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Blueberry River First Nation and the Piecemeal Infringement of Treaty 8

By: Robert Hamilton & Nick Ettinger

Case Commented On: *Yahey v British Columbia*, 2021 BCSC 1287 (CanLII)

In a highly anticipated decision, the Supreme Court of British Columbia ruled on June 29, 2021 that the Province of British Columbia (BC) unjustifiably infringed the Treaty 8 rights of Blueberry River First Nation (Blueberry) by "permitting the cumulative impacts of industrial development to meaningfully diminish Blueberry's exercise of its treaty rights" (*Yahey v British Columbia*, 2021 BCSC 1287 (CanLII) at para 1884 [*Yahey*]). The Court ordered the Province to consult and negotiate with Blueberry to establish regulatory mechanisms to manage and address the cumulative impacts of industrial development on Blueberry's treaty rights. If a satisfactory solution is not reached within 6 months, the Province will be prohibited from permitting further industrial activity in Blueberry's traditional territory (*Yahey*, para 1894), which overlies the vast natural gas and liquids resource of the Montney Formation in northeast BC. The Montney reserves form the anchor for LNG Canada's $40 billion liquefied natural gas processing and export facility under construction at Kitimat, BC, which will be serviced by the Coastal GasLink Pipeline, as well as the planned Woodfibre LNG export terminal on the Howe Sound fjord near Squamish, BC.

Yahey is the first case to explicitly consider whether the *cumulative* impact of industrial development on a First Nation's ability to exercise treaty rights in their traditional territory may constitute a treaty infringement. Such "piecemeal infringement" is one of the greatest challenges facing First Nations today (see Bruce McIvor, "The Piecemeal Infringement of Treaty Rights"). The decision has important implications for Indigenous peoples, extractive industries, and the Crown, creating uncertainty about the future of oil & gas and renewable energy development in northeast BC and about the common law respecting treaty infringement. The balance of this post distils the decision and briefly comments on implications and potential grounds for appeal. In a subsequent post we address the doctrinal aspects of infringement in more detail.

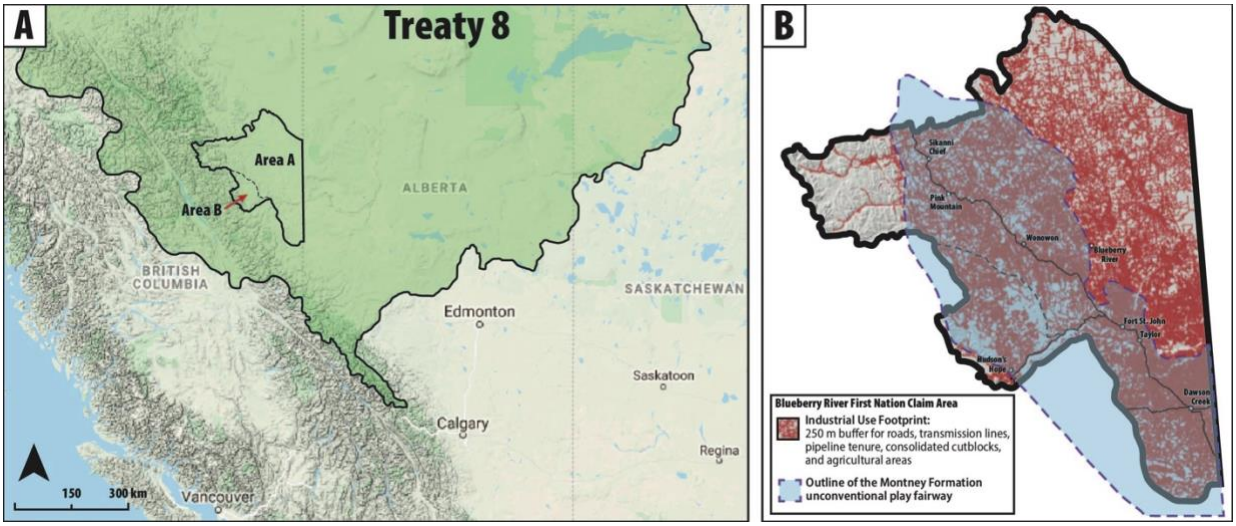
Background

For thousands of years, the Dane-zaa ancestors of Blueberry practiced a way of life intimately connected to and dependent on the land, wildlife, and natural resources of the Upper Peace River region of northeast BC (*Yahey*, para 428). In 1899, the Crown promised to protect that way of life indefinitely or, as the Indigenous signatories to Treaty 8 understood, for "[a]s long as the sun shines" (*Yahey*, para 156). Without this solemn promise, the Cree, Dane-zaa, and Chipewyan signatories of Treaty 8 would not have entered into treaty, and thus would not have surrendered their title to the land (*Yahey*, para 299). One hundred-twenty years later, that promise has apparently been broken by the Crown through the cumulative impacts of forestry, agriculture, and oil & gas developments it has permitted in the last few decades (see Eliana Macdonald 2016, *Atlas*

of Cumulative Landscape Disturbance in the Traditional Territory of Blueberry River First Nations, (Ecotrust Canada, 2016) [Macdonald 2016]).

Significant oil and gas exploration and development within Blueberry's traditional territory dates to the 1950s. More recently, the realization of the unconventional Montney reserves with the advent of multistage fracturing and advances in horizontal drilling technology has led to an unprecedented acceleration in the rate and scale of development. From 2012-2016, more than 2,600 wells were licensed in the territory; more than 2,600 kilometers of access, development, and permanent roads were authorized; approximately 1,500 kilometers of pipelines were permitted; 9,400 kilometers of seismic lines were authorized; additionally, almost 300 forestry cutblocks were harvested (see Macdonald 2016). The Court accepted that, as of 2018, 85% of Blueberry's traditional territory was within 250 meters of an industrial disturbance, and 91% was disturbed within a 500-meter buffer (see panel B of enclosed figure; *Yahey*, para 906). As Justice Emily Burke writes, "[t]he Province has taken up lands to such an extent that there are not sufficient and appropriate lands ... to allow for Blueberry's meaningful exercise of their treaty rights" (*Yahey*, para 1884).

In response to the Crown's failure to account for the cumulative effects of industrial activities, Blueberry filed its lawsuit in 2015 and simultaneously applied to enjoin the Crown from selling 15 timber sale licenses before the trial of the main action. After the latter was rejected, Blueberry applied for a wide-ranging interlocutory injunction restraining the Crown from allowing any further industrial development on its traditional territory (*Yahey v British Columbia*, 2015 BCSC 1302 (CanLII), and *Yahey v British Columbia*, 2017 BCSC 899 (CanLII), respectively). The Court also denied the second application on the grounds that the balance of convenience pointed toward waiting for the impending trial of the main treaty infringement action and allowing the duty to consult to serve as an interim measure of protection (2017 BCSC 899 at paras 122-123, 125-126). Following an adjournment during which the parties negotiated interim measures to restrict surface developments in a few critical areas, the trial of the main action – which took place over 160 days – concluded in late 2020.



Blueberry River First Nation Claim Area
Panel A: Map of Treaty 8 in BC, Alberta, and Saskatchewan with inset of Blueberry's claim area (source: Aboriginal and Treaty Rights Information System, Government of Canada). "Area A" is Blueberry's core traditional territory; Area B is the area in which Blueberry members have more recently expanded the practice of their traditional way of life. Panel B: Inset of Blueberry claim area depicted in panel A showing the overlap with the productive Montney fairway and the industrial land use footprint within the territory (modified from Macdonald 2016).

Issues

Justice Burke identified four issues raised by the case: 1) What are the rights and obligations protected under Treaty 8? 2) What is the test for finding an infringement of treaty rights? 3) Have Blueberry's treaty rights been infringed? 4) If the plaintiffs can no longer meaningfully exercise their Treaty 8 rights, has the Province breached the Treaty in failing to diligently implement the promises contained therein in accordance with the honour of the Crown? (*Yahey*, para 61-67). We address each in turn.

Issue 1: The Rights and Obligations in Treaty 8 (paras 104-439)

The central aim in ascertaining the rights and obligations under a treaty is identifying the common intention of the parties at the time the treaty was signed (*Yahey*, para 77; *R v Marshall*, [1999] 3 SCR 456, 1999 CanLII 655 at para 40). The common intention of the parties is identified by "considering not only the text of the treaty but also by taking into account the context in which the treaty was negotiated, concluded and committed to writing" (*Yahey*, para 104). Justice Burke noted the difficulty of this task, especially in the context of a treaty signed between parties with different "languages, concepts, cultures, mode of life, and world views" (*Yahey*, para 105). The principles of treaty interpretation require that the words of the text not be interpreted in a technical sense, but in a flexible manner and as the Indigenous parties would have understood them. Crucially, written treaties record "an agreement that had already been reached orally": the oral agreement reflects the content of the treaty as much, and perhaps more, than the written version (*Yahey*, para 107, citing *R v Badger*, [1996] 1 SCR 771, 1996 CanLII 236, at para 55). Thus, the nature of the rights and obligations are to be ascertained with reference to the language of the treaty, the treaty commissioners' reports, and oral history (*Yahey*, para 110). Further, courts must take a purposive approach to treaty interpretation that gives "meaning and substance to the Crown's promises" (*Yahey*, para 80). With this in mind, Justice Burke interpreted Treaty 8 in light of both historical evidence and previous case law.

Drawing on historical evidence and commissioner reports, Justice Burke characterized Blueberry's treaty rights not as a prescribed list of rights to hunt, fish, and trap, but as a *way of life* sustained by customary practices, resource use, spiritual connections, and community customs (e.g., *Yahey*, paras 296, 321, 428). Treaty 8 protects this way of life from undue interference:

> Treaty 8 guarantees the Indigenous signatories and adherents the right to continue a way of life based on hunting, fishing, and trapping, and promises that this way of life will not be forcibly interfered with. Inherent in the promise that there will be no forced interference with this way of life is that the Crown will not significantly affect or destroy the basic elements or features needed for that way of life to continue. (*Yahey*, para 175)

In this sense, the treaty was based on a fundamental premise that the Dane-zaa signatories would not be disturbed in their traditional use of the lands and resources. The Treaty's "taking up" clause, which permits the Crown to take up lands in the treaty area for a range of purposes, must be read as consistent with the fundamental promise. The clause "did not and does not modify, diminish, or abrogate from the essential promise of protecting its way of life" (*Yahey*, para 184).

The province argued that Treaty 8 does not protect a way of life, that it was designed to open the lands for settlement, and that the taking up clause foreshadowed changes to Indigenous modes of life (*Yahey*, para 185). Justice Burke rejected the province's argument, holding that "[i]t is not reasonable to conclude that the Dane-zaa agreed that their way of life would be 'fundamentally altered' or eradicated by a Treaty that is now a little over 120 years old. They did not agree to adopt a settler's way of life" (*Yahey*, para 198).

Drawing on previous case law, Justice Burke found that Treaty 8 protects resource rights in relation to specific locations *and* broader territories (*Yahey*, para 258). The Court emphasized the fact that the Indigenous peoples did not want to be confined to a prescribed list of cultural practices and economic activities in restricted locations. They wanted the "freedom and ability to travel through the Territory ... to hunt, trap, fish, gather, camp, process that which was harvested, engage in spiritual practices, and family/educational practices, including the teaching and passing on of knowledge to younger generations" (*Yahey*, para 296). Without this assurance, they would not have signed the treaty. Therefore, the Crown's right to take up land must be read alongside this assurance and interpreted in a way that gives effect to this foundational promise (*Yahey*, para 275). As to the taking up clause: "just as the right to hunt must be understood as the Treaty makers would have understood it, so too must the taking up provision and its reference to mining" (*Yahey*, para 265). From this lens, the Treaty commissioners can hardly be said to have envisioned the scale of landscape changes associated with the development of the Montney Formation.

Taken together, then, the historical evidence and previous case law demonstrate that Treaty 8 protects a way of life and maintenance of culture based on the ability to meaningfully pursue rights to hunt, fish, and trap in an environment suited to those pursuits. Without the assurance that their mode of life, including the ability to freely move through their territory and exercise their rights, would be protected, the Dane-zaa would not have entered into the treaty.

Issue 2: The Test for an Infringement of Treaty Rights (paras 445-547)

The answer to whether the impacts caused by the cumulative effects of multiple projects could ground a treaty rights infringement action turned to a considerable extent on the interpretation of the standard for infringement articulated in the *Mikisew Cree* decision (*Mikisew Cree First Nation v Canada (Minister of Canadian Heritage)*, 2005 SCC 69 (CanLII) [*Mikisew*]). There, the Supreme Court of Canada (SCC) held that an action for infringement could arise only when a First Nation was left with "no meaningful right" in its treaty territory (*Mikisew*, para 48). Blueberry argued that this standard turns on "whether there is no *meaningful* right left, not on whether the rights can be exercised *at all*" (*Yahey*, para 491). While the Province argued that its position was *not* that an infringement would only arise where "no" right remains, Justice Burke disagreed, holding that "the effect of [the province's] argument and reliance on the phrase noted, easily leads to that conclusion" (Yahey, para 503).

Understanding these conflicting interpretations requires that we revisit *Mikisew* and the case law it relied on. In *Mikisew*, the Supreme Court of Canada considered the contents of Treaty 8 and what it means to infringe the rights protected thereunder. The trial court in that case applied earlier case law, holding that an infringement would be found if there was a "meaningful diminution" of the right (*R v Gladstone*, [1996] 2 SCR 723, 1996 CanLII 160, at para 43), a "limitation on the method, timing and extent" of the exercise of the right (*Badger*, para 90), or "any interference" with the right (*Halfway River First Nation v British Columbia (Ministry of Forests)*, 1999 BCCA 470 (CanLII), at para 139). The SCC in *Mikisew* overruled the trial court, holding that an infringement of a treaty right would only arise when "no meaningful right [to hunt, trap, fish, etc.] remains" (at para 48).

One effect of the "no meaningful right" threshold has been to effectively preclude the success of claims for treaty infringement on a project-specific basis. The effects of any single taking up of treaty land would never itself constitute an "infringement" because no single project would be the direct cause of a treaty right being completely undermined. The result – as Justice Sheila Greckol of the Alberta Court of Appeal wrote in her concurring reasons in *Fort McKay First Nation v Prosper Petroleum Ltd*, 2020 ABCA 163 (CanLII) [*Fort McKay*] – is that "the extinguishment of the right will be brought about through the cumulative effects of numerous developments over time" (para 79). Potential infringement through cumulative effects therefore squarely raises the question of what constitutes a "meaningful right" and what the appropriate standard for infringement is where the Crown is taking up land under a treaty.

Mikisew's "no meaningful right" threshold was premised on the fact that the rights of a treaty Nation to maintain their way of life by pursuing "their usual vocations of hunting, trapping, and fishing throughout the tract surrendered" must be balanced against the Crown's right to make regulations affecting the territory and to take up land "from time to time for settlement, mining, lumbering, trading or other purposes" (*Mikisew*, citing Treaty 8, para 2). The "taking up" clause, the *Mikisew* Court reasoned, foreshadowed changes to the geographic extent and content of treaty rights, which the Crown is obligated to manage honourably (*Mikisew*, para 31). *Mikisew*, in other words, concluded that not every taking-up of land constitutes an infringement of treaty rights: only where an Indigenous rights holder is left with no "meaningful" right will a taking-up give rise to an infringement. As the Court in *Mikisew* did not define "meaningful", the standard has remained subject to debate. The interpretative challenge is symptomatic of the more central tension manifest in balancing interferences with First Nations' ability to practice their treaty rights with the Crown's treaty right to take up lands.

Yahey wrestled with the disparate jurisprudence on the standard for an infringement and the proper interpretation of the *Mikisew* "no meaningful right" test. Following a lengthy analysis of the law and the context surrounding the signing of Treaty 8, Justice Burke sided with Blueberry, holding that "the focus of the infringement analysis – and consideration of whether 'no meaningful right remains' – should be on whether the treaty rights can be *meaningfully* exercised, not on whether the rights can be exercised *at all*" (*Yahey*, para 540, emphasis in original). Thus, the standard for an infringement in *Yahey* was "whether Blueberry's treaty rights ... have been significantly or meaningfully diminished" (*Yahey*, para 541, emphasis added). In holding that an infringement action is available where a right has been "significantly diminished," Justice Burke held that the

effect of the taking up clause "cannot be that the Crown's right to take up lands can eclipse Blueberry's meaningful rights to hunt, fish, and trap as part of its way of life" (*Yahey*, para 532). The clause does not provide "an infinite power to take up lands" (*Yahey*, para 534). Thus, "[i]t is illogical and, ultimately, dishonourable to conclude that the Treaty is only infringed if the right to hunt, fish, and trap in a meaningful way no longer exists" (*Yahey*, para 514).

Issue 3: Have Blueberry's Treaty Rights been Infringed? (paras 548-1138)

To determine whether, despite extensive industrial activity, Blueberry today still has a meaningful right to exercise treaty rights in its traditional territory, the Court had to outline what that traditional territory was. This shifts away from previous courts' narrower focus on the extent to which specific fauna were used within established boundaries of a traditional territory, for example (e.g., *Prophet River First Nation v British Columbia (Environment)*, 2015 BCSC 1682 (CanLII), at para 143, upheld by the Court of Appeal in 2017 BCCA 58 (CanLII)). Moreover, in seeking to describe the area over which Blueberry's protected way of life extended, Justice Burke's approach emphasizes the paramountcy of the Indigenous perspective (at para 613):

> specificity ... can only come from the Indigenous people. They can tell the Province and the courts which are their preferred or core areas and why. They can provide insight into the important features that allow for the meaningful exercise of rights in these locations. They can explain the values the lands and waters contain.

Accordingly, the Court rejected the Province's defence that Blueberry's claim area was an "arbitrarily defined portion of a larger historic traditional territory" (*Yahey*, para 557) and the suggestion that Blueberry members cannot be said to have been deprived of the right to meaningfully exercise their treaty rights because there exist other viable areas within that larger historic area (*Yahey*, para 591). Justice Burke noted that Blueberry "provided very comprehensive answers" to the Province's demand for particulars on the location and specifics of the cultural and economic activities it could no longer meaningfully practice (*Yahey*, para 1838).

Justice Burke concluded that the area over which Blueberry claimed it was no longer able to meaningfully exercise their treaty rights accorded with the area used by their ancestors at the time they adhered to Treaty 8 in 1900 (i.e., their core traditional territory, "Area A" in panel A of enclosed figure; *Yahey*, para 658). Additionally, Justice Burke accepted the evidence that Blueberry's members had more recently begun to use an area outside of its core traditional territory west of the Halfway River for the practice of their traditional way of life, to the extent that the area would be considered part of Blueberry's contiguous traditional territory for the purposes of their infringement claim (see "Area B" in panel A of enclosed figure; *Yahey*, paras 658-659).

Justice Burke then reviewed development in that territory and impacts on wildlife. Having established that the standard for an infringement was whether the treaty rights had been "significantly or meaningfully diminished," and that this diminishment can be caused by the cumulative effects of multiple developments, the evidence that 91% of Blueberry's traditional territory was within 500 meters of an industrial disturbance led the Court to conclude that the

Province's historical incentivization and permitting of industrial development within Blueberry's traditional territory constitutes an infringement of Treaty 8 (*Yahey*, para 906).

Blueberry's evidence as to the effect of the cumulative disturbances of the land led to the conclusion that "[t]heir rights to hunt, fish and trap within the Blueberry Claim Area have been significantly and meaningfully diminished when viewed within the context of the way of life in which these rights are grounded" (*Yahey*, para 1129). In particular, the dearth of mature forests, diverse wildlife habitats, clean watersheds, and access to those areas significantly impaired Blueberry's ability hunt, fish, and trap (*Yahey*, para 1130).

Issue 4: Treaty Implementation, the Honour of the Crown, and the Fiduciary Duty (paras 1134 – 1809)

In addition to the declaration on treaty infringement, Blueberry also sought declarations that the Crown had breached its obligations under the treaty (*Yahey*, para 1134). Blueberry argued that the province failed "to diligently implement the Treaty's promise to protect Blueberry's rights and way of life from the encroaching cumulative impacts of industrial development" (*Yahey*, para 1135). This failure to diligently implement the Treaty promises, Blueberry argued, breached obligations grounded in both the honour of the Crown and the Crown's fiduciary duties.

The honour of the Crown is a constitutional principle that applies to all Crown dealings with Indigenous peoples (see *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73 (CanLII), at para 17). It requires that the Crown "endeavour to ensure its [constitutional] obligations are fulfilled" (*Yahey*, para 1155). This includes a duty to diligently implement treaty promises. While perfect implementation is not required, "a persistent pattern of errors and indifference that substantially frustrates the purpose of the promise may betray the duty (*Yahey*, para 1155). The fiduciary duty arises when the Crown assumes discretionary control of a cognizable Indigenous interest (*Manitoba Metis Federation Inc v Canada (Attorney General)*, 2013 SCC 14 (CanLII), at para 73). In this instance, a range of specific duties arise in respect of the interest, including conventional fiduciary duties (to act in good faith, with diligence, etc.) and additional duties specific to Crown-Indigenous relations.

On this basis, Blueberry argued that "the honour of the Crown gives rise to a positive obligation on the Province to implement Treaty 8" and that "implementing the Treaty promise means that before the Province authorizes land uses in the areas Blueberry relies on, it must put in place measures to ensure the essential elements of the Treaty will not be violated" (*Yahey*, para 1165). Put otherwise, "the Province has a positive duty to protect treaty rights, and its management of the lands and resources should reflect this" (*Yahey*, para 1165).

The province argued, in effect, that Blueberry was taking too broad a view of the nature of the Crown's obligations, arguing that "there is no duty for the Province to implement regulatory policies that place Blueberry's views as the paramount views. It has no duty to implement the kind of 'fettered regulatory structure' Blueberry seems to be seeking" (*Yahey*, para 1174).

The Court considered the question of treaty implementation in respect of the province's regulatory regimes for oil & gas development, forestry management, cumulative effects framework and

wildlife management. Justice Burke held that the disturbances to Blueberry's traditional territory and the consequent deprivation of their meaningful exercise of treaty rights "has been fostered by the Province's regulatory regime," which neglects to adequately consider the cumulative impact of historical and modern industrial development on treaty rights (*Yahey,* para 1414). The oil & gas regulatory regime comprises a) oil and gas tenure rights to the subsurface administered by the Ministry of Energy, Mines and Petroleum Resources; and b) permitting of surface oil and gas activities by the BC Oil and Gas Commission. Evidence was led – and accepted – that the two administrative bodies are like "ships passing in the night," each erroneously assuming the other accounted for cumulative impacts on treaty rights (*Yahey,* para 1311).

At the most basic level, the Court found that the regulatory framework for the permitting process neglects to consider the full scale or scope of projects (*Yahey,* para 1336) – e.g., it does not consider whether a project initiated on the permitting of a single well pad is anticipated to expand through the addition of a processing facility to that area initially cleared for the pad. In the current scheme, the initial pad would be considered exclusively, and the processing facility or other expansion would be the subject of a subsequent application(s) that are subject to a lower level of consultation, precluding First Nations' "ability to meaningfully respond on the full scope of the project" (*Yahey,* para 1203). Moreover, permit applications are not required to disclose the number of wells envisioned or when they may be drilled. Instead, the subsequent wells are assessed on separate applications that attract the lower end of the consultation spectrum with respect to the duty to consult (i.e., the provision of information about the well to the First Nation; *Yahey,* para 1336).

Additionally, the permitting process currently relies on an "Area Based Analysis Tool," which the trial judge ruled is grossly inadequate for assessing cumulative impacts on treaty rights. Specifically, the Area Based Analysis Tool:

A. is applied at too coarse a scale of disturbance units to have any sensitivity to the intensity of development within smaller areas that make up that unit, thus those intensely developed areas are overlooked;
B. only considers a few inputs, such as riparian reserves, old forest, and designated wildlife areas and neglects to consider the essential wildlife and habitat inputs that encompass treaty rights;
C. lacks any guidance for decision makers with respect to addressing red flags and other concerns arising from cumulative impacts on the environment and how to ensure the protection of treaty rights; and
D. does not incorporate meaningful or enforceable thresholds or triggers above which development is precluded or must be limited.
(*Yahey,* paras 1755-1760)

As a result, the Oil and Gas Commission has *never* turned down an application over concerns about habitat or cumulative effects on treaty rights (*Yahey,* para 1760).

Similarly, the Court ruled that the Province's forestry regime is focused on replacing natural forests with planted ones to maximize the efficiency and profitability of future harvest cycles (*Yahey,* para 1562). Its "decision makers lack authority to manage cumulative effects, or take into account impacts on the exercise of treaty rights," and there is a lack of regulatory independence from forestry industry participants "who hold much of the power regarding what cutblocks to harvest,

how and when" (*Yahey*, para 1564). Forestry has advanced in Blueberry's traditional territory on the mistaken belief that Blueberry are still perfectly capable of pursuing their traditional way of life in other areas throughout Treaty 8 (*Yahey*, para 1576).

Around 2010, the Province began developing a cumulative effects framework for natural resources decision-making to address, among other things, an early 2000's Oil and Gas Commission report that revealed only 15% of Blueberry's core traditional territory remained undisturbed as of 1998 (*Yahey*, paras 1597, 1739). However, the interim framework established in 2016 lacks meaningful thresholds such that it has had no practical effect on the regulatory requirements for oil & gas or forestry developments (*Yahey*, para 1625). Further, the framework only led to one completed assessment as of 2020 – for grizzly bears – which lacks a practical application to decision-making (*Yahey*, paras 1617-1618). Despite having "reasonable and credible notice that its own actions and inactions were putting it in potential breach of Treaty 8 by its failure to monitor cumulative impacts," Justice Burke ruled, the Province "continued to permit and foster development in Blueberry's traditional territory," therefore failing to protect the meaningful exercise of Blueberry's treaty rights (*Yahey*, para 1737).

What About Justification of Infringement?

Whether or not the *Mikisew Cree* "no meaningful right" test and the duty to consult have actually headed off infringement as the Supreme Court seems to have envisioned, the precedent has largely precluded the need for the Crown to ever seek to justify an infringement in the treaty context. This has stymied the development of the law on the subject. The province's decision *not* to argue justified infringement in *Yahey* was thus a disappointment to those seeking clarity from the courts. The Crown's decision was particularly perplexing given that in its initial pleadings, the Province stated (in the alternative to its primary defence of denying an infringement had taken place) that any infringement *was* justified (*Yahey*, para 1822).

Though the Province had enough information regarding the nature of Blueberry's rights and traditional territory to put forward a justification of infringement argument (*Yahey*, para 1841), it elected not to do so, arguing that it could not do so in the absence of greater specificity about the full scope of the rights at issue and the nature of the infringements (*Yahey*, paras 1828, 1830).

Justice Burke rejected the Province's arguments, holding that the rights at issue were defined clearly enough, the infringements clearly enough identified, and that the Province could have put forward an argument on justification (*Yahey*, paras 1841-1849). Ultimately, Justice Burke delivered a rebuke to the Province, noting that "the trial was not bifurcated. The Province did not seek to sever the question of infringement from that of justification" (*Yahey*, para 1850). Further, Justice Burke wrote, "I agree with Blueberry that it is surprising, given the pleadings, the evidence, and the fact that the issue of justification was not severed from the issue of infringement, that the Province did not argue justification" (*Yahey*, para 1851).

Finally, Justice Burke held:

> Scarce judicial resources should not be used to have a trial of this length and magnitude proceed, only to allow the Province a further opportunity to advance both evidence and arguments in a later trial that it ought to have raised here. The Province

> had an opportunity to justify any potential infringement, and it made a strategic choice not to do so …Throughout this lengthy trial, Blueberry has understood that the Province would defend itself, at least in part or in the alternative, on the basis of the infringements being justified. So too has the Court. Blueberry ought not to be prejudiced in obtaining relief in this case simply because the Province chose not to advance a defence. (*Yahey,* paras 1852-1853)

Having concluded that the Province missed its opportunity to argue justification, Justice Burke stated that the evidence before the Court would have nonetheless pointed to the conclusion that the infringement could not be justified (*Yahey, para* 1855).

Conclusion

On the basis of the analysis outlined above, the Court issued the following declarations:

1. In causing and/or permitting the cumulative impacts of industrial development on Blueberry's treaty rights, the Province has breached its obligation to Blueberry under Treaty 8, including its honourable and fiduciary obligations. The Province's mechanisms for assessing and taking into account cumulative effects are lacking and have contributed to the breach of its obligations under Treaty 8;
2. The Province has taken up lands to such an extent that there are not sufficient and appropriate lands in the Blueberry Claim Area to allow for Blueberry's meaningful exercise of their treaty rights. The Province has therefore unjustifiably infringed Blueberry's treaty rights in permitting the cumulative impacts of industrial development to meaningfully diminish Blueberry's exercise of its treaty rights in the Blueberry Claim Area;
3. The Province may not continue to authorize activities that breach the promises included in the Treaty, including the Province's honourable and fiduciary obligations associated with the Treaty, or that unjustifiably infringe Blueberry's exercise of its treaty rights; and,
4. The parties must act with diligence to consult and negotiate for the purpose of establishing timely enforceable mechanisms to assess and manage the cumulative impact of industrial development on Blueberry's treaty rights, and to ensure these constitutional rights are respected. (*Yahey,* para 1894)

This decision will almost certainly be appealed. As it stands, the implications are far reaching. In particular, the decision requires the Crown to proactively assess and manage cumulative impacts in consultation with treaty First Nations. Provincial governments that have been permitting development in numbered treaty areas without consideration of the cumulative impacts on the exercise of treaty rights are now (subject to appeal and overruling) at risk of infringement litigation along the lines developed in *Yahey.* This places a positive obligation on governments to ensure that treaty promises are not eroded. While the Supreme Court of Canada has long held that the honour of the Crown attaches positive duties to recognize and accommodate Aboriginal rights and title prior to their infringement (e.g., *Haida Nation*, para 38), *Yahey* is a significant contribution to the doctrine of the honour of the Crown in that it suggests the Crown also has a positive duty to assess the cumulative effects of landscape disturbances before *treaty* rights are infringed.

Even if upheld on appeal, however, there are questions as to the broader precedential value of the decision. The analysis is heavily dependent on two features that may limit the applicability. First, it is directly applicable only where there are "taking up" clauses. While these are present in all of the Numbered Treaties and the Robinson Treaties, there are no such clauses in the Maritime Peace and Friendship Treaties, nor the Vancouver Island Douglas Treaties (though the structure of the latter suggests a similar analysis may apply there). While *Yahey* would likely still strengthen infringement claims of Peace and Friendship First Nations – establishing a lower bar for infringement – the direct applicability of *Yahey* requires further consideration in those contexts. Second, the finding that Treaty 8 protects a way of life was based on oral promises made during negotiations – that may not be present across numbered treaty contexts. This was an essential part of finding that cumulative impacts constituted an infringement of the treaty guarantees. Finally, the nature and scale of development in the area of Treaty 8 at issue here forms a unique factual basis that may not be applicable in all other contexts.

Nonetheless, this is a significant clarification of the standard for infringement in treaty contexts. The sacred nature of treaty relationships and the Crown's constitutional obligations not only to uphold, but to diligently implement, treaty promises informs the standard for infringement and open the door to a meaningful assessment of the cumulative impacts of development in treaty territories. While it remains open to the Crown to seek to justify infringements and unilateral decision making, for example on the grounds of economic development in the public interest, *Yahey* suggests that infringements will be difficult to justify, and that substantive engagement and negotiation will be required. The Crown has a positive obligation to ensure that treaty rights can be *meaningfully* exercised in continuance of the way of life the parties understood would be protected when Treaty 8 was negotiated.

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