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Yahey v British Columbia and the Clarification of the Standard for a Treaty Infringement

By: Robert Hamilton & Nick Ettinger

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

On June 29, 2021, the Supreme Court of British Columbia ruled that the Crown had infringed Treaty 8 by "permitting the cumulative impacts of industrial development to meaningfully diminish [Blueberry River First Nation's (Blueberry)] exercise of its treaty rights" (*Yahey v British Columbia*, 2021 BCSC 1287 (CanLII) at para 1884 [*Yahey*]). This is the first time a court has held that the *cumulative effects* of multiple projects may form the basis of a treaty infringement. The trial judge's nuanced articulation of the standard for what constitutes a treaty infringement enabled this groundbreaking development (see paras 445-547). We reviewed the factual and legal findings of the decision in a previous post. This post unpacks the doctrinal aspects of treaty infringement in more detail to contextualize Justice Emily Burke's navigation of infringement case law and formulation of the "significantly or meaningfully diminished" standard in *Yahey* (at para 541). While some pundits have interpreted *Yahey* to be a dramatic lowering of the standard for an infringement, we believe the decision is an insightful clarification and faithful application of Supreme Court precedent.

Despite the Province's decision not to appeal, *Yahey*'s clarification is certain to be considered in the numerous ongoing and forthcoming cumulative effects infringement cases: West Moberly First Nation filed a cumulative effects-based Treaty 8 infringement lawsuit against the governments of BC and Canada in respect of the Site C Dam in 2018, Carry the Kettle First Nation filed a similar lawsuit alleging piecemeal infringement of its Treaty 4 rights against the governments of Saskatchewan and Canada in 2018, and the Beaver Lake Cree Nation filed its action for piecemeal infringement of its Treaty 6 rights against Alberta in 2008.

Framing the Issue

Prior to *Yahey*, the question of whether cumulative impacts of multiple projects can ground a treaty infringement claim had received little analysis. The answer depends to a considerable extent on the resolution of a more granular question: how should the term "meaningful" be understood following the Supreme Court's holding in *Mikisew Cree First Nation v Canada (Minister of Canadian Heritage)*, 2005 SCC 69 (CanLII) [*Mikisew*] that a claim for infringement could only arise where "no meaningful [treaty right] remains" (at para 38)?

Mikisew, like *Yahey*, considered how infringement doctrine applies when the Crown "takes-up" land under Treaty 8. Specifically, the courts considered what constitutional protections Indigenous treaty rights have when the Crown exercises its right, recognized in the

numbered treaties, to take up lands for development purposes. The *Mikisew* Court held that a *prima facie* infringement triggering a justification analysis lay only "where the Crown has taken up land in bad faith or has taken up so much land that no meaningful right to hunt remains" (*Mikisew* at para 48). Instead of litigation on infringement being triggered for every project, the duty to consult would provide pre-emptive protection, preventing the Crown from running roughshod over treaty rights (*Mikisew* at para 55).

In the years since *Mikisew*, there has been much debate about how this standard ought to be interpreted. Federal and provincial governments have consistently argued for interpretations that would effectively limit infringement actions to those situations where Indigenous rights-holders are left without *any* ability to exercise rights in their traditional territory (see e.g., *Keewatin v Minister of Natural Resources*, 2011 ONSC 4801 (CanLII) [*Keewatin*]; *Yahey* at paras 445-446). The implication of this interpretation is that cumulative impacts would be permitted to erode treaty rights to the point of their extinguishment. Consequently, Indigenous nations have alleged that their rights are subject to piecemeal infringement (see, e.g., McIvor 2015) and have argued – as Blueberry did in the present case – that determining whether the meaningful exercise of rights remains possible should only require a court to ask whether those rights have been "significantly or meaningfully diminished" (*Yahey* at para 541). In siding with Blueberry in *Yahey*, Justice Burke provided a substantive interpretation of the *Mikisew* "no meaningful right" standard and how it applies in the context of cumulative impacts.

Background on Infringement

The Supreme Court laid out a framework to determine whether government legislation that restricts Aboriginal rights (legislative interferences) constitutes an infringement of s 35 of the *Constitution Act, 1982*, Schedule B to the Canada Act 1982 (UK), 1982, c 11 [s 35] in *R v Sparrow*, 1990 CanLII 104, [1990] 1 SCR 1075 (SCC) [*Sparrow*]. The initial burden is on the claimant to demonstrate a *prima facie* infringement and, if such an infringement is established, the burden then shifts to the Crown to justify that infringement. In assessing whether a *prima facie* infringement has occurred, the Court identified three preliminary indicia: 1) "is the limitation unreasonable?"; 2) does the interference "impose undue hardship?"; and 3) does the limitation deny the rights holders "their preferred means of exercising that right?" (at 1112). Justified infringement would require: 1) "a valid [i.e., compelling and substantial] legislative objective"; 2) consistency with the honour of the Crown, specifically the Crown's fiduciary obligations to the Indigenous group (at 1114); and other conditions as the circumstances might require, including minimal impairment, compensation, and consultation (at 1119). These conditions resemble the *Oakes* test for justified infringements under s 1 of the *Canadian Charter of Rights and Freedoms* (*R v Oakes*, 1986 CanLII 46, [1986] 1 SCR 103 (SCC), at paras 69–71), notwithstanding the fact that Aboriginal and treaty rights aren't subject to s 1 of the *Charter*.

In *R v Gladstone*, 1996 CanLII 160, [1996] 2 SCR 723 (SCC) [*Gladstone*], the Supreme Court clarified *Sparrow* further:

> [T]he questions the [*Sparrow*] test directs courts to answer in determining whether an infringement has taken place incorporate ideas such as unreasonableness and "undue" hardship, ideas which suggest that something more

> than meaningful diminution is required to demonstrate infringement. This internal contradiction is, however, more apparent than real. The questions asked by the Court in *Sparrow* do not define the concept of *prima facie* infringement; they only point to factors which will indicate that such an infringement has taken place. Simply because one of those questions is answered in the negative will not prohibit a finding by a court that a *prima facie* infringement has taken place; it will just be one factor for a court to consider in its determination of whether there has been a *prima facie* infringement. (at para 43)

Thus, in *Gladstone*, the standard for an infringement was the "meaningful diminution" of the right through any one or more of the indicia outlined in *Sparrow*.

The Supreme Court then applied the *Sparrow* framework to treaty rights in *R v Badger*, 1996 CanLII 236, [1996] 1 SCR 771 (SCC) [*Badger*]. On the standard for infringement, *Badger* held that interferences with hunting rights under Treaty 8 "may not be permissible if they erode an important aspect of the Indian hunting rights" (at para 90). Specifically, "there can be no limitation on the method, timing and extent of Indian hunting under a Treaty" (*Badger* at para 90). An infringement analysis must nevertheless be considered within the context of the specific treaty at issue, including any internal limitations of treaty rights (at para 85; see *Yahey* at para 1814). The two limitations internal to Treaty 8 include: 1) the government's right to enact certain regulations that may interfere with Treaty rights, and 2) the geographic limitation of Treaty rights to "the tract surrendered . . . saving and excepting such tracts as may be required or taken up from time to time for settlement, mining, lumbering, trading or other purposes" (*Badger* at para 40).

In respect of the first limitation, the Supreme Court held in *R v Marshall*, 1999 CanLII 665, [1999] 3 SCR 456 (SCC) [*Marshall* 1] and *R v Marshall*, 1999 CanLII 666, [1999] 3 SCR 533 (SCC) [*Marshall* 2] that not every regulation that constrains a treaty right constitutes an infringement that requires justification:

> Catch limits that could reasonably be expected to produce a moderate livelihood for individual Mi'kmaq families at present-day standards can be established by regulation and enforced without violating the treaty right. In that case, the regulations would accommodate the treaty right. Such regulations would *not* constitute an infringement that would have to be justified under the *Badger* standard; (*Marshall* 1 at para 61)

> In other words, regulations that do no more than reasonably define the Mi'kmaq treaty right in terms that can be administered by the regulator and understood by the Mi'kmaq community that holds the treaty rights do not impair the exercise of the treaty right and therefore do not have to meet the *Badger* standard of justification. (*Marshall* 2 at para 37, emphasis in original)

The court further clarified the importance of accommodating treaty rights in *R v Sundown*, 1999 CanLII 673, [1999] 1 SCR 393 (SCC) [*Sundown*]:

> Regulations clearly aimed at conservation that carefully consider the treaty rights of the [rights holders] may very well pass the *Sparrow* justification test. However, both the purpose of the regulations and the accommodation of the treaty rights in issue would have to be clear from the wording of the legislation. It would not be sufficient for the Crown to simply assert that the regulations are "necessary" for conservation. Evidence on this issue would have to be adduced. The Crown would also have to demonstrate that the legislation does not unduly impair treaty rights. The solemn promises of the treaty must be fairly interpreted and the honour of the Crown upheld. Treaty rights must not be lightly infringed. Clear evidence of justification would be required before that infringement could be accepted. (at para 46)

Therefore, though several treaties have been interpreted as enabling legislative interferences with treaty rights, such internal limitations are constrained by the requirement that they accommodate the exercise of the right. In other words, limitations must allow for the continued exercise of treaty rights rather than impairing them.

The Crown has also argued that certain treaty rights are inherently limited where so-called "taking up" clauses are present in the text of treaties. In *Halfway River First Nation v British Columbia (Ministry of Forests)*, 1999 BCCA 470 (CanLII) [*Halfway River*], BC argued that a *prima facie* infringement could not be established where the Crown merely exercised its equal right under Treaty 8 to take up treaty lands (at paras 94, 98). The trial and appellate courts of BC rejected this position, however, ruling that "any interference with the right to hunt is a *prima facie* infringement of the Indians' treaty rights as protected by s. 35," notwithstanding the presence of a "taking up" clause (*Halfway River* at para 144, emphasis in original). This reflects a crucial point reiterated in *Yahey*: the parties to treaties with "taking up" clauses did not intend that the Crown be granted an unlimited discretionary power to effectively extinguish treaty rights by taking up treaty lands (*Yahey* at para 534) – a point also supported by *Badger*: "limitations which restrict the rights of Indians under treaties must be narrowly construed" (at para 41).

Halfway River and *Badger* were concerned with determining whether a *prima facie* infringement of s 35 rights had taken place. Though *Badger* only considered a legislative interference and did not explicitly contemplate whether the *Sparrow* infringement analysis would apply to the Crown taking up treaty lands, it did so implicitly in holding that Treaty 8 land that had *not* been taken up by the Province was "land to which the Indians had a right of access to hunt for food" (at para 51, emphasis added); taking up land over which a treaty right *had* extended inherently interferes with the geographic extent of that right and, according to *Badger*, there "there can be no limitation on the...extent of Indian hunting under a Treaty" (*Badger* at para 90). The *Halfway River* Court came to the same conclusion more directly, suggesting that the taking up of any such land would presumptively interfere with the geographic extent of First Nations' hunting rights and would therefore constitute a *prima facie* infringement under the *Sparrow* framework. Like legislative limitations on treaty rights considered in *Marshall* 1 & 2 and *Sundown*, it seemed "taking up" clauses were not meant to endorse government-sanctioned curtailment of treaty rights without adequate justification. The Supreme Court would partly reject this notion and the *Halfway River* standard of infringement, however, in *Mikisew*.

The *Mikisew* "No Meaningful Right Remains" Infringement Standard

The burden on Indigenous groups to prove the existence and infringement of a s 35 right before they were afforded concrete procedural protections under the *Sparrow* framework led to lengthy and complex litigation that was unwieldy for the courts and, more importantly, Indigenous claimants. Further, it left an important gap: what protections would rights be afforded while they were in the process of litigation and negotiation? Seeking to close this gap and mitigate the effects of drawn-out litigation, the Supreme Court shifted the focus away from proving whether a Crown action or law constituted a *prima facie* infringement toward the pre-emptive duty to consult and accommodate (*Haida Nation v British Columbia (Minister of Forests*), 2004 SCC 73 (CanLII) [*Haida Nation*]; *Taku River Tlingit First Nation v British Columbia (Project Assessment Director)*, 2004 SCC 74 (CanLII) [*Taku River*]; and *Mikisew*). In the context of this relatively recently developed duty, the Supreme Court reconsidered the line between permissible interferences with treaty rights and infringement in *Mikisew*. The court held that the Crown has a duty to consult Indigenous nations when exercising its right to "take up" lands under Treaty 8 if doing so may adversely impact treaty rights (*Mikisew* at para 55), notwithstanding the fact that "taking up" clauses foreshadowed changes to the geographic extent of treaty rights (at para 31).

Prior to *Mikisew*, governments had tended to treat the "taking up" clause as license to unilaterally expropriate land (see generally, Shin Imai, "Treaty Lands and Crown Obligations: The 'Tracts Taken Up' Provision" (2001) 27 Queen's LJ 1 n 9). By extending the duty to consult to these actions, the Court provided a measure of procedural protection to treaty rights and asserted treaty and Aboriginal rights. The Court's conclusions on treaty infringement, however, raised the concern that it may have in fact weakened the protection of such rights. The Court held that a *prima facie* infringement triggering the *Sparrow* justification analysis arose only "where the Crown has taken up land in bad faith or has taken up so much land that no meaningful right to hunt remains" (*Mikisew* at para 48, emphasis added). Despite ruling that the "taking up" of land had a "demonstrably adverse" effect on the "continued exercise of the Mikisew hunting and trapping rights over the lands in question" (at 390), the interference did not constitute an infringement. The Mikisew had not shown that "no meaningful right to hunt" remained. This infringement standard was remarkable considering the Court's infringement standard applied to other constitutionally protected rights a year earlier, where the Court held that a "non-trivial or non-insubstantial interference" with the exercise of freedom of religion constituted a *Charter* infringement (*Syndicat Northcrest v Amselem*, 2004 SCC 47 (CanLII) at para 554).

However, as the determinative issue in *Mikisew* concerned the duty to consult rather than infringement, the Supreme Court did not elaborate on what the "meaningful" exercise of treaty rights entailed. The ambiguity of the language and lack of substantive analysis invited a range of interpretations. The case could be read as significantly weakening the protections afforded to treaty rights by holding that an infringement action could only be sustained where a government action was on the verge of eliminating a right altogether. Until that point, Crown actions would be subject only to the lesser protections of the duty to consult. Equally, however, the decision could be read as consistent with earlier case law. In *Marshall* 1 & 2, for example, the Supreme Court held that regulations impacting a treaty right would not constitute an infringement so long as they "accommodated" the right in question. It remained unclear whether *Mikisew*'s "no

meaningful right remains" standard re-articulated this or whether the development of the duty to consult and the presence of a taking-up clause resulted in a modified standard in *Mikisew*.

Little further guidance came from the Supreme Court. Two years after *Mikisew*, the Court considered the infringement of a treaty right in *R v Morris*, 2006 SCC 59 (CanLII) [*Morris*]. The case dealt with a provincial law's interference with a treaty right, though in the context of a treaty without a "taking up" clause. The Court held that "a *prima facie* infringement requires a 'meaningful diminution' of a treaty right. This includes anything but an insignificant interference with that right. If provincial laws or regulations interfere insignificantly with the exercise of treaty rights, they will not be found to infringe" (at para 53, emphasis added). *Morris* reiterated the constitutional protection afforded to treaty rights: "restraints on the exercise of the treaty right have to be justified on the basis of conservation or other compelling and substantial public objectives" (at para 46, citing *Marshall* 2 at para 24, emphasis in original). Without mentioning *Morris*, however, the Supreme Court applied the *Mikisew* standard to the taking-up clause of Treaty 3 in *Grassy Narrows First Nation v Ontario*, 2014 SCC 48 (CanLII), reiterating that an action for treaty infringement would not be available until a Crown "taking up" "leaves the Ojibway with no meaningful right to hunt, fish or trap" (at para 52). Still, beyond restating the *Mikisew* standard, the Court did not define what a "meaningful right" includes. Consequently, the interpretation of the "meaningful" exercise of treaty rights was left for later cases to determine in light of specific facts and further argument. Enter *Yahey*.

The *Yahey* "Significantly or Meaningfully Diminished" Infringement Standard

As of 2018, 85% of Blueberry River First Nation's traditional territory – located in today's Peace Region of northeastern British Columbia – was within 250 meters of an industrial disturbance, and 91% was disturbed within a 500-meter buffer (*Yahey* at para 906). The question of whether the *cumulative* effects of the numerous developments that contributed to this level of disturbance could form the basis for a treaty infringement claim is what made *Yahey* a case of first instance. Addressing that question forced the Court to confront restrictive interpretations of the *Mikisew* "no meaningful right remains" standard for infringement: the Court had to define the "meaningful exercise" of a right and give substance to the *Mikisew* standard.

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*" (at para 540, emphasis in original). Further, the "meaningful exercise" of treaty rights would be lost where "Blueberry's treaty rights ... have been significantly or meaningfully diminished" (at para 541, emphasis added). An infringement can be established *before* a First Nation can no longer exercise treaty rights. Given the scale and nature of the cumulative impact of industrial developments on Blueberry's traditional territory, their treaty rights had been significantly and meaningfully diminished, resulting in an unjustified infringement.

In articulating this standard for infringement, Justice Burke found that the intent or effect of the *Mikisew* Court's "no meaningful right remains" standard could not have been that Treaty 8 would only be infringed "if the right to hunt, fish and trap in a meaningful way no longer exists" (at para 514). 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" (at para 532). The clause does not provide "an infinite power to take up lands" (*Yahey* at para 534). Further, "[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* at para 514). Invoking the honour of the Crown – a constitutional principle requiring that treaties be interpreted in a liberal, purposive manner and presuming that the Crown fulfills its promises – Justice Burke found that treaty signatories did not intend that the Crown have an unlimited discretionary power to effectively extinguish treaty rights by taking up treaty lands. In fact, at the time of signing, the Crown promised to protect the Indigenous signatories' way of life, sustained by their treaty rights indefinitely or, as the Indigenous signatories understood, for "[a]s long as the sun shines" (*Yahey* at para 156). Without this solemn promise, the Cree, Dane-zaa, and Chipewyan signatories of Treaty 8 would not have entered into the treaty (*Yahey* at para 299).

In reaching this conclusion, Justice Burke helpfully considered previous case law on the infringement standard along a spectrum. Thus, "[a]t the lower end of the infringement spectrum lies the idea that 'any interference' constitutes a *prima facie* infringement or *prima facie* interference" (*Yahey* at para 526). This language is used in *Sparrow* and *Halfway River* and draws on the indicia of a *prima facie* infringement outlined in *Sparrow* (i.e., "is the limitation unreasonable," does it "impose undue hardship," or deny the rights holders "their preferred means of exercising that right?"). At the other end of the spectrum "lies the idea expressed in *Mikisew* and repeated in *Grassy Narrows* that treaty rights are infringed when 'no meaningful right' – be it to hunt, fish or trap – remains within a First Nation's traditional territories" (*Yahey* at para 527).

In between these poles, the Supreme Court has described the standard in various ways: does the interference cause a "meaningful diminution" of the right (*Gladstone*), "unduly impair" the right (*Sundown*), or "accommodate" the right (*Marshall* 1 & 2)? These standards inform the trier of fact's assessment of whether a right can be meaningfully exercised (see *Yahey* at paras 522–529). That is, these are context-specific approaches to ascertaining the level of impact that constitutes an infringement, and that is acceptable before the Crown must satisfy the justification test. The *Mikisew* standard must be considered alongside these articulations. As Justice Burke concludes, all the various standards preclude interferences with s 35 rights that would enable the disappearance of the right if impacted further. An interpretation of *Mikisew* holding that an infringement only arises where a right no longer exists would mark it as a significant outlier when placed alongside the other cases. After all, an interpretation of "meaningful" that involves the abridgement of rights up to the point of their disappearance would amount to an extinguishment, which has been constitutionally impermissible since the enactment of s 35 of the *Constitution Act, 1982*. The *Mikisew* majority could not have intended to place the line of substantive infringement where the right would be effectively terminated.

In essence, Justice Burke rejected the view that *Mikisew* creates a significantly weakened standard for infringement. The indicia articulated in *Sparrow* and expanded upon in subsequent cases must inform a judge's interpretation of whether the meaningful practice of treaty rights remains. While the majority in *Mikisew* may have believed that the extension of the duty to consult and the presence of a "taking-up" clause meant that it was inappropriate to hold that every impact constituted an infringement, the decision cannot be taken to have meant that the

Crown would only need to justify infringements when no ability to exercise the right remained. The *Grassy Narrows* trial decision (*Keewatin*) articulated a similar interpretation:

> In *Mikisew*, the Supreme Court of Canada highlighted the difference between substantive treaty rights that cannot be infringed except upon satisfying the *Sparrow* test, and procedural rights that apply under the Honour of the Crown, even before the point of substantive breach of the treaty has been reached. It made it clear that the Honour of the Crown requires consideration of the content of the substantive promise, in effect recognition of the overall promise, consultation and monitoring in anticipation of possible breach and, in some circumstances, accommodation to ensure that the line between possible and substantive breach will not be crossed. The Court held that once the geographic scope had been so narrowed that the hunting right was about to become meaningless, any further authorizations of land uses would need to meet the s. 35 *Sparrow* test. The *Sparrow* analysis would apply to the federal Crown as soon as the line of substantive infringement was crossed. (at para 1473)

In other words, the application of the duty to consult and accommodate to treaty rights must be understood as adding *additional* protections to the rights – procedural protections prior to an infringement – not as lowering the standard the Crown must meet. Indeed, the latter would be impossible to square with the Honour of the Crown and would undermine the basis for the pre-emptive application of the duty to consult and accommodate if it were relied on to limit the protections afforded to rights.

Conclusion on the Infringement Standard

It may seem on a first reading that *Yahey* lowered the threshold for infringement articulated in *Mikisew*. In fact, the Court merely interpreted and clarified what the "meaningful exercise" of a right is, which the Supreme Court had left open to debate. *Yahey*'s finding that an infringement lies where the meaningful exercise of treaty rights has been "significantly or meaningfully diminished" aligns with the impetus for the *Mikisew* Court's focus on the pre-emptory nature of consultation and accommodation – that is, upholding the honour of the Crown and the constitutional status of s 35 rights. To hold that the "no meaningful right" standard means that an infringement action only arises when a right can no longer be exercised contradicts the need to balance the interests under the treaty and the Crown's promise to protect Indigenous signatories' traditional way of life, undermining the honour of the Crown. *Yahey*'s nuanced articulation of the infringement standard corrects misconceptions about the Supreme Court's statement that an infringement lies where "no meaningful right remains" and serves as a benchmark for future infringement litigation. The Attorney General of BC acknowledged as much in his announcement that the Province would not appeal the *Yahey* trial decision.

As laudable as the decision in *Mikisew* was in terms of shifting the onus of upholding treaty rights to the Crown through the duty to consult, *Yahey* and other litigation reckoning with the cumulative impact of industrial developments on treaty rights (e.g., *Fort McKay First Nation v Prosper Petroleum Ltd*, 2020 ABCA 163 (CanLII) [*Fort McKay*]) lay bare the inadequacy of the consultation-focused *Mikisew* infringement doctrine. The reality is that in many parts of the

country, there is a very real risk that "the extinguishment of [treaty rights] will be brought about through the cumulative effects of numerous developments" (Justice Sheila Greckol (concurring), *Fort McKay* at para 79). Extinguishment of s 35 rights has not been constitutionally permissible since April 17, 1982. Since then, only justified infringements have been possible. Whereas the semantic gymnastics born of the "no meaningful right remains" definition of an infringement has enabled complacent governments to neglect cumulative effects – allowing treaty rights to approach the precipice of extinction before an "infringement" can be made out – the *Yahey* decision compels the consideration of cumulative effects before rights are "significantly or meaningfully diminished," potentially heralding a new era in which treaty rights are safeguarded from death by a thousand cuts. Still, the infringement standard remains qualitative, and it remains to be seen how it will be applied to different scenarios. Nevertheless, *Yahey* provides valuable clarity on the spectrum of infringement and its relationship to the duty to consult and accommodate, which will be valuable for courts, governments, and First Nations in the years ahead.

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