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British Columbia Supreme Court issues precedent-setting cumulative effects decision

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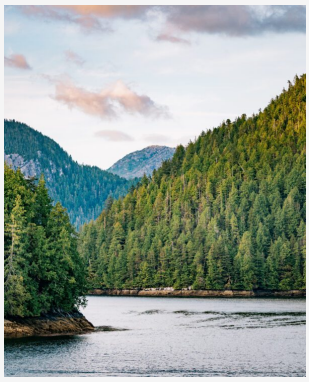

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Summary

On June 29, 2021, the British Columbia Supreme Court released its decision in *Yahey v British Columbia*, in which it ruled that the rights of the Blueberry River First Nations (BRFN) under Treaty 8 in northeast British Columbia had been infringed by the cumulative impacts of industrial developments within Blueberry's traditional territory, including forestry, oil and gas, renewable energy and agriculture. This decision marks a significant departure from past cases involving cumulative effects and treaty rights infringement. Depending on the outcome of any appeal, it could materially increase regulatory risks for new infrastructure projects in northeast British Columbia, and could extend to other areas in Canada where similar claims may be made.

Background

BRFN is a relatively small First Nation in northeast British Columbia (B.C.), with a reserve located approximately 80 kilometres northwest of Fort St. John. BRFN has roughly 190 members living on-reserve and 295 members off-reserve.[1] BRFN's traditional territory is approximately 38,000 square kilometres, spanning from the Alberta-B.C. border in the east to the foothills of the Rocky Mountains in the west, south to the Peace River, and north and east to Pink Mountain, Sikanni Chief, Lily Lake and Tommy Lakes. This area includes most of the Montney natural gas play in B.C., agricultural lands, various municipalities (including Fort St. John and Dawson Creek), active forestry areas, hydro-electric projects (including Site C), and several mines. BRFN's territory also falls within the area of Treaty 8, which BRFN's ancestors signed in 1900. BRFN's traditional territory also overlaps, to varying degrees, with the asserted territories of several other Indigenous groups who were not parties to the proceedings before the Court.

In 2015, BRFN filed a civil action seeking, among other things:

- a declaration that the B.C. government infringed BRFN's rights under Treaty 8, particularly the Crown's oral promises that Indigenous signatories would be as free to hunt, trap and fish after the Treaty as they would be had they never entered into it, and the Treaty would

not lead to forced interference with their mode of life; and

- to enjoin B.C. from approving any further developments within its traditional territory.

After a series of unsuccessful pre-trial applications, including two applications by BRFN to enjoin certain Crown conduct pending the outcome of the trial and a judicial review petition, the B.C. Supreme Court held a full trial to consider BRFN's civil claim. The trial included roughly 70 days of expert and lay witness testimony, tens of thousands of pages of written submissions, and 25 days of oral argument.

Summary of decision

On June 29, 2021, the B.C. Supreme Court released its 511 page decision: *Yahey v British Columbia*, 2021 BCSC 1287 (Yahey) Justice Burke for the Court held that the cumulative effects from all types of industrial development in BRFN's territory have resulted in significant adverse impacts on the lands, water, fish and wildlife in the area, and to the exercise of BRFN's Treaty 8 rights. In particular, she found that BRFN's treaty rights to meaningfully hunt, fish and trap within the BRFN traditional territory have been significantly and meaningfully diminished, such that BRFN's rights under Treaty 8 have been infringed (paras 1116 and 1132).

In language reminiscent of the Alberta Court of Appeal's decision last year in Fort McKay, Justice Burke's conclusions were rooted in her view that B.C. had not acted honourably by allowing resource development to proceed "at an extensive scale" without assessing BRFN's concerns about cumulative effects of this development:

I find that the Province has, for approximately two decades, been aware that the cumulative effects of development in the northeast portion of BC were leading to changes in wildlife habitat and water quality that posed serious concerns, and that by the late 1990s much of [BRFN's Traditional Territory] was being significantly impacted by industrial development. The Province has also, for at least a decade and likely more, had notice from Blueberry that it was concerned about the impacts of cumulative development in [BRFN's Traditional Territory], and on the exercise of their treaty rights. Despite having notice of Blueberry's concerns, I find that the Province has failed to respond in a manner that upholds the honour of the Crown and the obligation to implement treaty promises (para 1750).

[...]

Acting with ordinary prudence in this case required that the Province investigate the concerns regarding cumulative impacts by developing processes to assess cumulative effects in [BRFN's Traditional Territory] and develop ways of managing and mitigating these effects. In the Court's view, ordinary prudence would have required that the Province pause some development in [BRFN's Traditional Territory], or key areas within [BRFN's Traditional Territory], pending the results of this work. Allowing development to proceed in the face of these substantial and well grounded concerns could not be said to be acting with good faith, loyalty, or ordinary prudence with a view to Blueberry's best interests. Ordinary prudence requires long-term planning, looking ahead and considering the likely future effects of current decisions, as opposed to simply stubbornly "staying the course." (para 1805)

Justice Burke granted the following declaratory relief:

1. In causing and/or permitting the cumulative impacts of industrial development on BRFN's treaty rights, B.C. has breached its obligation to BRFN under Treaty 8, including its honourable and fiduciary obligations. B.C.'s regulatory mechanisms for assessing and

taking into account cumulative effects are lacking and have contributed to the breach of its obligations under Treaty 8.

2. B.C. has taken up lands to such an extent that there are not sufficient and appropriate lands in BRFN's traditional territory to allow for BRFN's meaningful exercise of their treaty rights. B.C. has therefore unjustifiably infringed BRFN's treaty rights in permitting the cumulative impacts of industrial development to meaningfully diminish BRFN's's exercise of its treaty rights in its traditional territory.
3. B.C. may not continue to authorize activities that breach the promises included in the Treaty, including B.C.'s honourable and fiduciary obligations associated with the Treaty, or that unjustifiably infringe BRFN's exercise of its treaty rights.
4. B.C. and BRFN 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 BRFN's treaty rights, and to ensure these constitutional rights are respected [para 1894].

Justice Burke suspended Declaration #3 for six months to give the parties the opportunity to negotiate changes to the regulatory regime that recognize and respect BRFN's treaty rights.

Implications

There are many aspects of *Yahey* that warrant comment, but for the purposes of this Update we focus on two key implications: Justice Burke's test for treaty infringement, and the decision's potential impacts on all types of infrastructure development in Canada.

Test for Treaty infringement

Unlike prior Treaty rights jurisprudence, where allegations of infringement focused on a single piece of legislation or regulatory regime, BRFN's claim was based on the cumulative impacts of various activities, projects, and developments in northeast B.C. over the last 120 years, including municipal and agricultural development. Justice Burke considered this development in the context of the promises enshrined in Treaty 8 and found that, while the Crown has the power to take up lands from time to time, that power is not absolute or unrestricted and cannot be used to make the constitutional protection of Indigenous hunting, trapping and fishing rights meaningless (para 275). Among other things, Justice Burke found that BRFN's Treaty 8 rights depend on healthy populations of moose and other wildlife so that the BRFN members have a chance at being successful on their hunts and do not need to travel far from or outside of their territory to find game (para 437). She also noted that BRFN's way of life depends on a relatively stable environment, and that if forests are cut, or critical habitats are destroyed, it is not as simple as finding another place to hunt (para 433).

According to Justice Burke, the test for determining whether treaty rights have been infringed is whether there has been a *significant or meaningful diminishment of the rights* (para. 529). Arguably, this modifies the Supreme Court of Canada's guidance in *Sparrow* and *Mikisew* that infringement occurs when there is "no meaningful exercise of the rights" – a test that Justice Burke concluded would upend the terms of the Treaty (para. 514). Justice Burke's test is much easier to establish than the prior test in *Sparrow* and *Mikisew*, particularly when many parts of Canada (and Indigenous communities themselves) have changed materially over the last 120 years through, among other things, population growth, modernization and climate change. As Justice Burke acknowledged, "with more and more takings and

development it becomes harder and harder for the Crown to fulfill its promise to Indigenous people that their modes of life would not be interfered with" (para. 520).

Importantly, B.C. did not advance the defence that the infringement was justified. Justice Burke observed in obiter that "even if the Province had argued justification, it would have been difficult for the Province to justify the infringements of Blueberry's treaty rights" (para 1855). As the justification defence was not advanced, there remains a gap in the law as to what could justify such infringement in the circumstances. For example, Justice Burke observed (also in obiter) that, while BRFN received $18 million from B.C. in benefits agreements from 2006 to 2013 (which could be viewed as accommodation for impacts to treaty rights), these payments are minimal relative to the annual revenue B.C. receives from resource royalties in the area (para. 1213). While this reasoning does not follow any recognized legal test, this aspect of *Yahey* will likely be used to challenge attempts by provincial or federal governments in future litigation to argue that Treaty rights infringement has been justified by means of financial compensation.

Implications for infrastructure development

Obviously, *Yahey* has direct and serious implications for any future infrastructure development in BRFN's Traditional Territory. Declarations #3 and #4 in the decision may be construed as granting BRFN the right to veto any new development across its entire, expansive territory, without considering the potentially conflicting views of other Indigenous groups whose asserted traditional territories may overlap with BFRN's traditional territory. It is also possible that other Treaty 8 First Nations in northeast B.C. will rely on *Yahey* to assert that they are entitled to the same relief Justice Burke granted BRFN. Unless B.C. successfully appeals *Yahey* or reaches a settlement with BRFN that would allow development to proceed, the future of any new development in this part of B.C. (including, again, most of the Montney gas play in B.C.) may require BRFN's consent – thereby transferring control of a substantial portion of B.C.'s resource base from B.C. to BRFN. If B.C. does not seek to appeal *Yahey*, the appellate courts will not have an opportunity to weigh in on the trial decision.

The effects of *Yahey* will likely not be confined to northeast B.C. Many parts of Canada have seen material population growth, infrastructure and/or resource development since the time that historic treaties with Indigenous groups were entered into. We expect *Yahey* will lead to similar cumulative effects claims across Canada, particularly across the Prairies and northern Ontario with historic numbered treaties similar to Treaty 8. Such claims could inject further uncertainty into Canada's regulatory approval processes, and, if successful, could significantly change the future of resource and infrastructure development in Canada.

The deadline for B.C. to file a notice of appeal is July 29, 2021. Osler will continue to monitor the developments in this important proceeding and their impacts on Canada's regulatory environment.

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[1] British Columbia Assembly of First Nations: https://www.bcafn.ca/first-nations-bc/northeast/blueberry-river-first-nations.