

Yahey v British Columbia **2021 BCSC 1287 (CanLII)** **Case Summary**

On June 29, 2021, the British Columbia Supreme Court released its decision in [*Yahey v British Columbia*](#). This case is significant because it represents the first time that a court in Canada has found treaty infringement based on the cumulative effects of development within a First Nation's territory.

Overview of the Court's Decision

Blueberry River First Nations ("Blueberry") is a Dane-zaa and Cree community located in the Upper Peace River region in what is now northeastern British Columbia. Blueberry is a party to Treaty 8, having adhered to the Treaty in 1900. Since adhering to the Treaty, Blueberry's territory has been highly impacted by industrial development of all kinds.

Blueberry filed its claim in 2015 alleging that the cumulative effects of industrial development had damaged the forests, lands, waters, fish and wildlife within their traditional territory and had therefore had a profound and negative effect on their members' ability to exercise their Treaty 8 rights.

In its defence, the Province relied on the taking up clause of the Treaty which gives the government the power to take up lands within the Treaty territory for specific purposes. The Province argued that the Treaty would only be infringed if so much land were taken up that no ability to exercise the Treaty right remained.

The Court rejected the Province's position and found in favour of Blueberry. The Court said that the Treaty does not give the Province the infinite power to take up lands--to hold otherwise would leave Blueberry with an "empty shell of a treaty promise."¹ Rather, the Province's power to take up lands under the Treaty must be exercised in a way that upholds the Treaty's promises. Therefore, the test for treaty infringement is not whether there is no ability left to exercise the rights at all, but whether a First Nation's rights have been significantly diminished. Blueberry's exercise of rights must remain meaningful in the face of the Province's ability to take up lands. The Court found that the Province had taken up so much land that the exercise of rights was no longer meaningful.

Further, the Court held that the Province had failed to honourably and diligently implement the Treaty. The honour of the Crown requires the Province to act with diligence and integrity to implement, uphold and protect the purpose and promise of Treaty 8. The Court found that the existing regulatory processes for authorizing industrial development do not adequately account for cumulative effects or ensure that Treaty rights are protected.²

¹ *Yahey v British Columbia*, 2021 BCSC 1287 [*Yahey*] at paras. 512, 534.

² *Yahey* at para. 1751.

Having found that the Province breached the Treaty and infringed Blueberry's Treaty rights, the Court issued a declaration prohibiting the Province from authorizing further activities which infringe Blueberry's rights.³ This prohibition is suspended for a 6-month period to provide the parties an opportunity to negotiate changes to the regulatory regime to ensure Blueberry's rights are recognized and protected.⁴

Test for Infringement

The Province and Blueberry fundamentally disagreed at trial as to the test for treaty infringement. The Province argued that the test for infringement is whether the Crown has taken up so much land that "no meaningful right" to hunt, fish or trap remains. The Court disagreed with the Province, holding that no rights remaining is not the test for infringement. The Court confirmed that the Province does not have infinite power to take up treaty lands. Rather, treaty rights are infringed when there has been a significant or meaningful diminishment of the rights.⁵

Under this test, the Court determined that Blueberry's treaty rights had been infringed because the Province has taken up so much land that Blueberry can no longer meaningfully exercise its treaty rights. Significantly, the Court did not accept that there had been no infringement because Blueberry members can continue to exercise their treaty rights within a broader traditional territory, outside the bounds of the territory at issue in the case.⁶ Nor did Blueberry need to show that they had ceased exercising their rights to make out their infringement claim, stating "the law does not require that Indigenous people stop trying to exercise their treaty rights."⁷

Significantly, the Province did not advance a justification defence. Therefore, we do not know what could justify such an infringement under the circumstances. However, the Court noted 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.⁸

Cumulative Effects

This case is fundamentally about how far the Province can go in permitting cumulative effects in Treaty 8 territory before the Treaty is infringed and the Treaty promises breached. The Court's main findings speak to this tipping point. Where a Treaty 8 First Nation can show that so much land has been taken up that the exercise of their treaty rights has been meaningfully diminished, they will be able to make out a claim for infringement. The Court's holding incorporates a consideration of cumulative effects into the test for infringement.⁹

Further, the Court's decision regarding breach of the Treaty requires that regulatory regimes incorporate a consideration of cumulative effects. The Court found a "persistent pattern of redirection" on the part of the Province, where Blueberry would be told that its concerns about

³ *Yahey* at para. 1894.

⁴ *Yahey* at para. 1895.

⁵ *Yahey* at para. 529.

⁶ *Yahey* at para. 657.

⁷ *Yahey* at para. 1107.

⁸ *Yahey* at para. 1855.

⁹ *Yahey* at para. 520.

cumulative effects would be addressed elsewhere and found that this conduct frustrated the essential promise of the Treaty.¹⁰ While the Province had “all the power in the relationship,” that power was exercised in breach of its obligations under the Treaty.¹¹

The Court agreed with Blueberry that the Province had failed to:

1. develop processes to assess whether the ecological conditions in Blueberry’s traditional territories are sufficient to support Blueberry’s way of life;
2. develop processes to assess or manage cumulative impacts to the ecosystems in Blueberry’s traditional territories and/or on their treaty rights;
3. 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,
4. put in place sufficient interim measures to protect Blueberry’s treaty rights while these other processes are developed.

Why is this Case Important?

This case is important because it is the first case in Canada to consider treaty infringements arising from the cumulative effects of development rather than infringement based on a specific project, authorization or legislative restriction. For the first time a court has found that: (1) a Province breached treaty promises by permitting the cumulative impacts of industrial development on treaty rights; and (2) infringed a treaty by taking up lands to such an extent that there are insufficient lands for the meaningful exercise of treaty rights.

This case calls upon the British Columbia government to do more to protect Treaty rights and uphold the promises of Treaty 8. It will likely also have implications for other Treaty 8 Nations as well as First Nations across Canada who are signatories to treaties with similar language.

The case will may affect other BC First Nations as the Province reviews its regulatory regime and makes changes to account for the cumulative effects of development on the exercise of Aboriginal and treaty rights.

Another significant aspect of this case is its implications for future development within Blueberry’s territory. The Court’s declarations may be construed as requiring Blueberry’s consent for any such development. This could lead to conflict, not only with proponents, but also perhaps with other Nations with overlapping territories.

Given the significance of the Court’s decision, the case will almost certainly be appealed. The Province has 30 days from the date of the judgment to do so (until June 29, 2021).

¹⁰ *Yahey* at para. 1779.

¹¹ *Yahey* at para. 1785.