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## Counting Straws: *Yahey v British Columbia* and the Future of Cumulative Effects Management in Canada

By: Martin Olszynski

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

Much has already been written about the British Columbia Supreme Court’s ground-breaking decision in *Yahey v British Columbia*, [2021 BCSC 1287 \(CanLII\)](#) (also referred to as Blueberry River First Nation, BRFN, or simply Blueberry throughout). In *Yahey*, the Court agreed with the BRFN that, in the context of BRFN’s traditional territory in Northeastern British Columbia, “the cumulative effects of industrial development authorized by [British Columbia] have significantly diminished the ability of Blueberry members to exercise their rights to hunt, fish and trap in their territory as part of their way of life and therefore constitute an infringement of their treaty rights” (at para 3). My colleague Professor Robert Hamilton and former UCalgary Law JD student (now alumnus) Nick Ettinger wrote two outstanding blogs on the decision when it first came out: a [first post](#) summarized the decision, while a [second](#) focused on *Yahey*’s standard for treaty infringement, i.e., “meaningful diminishment”. They also published a law review article on the decision: Robert Hamilton and Nicholas P. Ettinger, “[The Future of Treaty Interpretation in \*Yahey v British Columbia\*: Clarification on Cumulative Effects, Common Intentions, and Treaty Infringement.](#)” 2023 54-1 Ottawa L Rev 109. In this (very) belated post spurred on by a presentation that I gave at an environmental law conference last month, I focus on the Court’s findings with respect to British Columbia’s approach to resource development, and specifically its [failure to effectively manage the cumulative effects](#) associated with oil and gas and forestry. In my view, and as further set out below, these findings and analysis are relevant to every level of government in Canada: federal, provincial, territorial, Indigenous, and municipal.

### A Brief Primer on Cumulative Effects

Cumulative effects have been defined as “the changes in the environment caused by multiple interactions among human activities and natural processes, which accumulate across time and space” (Hegmann, G. et al. [Cumulative Effects Assessment Practitioners Guide](#), 1999). In prior [ABlawg posts](#) where I’ve discussed the problem of cumulative effects, I have drawn on the work of American ecologist William E. Odum, who described cumulative effects as “the tyranny of small decisions.” For example, with respect to the eutrophication of lakes, i.e., excessive plant growth that leads to a depletion of oxygen necessary for aquatic life (see e.g. [Lake Erie](#)), Odum noted that

[f]ew cases...are the result of intentional and rational choice. Instead, lakes gradually become more and more eutrophic through the cumulative effects of small decisions: the addition of increasing numbers of domestic sewage and industrial outfalls along

with increasing run-off from more and more housing developments, highways, and agricultural fields. (William E Odum, “Environmental Degradation and the Tyranny of Small Decisions” (1982) 32:9 Bioscience 728 at 728)

There are even simpler analogies and metaphors for understanding the mechanics of cumulative effects. Canadian courts have long understood cumulative effects as a “death by a thousand cuts” (*R v Panarctic Oils Ltd*, [1982 CanLII 4944 \(NWT TC\), 12 CELR 29](#)). Another useful metaphor is “the straw that broke the camel’s back,” which [has been described](#) as “a minor happening, circumstance, etc. which, when added to a whole string of other annoyances, is finally too much to bear.” In the resource management context, we can think of each ‘straw’ as a form of land disturbance: an oil or gas well, a pipeline, a road, a mine, a cut block, etc., and the ‘camel’ as the region, territory, or watershed in which they are located.

In addition to simplifying what in practice can be a complex exercise, these metaphors can help to convey the basic problem with resource management regimes throughout most of Canada: governments’ inability, which is often actually an intentional refusal, to assess and describe the ecological conditions of any given region or watershed, whether to Indigenous peoples or the Canadian public more broadly, in order to avoid being constrained by such conditions. In other words, governments generally refuse to find out: (i) how many straws a given region, territory, or watershed *might reasonably be expected* to carry; (ii) how many straws a given region, territory, or watershed is *currently* carrying; and (iii) how many *further* straws will be managed in light of existing straws in those regions, territories or watersheds? Where they do make such attempts, the results often appear deliberately more complex and opaque than necessary.

### **British Columbia’s Resource Management Regimes: “Ships in the Night”**

Justice Emily M. Burke summarizes her primary conclusions at the outset of the decision. Three are most relevant to this post:

This case is novel and the judgment lengthy. For ease of reference, I set out below a very condensed overview of the facts of the claim, the parties’ positions and my essential conclusions on the issues raised...

- The Province has *not, to date, shown that it has an appropriate, enforceable way of taking into account Blueberry’s treaty rights or assessing the cumulative impacts of development on the meaningful exercise of these rights*, or that it has developed ways to ensure that Blueberry can continue to exercise these rights in a manner consistent with its way of life. *The Province’s discretionary decision-making processes do not adequately consider cumulative effects and the impact on treaty rights...*
- ...The extent of the lands taken up by the Province for industrial development (including the associated disturbances, impacts on wildlife, and impacts on Blueberry’s way of life), means there are no longer sufficient and appropriate lands in Blueberry’s territory to allow for the meaningful exercise by Blueberry of its treaty rights.

- ...*Despite having notice of these legitimate concerns, the Province failed to respond in a manner that upholds the honour of the Crown and implements the promises contained in Treaty 8. The Province has also breached its fiduciary duty to Blueberry by causing and permitting the cumulative impacts of industrial development without protecting Blueberry's treaty rights.*  
(at para 3, emphasis added)

At just over 500 paragraphs (see paras 1190 – 1713), Justice Burke's detailed analysis and discussion of British Columbia's regulatory regimes for oil and gas, forestry, and wildlife management ought to be required reading for regulators throughout Canada. Failing that, Hamilton and Ettinger summarize some of her key findings in their [first post](#) on *Yahey*. For example, the two administrative agencies in charge of oil and gas – the Ministry of Energy, Mines and Petroleum Resources and the BC Oil and Gas Commission (now the BC Energy Regulator) – are described as “ships passing in the night,” each erroneously assuming the other accounted for cumulative impacts on treaty rights” (Hamilton and Ettinger, citing *Yahey* at para 1311). Overall, with respect to oil and gas, Justice Burke concluded:

Although the Province has identified certain measures that it says take into account treaty rights and/or cumulative effects, a review and consideration of the evidence reflects this is not the case. I find there is a significant disconnect between the tenuring and permitting decision makers, such that each believes the other considers treaty rights and/or cumulative effects to a greater degree than they actually do. This disconnect has created a gap through which Blueberry's rights have fallen.

*What tools the Province does have in place – including tenure caveats, permit conditions and the Area Based Analysis as presently structured and used by the Oil and Gas Commission – are largely ineffective...* (at paras 1197-1198, emphasis added)

Similarly, with respect to forestry:

...I find that the Province's forestry regime is built upon the fundamental goal of maximizing harvest and replacing all the natural forests with crop plantations that will create efficiencies for the next harvest cycle.

I also find that the operational decisions of district and resource managers are connected to higher level plans and processes that have already zoned much of the Blueberry Claim Area for high intensity forestry.

Finally, *I find that decision makers lack authority to manage cumulative effects, or take into account impacts on the exercise of treaty rights.* As Blueberry points out that, at the end of the day, it is the forestry companies...who hold much of the power regarding what cutblocks to harvest, how and when. (at paras 1562-1564, emphasis added)

Two points are worth making here. The first, admittedly tentative (for now) but based on my fifteen years of practice and research in this area, is that Justice Burke's findings are broadly applicable

to the vast majority of regulatory regimes in every province in Canada, as well as those at the [federal level](#), where, despite some sporadic improvements, the overwhelming focus has always been – and continues to be – on individual project approval without sufficient regard to cumulative effects, whether within or between sectors. Indeed, Alberta appears to have recognized this problem over fifteen years ago, when it first introduced its [Land Use Framework](#), which recognized that there were “more and more people doing more and more activities on the same piece of land... [putting] stress on the finite capacity of our land, air, water and habitat” and that “the old rules will not produce the quality of life we have come to expect”: (Government of Alberta, “[Executive Summary](#)”, *Land-Use Framework*, (2008) at 1). Unfortunately, this Framework has never reached its potential and has since [withered from deficiencies and disuse](#) (see also this series of posts by David Laidlaw, cataloguing the many deficiencies of the first regional plan pursuant to the Land-use Framework, the Lower Athabasca Regional Plan (LARP): [Part I](#), [Part II](#), [Part III](#)).

The second point is that such deficiencies are not inevitable, as the evidentiary record in the *Yahey* litigation makes clear. Critical to Justice Burke’s conclusions with respect to infringement were several products from a “Regional Strategic Environmental Assessment” [RSEA]. In contrast to project-specific impact assessments, which focus on one project at a time, such assessments can be understood as “a means to assess the potential environmental effects, including cumulative effects, of strategic policy, plan and program alternatives for a region” (Canadian Council of Ministers of the Environment, “[Regional Strategic Environmental Assessment in Canada: Principles and Guidance](#)” (2009)). One such product of the RSEA was a map that reflected all of the disturbance in BRFN’s territory, as explained by Justice Burke:

This [RSEA] process is a broad collaborative planning process involving seven Treaty 8 First Nations and the Province, and also includes representatives from industry (primarily from the forestry and oil and gas sectors) as observers. Blueberry joined the Regional Strategic Environmental Assessment process in 2016.

[...]

It was recognized that, in order to progress the work of RSEA, all parties would need one source of data they could use and trust. A data working group was constituted with representatives from both the Province and participating Treaty 8 First Nations.

*The data working group was cognizant that disturbance data associated with certain activities such as oil and gas development and forestry are held in separate government departments. The data are stored and updated differently, and departments do not reference each other’s data in a comprehensive way. For example, if someone wanted to know how many roads there were in northeast BC, they would have to access and review all the datasets, but they would not necessarily know if they had retrieved all the available datasets, or whether they overlapped such that they were double counting.*

*One of the primary tasks of the data working group was to establish a layer of disturbance information that gathered into one place all the relevant datasets stored*

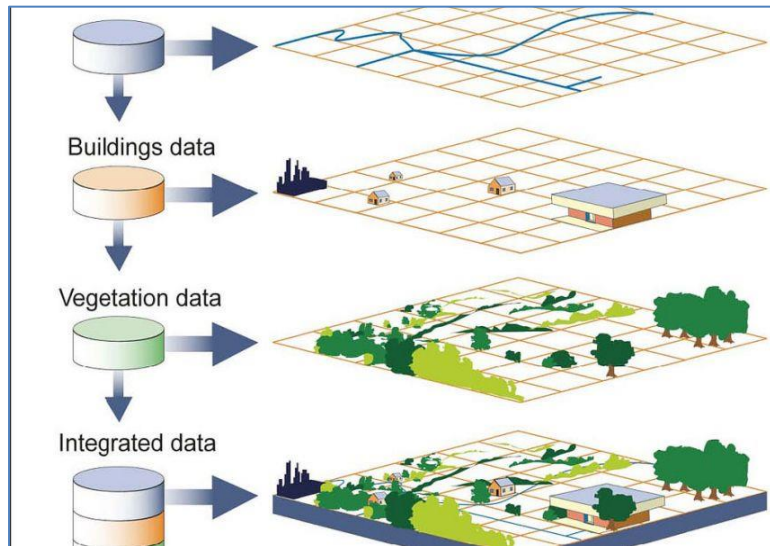
*and utilized by the Province.* Therefore, it was decided that other RSEA work should be put on hold until this reliable disturbance data was generated.

[...]

Dr. Holt requested that Gregory Khem, a GIS technician, calculate the overall disturbance in Blueberry's territory. In other words, take the shape file from the RSEA disturbance layer, "clip" the data from the 25 million hectare dataset included in the RSEA study area to focus on the approximately 4 million hectares that make up the Blueberry Claim Area, and run the calculations (i.e., map the disturbances) applying first a 250-metre, and then a 500-metre, buffer.

*The buffering process was described as simple math: the computer draws either a 250-metre line or a 500-metre line around everything in the data layer, and then it adds up how much area is within those areas and uses the total Blueberry Claim Area as the denominator. This shows how much of the Blueberry Claim Area is affected by disturbance. The results of these calculations indicated that 85% of the Blueberry Claim Area is within 250 metres of a disturbance, and 91% of the Blueberry Claim Area is within 500 metres of a disturbance.* (at paras 868, 879-881, 888-889, emphasis added)

Understanding this evidence may require its own primer in GIS (geographic information systems), and this [one from National Geographic](#) is helpful. For my purposes, it is hopefully sufficient to note that GIS is simply "a computer system for capturing, storing, checking, and displaying data related to positions on Earth's surface" (ibid). Such data is commonly displayed in the form of a map. Maps can be simple or can combine data from multiple sources, which can then be viewed individually or in various combinations. Such data can also be manipulated using various tools. The buffering tool referred to in *Yahey*, above, is commonly used in forestry, e.g. to determine what percentage of a harvestable area is within 15 or 25 metres of a watercourse (and therefore potentially restricted to logging), or which percentage is within a certain proximity of existing roads (and therefore most economical). As one example for Blueberry, having 85% of its claim area within 250 metres of a disturbance exceeds the scientific thresholds for caribou recovery (at para 1710).



Source: <https://education.nationalgeographic.org/resource/geographic-information-system-gis/>

The key takeaway from the above passage in *Yahey*, and further reflected throughout the decision, is this: British Columbia had all the relevant data but did not diligently try to use it in a way that would actually manage cumulative effects and protect BRFN’s treaty rights:

I find that the Province’s work on the development of a cumulative effects framework has been plagued by inordinate delay... The Province has been unable to show that it is effectively considering or addressing cumulative effects in its decision-making. *Current condition reports from the Regional Strategic Environmental Assessment process, whether finalized or in draft, are not currently being incorporated into decision-making* and there is a lack of guidance for decision-makers as to how the various tools that are anticipated to emerge from the work on developing a cumulative effects framework are to be used... (at para 1783, emphasis added).

Again, and at the risk of stating the obvious, the same “inordinate delay” has occurred throughout Canada and certainly in Alberta, where only two regional plans have actually been completed and both suffer from significant deficiencies that the province has thus far refused to address.

### **Implications for Resource Management throughout Canada**

One of the more interesting discussions following *Yahey* relates to its potential impact as a matter of precedent. In their article in the *Ottawa Law Review*, Hamilton and Ettinger suggest that “a comprehensive answer to this requires a paper of its own” (at 148). Focusing on the question of treaty infringement, they suggest that *Yahey* is bound to have implications for other Treaty 8 First Nations, some of whom have already initiated such litigation (e.g., [West Moberly](#) and [Duncan](#) First Nations), but also in other treaty contexts (at 146 – 150).

My focus is on the findings with respect to cumulative effects and their effective management, or lack thereof. Near the end of her judgment, Justice Burke ties the province's failures to its obligations to Blueberry:

As noted by Blueberry, the *Crown has all the power in the relationship*. When the Province and Blueberry cannot agree, the Province can proceed as it intends. Ultimately, however, by doing so on a persistent and consistent basis, the Province has failed in its obligation to diligently and honourably implement the Treaty. *It cannot actively or passively allow the territory and wildlife to be drastically altered, fundamentally impacting Blueberry's ability to carry on their mode of life and meaningfully exercise their rights, by authorizing development without proper measures in place to recognize and manage cumulative impacts and protect treaty rights.*

[...]

In view of all the above, I agree, as Blueberry argued, that the Province has failed to:

- a) develop *processes to assess whether the ecological conditions* in Blueberry's traditional territories are sufficient to support Blueberry's way of life;
- b) develop *processes to assess or manage cumulative impacts to the ecosystems* in Blueberry's traditional territories and/or on their treaty rights;
- c) implement *a regulatory regime or structure that will take into account and protect treaty rights*, and that will guide decision-making for taking up lands or granting interests to lands and resources within Treaty 8; and,
- d) put in place *sufficient interim measures to protect Blueberry's treaty rights* while these other processes are developed.

(at paras 1785, 1787, emphasis added)

I am not an Indigenous rights scholar, but the logic and direction of that jurisprudence and doctrine over the past thirty years suggests to me that an obligation to *effectively* manage cumulative effects should not be restricted to the Treaty 8 context, nor to traditional territories such as BRFN's that have been so heavily disturbed (to the point of treaty infringement). In my view and as further set out below, wherever First Nations have non-trivial concerns about cumulative effects and their potential impacts on their Aboriginal or treaty rights, *Yahey* strongly supports the triggering of a duty to consult and accommodate with respect to those concerns, independent of any individual permit or project-related consultations that may be occurring. Instituting *effective* processes and regimes for managing cumulative effects or, where some such regimes exist, improving them would be the most obvious ways to accommodate such concerns.

Section 35 of the [Constitution Act, 1982](#) protects existing aboriginal and treaty rights throughout Canada. Initial jurisprudence was concerned with identifying those rights and establishing the conditions under which they might be infringed, but subsequent developments – and specifically the duty to consult and accommodate – were a response to Crown attempts to “run roughshod” over such rights pending their negotiation or proof (*Haida Nation v British Columbia (Minister of*

*Forests*), [2004 SCC 73 \(CanLII\)](#) at para 27). This duty is rooted in the honour of the Crown (ibid at para 16). As noted by Justice Burke, “[i]n all its dealings with Indigenous peoples, the Crown must act honourably, in accordance with its historical and future relationship with the Indigenous peoples in question” (*Yahey* at para 83). The duty is triggered “when the Crown has knowledge...of the potential existence of the Aboriginal right or title and contemplates conduct that might adversely affect it” (*Haida Nation* at para 35).

The Supreme Court has confirmed that Crown conduct “is not confined to government exercise of statutory powers,” nor is it “confined to decisions or conduct which have an *immediate impact* on lands and resources... Thus, the duty to consult *extends to ‘strategic, higher level decisions’ that may have an impact* on Aboriginal claims and rights” (*Rio Tinto Alcan Inc v Carrier Sekani Tribal Council*, [2010 SCC 43 \(CanLII\)](#) at paras 43 – 44, emphasis added). That being said, appellate courts have cautioned that an “impact that is, at best, indirect, that may or may not happen at all...and that can be fully addressed later” may be deemed too speculative to trigger the duty (*Hupacasath First Nation v Canada (Minister of Foreign Affairs)*, [2015 FCA 4 \(CanLII\)](#) at para 100; *Buffalo River Dene Nation v Saskatchewan (Minister of Energy & Resources)*, [2015 SKCA 31 \(CanLII\)](#) at para 104). The duty is also not triggered by past wrongs (*Rio Tinto Alcan* at para 45).

In my view, *Yahey* speaks directly to the question of triggering Crown conduct. *Yahey* makes painfully clear what many First Nations have long-since known: the decision to develop processes to *effectively* assess and manage cumulative effects – or more accurately the decision to delay or not develop such processes – is a strategic, higher level decision that will impact Aboriginal claims and rights in a way that cannot be fully addressed later (see also *Coastal First Nations v British Columbia (Environment)*, [2016 BCSC 34 \(CanLII\)](#) at paras 205 – 213). Such decisions should therefore trigger a duty to consult and accommodate affected First Nations – regardless of whether such impacts have reached the point of rights infringement. Indeed, triggering the duty on this basis would reduce the likelihood of such infringements while also reducing the need for First Nations to spend the significant amounts of time and resources in litigation (in addition to *Yahey*, see e.g. *Anderson v Alberta*, [2022 SCC 6 \(CanLII\)](#), wherein the Beaver Lake Cree Nation sought advanced costs to sustain its Treaty 6 infringement suit).

This is not to suggest or argue for any kind of unprecedented positive duty (although I recognize that Justice Burke found that British Columbia owed such a duty pursuant to the terms of Treaty 8). Whatever the merits of such obligations (a matter for its own post), the mechanics by which cumulative effects impact Aboriginal and treaty rights is a paradigm example of government *interference* with such rights, not its failure to *ensure* their meaningful exercise. In the modern regulatory era, governments not only prevent some kinds of environmental harms, but also *enable* other kinds through the process of statutory authorization. There can be no oil and gas, no forestry, no mining, no roads, no bridges, nor dams without government approval. A province’s “regulatory regime controls development and impacts” in a given area (*Yahey* at para 1185).

Understood this way, a duty to consult and accommodate with respect to the management of cumulative effects is a logical extension of *Haida*. *Haida* recognized that limiting reconciliation to the post-proof sphere risked “unfortunate consequences. When the distant goal of proof is finally reached, the *Aboriginal peoples may find their land and resources changed and denuded*” (at para



3, emphasis added). Similarly, *Yahey* demonstrates that while First Nations may be consulted on individual project or permit decisions, government failure to set up processes to effectively manage the cumulative effects of all that activity risks those very same consequences – a risk that increases with each individual project or permit decision. As in *Haida*, this “is not reconciliation. Nor is it honourable” (at para 33).

While such a development in the law may seem jarring to some, contemporaneous developments, such as the implementation of the United Nations Declaration on the Rights of Indigenous Peoples ([UNDRIP](#)), are bound to point in the same basic direction (at least federally and in British Columbia: see *United Nations Declaration on the Rights of Indigenous Peoples Act*, [SC 2021, c 14](#), and *Declaration on the Rights of Indigenous Peoples Act*, [SBC 2019, c 44](#)) (for some initial musings, see Nigel Bankes, “[Implementing UNDRIP: some reflections on Bill C-262](#)”). Fortunately, there are several functioning land-use planning regimes throughout Canada, especially in the north, which we can all learn from (see e.g., [Peel Watershed Regional Land Use Plan](#)). The federal government has also recently [entered into the regional assessment arena](#), including in [Ontario’s Lake of Fire area](#) and for [Offshore Wind Development in Nova Scotia](#), although local governments will undoubtedly be the presumptive leads in the regional planning space. Last but certainly not least, there is the [new regulatory regime](#) agreed to by British Columbia and Blueberry in the wake of the *Yahey* decision. And, of course, Justice Burke’s decision sets out many of the deficiencies to look out for. Assessing and learning from all these efforts is a longer-term endeavour, to be sure. In the meantime, parties might also be guided by the fairly straightforward questions posed at the outset of this post: How many straws (disturbance) is this region or watershed currently carrying? How many can it carry? What is the plan for adding further straws without breaking the region or watershed’s back? If a provincial or federal regulator is unable to answer these basic questions, they’re almost certainly not effectively managing cumulative effects – and that should be unacceptable to all of us.

*I am grateful to Robert Hamilton, Nigel Bankes and David Wright for their insightful comments and suggestions on earlier versions of this post, to Athina Pantazopoulos for her editorial assistance, and to the participants of two workshops over the past year where some of the ideas reflected here were first presented and discussed.*

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