

# *Unprecedented Treaty Rights Decision: Cumulative Effects of Industrial Development Breach Treaty Obligations to First Nations*

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## **Introduction**

The Supreme Court of British Columbia recently released its decision in *Yahey v British Columbia*, 2021.<sup>1</sup> This decision is unprecedented because—for the first time—the cumulative effects of government programs and policies have been found to breach Crown Treaty obligations to First Nations. In this case, the Court found that the cumulative effects of provincially authorized industrial development infringed the Blueberry River First Nations (“BRFN”) Treaty Rights.<sup>2</sup>

At 512 pages, the case is lengthy and considers an extraordinary amount of evidence including history, ethnography, wildlife science, geography, geology, forestry, land use planning and various regulatory regimes, and evidence from BRFN members about the impacts on the exercise of their treaty rights.

## **Brief Overview**

BRFN’s territory is located in the upper Peace River region of northeastern British Columbia (BC), approximately 65 kilometres north of Fort St. John.<sup>3</sup> Signatory to Treaty 8, BRFN has the right to pursue hunting, trapping and fishing, within some 38,000 square kilometres of traditional territory.<sup>4</sup> While Treaty 8 recognises the power of the Province to take up lands, it is not an unfettered power but must be exercised in a way that upholds promises and protections of Treaty 8.

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<sup>1</sup> *Yahey v British Columbia*, 2021 BCSC 1287 at paras 1880-1881.

<sup>2</sup> *Ibid* at para 1894.

<sup>3</sup> *Ibid* at para 11.

<sup>4</sup> *Ibid* at paras 14 and 20.

Significant industrial development has taken place in that area recently, including oil and gas, forestry, mining, hydroelectric and agriculture. In 2015, BRFN had commenced a lawsuit against BC, alleging infringement of their constitutionally protected rights as a result of the cumulative effects of industrial activities within their traditional territory. BRFN sought (1) a declaration that BC had infringed its obligations under Treaty 8, and (2) an injunction preventing further developments within their traditional territory.

### The Decision

The Court concluded that industrial activity resulted in less than 14 percent of forests in the region being left intact, with a correlated decline in moose, caribou and other wildlife populations in the traditional area.<sup>5</sup> Additionally, “[b]y 2018, disturbance had increased such that 85% of the Blueberry [traditional area] was within 250 metres of an industrial disturbance” (emphasis added).<sup>6</sup>

The Court found that BC diminished and infringed BRFN’s Treaty Rights to such an extent, that BRFN could no longer meaningfully exercise them.<sup>7</sup> Consequently, the Court (1) held that the Province must cease authorizing activities that breach its Treaty 8 obligations, and (2) suspended the declaration for six months in order for the parties to negotiate regulatory changes that would respect BRFN’s Treaty Rights.<sup>8</sup>

### Treaty Infringement Test

The Court determined that the test for Treaty Right infringement is whether “there has been a *significant or meaningful diminishment* of the [Treaty] [R]ights” (emphasis added).<sup>9</sup> This is a different and broader interpretation of the Supreme Court of Canada test in *R v Sparrow* and *Mikisew Cree Nation v Canada*, which states that an infringement occurs when there is “*no meaningful exercise* of the [Treaty] [R]ights” (emphasis added).

Applying this new test, the Court found that:<sup>10</sup>

[T]he 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. *The cumulative effects of industrial development authorized by the Province have significantly diminished the*

<sup>5</sup> *Ibid* at paras 1122-1128.

<sup>6</sup> *Ibid* at para 1122.

<sup>7</sup> *Ibid* at paras 1129-1133.

<sup>8</sup> *Ibid* at para 1888.

<sup>9</sup> *Ibid* at para 529.

<sup>10</sup> *Ibid* at para 1808.

*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.* The Province has not justified this infringement (emphasis added).

### **Breach of the Honour of the Crown**

The Court found that, for at least a decade, BC had been notified of BRFN’s concerns regarding the cumulative effects of industrial development on the exercise of its Treaty Rights. Evidence also showed that the province had actively encouraged the aggressive development of BRFN’s traditional area by means of specific royalty programs and ‘Jobs Plan’ policies.<sup>11</sup>

After reviewing BC’s permitting regimes across all industries, the Court concluded that the province did not establish regulatory mechanisms sufficient to meet its obligations under Treaty 8. It authorized development without consideration of cumulative effects on Treaty rights. The Court found that consultation on a project by project basis does not discharge the Crown’s obligation to protect Treaty rights from cumulative impacts of industrial development. The Court concluded that BC had breached the honour of the Crown.<sup>12</sup>

### **Breach of Fiduciary Duty**

Fiduciary duty, at a minimum, requires the Crown to act with ordinary prudence with a view to the best interest of its Indigenous beneficiaries.<sup>13</sup> Whilst the Crown must meet this standard of conduct, “it is not in breach of its fiduciary obligations if it fails to deliver any particular result”.<sup>14</sup>

Despite BC’s project-by-project consultation process, the Court held that the Province breached its fiduciary duty to BRFN “by causing and permitting the cumulative impacts of industrial development *without protecting Blueberry’s treaty rights*” (emphasis added).<sup>15</sup>

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<sup>11</sup> *Ibid* at para 1413.

<sup>12</sup> *Ibid* at paras 1750-1751.

<sup>13</sup> *Ibid* at para 92.

<sup>14</sup> *Ibid* at para 1800.

<sup>15</sup> *Ibid* at paras 1735 and 1809.

## Remedy

The Court granted the following declarations:<sup>16</sup>

- 1 BC breached its Treaty 8 obligations to BRFN due to its insufficient mechanisms for assessing the cumulative impacts of industrial development;
- 2 BC had taken up lands to such an extent that BRFN could not meaningfully exercise their Treaty Rights. The Province had 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;
- 3 BC could not authorize further activities that breach its Treaty obligations or unjustifiably infringe BRFN's exercise of its Treaty Rights; and
- 4 The parties were now required to negotiate for timely enforceable mechanisms to assess and manage the cumulative impacts of industrial development on BRFN's Treaty Rights.

## Significance of this Decision

While there is a 30-day appeal period of the Court decision, there are potential implications respecting Indigenous litigation and industrial development.

First, this case serves as a reminder that while the duty to consult and accommodate is an appropriate response to asserted rights, established and existing rights must be respected and upheld, or in the alternative any infringement of those rights must be justified according to the test set out years ago by the Supreme Court in the *Sparrow* decision. We are likely to see greater attention paid to whether rights are asserted or proven by those taking part in the duty to consult process.

Second, this is the first case where cumulative effects were found to constitute an infringement of Aboriginal rights recognized in Section 35 of the Constitution Act. The Court required BC and BRFN to establish a process that addresses the cumulative impacts of industrial development on BRFN's Treaty Rights. This precedent could introduce a stronger more comprehensive assessment of cumulative impacts in connection with federal and provincial permitting processes across Canada. In certain cases, a project-by-project assessment of cumulative effects may not be sufficient to determine whether there has been a significant or meaningful diminishment of treaty rights.

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<sup>16</sup> *Ibid* at para 1894.

Third, with the declaration that there had been a significant or meaningful diminishment of BRFN's treaty rights due to cumulative industrial impacts, it is likely that other First Nations will not wait for their treaty rights to be so diminished and will seek injunctive relief to prevent the same. However, the effort to bring a successful case should not be underestimated; BRFN prepared a huge amount of evidence across numerous disciplines about cumulative effects and the regulatory processes.

Finally, at the heart of this case is interpretation of Treaty 8, based on historical evidence of the circumstances of the signing of the Treaty. While the circumstances of signing may be different, similar language is found in other historical numbered treaties. This may bring more focus on the nature of promises made in historic treaties.

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