

# Treaty rights and resource development: The cumulative effects claims begin to pile up

JANUARY 11, 2023 6 MIN READ

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Authors: [Maureen Killoran, KC](#), [Richard J. King](#), [Sander Duncanson](#), [Sean Sutherland](#), [Erin Bower](#)

Our [2021 Legal Year in Review update](#) discussed the landmark B.C. Supreme Court decision in *Yahey v. British Columbia* (*Yahey*) which held that the cumulative impacts of industrial development within the traditional territory of the Blueberry River First Nations (Blueberry River) amounted to an infringement of their rights under Treaty 8. As anticipated, *Yahey* led other First Nations communities and groups to file claims alleging treaty infringement based on cumulative impacts from industrial development.

The rise in cumulative effects treaty-infringement claims is an evolving area of Indigenous law with potentially critical implications for resource development and the regulatory frameworks governing project assessment across Canada.

## The B.C. Supreme Court's decision in *Yahey*

In June 2021, the B.C. Supreme Court found in *Yahey* that the cumulative effects from resource development in an area of northeastern B.C. amounted to an infringement of Blueberry River's Treaty 8 rights. As a result of industrial development, at least 85% of Blueberry River's traditional territory was within 500 metres of an industrial feature. The Court found that the extent of lands taken up by the province of B.C. for industrial development left Blueberry River without sufficient land to meaningfully exercise its treaty rights to hunt, trap and fish in a manner consistent with its way of life. Further, the Court held that B.C.'s regulatory regime did not appropriately consider or assess the cumulative impact of development on treaty rights.

As a remedy, the Court declared that the province could not continue to authorize activities that would further infringe Blueberry River's treaty rights. This resulted in a suspension of permit applications in the area. Significantly, the area of northeastern B.C. in question is the location of major resource development activities, including the Site C hydroelectric dam, most of B.C.'s natural gas production, and mining and forestry operations.

The B.C. government did not appeal *Yahey*. Instead, it entered into negotiations with Blueberry River to assess and manage the cumulative impacts of industrial development. The parties reached an initial agreement in October 2021, establishing a \$65-million fund for Blueberry River to, among other things, protect its way of life, restore land and create economic opportunities in the community. A final agreement implementing changes to B.C.'s approach to reviewing industrial activities to account for cumulative impacts and treaty rights is pending.

## Pre-*Yahey* claims

Although *Yahey* is the first decision to find that a treaty has been infringed based on cumulative impacts of development over a period of years, it was not the first claim advanced on these grounds. Two prior claims similarly assert treaty infringement based on cumulative effects. The first involves Beaver Lake Cree Nation, a signatory to Treaty 6, with traditional territory northeast of Edmonton, Alberta. The second involves Carry the Kettle Nakoda Nation (CTK), a signatory to Treaty 4, with traditional territory east of Regina, Saskatchewan. These claims remain ongoing.

## Post-*Yahey* claims

In July of this year, mirroring *Yahey*, Duncan's First Nation (DFN) filed a claim against the government of Alberta alleging an unjustifiable infringement of their treaty rights based on the cumulative effects of development in their traditional territory. Like Blueberry River, DFN is also a signatory to Treaty 8. Its traditional territory is located in the Peace River area of northern Alberta, an area that supports oil and gas, forestry, mining and other industries.

The central premise of the claim is that, because of Alberta's authorization of resource development and other activities, DFN no longer has sufficient land and resources to support the meaningful exercise of their treaty rights and way of life. DFN seeks similar relief to that granted in *Yahey*. This includes court orders declaring that Alberta's regulatory mechanisms are ineffective to assess cumulative effects and directing the province to establish new mechanisms for the assessment of cumulative impacts of development. DFN also seeks to prohibit the province from permitting any activities that further infringe DFN's treaty rights.

In late September, Chapleau Cree First Nation, Missanabie Cree First Nation and Brunswick House First Nation brought a claim against the government of Ontario alleging that cumulative impacts from development have infringed their treaty rights. The traditional territories of these three First Nations are within Treaty 9 in the James Bay region of Ontario.

In addition to advancing the same types of claims and relief as were asserted in *Yahey*, these First Nations are seeking several further remedies, including payment from Ontario of a fair share of the net profits that the province has acquired since 1905 from authorized industrial activities in the area. They are also seeking a declaration that recent changes to environmental legislation and regulations granting exemptions to certain forestry activities unjustifiably infringe their treaty rights, as well as a declaration that the aerial spraying of pesticides without proper authorization breaches their treaty rights.

## Outlook

The provision of Treaty 8 at the centre of *Yahey* protects a First Nation's right to hunt, trap and fish throughout their traditional territory, subject to government regulations and the government's ability to take up land for certain purposes. A version of this provision is present in nine out of the 11 numbered treaties across the country. These treaties cover an expansive portion of Canada, including most of Ontario; portions of British Columbia, the Yukon and the Northwest Territories; and all of Manitoba, Saskatchewan and Alberta.

Given their complexity, these claims will take several years to progress through the courts (or otherwise reach resolution). In the near term, First Nations filing these claims may seek interim injunctions restraining provinces from authorizing new development projects or changes to existing projects on their traditional territories. Over the course of its litigation,

Blueberry River sought two such injunctions. Both were ultimately dismissed by the B.C. Supreme Court; however, interim injunction applications to prevent development in the disputed areas pending the resolution of the claims remain a possibility. Injunction applications will be determined based on the unique facts of each case.

Courts in other provinces do not have to follow the B.C. Supreme Court's decision in *Yahey*. As a lower court decision in one province, the reasoning in *Yahey* is not legally binding elsewhere in Canada. Moreover, *Yahey* was decided based on extensive historical, anthropological, anthropogenic and oral evidence specific to the claim area, to Blueberry River's historic and contemporary use of the region, and to the nature of the developments approved by the province in Blueberry River's traditional territory. The decision was also based on the province's specific permitting and licensing processes, which the Court classified as ineffective to address the cumulative effects of development on treaty rights. Since each province has its own unique history, as well as its own development and regulatory regime, the extent to which courts in other provinces will adopt the reasoning and outcome of *Yahey* remains to be seen.

## Implications

The potential for cumulative effects claims to delay or halt changes to operating projects and the assessment and approval of proposed projects reinforces the importance of engaging with local Indigenous communities and groups early and often to discuss any concerns, to identify and implement measures to mitigate and/or accommodate potential impacts on Indigenous rights (including cumulative impacts on such rights), and to reach agreements to share in the benefits of a project and obtain consent or non-opposition.

Additionally, project operators and proponents operating in areas subject to cumulative effects claims should monitor these proceedings and obtain legal advice on their possible participation as directly affected parties. Operator and proponent participation is particularly important when a plaintiff Indigenous community or group is seeking interim or permanent injunctive relief that may affect project construction or operations. Both the perspective, and evidence, of operators and proponents may be critical to resisting such relief and thereby allowing projects to proceed as planned.