statement of Claim of Elsie Jack on her own behalf and on behalf of all other Carry the Kettle First Nation Beneficiaries of Treaty No. 5 and Carry the Kettle First Nation filed 21 December 2017 at paras 3, 6.

integrative approaches to land management.

(i) Australia

Australia's *Environment Protection and Biodiversity Conservation Act 1999* ("EPBC Act") requires a review of the state of the Australian environment every five years by an independent committee.[163] In 2021, the latest State of the Environment Report ("SOE Report") considered the impact of cumulative effects, and the ways that Australia's legislative schemes address cumulative effects. The SOE Report noted that the EPBC Act does not explicitly address cumulative effects, but that a 2020 review of the EPBC Act identified cumulative effects as an area that needed to be included. Currently, state and territory governments approach the cumulative effects issue by aligning themselves through local government planning and state goals, but Australia still generally lacks a cohesive, nation-wide, cumulative effects framework.[164]

One of the exceptions is the Reef 2050 Long-Term Sustainability Plan, which provides an overarching framework to manage the cumulative impacts on the Great Barrier Reef. The plan provides governments with an outline of how cumulative impacts can be managed. For example, the Queensland Government will work in partnership with the Australian Government to develop guidance materials for identifying and assessing cumulative impacts on the Great Barrier Reef in environmental impact assessments.[165]

Australia's Environmental Protection Authority ("EPA") has also provided advice to the

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[163] Rowan Trebilco et al, "Australia – State of the Environment" (2021) at About this Report, online: <soe.dcceew.gov.au/about-soe/about-report> ["SOE Report"].

[164] *Ibid* at Marine: Cumulative effects: Case study: Assessing cumulative effects in Australia, online: <soe.dcceew.gov.au/marine/pressures/cumulative-effects>.

[165] Queensland Government, "Cumulative Impact Management Policy: Queensland's Implementation Plan" pp. 1–3, online (pdf): <www.qld.gov.au/__data/assets/pdf_file/0021/69024/cumulative-impact-mgment-policy-qld-implemntation-plan.pdf>.

Minister for Environment regarding the potential cumulative impacts of proposed activities and developments on the Exmouth Gulf in Western Australia. The EPA recognized the increasing pressures from uncoordinated development and recommended that future developments consider cumulative impacts.[166] Industry actors, academics, and governments have also collaborated on guiding policy development to address cumulative effects. For example, a report was published in April 2022 which advocated for a comprehensive framework for cumulative impact assessments of mine closures at regional scales.[167]

Although it appears as though the legislative regimes in Australia have not yet incorporated the above recommendations, Australia appears to be moving towards more explicit management of cumulative effects through legislation. With respect to Indigenous knowledge, the SOE Report notes that Indigenous stewardship is recognized in the EPBC Act; however, practical application is still lacking on a nation-wide basis.[168]

(ii) New Zealand

In New Zealand, cumulative effects management has proceeded under a co-management approach not dissimilar to the one now established in BC. Under the *Resource Management Act* ("RMA"), New Zealand addresses cumulative effects through an order of elected government called "Regional Councils", which oversee regional cumulative effects management in their

[166] Environmental Protection Authority, "Potential cumulative impacts of proposed activities and developments on the environmental, social and cultural values of Exmouth Gulf in accordance with section 16(e) of the *Environmental Protection Act 1986*" (August 2021) pp. 5–7, online (pdf): *Government of Western Australia* <www.epa.wa.gov.au/sites/default/files/Publications/EPA%20s.16e%20Report%20-Exmouth%20Gulf.pdf>.

[167] Lian Sinclair et al, "Towards a framework for regional cumulative impact assessment" (April 2022), online (pdf): *CRC Time* <crctime.com.au/macwp/wp-content/uploads/2022/04/Project-1.1_Final-Report_14.04.22_approved.pdf>.

[168] SOE Report, *supra* note 163 at Indigenous: Key Findings, online: <soe.dcceew.gov.au/indigenous/key-findings>.

respective regions.[169] In 2005, the RMA was amended to allow Regional Councils to enter into joint management agreements with Indigenous governments and communities to encourage collaboration and co-management.[170]

Regional Councils are required to prepare land use and resource management plans, including regional policy statements and coastal plans. Regional Councils are also responsible for making "resource content" decisions – or project approvals and assessments – under the RMA, which are required for resource use or development in New Zealand. The RMA establishes a framework for integrated resource management, requiring cumulative effects be considered for evaluating the potential impacts of regional plans and policies before approvals are granted.[171] The RMA is also intended to better recognize Māori values and knowledge as part of the joint management agreement.[172]

(iii) Norway

Cumulative effects are generally considered under Norway's resource development legislation, and have recently been litigated in the environmental context. On December 22, 2020, the Supreme Court of Norway gave its decision in *Nature and Youth Norway & Greenpeace Nordic* v *Ministry of Petroleum and Energy*.[173] The case primarily concerned an approval of ten

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[169] Jessica Clogg et al, "Paddling Together: Co-Governance Models for Regional Cumulative Effects Management" (May 2017) p. 46, online (pdf): *West Coast Environmental Law* <www.wcel.org/sites/default/files/publications/2017-06-wcel-paddlingtogether-report.pdf>.

[170] *Ibid,* p. 47.

[171] *Ibid,* p. 47.

[172] Rasmus Kløcker Larsen, "Impact assessment and indigenous self-determination: a scalar framework of participation options" (2017) 36:3 Impact Assessment and Project Appraisal 208 at 215, online (pdf): *Taylor and Francis* <www.tandfonline.com/doi/pdf/10.1080/14615517.2017.1390874>.

[173] Supreme Court of Norway, Oslo, 22 December 2020, *Nature and Youth Norway & Greenpeace Nordic v Ministry of Petroleum and Energy* (2020) (Norway), online (pdf): <www.domstol.no/globalassets/upload/hret/decisions-in-english-translation/hr-2020-2472-p.pdf>.

petroleum licences in the Barents Sea, where the appellants sought to quash the approval on the grounds that the Norwegian government had violated Article 112 of the Norwegian Constitution on the right to a healthy environment because it did not consider cumulative effects abroad.

In its decision, the Supreme Court considered the ways that cumulative effects are managed under Norwegian legislation, including the *Petroleum Act*, the *Petroleum Regulations*, and the *SEA Directive* – which, together, provide the environmental impact assessment ("EIA") framework for petroleum projects.[174] The Supreme Court stated that EIAs are required to describe relevant climate and environmental effects, including cumulative effects.[175] Ultimately, the Court dismissed the legal challenge, finding the cumulative effects assessment lawful notwithstanding the exclusion of cumulative effects abroad.

B. Domestic Risk Mitigation Strategies

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 BC 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* in 2008 to

[174] *Ibid* at para 185.

[175] *Ibid* at paras 210, 263, 265.

set landscape-level criteria and targets to guide future development decisions.[176] 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 BC. 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 project fits 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 (*e.g.,* having industry avoid certain sites, restoring legacy disturbance, funding studies of cumulative effects on certain cultural indicators, etc.) 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 head off a treaty rights infringement claim (*e.g.,* what appears to have happened with Fort McKay First Nation, Alberta

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[176] Alberta Land Use Secretariat, "Land-Use Framework" (December 2008), online (pdf): <landuse.alberta.ca/Documents/LUF_Land-use_Framework_Report-2008-12.pdf>.

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 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 and/or regulatory frameworks that meaningfully address cumulative effects) but also preparing legal defenses 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 1.5 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 BCSC 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 or unreasonable interference with their use of enjoyment of the reserve land."[177] In

[177] *Thomas and Saik'uz First Nation v Rio Tinto Alcan Inc*, 2022 BCSC 15 at para 366. The case has since been appealed to the British Columbia Court of Appeal, and is expected to be heard on June 19–23, 2023.

Thomas and Saik'uz First Nation v Rio Tinto Alcan Inc., ("*Thomas and Saik'uz*") the BCSC found that the defendant company's construction of a dam had caused, or contributed to, a severe decline in fish population.[178] 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.[179] 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 bar will be lowered for finding significant interference sufficient to meet the threshold of a nuisance claim based on the fact that 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.

VIII. 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 rights. This case has led to a fundamental change in how resource decision-making will occur in northeast BC. The ripple effect of the *Yahey* decision is already spreading, with similar cases being brought

[178] *Ibid* at para 493.

[179] *Ibid* at para 602.

across Canada and many Indigenous groups advocating for similar outcomes.

Though *Yahey* is still only a BCSC decision, it is likely only the start of a long line of litigation, ripe with potential to escalate up the levels of courts and towards the SCC. 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.

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