

# The Regulation and Litigation of Cumulative Effects on Indigenous Rights following *Yahey* and Blueberry River First Nations' Settlement with BC

PRESENTED TO THE CANADIAN ENERGY LAW FOUNDATION 62<sup>ND</sup> ANNUAL JASPER RESEARCH SEMINAR

OSLER

**Martha Peden | NorthRiver Midstream**



Vice President, Regulatory  
and Public Affairs

**Sean Sutherland | Osler, Hoskin & Harcourt LLP**



Partner, Litigation

**Kevin Thrasher | Trans Mountain Corporation**



Vice President, Legal

**Sander Duncanson | Osler, Hoskin & Harcourt LLP**



Partner and Co-Chair,  
Regulatory, Indigenous  
and Environmental

## Overview

- Introduction
- Legal Context: Treaties and Cumulative Effects
- *Yahey v British Columbia*: The Blueberry Case
- Post-Blueberry Developments
- Recent Cumulative Effects Litigation
- Risk Mitigation
- Conclusion / Discussion

# Introduction

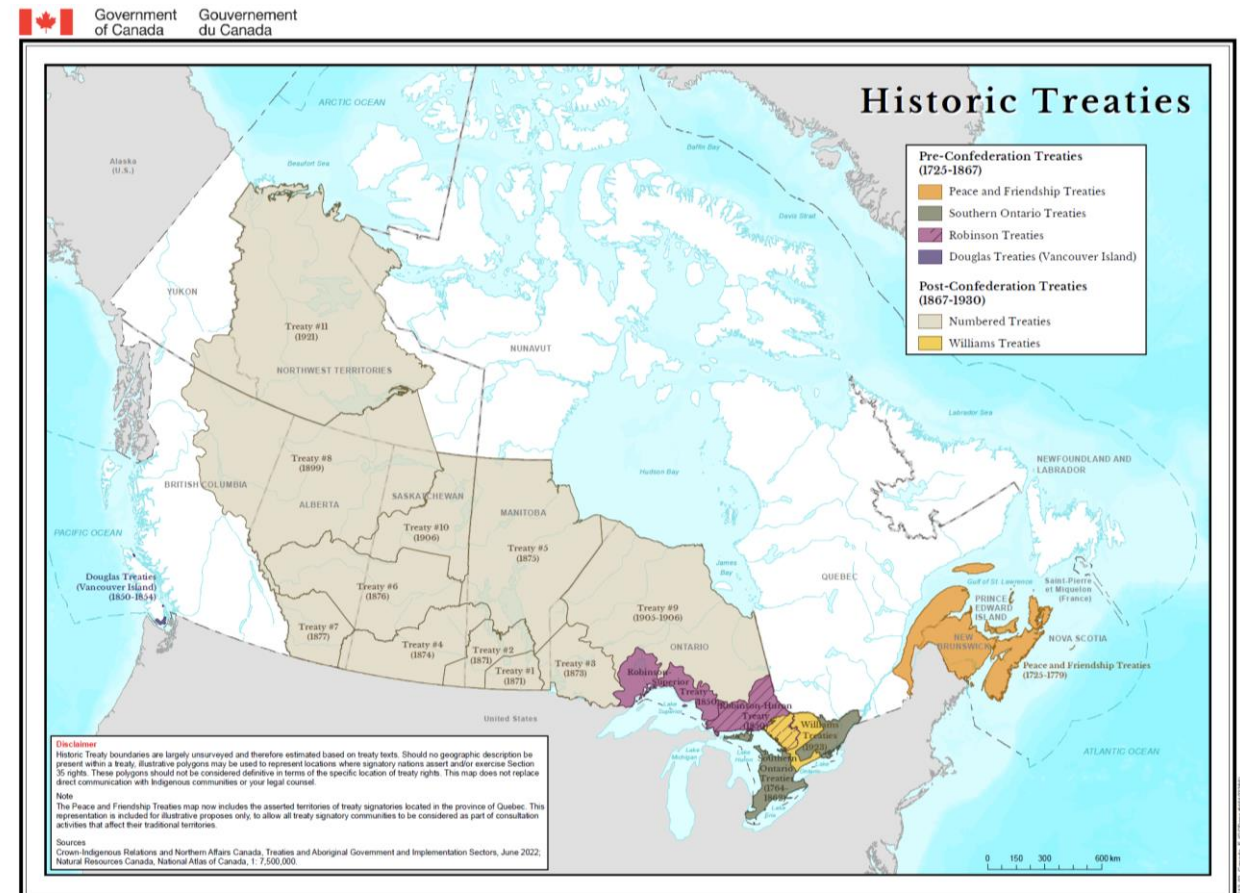
## Introduction

- June 2021: BCSC issues *Yahey* decision
- Province infringed treaty rights based on cumulative effects of 100 years of development
- Important questions of constitutional law, reconciliation, and land-use planning
- BC has resolved the dispute with Blueberry
- Indigenous groups across Canada now seek to replicate *Yahey* with similar claims
- Potential to significantly impact the future of resource development and land use across Canada

Legal Context: Treaties and Cumulative Effects

## Treaty Rights, Obligations and Restrictions

- Historic (numbered) treaties
- Surrender of sovereign title to Indigenous traditional territory in exchange for:
  - the Crown's solemn promise to administer the land with honour; and
  - continued right to hunt, fish, and trap in the surrendered territory, subject to "taking-up" provisions



## Judicial Consideration of Treaty Provisions

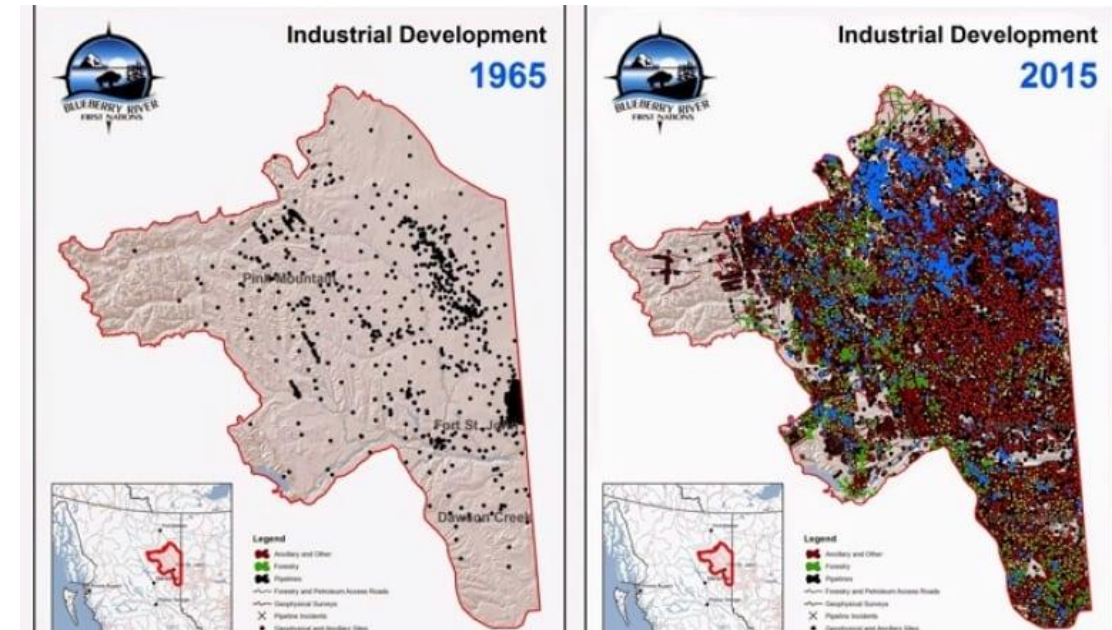
- Treaty rights are circumscribed as:
  - Geographic restriction: traditional territory
  - Legislative restriction: infringement and justification
  - Decision-making restrictions: consultation and accommodation
- Limitations on consultation and accommodation:
  - Specific Crown decisions (e.g., approval for a single project)
  - Cannot rectify past impacts
  - Limited ability to deal with cumulative effects
- Treaty infringement:
  - No meaningful ability to exercise right
  - Crown must then justify
  - *Pre-Yahey*: not applied in cumulative effects context



# *Yahey v British Columbia*: The Blueberry Case

## Background

- Treaty 8
- Argument: unjustified infringement based on cumulative effects
- Court findings:
  - “little intact forest remaining”
  - 85% of the Blueberry Claim Area within 250m of an industrial “disturbance”
  - 91% of the Blueberry Claim Area within 500m



Source: CBC News, “Altas documents industrialization of Northern B.C. First Nations’ territory” (29 June 2016).

## The Cumulative Effects Analysis

- Court found an unjustifiable infringement on treaty rights based on cumulative effects
- Key evidentiary findings:
  - promises made at the time Treaty 8 was signed
  - specific impacts in the Blueberry Claim Area
  - BC's regulatory regime did not have mechanisms assessing and accommodating cumulative effects
- New legal test: infringement unjustifiable when there is a “significant diminishment” of the treaty right

## Court's Reasoning

- Interference is a significant effect on, or destruction of, a basic element or feature that is needed for the way of life to continue
- Treaty 8 does not promise continuity of 19<sup>th</sup> century patterns of land use, but it ensures that the First Nation's "way of life" will not suffer "forced interference" by the Crown as those traditional patterns of living evolve to meet contemporary demands
- Not just about the quantitative analysis of the number of times members hunt, fish or trap. It is also about the "quality and meaning of [the First Nation's] experience on the lands."

## Court's Reasoning

- Consultation insufficient: processes did not consider the impacts on the exercise of treaty rights, or implement protections aside from the “occasional site specific mitigation measures”
- Courts should consider cumulative effects of previous developments when deciding whether a First Nation's way of life had been significantly diminished
- A project that may be justified individually, but may not be justified for its contribution to the cumulative effects of prior developments in an area

## Significant Declaratory Relief Granted

- The Court 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
  - BC had unjustifiably ‘taken up’ lands under Treaty 8 by approving industrial developments in Blueberry’s traditional territories in the matter that it did
  - BC was barred from authorizing any new developments which might contribute to the cumulative effects, and result in continued breach of the Treaty
    - This was suspended for 6 months to allow the parties to negotiate changes that recognize and respect Blueberry’s treaty rights
  - 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

# Post-Blueberry Developments

## Immediate Developments

- No appeal
- OGC suspended all pending permit applications
- Ministry of Energy, Mines and Low Carbon Innovation cancelled pending petroleum and natural gas tenure dispositions
- Blueberry further requested that industry defer acting on permits that had been issued for upcoming winter season but had not yet been acted on
- OGC subsequently suspends some existing permits on a temporary basis, pending the outcome of negotiations with Blueberry
- BC commences negotiations with Blueberry, first to address existing permits (beyond the scope of *Yahey*) and then to address future permits



## Initial Agreement

- October 7, 2021
- BC provided Blueberry with \$65 million:
  - \$35 million – fund to restore the land, create jobs, and provide contracts to service providers
  - \$30 million – support Blueberry to protect their Indigenous way of life
- 195 forestry and oil and gas projects that were permitted or authorized prior to *Yahey*, but that had not yet begun activities, could proceed
  - However, 20 authorizations for development in “areas of high cultural importance” remained suspended indefinitely
- This agreement was not mandated by *Yahey*

## Implementation Agreement

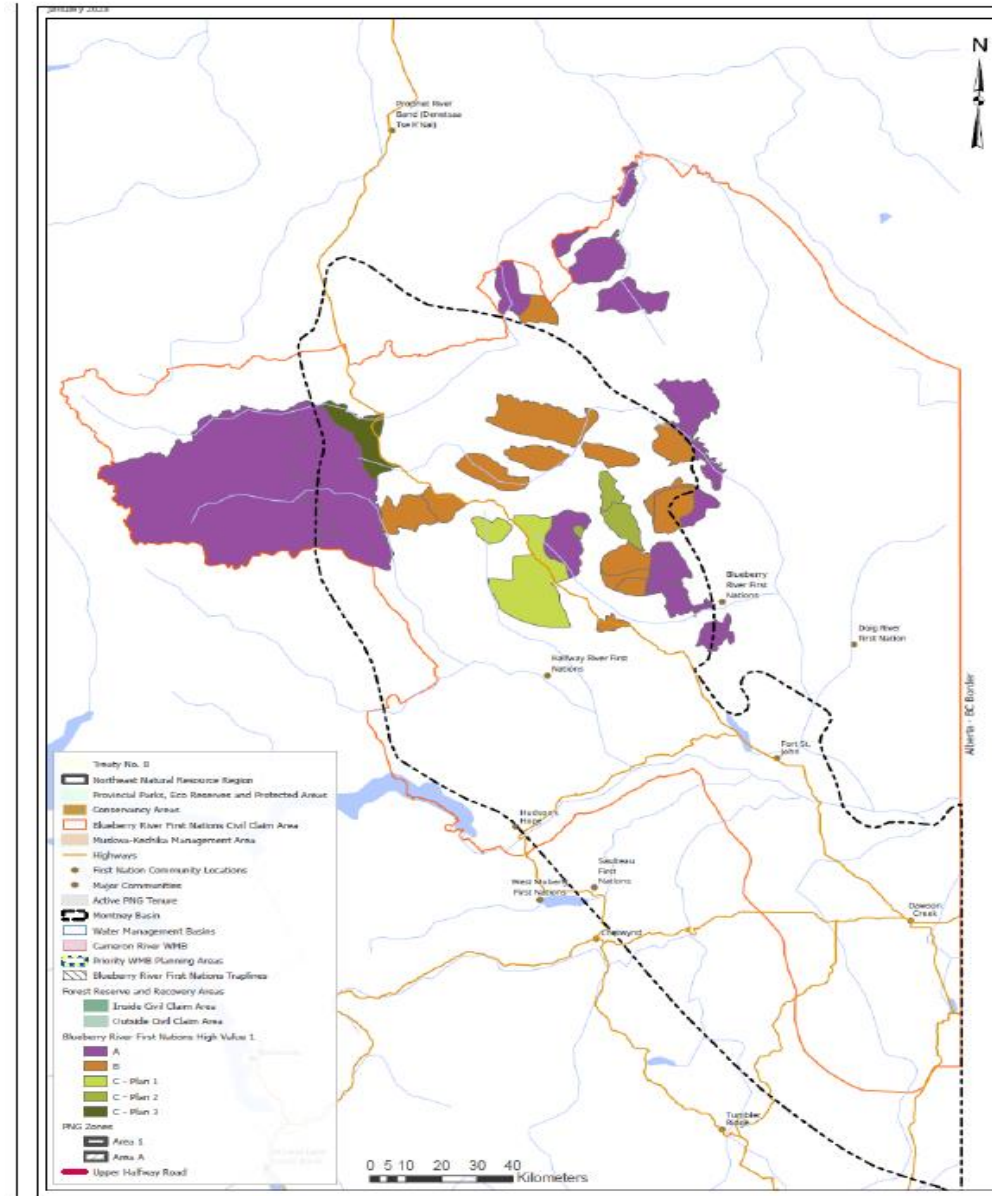
- January 18, 2023
- Five key areas:
  - Wildlife co-management
  - Land-use plans
  - PNG
  - Forestry
  - “Honouring Treaty 8”

## Implementation Agreement

- Limits on “New Disturbance”
  - all oil and gas activity-related disturbances on Crown land, outside any permitted and existing PNG footprint identified in the BCER surface land use (SLU) data, and excluding certain activities (including restoration activities, Health and Safety Activities, Environmental Protection Activities, and new operational activities within existing oil and gas disturbances)
  - Limit New Disturbance in HV1 areas (by 60-100%) and limit New Disturbance in the balance of the Blueberry Claim Area by approximately half (50%) compared to previous years.
  - Avoid New Disturbance for new wells and infrastructure in favour of previously disturbed sites and where disturbance exists, use such existing disturbance as much as possible.
  - Ensure overall limits, potential locations and manner of any New Disturbance is managed through the application of the Cumulative Effects Management Regime (essentially all of the processes and tools under the Agreement).

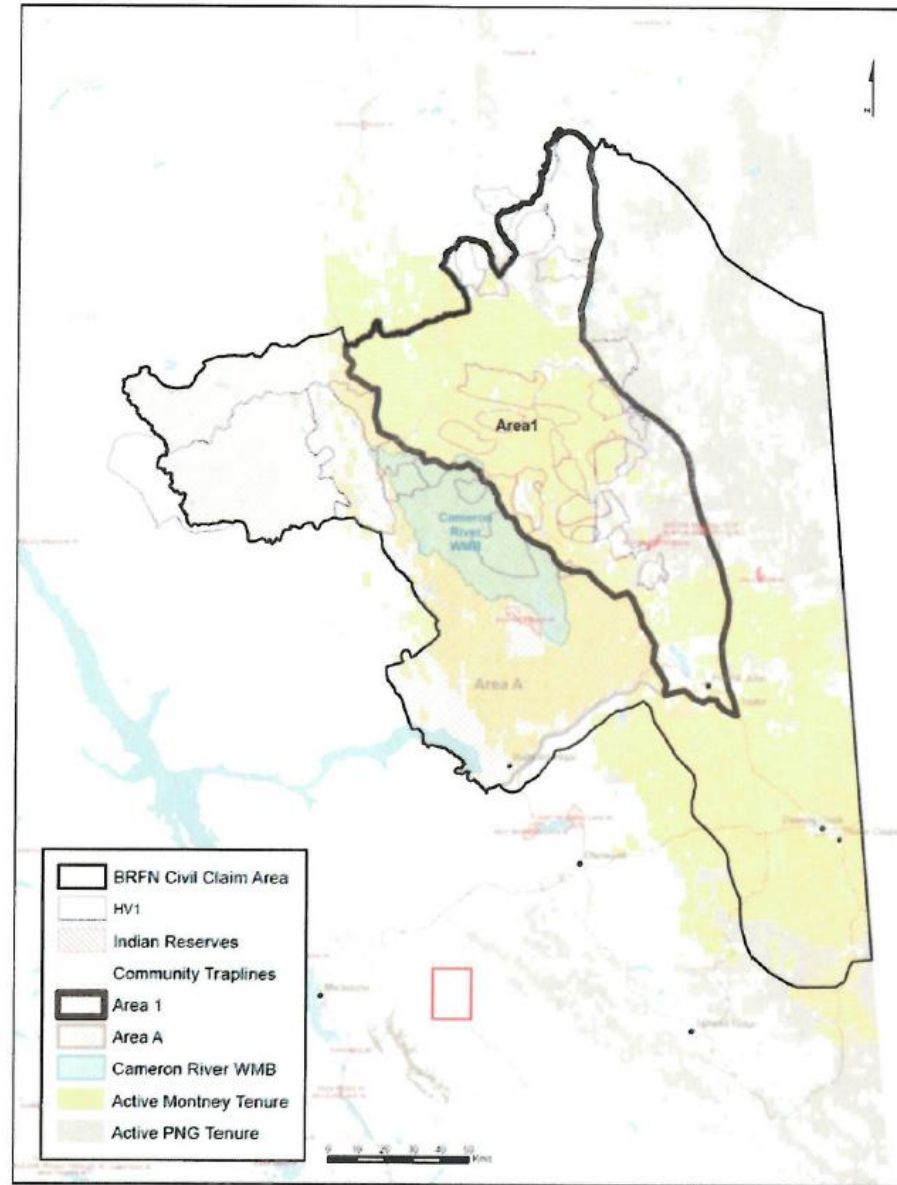
## Implementation Agreement

- HV1 (High Value 1) Areas
  - HV1 plans under development
  - HV1A (Purple)
    - 100% protected, existing operations wound down
  - HV1B (Orange)
    - 80% protected, nothing for 2 years
  - HV1C (Chartreuse)
    - 60% protected, must be consistent with HV1 plans



## Implementation Agreement

- Disturbance caps
  - **Area 1** – New Disturbance capped at 200 ha per year
  - **Rest of Claim Area** – New Disturbance capped at 660 ha in first year and 550 ha per year thereafter
  - **Area A** – default sub-cap of 240 ha in first year and 200 ha per year thereafter, pending a Cameron River WMB sub-cap



## Implementation Agreement

- Blueberry-BC Restoration Fund
  - 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 high-value (“HV1”) areas, and areas that are (or will be) covered by priority Watershed Management Basin Plans
  - Fees for new disturbances in areas not covered by HV1 areas or Watershed Management Basin Plans will be split between the Blueberry Restoration Fund, and the other Treaty 8 Restoration Fund
  - Fund expected to reach \$200 million by 2025
- Resolution plan if Blueberry takes issue with an application for a new oil and gas activity
- Blueberry may agree to waive or otherwise amend on a permit-by-permit basis or area-by-area basis
- ARTICLE 14 RULES
- Direct award of some tenures to Blueberry
- Waiver of infringement claims, but ability to judicially review remains

## Agreements with Other Treaty 8 First Nations

- BC reached consensus on a collaborative approach to land and resource planning (“Consensus Agreements”), along with temporary Revenue Sharing Agreements with five other Treaty 8 First Nations:
  - Fort Nelson First Nation; Saulneau First Nation; Halfway River First Nation; Doig River First Nation, and McLeod Lake Indian Band
- Consensus Agreements include initiatives to:
  - co-manage wildlife;
  - implement new land-use plans and protection measures;
  - implement a cumulative effects management system;
  - implement a multi-year shared restoration fund (the Treaty 8 Restoration Fund);
  - implement new revenue sharing approaches; and
  - promote education about Treaty 8

## Agreements with Other Treaty 8 First Nations

- Revenue Sharing Agreements establish funds that will be provided to each First Nation in the fiscal year, terminating on March 31, 2024
  - Exact amounts confidential
  - Funds comprised of a share of PNG royalties, tenure sales, and rents
- Waiver of new treaty infringement claims against BC on the basis of cumulative effects.



# Recent Cumulative Effects Litigation

## Claims Arising Post-*Yahey*

- Similar claims from First Nations in other Canadian provinces
  - Duncan's First Nation (Alberta)
  - Chapleau Cree First Nation, Missanabie Cree First Nation and Brunswick House First Nation (Ontario)
- Pre-*Yahey* Claims
  - Beaver Lake Cree Nation (Alberta)
  - Carry the Kettle First Nation (Saskatchewan)
- The prospective success of these claims depends on the specific circumstances of each claimant, the location of their traditional territories, the extent of development, and whether courts in other provinces will follow *Yahey*
- Even if treaty infringements are found, the Crown may still justify it on the basis of a compelling and substantial public objective
  - In *Yahey*, BC did not advance any oral or written arguments on the question of justification

# Risk Mitigation

## Risk Mitigation Strategies for Canada Companies

- **Industry should encourage land-use plans from provincial governments**
- Robust land-use plans are the most effective way to mitigate the risk of successful treaty rights infringement claims
  - *Yahey* was heavily influenced by the lack of a provincial regulatory framework that meaningfully considers and manages cumulative effects
  - Alberta has the *Alberta Land Stewardship Act* from 2008; however, the framework has been stalled for some time (only 2 of the 7 regional plans have been finalized)

## Risk Mitigation Strategies for Canada Companies

- **Companies should engage proactively about cumulative effects management with affected Indigenous groups**
  - Consider how an individual project fits into the broader context of existing and planned developments in the area, engage/consult on that basis, and build a record
- If Indigenous groups see that they can achieve some of their key land-use goals (e.g., industry avoiding certain sites, restoring legacy disturbance, etc.) through engagement and negotiation, they will prefer that outcome to fighting in court
  - The same applies to provincial governments (e.g., Moose Lake Access Management Plan)

## Risk Mitigation Strategies for Canada Companies

- **Companies could negotiate protective clauses in project agreements with Indigenous groups**
  - Companies could negotiate to include clauses that:
    - prevent signatory Indigenous groups from bringing a cumulative effects claim against the project; and/or,
    - prevent signatory Indigenous groups from seeking damages or compensation against the project proponent.
  - This will allow industry and governments more control over the outcome, than if the matter was decided by a judge

## Risk Mitigation Strategies for Canada Companies

- **Companies and provincial governments should develop litigation strategies for defending treaty rights infringement claims**
  - Involves proactively improving the underlying facts (i.e, developing land-use plans or regulatory frameworks that meaningfully address cumulative effects)
  - Preparing legal defences that reduce the likelihood of a court reaching the same conclusion as in *Yahey*

Conclusion / Discussion



Questions?