

# B.C. Supreme Court rules that cumulative effects of industrial development infringed treaty rights of Blueberry River First Nations

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In [Yahey v British Columbia](#), the British Columbia Supreme Court (BCSC) recently decided that B.C.'s industrial policies over decades have resulted in accumulated changes to the environment—known as cumulative effects—that infringed Blueberry River First Nations' (Blueberry River) Treaty 8 rights. This precedent-setting decision marks the first time a Canadian court has found an infringement of Indigenous Treaty rights, as the result of the cumulative effects of various government policies and permitted projects over decades, rather than as a result of a specific action or project. The Court found that the effect of B.C.'s industrial development policies is that there are no longer sufficient available Treaty lands and resources over which Blueberry River First Nations may effectively exercise their Treaty rights.

## What you need to know

- Blueberry River is based in Northeast British Columbia, and adheres to Treaty 8, which provides rights for over 38,000 km of territory, including rights to hunt moose, caribou and other furbearing species. In recent decades, Treaty 8 lands have been subject to significant industrial development, including in the agriculture, forestry, mining, hydroelectric, and oil and gas sectors.
- The Court found that B.C. infringed Blueberry River's Treaty rights by authorizing these activities, the cumulative impact of which has significantly diminished Blueberry River's ability to exercise their rights in their traditional territory. The Government did not present a justification defence.
- The Court also found that B.C. breached its fiduciary duty to Blueberry River and the honour of the Crown. The Court found that B.C. had known for a decade that Blueberry River had concerns about the cumulative impacts of industrial development, did not respond honourably to those concerns, and continued to permit industrial development.
- The BCSC issued two further declarations with forward-looking effect:
  - B.C. is prohibited from continuing to authorize activities that breach Treaty 8 or that unjustifiably infringe Blueberry River's treaty rights (which will enter into force in six months).

- B.C. and Blueberry River must consult and negotiate enforceable mechanisms to assess and manage the cumulative impacts of industrial development on Blueberry River's Treaty rights, and to ensure that these rights are respected.

## The decision

Blueberry River's traditional territory covers 38,000 km of the upper Peace River region of Northeast British Columbia, falling within Treaty 8. Treaty 8 covers a larger area of Northeastern British Columbia, Northern Alberta, and Northwestern Saskatchewan, however Blueberry River's Treaty rights arise in the specific areas where the Nations traditionally hunted, fished and trapped.

The Court's 512-page decision follows 160 days of trial. It addresses unique aspects of the test for infringement of a right protected by section 35 of the *Constitution Act, 1982*, the application of the honour of the Crown, and the Crown's fiduciary duty in respect of Indigenous peoples, and appropriate remedies in this circumstance, discussed below.

Animating the Court's reasons were findings related to the breadth of Treaty 8 rights. The Court eschewed a narrow reading and held that Treaty 8 guarantees that signatory and adherent First Nations would have the right to continue their way of life based on hunting, fishing and trapping throughout their territory. Inherent in this promise is that the Crown would not infringe the basic elements required for this way of life. The Court found that hunting, fishing and trapping are core aspects of Blueberry River's identity, that depends on a stable environment so that traditional knowledge of places to hunt, fish and trap remains relevant and applicable.

## Infringement

The parties disagreed about what was required to demonstrate infringement of a Treaty right. The Court rejected B.C.'s argument that the infringement test focuses on a narrow question of whether Treaty rights can be exercised in some form. The Court held that the infringement test must focus on whether a Treaty right can be meaningfully exercised<sup>1</sup>. The Court found that while an infringement is obvious where there is no meaningful ability to exercise a right, an infringement will also occur where there has been a "significant" or "meaningful diminishment" of the ability to exercise a right. The Court also rejected B.C.'s argument that there is no infringement if Blueberry River could exercise its treaty rights in other broader areas beyond the "core" of its traditional territory.

The Court found that the health of wildlife populations are of fundamental importance to Blueberry River's exercise of its Treaty rights, and that successive forms of industrial activity through agriculture, forestry, oil and gas development, hydroelectric development and mining, together with the large road networks developed to access these developments, have caused or contributed to the significant decline in moose, caribou, marten and fisher populations. The Court noted the consistency of evidence regarding diminution of these species causing significant adverse impacts on traditional hunting, fishing and trapping practices and areas, fragmentation and pollution of lands, and concerns from Blueberry River about safety of using their traditional territories.

The Court found that, as a result, there is no longer sufficient appropriate lands in Blueberry River's traditional territory for its members to exercise their Treaty rights.

## Breach of the honour of the Crown

The honour of the Crown applies to government conduct in implementing any Indigenous Treaty. The Court held that the honour of the Crown requires B.C. to implement Treaty 8 in a manner that ensures that Blueberry River can meaningfully exercise its Treaty rights. That in turn requires B.C. to implement on an ongoing basis, regulatory procedures that are sufficient to protect Blueberry River's Treaty rights. The Court concluded that applicable regulatory processes were not sufficient, and as a result B.C. breached the honour of the Crown.

In making this finding, the Court reviewed applicable regulatory processes for oil and gas and forestry approvals, among others, and found that the processes did not sufficiently assess impacts on Blueberry River's Treaty rights or the cumulative effects of industrial development on those rights. The Court also found that B.C. had actively encouraged forestry and oil and gas development in Blueberry River's territory through measures such as royalty programs and employment policies. The Court contrasted these policies and regulatory structures with years of consultation with Blueberry River, in which the Nations raised their view that the current framework was unable effectively address cumulative impacts. The Court found that the Crown's failure to meaningfully respond to those concerns resulted in "death by a thousand cuts" and constituted a breach of the honour of the Crown.

## Breach of fiduciary duty

The Crown has a fiduciary duty in respect of Indigenous peoples in certain contexts. The Court also held that B.C. had a fiduciary duty to implement Treaty 8 in a manner that is in the best interests of Blueberry River, and that B.C. breached that duty. The fiduciary duty was found on the basis that B.C. exercises discretion over Blueberry River's treaty rights when deciding to take up lands for industrial development in Blueberry River's traditional territory, implements natural resource regulatory structures affecting Blueberry River's Treaty rights, and makes decisions that affect the lands, waters and wildlife that Blueberry River relies on to exercise its Treaty rights.

The Court found that, despite consulting in respect of impacts on Treaty rights on a project-by-project basis, a project-specific approach has not addressed the cumulative effects of industrial development. The Court held that, in light of the concerns raised by Blueberry River, B.C. was required to do something more to address cumulative effects.

The Court found that B.C. is not required to prioritize Treaty rights over other interests in every circumstance. However, its fiduciary duty required B.C. to investigate concerns regarding cumulative impacts and develop methods of mitigating these impacts. The Court also found that B.C. is required to pause further development in Blueberry River's traditional territory until this mitigation work is completed. When cumulative impacts are assessed and managed to ensure Blueberry River's Treaty rights are protected, development can continue.

## Remedy

The BCSC issued four declarations, developing the law on appropriate remedy in this circumstance. Two declarations relate to the current state of affairs, and two are forward looking. None of the remedies ordered require changes to existing industrial developments. They are:

1. In causing or permitting the cumulative impacts of industrial development on Blueberry River's Treaty rights, B.C. breached its obligation to Blueberry River under Treaty 8, including BC's honourable and fiduciary obligations.
2. B.C. has taken up lands to such an extent that there are not sufficient appropriate lands in Blueberry River's traditional territory to allow meaningful exercise of their Treaty rights. B.C. therefore infringed Blueberry River's Treaty rights.
3. B.C. may not continue to authorize activities that breach Treaty 8, including BC's honourable and fiduciary obligations associated with the Treaty, or that unjustifiably infringe Blueberry River's exercise of its Treaty rights. This declaration is suspended for six months to allow the parties time to negotiate mechanisms to ensure that Blueberry River's rights are respected.
4. B.C. and Blueberry River must act with diligence to consult and negotiate timely enforceable mechanisms to assess and manage the cumulative impact of industrial development on Blueberry River's Treaty rights, to ensure they are respected.

## Implications

This is the first case where a Court has found infringement of section 35 rights on the basis of cumulative effects. It has potentially significant implications, including on future cumulative effects litigation and the discharge of the duty to consult.

While this decision may be appealed<sup>2</sup>, it demonstrates a potentially viable path to establishing an infringement of Aboriginal or Treaty rights on the basis of cumulative effects of industrial development. Indigenous groups pursuing similar claims will no doubt rely on this decision. The text of the Numbered Treaties, which cover territory from portions of B.C. to Ontario, and Northwest Territories and Yukon, is similar in many respects. While the interpretation in this case was in part driven by promises given by the Crown in the context of negotiating Treaty 8, a similar interpretation may be sought for Numbered Treaties.

This decision also found the established regulatory frameworks enacted by B.C., which involve Indigenous consultation, to be insufficient in accounting for cumulative effects of industrial development. The question of how to meaningfully address cumulative effects is complex, requiring analysis of many industries, species, and government priorities. It is one that is likely to be more significant in future regulatory processes. The implications of this decision can be expected to influence the future development of the duty to consult and accommodate and other practices.

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<sup>1</sup> We note that the test for infringement applied by the Court—a “significant” or “meaningful diminishment”—is arguably broader than the standard set out by the Supreme Court of Canada in *R v. Sparrow*, [1990] 1 SCR 1075 and *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, 2005 SCC 69 of “no meaningful exercise of the rights.”

<sup>2</sup> The deadline to commence an appeal is July 29, 2021.

*To discuss these issues, please contact the author(s).*

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