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The Future of Treaty Interpretation in *Yahey v British Columbia*: Clarification on Cumulative Effects, Common Intentions, and Treaty Infringement

Robert Hamilton and Nicholas P. Ettinger

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Article abstract

On June 29, 2021, Justice Emily Burke of the Supreme Court of British Columbia ruled that the Province of British Columbia unjustifiably infringed the Treaty 8 rights of Blueberry River First Nation by "permitting the cumulative impacts of industrial development to meaningfully diminish Blueberry's exercise of its treaty rights." The decision was a highly anticipated one: *Yahey* is the first case to explicitly consider whether the *cumulative* impact of industrial development on a First Nation's ability to exercise treaty rights in their traditional territory may constitute a treaty infringement. The "piecemeal infringement" of Aboriginal and treaty rights significantly undermines Indigenous peoples' constitutional rights and legal doctrine has been slow to respond. Several cases are working their way through the courts considering these intractable issues. *Yahey* provides a well-reasoned and doctrinally sound interpretation of treaty rights that provides a model for what a doctrinal response might look like. This paper outlines the arguments *Yahey* developed on these issues, sets them within the broader context of the development of treaty interpretation doctrine, and considers how persuasive they ought to be for subsequent courts.

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ON JUNE 29, 2021, Justice Emily Burke of the Supreme Court of British Columbia ruled that the Province of British Columbia unjustifiably infringed the Treaty 8 rights of Blueberry River First Nation by "permitting the cumulative impacts of industrial development to meaningfully diminish Blueberry's exercise of its treaty rights." The decision was a highly anticipated one: *Yahey* is the first case to explicitly consider whether the *cumulative* impact of industrial development on a First Nation's ability to exercise treaty rights in their traditional territory may constitute a treaty infringement. The "piecemeal infringement" of Aboriginal and treaty rights significantly undermines Indigenous peoples' constitutional rights and legal doctrine has been slow to respond. Several cases are working their way through the courts considering these intractable issues. *Yahey* provides a well-reasoned and doctrinally sound interpretation of treaty rights that provides a model for what a doctrinal response might look like. This paper outlines the arguments *Yahey* developed on these issues, sets them within the broader context of the development of treaty interpretation doctrine, and considers how persuasive they ought to be for subsequent courts.

LE 29 JUIN 2021, la juge Emily Burke de la Cour suprême de la Colombie-Britannique a rendu sa décision affirmant que la province de la Colombie-Britannique avait enfreint de façon injustifiée les droits d'une Première nation de Blueberry River en vertu du Traité no 8 en « permettant aux impacts cumulatifs du développement industriel de diminuer de façon significative l'exercice par Blueberry de ses droits issus du traité ». Cette décision était fort attendue. L'affaire *Yahey* est la première affaire à considérer explicitement si l'impact *cumulatif* du développement industriel sur la capacité qu'a une Première nation de pouvoir exercer ses droits issus de traités sur son territoire traditionnel peut constituer une violation des droits issus du traité. Cette violation « fragmentaire » des droits autochtones et des droits issus de traités porte gravement atteinte aux droits constitutionnels des peuples autochtones et la doctrine juridique prend du temps à réagir. Plusieurs affaires faisant leur chemin devant les tribunaux soulèvent ces questions insolubles. L'affaire *Yahey* présente une interprétation raisonnée et doctrinalement fondée sur les droits issus de traités fournissant ainsi un modèle de ce à quoi pourrait ressembler une réponse doctrinale. Cet article présente les arguments évoqués par l'affaire *Yahey* sur ces questions, les place dans un plus large contexte en ce qui concerne l'évolution de la doctrine de l'interprétation des traitées, et examine dans quelle mesure ils devraient être plus convaincants pour les décisions subséquentes des tribunaux.

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The Future of Treaty Interpretation in *Yahey v British Columbia*: Clarification on Cumulative Effects, Common Intentions, and Treaty Infringement

Robert Hamilton[*] *and Nicholas P. Ettinger*[**]

I. INTRODUCTION[1]

On June 29, 2021, Justice Burke of the Supreme Court of British Columbia ruled that the Province of British Columbia unjustifiably infringed the Treaty 8 rights of Blueberry River First Nation (Blueberry) by "permitting the cumulative impacts of industrial development to meaningfully diminish Blueberry's exercise of its treaty rights."[2] The decision was a highly anticipated one: *Yahey* is the first case to explicitly consider whether the *cumulative* impact of industrial development on a First Nation's ability to exercise treaty rights in their traditional territory may constitute a treaty infringement. Such "piecemeal infringement" of Aboriginal and treaty rights significantly undermines Indigenous peoples' constitutional rights, and legal doctrine has been slow to respond.[3] Several cases are working their way through the courts considering these intractable issues. *Yahey*

* Associate Professor, University of Calgary Faculty of Law.

** M.Sc. (University of Texas at Austin), J.D. (University of Calgary), Torys LLP.

1 Some sections of this paper were previously published as blog posts. See Robert Hamilton & Nick Ettinger, "Blueberry River First Nation and the Piecemeal Infringement of Treaty 8" (20 July 2021), online (blog): *ABlawg* <ablawg.ca/wp-content/uploads/2021/07/Blog_RH_NE_Blueberry_Treaty_Rights.pdf>; Robert Hamilton & Nick Ettinger, "*Yahey v British Columbia* and the Clarification of the Standard for a Treaty Infringement" (24 September 2021), online (blog): *ABlawg* <ablawg.ca/wp-content/uploads/2021/09/Blog_RH_NE_Yahey_Infringement.pdf>.

2 *Yahey v British Columbia*, 2021 BCSC 1287 at para 1884 [*Yahey*].

3 See Bruce McIvor, "The Piecemeal Infringement of Treaty Rights" (18 August 2015), online (blog): *First People's Law Blog* <www.firstpeopleslaw.com/public-education/blog/the-piecemeal-infringement-of-treaty-rights>.

provides a well-reasoned interpretation of treaty rights doctrine and a model for a doctrinally sound response.

After finding that Blueberry's rights under Treaty 8 had been infringed, Justice Burke ordered the Government of British Columbia to consult and negotiate with Blueberry to establish regulatory mechanisms to manage and address the cumulative impacts of industrial development on Blueberry's treaty rights. A six-month timeline to reach a solution was set, and the Province was prohibited from permitting further industrial activity in Blueberry's traditional territory, absent an agreement.[4] This is significant not only because of the nature of the remedy, but because Blueberry's traditional territory overlies the vast natural gas and liquids resource of the Montney Formation in northeast British Columbia. The Montney reserves form the anchor for LNG Canada's $40 billion liquefied natural gas processing and export facility under construction at Kitimat, British Columbia, which will be serviced by the Coastal GasLink Pipeline, as well as the planned Woodfibre LNG export terminal on the Howe Sound fjord near Squamish, British Columbia, and the Nisga'a Nation's proposed Ksi Lisims floating LNG terminal on Pearse Island, British Columbia.

The decision has important implications for Indigenous peoples, extractive industries, infrastructure development, and the Crown, creating uncertainty about the future of oil and gas and renewable energy development in northeast British Columbia, and about the common law respecting treaty infringement. With its nuanced consideration of constitutional issues related to treaty rights, *Yahey* will be an important precedent for forthcoming treaty infringement litigation, particularly lawsuits focused on cumulative impacts.[5] Justice Burke identified four issues relevant to the disposition of the case: 1) What are the rights and obligations protected under Treaty 8?; 2) What is the test for finding an infringement of treaty rights?; 3) Have Blueberry's treaty rights been infringed?; and 4) If the plaintiffs can no longer meaningfully exercise their Treaty 8 rights, has the Province breached the Treaty in failing to diligently implement the

4 *Yahey*, *supra* note 2 at paras 1894–1895.

5 See e.g. Carry the Kettle First Nation's Treaty 4 piecemeal infringement lawsuit: *Jack et al v Saskatchewan*, (21 December 2017), OBG 3225 SKKB (Statement of Claim) [*Jack SOC*]; Beaver Lake Cree Nation's Treaty 6 piecemeal infringement lawsuit for which a trial date has been set for 2024: *Lameman et al v Alberta*, (13 July 2012) 0803 06718 ABKB (Amended Statement of Claim) [*Lameman SOC*]; Duncan First Nation's Treaty 8 piecemeal infringement lawsuit: *Gladue et al v Alberta*, (18 July 2022) 2203 10939 ABKB (Statement of Claim) [*Gladue SOC*].

promises contained therein in accordance with the Honour of the Crown?[6] This paper outlines the arguments Justice Burke developed on these issues, sets them within the broader context of doctrinal developments in this area, and considers how persuasive they ought to be for subsequent courts. As we argue, while *Yahey* deals with a novel legal issue, the reasoning and conclusions are consistent with established guidance on treaty interpretation from the Supreme Court of Canada (Supreme Court) and the decision ought to be highly persuasive for subsequent courts.

II. BACKGROUND

For thousands of years, the Dane-zaa ancestors of the Blueberry River First Nation practiced a way of life intimately connected to and dependent on the land, wildlife, and natural resources of the Upper Peace River region of northeastern British Columbia.[7] In 1899, the Crown promised to protect that way of life indefinitely or, as the Indigenous signatories to Treaty 8 understood, for "[a]s long as the sun shines."[8] Without this solemn promise, the Cree, Dane-zaa, and Chipewyan signatories of Treaty 8 would not have entered into the treaty and agreed to share the territory's lands and resources.[9] One hundred and twenty years later, the Supreme Court of British Columbia concluded that the Crown, through the cumulative impacts of forestry, agriculture, and oil and gas developments it has permitted, has broken that promise.[10]

Significant oil and gas exploration and development within Blueberry's traditional territory dates back to the 1950s.[11] More recently, the realization of the unconventional Montney reserves with the advent of multistage fracturing and advances in horizontal drilling technology has led to an unprecedented acceleration in the rate and scale of development. From 2012–2016, more than 2,600 wells were licensed in the territory; more than 2,600 kilometres of access, development, and permanent roads were authorized; approximately 1,500 kilometres of pipelines were permitted;

6 *Yahey*, *supra* note 2 at paras 61–67.

7 *Ibid* at paras 428–429.

8 *Ibid* at para 156.

9 *Ibid* at para 299.

10 See Eliana Macdonald, "Atlas of Cumulative Landscape Disturbance in the Traditional Territory of Blueberry River First Nations, 2016" (2016) at 8, online (pdf): *David Suzuki Foundation* <davidsuzuki.wpenginepowered.com/wp-content/uploads/2017/09/atlas-cumulative-landscape-disturbance-traditional-territory-blueberry-river-first-nations-2016.pdf>.

11 *Ibid* at 47, 64.

9,400 kilometres of seismic lines were authorized; and almost 300 forestry cutblocks were harvested.[12] The Court accepted that, as of 2018, 85% of Blueberry's traditional territory was within 250 metres of an industrial disturbance, and 91% was disturbed within a 500-metre buffer.[13] As Justice Burke found, "[t]he Province has taken up lands to such an extent that there are not sufficient and appropriate lands…to allow for Blueberry's meaningful exercise of their treaty rights."[14]

In response to the Crown's failure to account for the cumulative effects of industrial activities, Blueberry filed its lawsuit in 2015 and simultaneously applied to enjoin the Crown from selling 15 timber licenses before the trial of the main action. After the latter was rejected, Blueberry applied for a wide-ranging interlocutory injunction restraining the Crown from allowing any further industrial development on its traditional territory.[15] The Court also denied the second application on the grounds that the balance of convenience pointed toward waiting for the impending trial of the main treaty infringement action and allowing the duty to consult to serve as an interim measure of protection.[16] Following an adjournment during which the parties negotiated interim measures to restrict surface developments in a few critical areas, the trial of the main action—which took place over 160 days—concluded in late 2020.

III. TREATY RIGHTS AND OBLIGATIONS: ASCERTAINING THE COMMON INTENTION OF THE PARTIES

The novel doctrinal point *Yahey* considered was whether the cumulative effects of industrial development can amount to an infringement of a treaty right.[17] In its analysis, the Court determined what rights and obli-

12 *Ibid* at 6.

13 *Yahey*, *supra* note 2 at para 906.

14 *Ibid* at para 1884.

15 See *Yahey v British Columbia*, 2015 BCSC 1302; *Yahey v British Columbia*, 2017 BCSC 899 [*Yahey 2017*].

16 *Yahey 2017*, *ibid* at paras 122–123, 125–126.

17 Cumulative effects have occasionally been discussed in the context of Aboriginal rights. See e.g. *R v Gladstone*, [1996] 2 SCR 723 at para 52, 137 DLR (4th) 648 (discusses the cumulative effect of Crown regulatory regimes on Aboriginal rights. Similarly, the cumulative effect of Crown regulations was found to constitute an infringement of an Aboriginal right to fish) [*Gladstone*]. See also *Ahousaht Indian Band and Nation v Canada* (*Attorney General*), 2009 BCSC 1494 at paras 687–734; *Ahousaht Indian Band and Nation v Canada* (*Attorney General*), 2021 BCCA 155 at paras 23–24 (the cumulative effect of Crown regulations was found to constitute an infringement of an Aboriginal right to fish).

gations were recognized in Treaty 8. In doing so, Justice Burke undertook a nuanced interpretation and application of the principles of treaty interpretation in Canada.

A. Principles of Treaty Interpretation

In *Marshall #1*, Justice McLachlin (as she then was and dissenting on another point) set out nine principles of treaty interpretation that have been cited as the authoritative statement on treaty interpretation by many courts since.[18] The most central principle in ascertaining the rights and obligations in a historic treaty is directing the court to "choose from among the various possible interpretations of common intention the one which best reconciles the interests of both parties at the time the treaty was signed."[19] This process is guided by the remaining principles of interpretation: treaties must be liberally construed and ambiguities resolved in favour of the Indigenous signatories; courts must give words the meaning they would have had for the parties at the time the treaty was signed and avoid highly technical interpretations; and treaty rights cannot be interpreted in "in a static or rigid way," but must be interpreted so as to "provide for their modern exercise."[20]

Ascertaining the common intention of the parties at the time the treaty was signed, then, requires that historical, cultural, and linguistic context be considered.[21] The common intention of the parties is identified by "considering not only the text of the treaty but also by taking into account the context in which the treaty was negotiated, concluded and committed to writing."[22] Written treaties record a prior oral agreement that reflects the content of the treaty as much, and perhaps more, than the written version.[23]

Justice Burke noted the difficulty of this task, especially in the context of treaties signed between parties with different "languages, concepts, cultures, modes of life, and world views."[24] It is the navigation of this difficult terrain, rather than the articulation of new or novel concepts, that makes *Yahey* a notable contribution to the doctrine of treaty interpretation. Justice

18 See *R v Marshall*, [1999] 3 SCR 456 at para 78, 177 DLR (4th) 513 [*Marshall #1*].

19 *Ibid*. See also *Yahey*, *supra* note 2 at para 77; *R v Marshall*, [1999] 3 SCR 533 at para 22, 179 DLR (4th) 193 [*Marshall #2*]; *R v Sioui*, [1990] 1 SCR 1025 at 1068–1069, 70 DLR (4th) 427.

20 *Marshall #1*, *supra* note 18 at para 78.

21 *Yahey*, *supra* note 2 at para 77; *Marshall #1*, *ibid* at para 40.

22 *Yahey*, *ibid* at para 104.

23 *Ibid* at para 107, citing *R v Badger*, [1996] 1 SCR 771 at para 55, 133 DLR (4th) 324 [*Badger*].

24 *Yahey*, *supra* note 2 at para 105.

Burke reinforced the principles outlined in *Marshall #1*, emphasizing a purposive approach to treaty interpretation that gives "meaning and substance to the Crown's promises"[25] and the importance of identifying the common intention of the parties: "[t]he nature and scope of the rights protected and promises made in Treaty 8 must be understood as Blueberry's ancestors and the Crown's treaty makers would have understood them when the Treaty was made and adhered to."[26] Pursuant to this principled approach, the infringement analysis engaged a substantive characterization of Blueberry's treaty rights beyond the limited text of Treaty 8, which necessitated the consideration of the cumulative effects of development on those rights.

B. Rights and Obligations in Treaty 8

Justice Burke characterized Blueberry's treaty rights not as a prescribed list of rights to hunt, fish, and trap, but as a right to a *way of life* sustained by customary practices, resource use, spiritual connections, and community customs.[27] Treaty 8 protects this *way of life* from undue interference:

> Treaty 8 guarantees the Indigenous signatories and adherents the right to continue a way of life based on hunting, fishing and trapping, and promises that this way of life will not be forcibly interfered with. Inherent in the promise that there will be no forced interference with this way of life is that the Crown will not significantly affect or destroy the basic elements or features needed for that way of life to continue.[28]

The Treaty was based on the fundamental promise that the Dane-zaa signatories would not be disturbed in their traditional use of the lands and resources. Further, Justice Burke found that Treaty 8 protects resource rights in relation to specific locations *and* broader territories.[29] This conclusion flowed not only from the historical materials available to the court, but from earlier case law on Treaty 8, all of which led to the conclusion that the Indigenous signatories did not enter the Treaty with the intention of being confined to carrying out a prescribed list of cultural practices and economic activities in restricted locations. Rather, they wanted the

25 *Ibid* at paras 76–80 (the nine "Marshall principles" are re-printed in a section labeled "Principles of Treaty Interpretation" with little added in the remainder of the section).

26 *Ibid* at para 110.

27 *Ibid* at paras 296, 321, 428–429.

28 *Ibid* at para 175.

29 *Ibid* at para 258.

"freedom and ability to travel through the Territory…to hunt, trap, fish, gather, camp, process that which was harvested, engage in spiritual practices, and family/educational practices, including the teaching and passing on of knowledge to younger generations."[30]

The Treaty's "taking up" clause, which permits the Crown to take up lands in the treaty area for a range of purposes, must be read as consistent with the fundamental promise that this freedom to maintain an autonomous way of life throughout the territory would be protected. The clause "did not and does not modify, diminish, or abrogate from the essential promise of protecting [their] way of life."[31] The Province argued that Treaty 8 does not protect a way of life, that it was designed to open the lands for settlement, and that the taking up clause foreshadowed changes to Indigenous modes of life.[32] Justice Burke rejected this argument, holding that "[i]t is not reasonable to conclude that the Dane-zaa agreed that their way of life would be 'fundamentally altered' or eradicated by a Treaty that is now a little over 120 years old. They did not agree to adopt a settler's way of life."[33] Without the assurance that their mode of life would be protected—including the ability to freely move through their territory and exercise their rights—the Dane-zaa would not have entered into the Treaty.[34] The rights and obligations under the Treaty, including the Crown's right to take up land, must therefore be read alongside this assurance and interpreted in a way that gives effect to the promise that the Dane-zaa way of life would be protected.[35] Further, the taking up clause must be understood as the signatories would have understood it, including "its reference to mining."[36] The Dane-zaa signatories and Treaty commissioners could hardly have envisioned the scale of landscape changes associated with the resource development of the last 50 years, particularly the unconventional development of the Montney resource.

Taken together, then, the historical evidence and previous case law demonstrate that Treaty 8 protects a way of life and maintenance of culture based on the ability to meaningfully pursue rights to hunt, fish, and trap in an environment suited to those pursuits. The importance of the Court's framing should not be understated. The Court recognized a

30 *Ibid* at para 296.
31 *Ibid* at para 184.
32 *Ibid* at para 185.
33 *Ibid* at para 198.
34 *Ibid* at para 197.
35 *Ibid* at para 275.
36 *Ibid* at para 265.

treaty-protected right to the continuance of a way of life throughout a First Nation's traditional territory. This recognition is more expansive than the rights to engage in particular activities that have characterized most treaty cases. It is also a key part of the reasoning that supported the finding of infringement in this case: the cumulative effects of development constituted an infringement because Blueberry could no longer practice the way of life protected under the Treaty.

This conclusion on treaty rights turned on the nuanced approach of Justice Burke to the "common intention" principle of treaty interpretation. By emphasizing what the Dane-zaa considered the essential promises of the Treaty, the Court moved beyond narrow conceptions of treaty rights. While the conclusions and reasoning in *Yahey* are closely tied to the factual circumstances and historical evidence of the people, territory, and treaty at issue, the reasoning is consistent with recent developments in other treaty rights decisions.

In *Restoule*, for example, the Ontario Superior Court provided a similarly nuanced reading of the "common intention" principle in holding that Anishinaabe law and practices of governance were essential to understanding the perspective of the Anishinaabe leaders who entered into the Robinson-Huron and Robinson-Superior treaties.[37] The Court held that an interpretation of the Treaty must consider "[t]he Anishinaabe perspective, particularly looking at the concepts of respect, responsibility, reciprocity, and renewal as manifested in Anishinaabe stories, governance structures, and political relationships, including alliance relationships."[38] The Court then examined principles of respect, responsibility, reciprocity, and renewal as *legally relevant* concepts that could help ascertain the Anishinaabe intentions upon signing the treaties and their understanding of the rights and obligations recognized in the treaties. The Court reasoned that "it is useful to review these concepts of the legal and political understandings of the Anishinaabe, as they are foundational to the Plaintiffs' position on how to interpret the Anishinaabe perspective and intention at the time."[39]

37 See *Restoule v Canada (Attorney General)*, 2018 ONSC 7701 at paras 411–423 [*Restoule*]. See also Heidi Bohaker, *Doodem and Council Fire: Anishinaabe Governance Through Alliance* (Toronto: University of Toronto Press, 2020) (for a more comprehensive analysis of relationship between the Robinson treaties and Anishinaabe law); Sara J Mainville, "Treaty Councils and Mutual Reconciliation under Section 35" (2007) 6:1 Indigenous LJ 141 (for an analysis of Anishinaabe legal principles and Treaty 3).

38 *Restoule*, *ibid* at para 411.

39 *Ibid* at para 414. See also *Restoule v Canada (Attorney General)*, 2021 ONCA 779 at 105 (though the ONCA was not as explicit in engaging these principles, they recognized as

Justice Burke did not engage with Indigenous law and governance in *Yahey* as explicitly as Justice Hennessey did in *Restoule*. Yet, there are important similarities in approach. Justice Burke emphasized that Treaty 8 protects not only activities, but also the way of life associated with the exercise of those activities.[40] As in *Restoule,* where Anishinaabe principles of law and governance were relied on to ascertain the common intention of the parties, the common intention in *Yahey* was considered in light of social and cultural connections to territory and the importance of maintaining a distinct and independent way of life. Both cases, in other words, recognized the legal relevance of the *Calder* Court's acknowledgment that "the fact is that when the settlers came, the Indians were there, organized in societies and occupying the land as their forefathers had done for centuries."[41] In both *Yahey* and *Restoule*, the fact that the Indigenous parties to the treaties in question lived in organized, law-governed societies at the time the treaties were signed shaped the courts' approach to the common intention analysis.[42]

This approach to treaty interpretation reflects the Supreme Court's emphasis, since *Simon*, on the political character of Indigenous peoples. In *Simon*, the Court dealt directly with the contention, given judicial support in the 1928 *Syliboy* decision and the lower courts in *Simon*, that the Treaty of 1752 was not enforceable because the Mi'kmaq lacked the capacity to enter treaties.[43] In dismissing this argument, the Supreme Court recognized the political character of Indigenous peoples as central to their capacity to enter treaties.

This emphasis ensures that principles of treaty interpretation align with the Supreme Court's holding that "the two purposes of s 35(1) are to recognize the prior occupation of Canada by organized, autonomous societies and to reconcile their modern-day existence with the Crown's assertion of sovereignty over them."[44] While this statement was made in

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a matter of fact the pre-existence of Anishinaabe law and governance, and the majority found no error in the trial judge's approach: "The trial judge correctly instructed herself on the principles governing the interpretation of historical treaties. No one argues to the contrary") [*Restoule* ONCA].

40 *Yahey*, *supra* note 2 at para 204.

41 *Calder et al v Attorney-General of British Columbia*, [1973] SCR 313 at 328, 34 DLR (3d) 145.

42 See Dayna Nadine Scott & Andrée Boisselie, "If There Can Only Be 'One Law', It Must Be Treaty Law. Learning From Kanawayandan D'aaki" (2019) 70 UNBLJ 230.

43 See *Simon v The Queen*, [1985] 2 SCR 387 at 399, 24 DLR (4th) 390, citing *R v Syliboy*, [1929] 1 DLR 307, 50 CCC 389 (NS Co Ct).

44 *R v Desautel*, 2021 SCC 17 at para 22 [*Desautel*].

the context of *Aboriginal*, rather than *treaty* rights, the Court's holding that section 35 jurisprudence must be guided by the need to recognize that Indigenous peoples lived in autonomous political societies prior to assertions of Crown sovereignty applies equally to both. *Yahey* and *Restoule* demonstrate how the common intention of the parties can be considered in a manner that reflects this.

IV. THE TEST FOR INFRINGEMENT: PIECEMEAL INFRINGEMENT, CUMULATIVE IMPACTS, AND THE "MEANINGFUL" EXERCISE OF TREATY RIGHTS

Prior to *Yahey*, the question of whether cumulative impacts of multiple projects can ground a treaty infringement claim had received little analysis. The answer depends, to a considerable extent, on the resolution of a more granular question: how should the term "meaningful" be understood following the Supreme Court's holding in *Mikisew Cree First Nation v Canada* (*Minister of Canadian Heritage*) that a claim for infringement could only arise where "no meaningful [treaty right] remains"?[45]

Mikisew, like *Yahey*, considered how the infringement doctrine applies when the Crown "takes-up" land under Treaty 8. Specifically, the courts considered what constitutional protections Indigenous treaty rights have when the Crown exercises its right to take up lands for development purposes. The *Mikisew* Court held that a *prima facie* infringement triggering a justification analysis arises only "where the Crown has taken up land in bad faith or has taken up so much land that no meaningful right to hunt remains."[46] Instead of litigation on infringement being triggered for every project approval, the duty to consult would provide pre-emptive protection, preventing the Crown from running roughshod over treaty rights.[47]

In the years since *Mikisew*, the proper interpretation of this standard has been much debated. Federal and provincial governments have consistently argued for interpretations that would effectively limit infringement actions to those situations where Indigenous rights-holders are left without *any* ability to exercise rights in their traditional territory.[48] The

45 2005 SCC 69 at paras 38, 44, 48 [*Mikisew*].

46 *Ibid* at para 48, citing *Mikisew Cree First Nation v Canada* (*Minister of Canadian Heritage*), 2004 FCA 66 at para 18.

47 *Mikisew*, *supra* note 45 at para 55.

48 See e.g. *Keewatin v Minister of Natural Resources*, 2011 ONSC 4801 [*Keewatin*]; *Yahey*, *supra* note 2 at paras 445–446.

implication of this interpretation is that cumulative impacts would be permitted to erode treaty rights to the point of extinguishment through repeated infringements that do not, in themselves, attract judicial scrutiny. Consequently, Indigenous nations have alleged that their rights are subject to piecemeal infringement,[49] and have argued—as Blueberry did in the present case—that determining whether the meaningful exercise of rights remains possible should only require a court to ask whether those rights have been "significantly or meaningfully diminished."[50] In siding with Blueberry in *Yahey*, Justice Burke provided a substantive interpretation of the *Mikisew* "no meaningful right" standard and how it applies in the context of cumulative impacts.

A. Background on Infringement

The Supreme Court laid out a framework to determine whether government legislation that restricts Aboriginal rights ("legislative interferences") constitutes an infringement of section 35 in *R v Sparrow*.[51] The initial burden is on the claimant to demonstrate a *prima facie* infringement; if such an infringement is established, the burden shifts to the Crown to justify that infringement. In assessing whether a *prima facie* infringement has occurred, the *Sparrow* Court identified three preliminary indicia: 1) "Is the limitation unreasonable?"; 2) Does the interference "impose undue hardship?"; and 3) Does the limitation deny the rights-holders "their preferred means of exercising that right?" Justifying an infringement would require: 1) "a valid (*i.e.* compelling and substantial) legislative objective"; 2) consistency with the Honour of the Crown, specifically the Crown's fiduciary obligations to the Indigenous group; and 3) other conditions as the circumstances might require, including minimal impairment, compensation, and consultation.[52] In *R v Gladstone*, the Supreme Court nuanced *Sparrow* further:

> [T]he questions the [*Sparrow*] test directs courts to answer in determining whether an infringement has taken place incorporate ideas such as unreasonableness and "undue" hardship, ideas which suggest that something more than meaningful diminution is required to demonstrate

49 McIvor, *supra* note 3.

50 *Yahey*, *supra* note 2 at para 541.

51 [1990] 1 SCR 1075, 70 DLR (4th) 385 [*Sparrow*].

52 *Ibid* at 1111–1119 (these conditions resemble the *Oakes* test for justified infringements under section 1 of the *Canadian Charter of Rights and Freedoms*, notwithstanding the fact that Aboriginal and treaty rights aren't subject to section 1 of the *Charter*).

> infringement. This internal contradiction is, however, more apparent than real. The questions asked by the Court in *Sparrow* do not define the concept of *prima facie* infringement; they only point to factors which will indicate that such an infringement has taken place. Simply because one of those questions is answered in the negative will not prohibit a finding by a court that a *prima facie* infringement has taken place; it will just be one factor for a court to consider in its determination of whether there has been a *prima facie* infringement.[53]

Thus, in *Gladstone*, the standard for infringement was the "meaningful diminution" of the right through any one or more of the indicia outlined in *Sparrow*.

The Supreme Court then applied the *Sparrow* framework to treaty rights in *R v Badger*.[54] On the standard for infringement, *Badger* held that interferences with hunting rights under Treaty 8 "may not be permissible if they erode an important aspect of the Indian hunting rights."[55] Specifically, "there can be no limitation on the method, timing and extent of Indian hunting under a Treaty."[56] An infringement analysis must nevertheless be considered within the context of the specific treaty at issue, including any internal limitations of treaty rights.[57] The two limitations internal to Treaty 8 include: 1) the government's right to enact certain regulations that may interfere with treaty rights, and 2) the geographic limitation of treaty rights to "the tract surrendered…saving and excepting such tracts as may be required or taken up from time to time for settlement, mining, lumbering, trading or other purposes."[58]

Regarding regulatory interference with treaty rights, the Supreme Court later held in *Marshall #1*[59] and *Marshall #2*[60] that not every regulation that constrains a treaty right constitutes an infringement that requires justification:

> Catch limits that could reasonably be expected to produce a moderate livelihood for individual Mi'kmaq families at present-day standards can be established by regulation and enforced without violating the treaty right. In that case, the regulations would accommodate the treaty right. Such

53 *Gladstone*, *supra* note 16 at para 43.
54 *Badger*, *supra* note 23.
55 *Ibid* at para 90.
56 *Ibid* at para 90.
57 *Ibid* at para 85; *Yahey*, *supra* note 2 at para 1814.
58 *Badger*, *supra* note 23 at para 40.
59 *Marshall #1*, *supra* note 18.
60 *Marshall #2*, *supra* note 19.

> regulations would *not* constitute an infringement that would have to be justified under the *Badger* standard.[61]
>
> ...
>
> In other words, regulations that do no more than reasonably define the Mi'kmaq treaty right in terms that can be administered by the regulator and understood by the Mi'kmaq community that holds the treaty rights do not impair the exercise of the treaty right and therefore do not have to meet the *Badger* standard of justification.[62]

The court further clarified the importance of accommodating treaty rights in *R v Sundown*:

> Regulations clearly aimed at conservation that carefully consider the treaty rights of the [rights holders] may very well pass the *Sparrow* justification test. However, both the purpose of the regulations and the accommodation of the treaty rights in issue would have to be clear from the wording of the legislation. It would not be sufficient for the Crown to simply assert that the regulations are "necessary" for conservation. Evidence on this issue would have to be adduced. The Crown would also have to demonstrate that the legislation does not unduly impair treaty rights. The solemn promises of the treaty must be fairly interpreted and the honour of the Crown upheld. Treaty rights must not be lightly infringed. Clear evidence of justification would be required before that infringement could be accepted.[63]

Therefore, though several treaties have been interpreted as enabling legislative interferences with treaty rights, such internal limitations are constrained by the requirement that they accommodate the exercise of the right. In other words, limitations must allow for the continued exercise of treaty rights.

The Crown has also argued that certain treaty rights are inherently limited where treaties contain "taking up" clauses. In *Halfway River First Nation v British Columbia (Ministry of Forests)*, British Columbia argued that a *prima facie* infringement could not be established where the Crown merely exercised its right under Treaty 8 to take up treaty lands.[64] The trial and appellate courts of British Columbia rejected this position, however, ruling that "any interference with the right to hunt is a *prima facie* infringe-

61 *Marshall #1*, *supra* note 18 at para 61.

62 *Marshall #2*, *supra* note 19 at para 37 [emphasis in original].

63 [1999] 1 SCR 393 at para 46, 170 DLR (4th) 385 [*Sundown*].

64 1999 BCCA 470 at paras 94, 98.

ment of the Indians' treaty right as protected by s 35," notwithstanding the presence of a "taking up" clause.[65] This reflects a crucial point reiterated in *Yahey*: the parties to treaties with "taking up" clauses did not intend that the Crown be granted an unlimited discretionary power to effectively extinguish treaty rights by taking up treaty lands.[66] This point is also supported by *Badger*: "limitations which restrict the rights of Indians under treaties must be narrowly construed."[67]

Halfway River and *Badger* were concerned with determining whether a *prima facie* infringement of section 35 rights had taken place. Though *Badger* only considered a legislative interference and did not explicitly contemplate whether the *Sparrow* infringement analysis would apply to the Crown taking up treaty lands, it did so implicitly in holding that Treaty 8 land that had *not* been taken up by the Province was "land to which the Indians had a right of access to hunt for food."[68] Taking up land over which a treaty right *had* extended inherently interferes with the geographic extent of that right and, according to *Badger*, "there can be no limitation on the...extent of Indian hunting under a Treaty."[69] The *Halfway River* Court came to the same conclusion more directly, suggesting that the taking up of any such land would presumptively interfere with the geographic extent of First Nations' hunting rights, and would therefore constitute a *prima facie* infringement under the *Sparrow* framework. "Taking up" clauses, it seemed, were not meant to endorse government-sanctioned curtailment of treaty rights without adequate justification. However, the Supreme Court partly rejected this notion and the *Halfway River* standard of infringement in *Mikisew*.

B. The *Mikisew* "No Meaningful Right Remains" Infringement Standard

The burden on Indigenous peoples to prove the existence and *prima facie* infringement of a section 35 right before those rights were afforded concrete procedural protections under the *Sparrow* framework led to lengthy and complex litigation that was unwieldy for the courts and burdensome for Indigenous claimants. Further, it left an important gap: what

65 *Ibid* at para 144 [emphasis in original].
66 *Yahey*, *supra* note 2 at para 534.
67 *Badger*, *supra* note 23 at para 41.
68 *Ibid* at para 51 [emphasis added].
69 *Ibid* at para 90.

protections would rights be afforded while they were in the process of litigation and negotiation? Seeking to close this gap and avoid drawn-out litigation, the Supreme Court shifted the focus away from proving whether a Crown action or law constituted a *prima facie* infringement, toward the pre-emptive duty to consult and accommodate.[70] In the context of this duty, the Supreme Court in *Mikisew* reconsidered the line between permissible interferences with treaty rights and infringement of those rights. The Court held that the Crown has a duty to consult Indigenous nations when exercising its right to "take up" lands under Treaty 8 if doing so may adversely impact treaty rights, notwithstanding the fact that "taking up" clauses foreshadowed changes to the geographic extent of treaty rights.[71]

Prior to *Mikisew*, governments tended to treat the "taking up" clause as license to unilaterally expropriate land.[72] By extending the duty to consult to these actions, the Court provided a measure of procedural protection to treaty rights and asserted Aboriginal rights. The Court's conclusions on treaty infringement, however, raised the concern that it may have in fact weakened the protection of such rights in important respects. The Court held that a *prima facie* infringement triggering the *Sparrow* justification analysis arose only "where the Crown has taken up land in bad faith or has taken up so much land that no meaningful right to hunt remains."[73] Despite ruling that the "taking up" of land had a "demonstrably adverse" effect on the "continued exercise of the Mikisew hunting and trapping rights over the lands in question,"[74] the interference did not constitute an infringement. The Mikisew Cree had not shown that "no meaningful right to hunt" remained. This infringement standard was remarkable considering the less stringent standards applied to other constitutionally protected rights. A year earlier, for example, the Court held that a "non-trivial or non-insubstantial interference" with the exercise of freedom of religion constituted a *Charter* infringement.[75]

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70 See *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73 [*Haida Nation*]. See also *Taku River Tlingit First Nation v British Columbia (Project Assessment Director)*, 2004 SCC 74; *Mikisew*, *supra* note 45.

71 *Mikisew*, *supra* note 45 at paras 31, 55.

72 See generally Shin Imai, "Treaty Lands and Crown Obligations: The 'Tracts Taken Up' Provision" (2001) 27 Queen's LJ 1.

73 *Mikisew*, *supra* note 45 at para 48 [emphasis in original].

74 *Ibid* at para 55.

75 See *Syndicat Northcrest v Amselem*, 2004 SCC 47 at para 554 (the divergence is problematic from the perspective of doctrinal consistency and cogency). See also Kerry Wilkins, "On the Breach: Identifying Infringements of Section 35 Rights" (2022) 72 UTLJ 287 at 287

However, as the determinative issue in *Mikisew* concerned the duty to consult rather than infringement, the Supreme Court did not to elaborate on what the "meaningful" exercise of treaty rights entailed. The ambiguity of the language and lack of substantive analysis invited a range of interpretations. *Mikisew* could be read as significantly weakening the protections afforded to treaty rights by holding that an infringement action could only be sustained where a government action was on the verge of eliminating a right altogether. Until that point, Crown actions would be subject only to the lesser protections provided by the duty to consult.

Equally, however, the decision could be read as consistent with earlier case law. As outlined above, the Supreme Court held in *Marshall #1* and *Marshall #2* that regulations impacting a treaty right would not constitute an infringement so long as they "accommodated" the right in question. That is, not every impact would amount to a *prima facie* infringement requiring justification, and Crown actions that accommodate the exercise of treaty rights sat below the threshold.[76] After *Mikisew*, it was unclear whether the "no meaningful right remains" standard re-articulated this, or whether the development of the duty to consult and the presence of a taking-up clause resulted in a modified infringement standard in *Mikisew*.

Little further guidance came from the Supreme Court. Two years after *Mikisew*, the Court considered the infringement of a treaty right in *R v Morris*.[77] The case dealt with a provincial law's interference with a treaty right, though in the context of a treaty without a "taking up" clause. The Court held that "a *prima facie* infringement requires a 'meaningful diminution' of a treaty right. This includes anything but an insignificant interference with that right. If provincial laws or regulations interfere insignificantly with the exercise of treaty rights, they will not be found to infringe."[78] *Morris* reiterated the constitutional protection afforded to treaty rights through a judicially supervised justification framework: "restraints on the exercise of the treaty right have to be justified on the basis of conservation or other compelling and substantial public objectives."[79]

("a suitable test for infringement needs to harmonize with the rest of the constitutional regime in which it must operate").

76 As discussed in sections IV(C) and V, however, this is a departure from the *Sparrow* and *Gladstone* standards, which seemed to have set a lower standard for a *prima facie* infringement and would have set more weight on the justification branch of the test. *Sparrow*, *supra* note 51; *Gladstone*, *supra* note 17.

77 2006 SCC 59.

78 *Ibid* at para 53 [emphasis added].

79 *Ibid* at para 46, citing *Marshall #2*, *supra* note 19 at para 24 [emphasis in original].

Without mentioning *Morris*, however, the Supreme Court subsequently applied the *Mikisew* standard to the taking-up clause of Treaty 3 in *Grassy Narrows*, reiterating that an action for treaty infringement would not be available until a Crown "taking up" of land "leaves the Ojibway with no meaningful right to hunt, fish or trap."[80] Beyond restating the *Mikisew* standard, however, the Court did not define what a "meaningful right" includes. Consequently, the interpretation of the "meaningful" exercise of treaty rights was left for later cases to determine in light of specific facts and further argument.

C. The *Yahey* "Significantly or Meaningfully Diminished" Infringement Standard

As of 2018, 85% of Blueberry's traditional territory—located in today's Peace River Region of northeastern British Columbia—was within 250 metres of an industrial disturbance, and 91% was disturbed within a 500-metre buffer.[81] The question of whether the *cumulative* effects of the numerous developments that contributed to this level of disturbance could form the basis for a treaty infringement claim is what made *Yahey* a case of first instance. Addressing that question compelled the Court to consider the *Mikisew* "no meaningful right remains" standard for infringement and define the "meaningful exercise" of a right.

Justice Burke sided with Blueberry, holding that "the focus of the infringement analysis—and consideration of whether 'no meaningful right remains'—should be on whether the treaty rights can be *meaningfully* exercised, not on whether the rights can be exercised *at all*."[82] Further, the "meaningful exercise" of treaty rights would be lost where "Blueberry's treaty rights...have been *significantly or meaningfully diminished*."[83] An infringement, that is, can be established *before* a First Nation can no longer exercise treaty rights. Given the scale and nature of the cumulative impact of industrial developments on Blueberry's traditional territory, their treaty rights had been significantly and meaningfully diminished; in other words, their rights had been infringed.

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80 *Grassy Narrows First Nation v Ontario (Natural Resources)*, 2014 SCC 48 at para 52 [*Grassy Narrows*].

81 *Yahey*, *supra* note 2 at para 906.

82 *Ibid* at para 540 [emphasis in original].

83 *Ibid* at para 541 [emphasis added].

In articulating this standard for infringement, Justice Burke found that the intent or effect of the *Mikisew* Court's "no meaningful right remains" standard could not have been that Treaty 8 would only be infringed "if the right to hunt, fish and trap in a meaningful way no longer exists."[84] The effect of the taking up clause "cannot be that the Crown's right to take up lands can eclipse Blueberry's meaningful rights to hunt, fish, and trap as part of its way of life."[85] The clause does not provide "an infinite power to take up lands."[86] Further, "[i]t is illogical and, ultimately, dishonourable to conclude that the Treaty is only infringed if the right to hunt, fish, and trap in a meaningful way no longer exists."[87]

Invoking the Honour of the Crown—a constitutional principle requiring that treaties be interpreted in a liberal, purposive manner and presuming that the Crown fulfills its promises[88]—Justice Burke found that the signatories to Treaty 8 did not intend that the Crown have an unlimited discretionary power to extinguish treaty rights by taking up treaty lands. In fact, at the time of signing, the Crown promised to protect the Indigenous signatories' way of life for "[a]s long as the sun shines."[89] This promise formed the backbone of the treaty.[90]

In reaching this conclusion on the *Mikisew* standard, Justice Burke helpfully considered previous case law on infringement along a spectrum. Thus, "[a]t the lower end of the infringement spectrum lies the idea that '*any* interference' constitutes a *prima facie* infringement or *prima facie* interference."[91] This language is used in *Sparrow* and *Halfway River* and draws on the indicia of a *prima facie* infringement outlined in *Sparrow* (*i.e.* "is the limitation unreasonable," does it "impose undue hardship," or deny the rights-holders "their preferred means of exercising that right?"). At the other end of the spectrum "lies the idea expressed in *Mikisew* and repeated in *Grassy Narrows* that treaty rights are infringed when 'no meaningful right'—be it to hunt, fish or trap—remains within a First Nation's traditional territories."[92]

84 *Ibid* at para 514.
85 *Ibid* at para 532.
86 *Ibid* at para 534.
87 *Ibid* at para 514.
88 See *Manitoba Métis Federation Inc v Canada (Attorney General)*, 2013 SCC 14 at para 73 [*Manitoba Métis*].
89 *Yahey*, *supra* note 2 at paras 156–157.
90 *Ibid* at para 299.
91 *Ibid* at para 526 [emphasis in original].
92 *Ibid* at para 527.

In between these poles, the Supreme Court has described the standard in various ways: does the interference cause a "meaningful diminution" of the right,[93] "unduly impair" the right,[94] or impose a restriction without accommodating the right? These standards inform the trier of fact's assessment of whether a right can be meaningfully exercised.[95] These are context specific approaches to ascertaining the level of impact that constitutes an infringement and that is acceptable before the Crown must satisfy the justification test.[96] The *Mikisew* standard must be considered alongside these articulations.

As Justice Burke concludes, the variously articulated standards all preclude interferences with section 35 rights that would enable the disappearance of the right if impacted further. An interpretation of *Mikisew* holding that an infringement only arises where a right no longer exists or can no longer be exercised would mark it as a significant outlier when placed alongside the other cases. After all, an interpretation of "meaningful" that involves the abridgement of rights up to the point of their disappearance would amount to an extinguishment, which has been constitutionally impermissible since the enactment of section 35 of the *Constitution Act, 1982*.[97] The *Mikisew* majority could not have intended to place the line of infringement where the right would be effectively terminated. Certainly, it cannot be taken to have done so without explicit reasoning justifying such an extreme departure from earlier case law. As in *Desautel* and *Côté*, where the Supreme Court held that narrow readings of section 35 risked "perpetuating the historical injustice suffered by aboriginal peoples at the hands of colonizers,"[98] an infringement standard that only provides substantive protections where a right is on the verge of extinguishment risks undermining treaty promises and constitutional obligations.

Yahey rejected the view that *Mikisew* creates a significantly weakened standard for infringement. The indicia articulated in *Sparrow* and

93 *Gladstone*, *supra* note 17 at para 43.

94 *Sundown*, *supra* note 63 at para 46.

95 *Yahey*, *supra* note 2 at paras 522–529.

96 Wilkins, *supra* note 75 at 288 (it should nevertheless be noted that the disparity in judicial approaches to determining both the standard of infringement and whether an infringement is made out in each case has led to a problematic lack of certainty for Indigenous peoples and the Crown. "[C]larity about infringement matters: to Indigenous peoples, so they know which of their complaints about legislation and Crown conduct are worth taking to court, and to the Crown, so it knows what kinds of things, presumptively, it is not supposed to be doing to or about section 35 rights").

97 *Yahey*, *supra* note 2 at para 512.

98 *Desautel*, *supra* note 44 at para 33, citing *R v Côté*, [1996] 3 SCR 139 at para 53, 138 DLR (4th) 385.

expanded upon in subsequent cases must inform a court's interpretation of whether the meaningful practice of treaty rights remains. While the majority in *Mikisew* may have believed that the extension of the duty to consult and the presence of a "taking-up" clause meant that it was inappropriate to hold that every impact constituted an infringement, the decision cannot be taken to have meant that the Crown would only need to justify infringements when the right was effectively extinguished (*i.e.* when no ability to exercise the right remained). The *Grassy Narrows* trial decision (*Keewatin*) articulated a similar interpretation:

> In *Mikisew*, the Supreme Court of Canada highlighted the difference between substantive treaty rights that cannot be infringed except upon satisfying the *Sparrow* test, and procedural rights that apply under the Honour of the Crown, even before the point of substantive breach of the treaty has been reached. It made it clear that the Honour of the Crown requires consideration of the content of the substantive promise, in effect recognition of the overall promise, consultation and monitoring in anticipation of possible breach and, in some circumstances, accommodation to ensure that the line between possible and substantive breach will not be crossed. The Court held that once the geographic scope had been so narrowed that the hunting right was about to become meaningless, any further authorizations of land uses would need to meet the s 35 *Sparrow* test. The *Sparrow* analysis would apply to the federal Crown as soon as the line of substantive infringement was crossed.[99]

In other words, the application of the duty to consult and accommodate treaty rights must be understood as adding *additional* protections to the rights—procedural protections prior to an infringement—not as lowering the standard the Crown must meet. Indeed, the latter would be impossible to square with the Honour of the Crown and would undermine the basis for the pre-emptive application of the duty to consult and accommodate if it were relied on to limit the protections afforded to rights.

It may seem on a first reading that *Yahey* lowered the threshold for infringement articulated in *Mikisew*. In fact, the Court merely interpreted and clarified what the "meaningful exercise" of a right is, which the Supreme Court had left open to debate; recall, the Supreme Court did not provide a substantive interpretation or analysis of infringement in *Mikisew*,

99 *Keewatin*, *supra* note 48 at para 1473 [emphasis in original].

resolving the decision on the basis of the duty to consult.[100] *Yahey*'s finding that an infringement lies where the meaningful exercise of treaty rights has been "significantly or meaningfully diminished" aligns with the impetus for the *Mikisew* Court's focus on the pre-emptory nature of consultation and accommodation—that is, upholding the honour of the Crown and the constitutional status of section 35 rights. To conclude that the "no meaningful right" standard stipulates that an infringement only arises when a right *can no longer be exercised* contradicts the need to balance the interests under the treaty and the Crown's promise to protect Indigenous signatories' traditional way of life, undermining the honour of the Crown. *Yahey*'s nuanced articulation of the infringement standard corrects misconceptions about the Supreme Court's statement that an infringement lies where "no meaningful right remains" and serves as a benchmark for future infringement litigation. The Attorney General of British Columbia acknowledged as much in the announcement that the Province would not appeal the *Yahey* trial decision.[101]

V. ASSESSING THE INFRINGEMENT OF BLUEBERRY RIVER'S TREATY RIGHTS

To determine whether Blueberry still had a meaningful right to exercise treaty rights in its traditional territory despite extensive industrial activity, the Court had to outline the scope of that traditional territory. In seeking to describe the area over which Blueberry's protected way of life extended, Justice Burke emphasized the paramountcy of the Indigenous perspective:

> Specificity...can only come from the Indigenous people. They can tell the Province and the courts which are their preferred or core areas and why. They can provide insight into the important features that allow for the meaningful exercise of rights in these locations. They can explain the values the lands and waters contain.[102]

Accordingly, the Court rejected the Province's defence that Blueberry's claim area was an "arbitrarily defined portion of a larger historic traditional

100 The Supreme Court had the opportunity to clarify in *Grassy Narrows*, *supra* note 80, but opted not to, instead re-iterating the *Mikisew* standard without substantive discussion or analysis.

101 See Andrew Kurjata, "B.C. won't appeal landmark First Nation court victory", *CBC News* (28 July 2021), online: <www.cbc.ca/news/canada/british-columbia/treaty-8-province-appeal-1.6121474>.

102 *Yahey*, *supra* note 2 at para 613.

territory"[103] and the suggestion that Blueberry members cannot be said to have been deprived of the right to meaningfully exercise their treaty rights because there exist other viable areas within that larger historic area.[104] The Court noted that Blueberry "provided very comprehensive answers" to the Province's demand for particulars on the location and specifics of the cultural and economic activities it could no longer meaningfully practice.[105] Justice Burke concluded that the area over which Blueberry claimed it was no longer able to meaningfully exercise their treaty rights accorded with the area used by their ancestors at the time they adhered to Treaty 8 in 1900 (*i.e.* their core traditional territory) and then reviewed development in that territory and impacts on wildlife.

Having established that the standard for an infringement was whether the treaty rights had been "significantly or meaningfully diminished," and that this diminishment can be caused by the cumulative effects of multiple projects, the evidence that 91% of Blueberry's traditional territory was within 500 metres of an industrial disturbance led to the conclusion that the Province's historical incentivization and permitting of industrial development within Blueberry's traditional territory constitutes an infringement of Treaty 8.[106] Blueberry's evidence of the effect of the cumulative disturbances in their territory led to the conclusion that "[t]heir rights to hunt, fish and trap within the Blueberry Claim Area have been significantly and meaningfully diminished when viewed within the context of the way of life in which these rights are grounded."[107] In particular, the dearth of mature forests, diverse wildlife habitats, clean watersheds, and access to those areas significantly impaired Blueberry's ability to hunt, fish, and trap.[108]

VI. THE DILIGENT IMPLEMENTATION OF TREATY PROMISES AND THE HONOUR OF THE CROWN

In addition to the declaration on treaty infringement, Blueberry sought declarations that the Crown had breached its obligations under the treaty.[109] Blueberry argued that the Province failed "to diligently implement the Treaty's promise to protect Blueberry's rights and way of life from

103 *Ibid* at para 557.
104 *Ibid* at para 591.
105 *Ibid* at para 1838.
106 *Ibid* at para 906.
107 *Ibid* at para 1129.
108 *Ibid* at para 1130.
109 *Ibid* at para 1134.

the encroaching cumulative impacts of industrial development."[110] Blueberry argued that this failure "to diligently implement the Treaty promises" breached obligations grounded in both the honour of the Crown and the Crown's fiduciary duties.[111] The Court's conclusion and reasoning on these points provide insight into what may be required to ensure diligent implementation of treaty promises, particularly where proactive measures may need to be taken to avoid infringement and in situations where the presence of a "taking up clause" has historically led governments to assume they held a broad discretionary authority and could act largely unimpeded by treaty rights concerns.

The honour of the Crown is a constitutional principle that applies to all Crown dealings with Indigenous peoples.[112] It requires that the Crown "endeavour to ensure its [constitutional] obligations are fulfilled"[113] and "looks forward to reconciliation between the Crown and Aboriginal peoples in an ongoing, 'mutually respectful long-term relationship.'"[114] These obligations include a duty to diligently implement treaty promises.[115] While perfect implementation is not required, "a persistent pattern of errors and indifference that substantially frustrates the purpose of the promise may betray the duty."[116] The fiduciary duty arises when the Crown assumes discretionary control of a cognizable Indigenous interest and compels the Crown to act in the best interest of the Indigenous party.[117]

In *Yahey,* Blueberry argued that "the honour of the Crown gives rise to a positive obligation on the Province to implement Treaty 8" and that "implementing the Treaty promise means that, before the Province authorizes land uses in the areas Blueberry relies on, it must put in place measures to ensure the essential elements of the Treaty will not be violated."[118] Put otherwise, "the Province has a positive duty to protect treaty rights, and its management of the lands and resources should reflect this."[119] This is a significant argument that would see the honour of the Crown create a

110 *Ibid* at para 1135.

111 *Ibid*.

112 *Haida Nation*, *supra* note 70 at para 17.

113 *Yahey*, *supra* note 2 at para 1155.

114 *Desautel*, *supra* note 44 at para 30, citing *Beckman v Little Salmon/Carmacks First Nation*, 2010 SCC 53 at para 10.

115 *Manitoba Métis*, *supra* note 88 at paras 73–79.

116 *Yahey*, *supra* note 2 at para 1155.

117 *Manitoba Métis*, *supra* note 88 at para 73. For a comprehensive discussion, see *Southwind v Canada*, 2021 SCC 28.

118 *Yahey*, *supra* note 2 at para 1165.

119 *Ibid* at 1165.

Crown obligation to take positive and proactive steps to ensure resource development projects would not unduly impact treaty rights *before* project approvals were granted rather than approving projects and dealing with infringement afterwards.[120] The Province contended that Blueberry took too broad a view of the nature of the Crown's obligations, arguing that "there is no duty for the Province to implement regulatory policies that place Blueberry's views as the paramount views. It has no duty to implement the kind of 'fettered regulatory structure' Blueberry seems to be seeking."[121] It is notable that the Crown, 30 years after the Supreme Court held unequivocally in *Sparrow* that Aboriginal and treaty rights place meaningful constitutional limits on state authority, continued to argue in favour of regulatory regimes unfettered by the existence of those rights.

Yahey considered the question of treaty implementation by considering the Province's regulatory regimes for oil and gas development, forestry management, and wildlife management, in addition to its cumulative effects framework. Justice Burke held that the disturbances to Blueberry's traditional territory and the consequent deprivation of their meaningful exercise of treaty rights "has been fostered by the Province's regulatory regime," which neglected to adequately consider the cumulative impact of historical and modern industrial development on treaty rights.[122] The oil and gas regulatory regime comprised of: a) oil and gas tenure rights to the subsurface administered by the Ministry of Energy, Mines and Petroleum Resources; and b) permitting of surface oil and gas activities by the BC Oil and Gas Commission. Evidence was led—and accepted—that the two administrative bodies were like "ships passing in the night," each erroneously assuming the other accounted for cumulative impacts on treaty rights.[123]

At the most basic level, the Court found that the regulatory framework for the permitting process neglected to consider the full scale or scope of projects[124]—*e.g.*, it does not consider whether a project initiated on the permitting of a single well pad is anticipated to expand through the addition of,

120 Two arguments might be advanced in relation to this argument. One, it may be claimed that the duty to consult and accommodate already does this. Two, it might be argued that existing regulatory regimes already require such considerations. The problem here is that the duty to consult still allows for a unilateral action that does not prevent infringement (and infringement would have to be litigated subsequently). And, as *Yahey* shows, existing regulatory regimes do not go far enough to prevent piecemeal infringement.

121 *Yahey*, *supra* note 2 at para 1174.

122 *Ibid* at para 1414.

123 *Ibid* at para 1311.

124 *Ibid* at para 1336.

for example, a processing facility to that area initially cleared for the pad. In the current scheme, the initial pad would be considered exclusively, and the processing facility or other subsequent expansion would be the subject of later application(s) subject to a lower level of consultation, precluding First Nations' "ability to meaningfully respond on the full scope of the project."[125] Moreover, permit applications are not required to disclose the number of wells envisioned or when they may be drilled. Instead, the subsequent wells are assessed on separate applications that often attract the lower end of the consultation spectrum with respect to the duty to consult.[126]

Additionally, the permitting process relied on an "Area Based Analysis Tool," which, the court held, was inadequate for assessing cumulative impacts on treaty rights. Specifically, the Area Based Analysis Tool:

a. was applied at too coarse a scale of disturbance units to have any sensitivity to the intensity of development within smaller areas that made up that unit, thus those intensely developed areas were overlooked;
b. only considered a few inputs, such as riparian reserves, old forests, and designated wildlife areas and neglected to consider the essential wildlife and habitat inputs that encompass treaty rights;
c. lacked any guidance for decision-makers with respect to addressing red flags and other concerns arising from cumulative impacts on the environment and how to ensure the protection of treaty rights; and
d. did not incorporate meaningful or enforceable thresholds or triggers above which development is precluded or must be limited.[127]

As a result, the Oil and Gas Commission had *never* turned down an application over concerns about habitat or cumulative effects on treaty rights.[128]

Similarly, the Court ruled that the Province's forestry regime was focused on replacing natural forests with planted ones to maximize the efficiency and profitability of future harvest cycles.[129] Its "decision-makers lack authority to manage cumulative effects, or take into account

125 *Ibid* at para 1203.

126 *Ibid* at para 1336. An argument might be advanced that uncertainty inherent to the geological and engineering success of an initial well precludes such forward-looking assessments. The non-exploratory nature of development in the Montney and other unconventional resource plays, and routine probabilistic forecasting associated with such development nevertheless weighs in favour of a broader scope of assessment at the Indigenous consultation phase.

127 *Ibid* at paras 1755–1760.

128 *Ibid* at para 1760.

129 *Ibid* at para 1562.

impacts on the exercise of treaty rights," and there was a lack of regulatory independence from forestry industry participants "who hold much of the power regarding what cutblocks to harvest, how and when."[130] Forestry advanced in Blueberry's traditional territory on the mistaken belief that Blueberry were perfectly capable of pursuing their traditional way of life in other areas throughout Treaty 8.[131]

Around 2010, the Province began developing a cumulative effects decision-making framework for natural resource development to address, among other things, an early 2000's Oil and Gas Commission report that revealed only 15% of Blueberry's core traditional territory remained undisturbed as of 1998.[132] However, the interim framework established in 2016 lacked meaningful thresholds and had no practical effect on the regulatory requirements for oil and gas or forestry developments.[133] Further, the framework only led to one completed assessment as of 2020—for grizzly bears—which lacked practical application to decision-making.[134] Despite having "reasonable and credible notice that its own actions and inactions were putting it in potential breach of Treaty 8 by its failure to monitor cumulative impacts," Justice Burke ruled the Province "continu[ed] to permit and foster development in Blueberry's traditional territory," therefore failing to protect "the meaningful exercise of [Blueberry's] treaty rights."[135] The failure to take measures to protect the exercise of treaty rights constitutes a failure to diligently implement and uphold the treaty in accordance with the honour of the Crown. This is surely correct. As the Supreme Court has held, the honour of the Crown "requires that the Crown act diligently to fulfill its constitutional obligations to Aboriginal peoples."[136]

VII. JUSTIFICATION OF INFRINGEMENT

Whether or not the *Mikisew Cree* "no meaningful right" test and the duty to consult have headed off infringement as the Supreme Court seems to have envisioned, the precedent has largely precluded the need for the Crown to ever seek to justify an infringement in the treaty context. This has stymied

130 *Ibid* at para 1564.
131 *Ibid* at para 1576.
132 *Ibid* at paras 1597, 1739.
133 *Ibid* at paras 1608, 1621, 1625.
134 *Ibid* at paras 1617–1618.
135 *Ibid* at para 1737.
136 *Desautel*, *supra* note 44 at para 30, citing *Manitoba Métis*, *supra* note 88 at paras 67, 75. See also *Haida Nation, supra* note 70 at para 25.

the development of the law on the subject. The Province's decision *not* to argue that any infringement could be justified in *Yahey* was thus a disappointment to those seeking clarity from the courts. The Crown's decision was perplexing given that, in its initial pleadings, it stated (in the alternative to its primary defence of denying an infringement had taken place) that any infringement *was* justified.[137]

Though the Province had enough information regarding the nature of Blueberry's rights and traditional territory to put forward a justification for the infringement argument,[138] it elected not to do so, arguing that it could not do so in the absence of greater specificity about the full scope of the rights at issue and the nature of the infringements.[139] Justice Burke rejected the Province's arguments, holding that the rights at issue were defined clearly enough, that the infringements were identified clearly enough, and that the Province could have put forward an argument on justification.[140] Ultimately, Justice Burke delivered a rebuke to the Province, noting that "[t]he trial was not bifurcated. The Province did not seek to sever the question of infringement from that of justification."[141] Further, Justice Burke wrote, "I agree with Blueberry that it is surprising, given the pleadings, the evidence, and the fact that the issue of justification was not severed from the issue of infringement, that the Province did not argue justification."[142] Finally, Justice Burke held:

> Scarce judicial resources should not be used to have a trial of this length and magnitude proceed, only to allow the Province a further opportunity to advance both evidence and arguments in a later trial that it ought to have raised here. The Province had an opportunity to justify any potential infringement, and it made a strategic choice not to do so. Throughout this lengthy trial, Blueberry has understood that the Province would defend itself, at least in part or in the alternative, on the basis of the infringements being justified. So too has the Court. Blueberry ought not to be prejudiced in obtaining relief in this case simply because the Province chose not to advance a defence.[143]

Having concluded that the Province missed its opportunity to argue justification, Justice Burke stated that the evidence before the Court would

137 *Yahey*, *supra* note 2 at para 1822.
138 *Ibid* at para 1841.
139 *Ibid* at paras 1828, 1830.
140 *Ibid* at paras 1841–1849.
141 *Ibid* at para 1850.
142 *Ibid* at para 1851.
143 *Ibid* at paras 1852–1853.

have nonetheless pointed to the conclusion that the infringement could not be justified.[144]

VIII. THE DECLARATIONS: TOWARDS A SUBSTANTIVE DUTY TO NEGOTIATE

Having found that the cumulative effects of industrial development infringed Blueberry's treaty rights and that the Crown had failed to diligently implement the promises it made in Treaty 8, the Court issued the following declarations:

1. In causing and/or permitting the cumulative impacts of industrial development on Blueberry's treaty rights, the Province has breached its obligation to Blueberry under Treaty 8, including its honourable and fiduciary obligations. The Province's mechanisms for assessing and taking into account cumulative effects are lacking and have contributed to the breach of its obligations under Treaty 8;
2. The Province has taken up lands to such an extent that there are not sufficient and appropriate lands in the Blueberry Claim Area to allow for Blueberry's meaningful exercise of their treaty rights. The Province has 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 in the Blueberry Claim Area;
3. The Province may not continue to authorize activities that breach the promises included in the Treaty, including the Province's honourable and fiduciary obligations associated with the Treaty, or that unjustifiably infringe Blueberry's exercise of its treaty rights; and
4. The parties 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 Blueberry's treaty rights, and to ensure these constitutional rights are respected.[145]

Declarations one and two largely reflect what has already been said above, but some points deserve further attention. The first declaration states that "[t]he Province's mechanisms for assessing and taking into account

144 *Ibid* at para 1855.
145 *Ibid* at para 1894.

cumulative effects are lacking," indicating that upholding obligations, such as those agreed to in Treaty 8, requires the development of effective mechanisms to mitigate the cumulative impacts of Crown approved projects on treaty rights. The second declaration confirms that an infringement can be made out where the cumulative effects undermine the "meaningful exercise" of treaty rights.

The third and fourth declarations are also notable. Declaration three prohibits the Province from authorizing activities that further impede the meaningful exercise of treaty rights: where there is an unjustifiable infringement of treaty rights, the court is prepared to prohibit activities that will cause further impacts. The fourth declaration states that the parties "must act with diligence to consult and negotiate" to ensure the development of "timely enforceable mechanisms to assess and manage the cumulative impact of industrial development on Blueberry's treaty rights."[146] Taken together, these declaratory remedies prohibited the Crown from engaging in further activities that will impact treaty rights (defined, recall, as the ability to maintain a way of life throughout traditional territory) until such time as they negotiated the contours of their activities to the satisfaction of the Indigenous rights-holder. This goes well beyond the duty to consult and accommodate, removing the possibility of unilateral Crown action, and requiring that negotiated outcomes be reached *before* allowing further Crown actions. In doing so, it maintains a clear distinction between the standards applicable to consultation and those that apply where an infringement has been established.

Though Justice Burke did not refer to it as such, this is similar to the "duty to negotiate" that some scholars have advocated for and other courts have alluded to.[147] The Supreme Court has, on several occasions, recognized a duty to negotiate in good faith. A lingering question is whether this amounts to the imposition of a duty to negotiate or, rather, establishes a standard that the Crown must meet once negotiations have begun.[148] Commentators have argued for further development of the former on the basis

146 *Ibid*.

147 See Felix Hoehn, "The Duty to Negotiate and the Ethos of Reconciliation" (2020) 83:1 Sask L Rev 1; Robert Hamilton & Joshua Nichols, "The Tin Ear of the Court: *Ktunaxa Nation* and the Foundation of the Duty to Consult" (2019) 56:3 Alta L Rev 729 at 756–760; *Métis Nation of Alberta Association v Alberta* (*Indigenous Relations*), 2022 ABQB 6 at para 216 (in a decision that followed *Yahey*, the Court of Queen's Bench of Alberta confirmed that "the duty to negotiate is not limited to title claims nor to the negotiation of treaties"— it also applies "more broadly to 'Aboriginal rights'").

148 See e.g. *Sam v British Columbia*, 2014 BCSC 1783 at para 10.

that the duty to consult and accommodate does not go far enough to limit the Crown's unilateral authority and, therefore, gives rise to practical problems and questions of legitimacy.

Where section 35 rights are established, as in the case of treaty rights, it is troublesome that the Crown can proceed with actions that likely infringe rights over objections of the rights holders and effectively dare them to litigate the issue. The duty to negotiate would require the Crown to reach a negotiated outcome before being able to approve actions that would amount to an infringement. It is, in effect, a recognition that the duty to consult and accommodate, while providing for greater Indigenous input into decision-making, has failed to ensure that rights are not "run roughshod over" and to develop a mechanism requiring Indigenous consent absent justification of infringement *before* the infringement takes place.

This latter qualification is key. Under a traditional infringement analysis, an Indigenous party must wait until an infringement occurs before they are able to seek a remedy in court for that infringement. While the duty to consult places some procedural limitations on the Crown's actions at this stage, it still allows the Crown to proceed over objections and force the Indigenous party to subsequently bring an infringement action. It still allows, in other words, the precise situation the Supreme Court sought to avoid in developing the duty to consult in *Haida Nation*, that the subject matter of the right be undermined by the time a judicial declaration is made. The difficulty to date in developing meaningful responses to the problem of cumulative effects and piecemeal infringement reflects this and illustrates the need for negotiated resolutions outside the context of individual projects.

This problem was heightened by the Supreme Court's 2005 *Mikisew* decision.[149] As outlined above, the Court held that not every "taking up" of land in treaty territory constitutes an infringement the Crown must justify. The Crown may take up land, even where doing so adversely impacts a treaty right, without needing to justify an infringement of that right. This decision created a scenario where cumulative effects might render the meaningful exercise of treaty rights impossible, in which case "the significance of the oral promise that 'the same means of earning a livelihood would continue after the treaty as existed before it' would clearly be in question."[150] The Court held that only then—when "no meaningful right"

149 *Mikisew*, *supra* note 43.

150 *Ibid* at para 48.

remained—would an action for treaty infringement be appropriate.[151] Consequently, it would be nearly impossible for a rights holder to establish that any given development or project amounted to an infringement. For one, there is an attribution problem: where a plurality of development projects impact a right, how can any single project be said to be the one that effectively renders it impossible to exercise the right? This approach also poses a significant evidentiary burden, as treaty rights holders have the burden to show that they can no longer exercise their rights through their traditional territory. Only then, on a narrow reading of *Mikisew* (a narrow reading that governments adopted, and the Crown argued for in *Yahey*), could a *prima facie* infringement be made out that would require justification.

In the context of cumulative effects, repeated infringement litigation for each project approval or resource development project is impractical, giving rise to the need to negotiate an alternative means of land use management to prevent an unconstitutional extinguishment of rights. As stated in the concurring reasons of Justice Greckol in *Fort McKay First Nation v Prosper Petroleum Ltd*, "the long-term protection of Aboriginal treaty rights, including the right to hunt under Treaty 8, is increasingly thought to require negotiation and just settlement of disputes outside the context of individual projects in order to address the *cumulative effects* of land development on First Nation treaty rights."[152]

Prosper considered Fort McKay First Nation's (FMFN) negotiations with the Government of Alberta toward developing a land access management plan within its traditional territory in Treaty 8 to mitigate the overwhelming cumulative impacts of decades of oil sands developments on their traditional territory and the exercise of their treaty rights (Moose Lake Access Management Plan, MLAMP).[153] FMFN identified certain areas around its reserves in the vicinity of Moose Lake as some of the last remaining areas where its members could meaningfully exercise their treaty rights and sought a ten-kilometre no-access buffer zone to protect the region from further cumulative effects.[154] Eleven years after the negotiations began, however, the land access management plan was still not concluded when a joint review panel studying the impact of a proposed oil sands expansion found that "the cumulative effects of oil sands development on

151 *Ibid* at para 48.

152 2020 ABCA 163 at para 81 [*Prosper*] [emphasis in original].

153 *Ibid* at para 8.

154 *Ibid* at para 10.

the First Nation's cultural heritage are 'already adverse, long-term, likely irreversible and significant.'"[155]

The panel acknowledged that "existing and approved projects and other disturbances are likely already having a significant adverse cumulative effect on the [traditional land use] activities of Fort McKay."[156] In the intervening years, the MLAMP negotiations were sidelined by the Province's establishment of the broader Lower Athabasca Regional Plan following the 2008 release of Alberta's Land-use Framework and the 2009 enactment of the *Alberta Land Stewardship Act*.[157] The finalized MLAMP was to be included in the regional plan's implementation.[158] However, a joint panel review of the regional plan was instigated by FMFN in 2013 and, in 2015, the panel found that "[t]he [regional plan] has not taken adequate measures to protect [FMFN's] Treaty and Aboriginal rights, Traditional Land Use and culture. In fact, it has done quite the opposite…in the not-too-distant future, FMFN will not be able to utilize *any* of their Traditional Land because of industrial development activities."[159]

The concurring reasons of Justice Greckol are particularly instructive on the honour of the Crown in the context of treaty implementation and the emerging need for negotiations designed to protect treaty rights from cumulative impacts. Considering the *Mikisew* infringement standard, Justice Greckol noted, "[t]his raises the prospect that the effects of any one 'taking up' of land will rarely, if ever, itself violate an Aboriginal group's [treaty right]; instead, the extinguishment of the right will be brought about through the *cumulative effects* of numerous developments over time."[160] By virtue of "taking up" clauses present in all the Numbered Treaties and the Robinson Treaties, there's an "inevitable tension"[161] between upholding treaty rights and the permissible development of land, such that those treaties could never have been a "finished land use blueprint."[162] From this reality, Justice Greckol reasoned that the Crown has an *ongoing* duty to

155 *Ibid* at para 7, citing *2013 ABAER 011* (9 July 2013) at para 1741, online: Alberta Energy Regulator <static.aer.ca/prd/documents/decisions/2013/2013-ABAER-011.pdf> [*2013 ABAER 011*].

156 *2013 ABAER* 011, *ibid* at para 1737.

157 SA 2009, c A-26.8; *Prosper*, *supra* note 152 at paras 8–9.

158 See Government of Alberta, *Lower Athabasca Regional Plan 2012-2022* (Alberta: Government of Alberta, 22 May 2012) at 5.

159 *Prosper*, *supra* note 152 at para 11 [emphasis in original].

160 *Ibid* at para 79 [emphasis in original].

161 *Mikisew*, *supra* note 45 at para 33.

162 *Ibid* at para 27.

ensure the meaningful exercise of treaty rights remains.[163] Whereas the duty to consult on individual projects has been the primary means of achieving that end, Justice Greckol pointed to the record in *Prosper* to suggest that negotiations "outside the context of individual projects" are necessary to ensure that treaty rights are upheld in the context of cumulative effects.[164] There was no need for the Court to determine whether Treaty 8 mandated the negotiation of MLAMP in *Prosper*; the ongoing negotiations themselves constituted an acknowledgement that the duty to consult was insufficient to the task of addressing the cumulative effects of development.[165] Having engaged in negotiations, the honour of the Crown demanded that the Province negotiate in good faith.

The decision of Justice Greckol nonetheless suggested that the honour of the Crown might *compel* negotiation as a matter of treaty implementation when the Crown has notice that the cumulative effects of land development are threatening the meaningful exercise of treaty rights. By nature, those circumstances will have already demonstrated the inability of the project-specific duty to consult[166] to prevent the effective extinguishment of section 35(1) rights.[167] In the absence of an adequate justification for developments that have the cumulative effect of significantly or meaningfully diminishing the exercise of treaty rights, the constitutional guarantee of those rights should compel the Crown to negotiate a "modern agreement" to the original treaty, which will prevent piecemeal infringement before additional development can proceed. This also reflects the finding in *Restoule*[168] that the Crown does not have unfettered discretion in determining how treaty rights are implemented: implementation may be subject to judicial supervision. It follows that courts will increasingly be called upon to enforce the duty to negotiate land use management plans or other forms of shared or coordinated jurisdictional arrangements that prevent the piecemeal infringement of Aboriginal and treaty rights, which was precisely the case the year after *Prosper* in *Yahey*.

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163 *Prosper*, *supra* note 152 at para 81.

164 *Ibid* at para 81.

165 *Ibid* at para 82.

166 See generally *Chippewas of the Thames First Nation v Enbridge Pipelines Inc*, 2017 SCC 41 1099 at para 41, citing *Rio Tinto Alcan Inc v Carrier Sekani Tribal Council*, 2010 SCC 43 at para 53 (the Court held that the "duty to consult is not triggered by historical impacts" nor the "larger adverse impacts of the project of which it is a part," but rather the "adverse impacts flowing from the specific Crown proposal at issue").

167 *Prosper*, *supra* note 152 at paras 79, 81, 82.

168 *Restoule* ONCA, *supra* note 39 at paras 215, 229, 248.

On the urging of Justice Burke, the trial of Blueberry's main action was adjourned for a significant portion of 2018 to allow Blueberry and the Province to negotiate an interim land access management plan that would restrict development in a few critical areas. Those negotiations were unsuccessful.[169] While it's arguable whether British Columbia had notice that the cumulative effects of land development were jeopardizing the meaningful exercise of Blueberry's treaty rights when Blueberry submitted its statement of claim,[170] the Province unquestionably took notice when it voluntarily entered the mid-trial negotiations. Upon taking such notice, it was incumbent upon the Province to acknowledge that project-specific consultation and accommodation were no longer sufficient to prevent the infringement of Blueberry's treaty rights and that it was compelled to negotiate "outside the context of individual projects in order to address the *cumulative effects* of land development."[171] As Justice Burke wrote:

> The Province's reliance on the duty to consult to prevent an infringement here, however, presupposes both the ability of those consultation processes to consider and address concerns about cumulative effects as opposed to simply single projects or authorizations, as well as the success of those consultations.[172]
>
> ...
>
> While the Province says it has responded to [Blueberry's notice concerning cumulative effects] in the context of this litigation, that is not consistent with the honour of the Crown. The Crown cannot ignore a legitimate request by a First Nation to address information and concerns relating to cumulative impacts by pointing to litigation which may take years to complete. There is an obligation on the Crown to deal with matters outside litigation. The honour of the Crown requires more than just an adversarial response in the context of this litigation. The courtroom is not an alternative to the negotiating table, and true reconciliation is rarely, if ever, achieved in courtrooms.[173]

169 *Yahey*, *supra* note 2 at paras 37, 40, 1223.

170 See above the text accompanying note 135. See also Kerry Wilkins "On the Breach: Identifying Infringements of Section 35 Rights" (2022) 72:3 UTLJ 287 at 292 (Kerry Wilkins notes of the Indigenous perspective, the mere fact that a First Nation would elect to allocate potentially scarce community and financial resources to seek a judicial remedy for the cumulative impact of Crown development on its treaty rights suggests the serious possibility that an infringement has taken place and, if unabated, that extinguishment might transpire).

171 *Prosper*, *supra* note 152 at para 81.

172 *Yahey*, *supra* note 2 at para 500.

173 *Ibid* at para 925, citing *Desautel*, *supra* note 44 at paras 87, 91.

This affirms the suggestion of Justice Greckol in *Prosper* that the honour of the Crown will *compel* negotiation as a matter of treaty implementation when the Crown has notice that cumulative effects are threatening the meaningful exercise of treaty rights.

Yahey further implies that the threshold for "notice" in those circumstances—*i.e.*, the "trigger"—is not only met by the Crown voluntarily engaging in negotiations. Rather, the duty to negotiate is triggered at the much lower threshold of "a legitimate request by a First Nation" to address cumulative impacts.[174] The legitimacy of Blueberry's request was substantiated by an independent 2016 report detailing the level of disturbance in their traditional territory,[175] paving the way for the Court to *enforce* the duty to negotiate a land access management plan outside the context of individual projects. Importantly, this suggests that the piecemeal infringement of treaty rights by the cumulative effect of development need not be made out in court for the duty to negotiate to be triggered and enforced. Justice Burke suspended the prohibition on the continued authorization of activities in Blueberry's traditional territory for six months, however, on the basis that the Province would diligently and "expeditiously negotiate changes to the regulatory regime that recognize and respect treaty rights."[176] Unlike the duty to consult—which requires that the Crown engage with Indigenous peoples to understand the scope of the impacts a proposed project would have on their rights and take steps to mitigate those impacts, but ultimately leaves unilateral decision-making authority with the Crown—the duty to negotiate taking shape in decisions like *Yahey* and *Prosper* requires the negotiation of mutually acceptable regulatory processes *before* decisions can be taken which will erode treaty rights.

IX. IMPACT OF THE DECISION ON TREATY RIGHTS DOCTRINE

A. Immediate Impacts in Treaty 8 Territory in British Columbia

Three months after *Yahey*, Blueberry and British Columbia reached an initial agreement that would: a) establish "a $35-million fund for Blueberry to undertake activities to heal the land" and an additional $30 million "to support the Blueberry River First Nations in protecting their Indigenous

174 *Haida Nation*, *supra* note 70 at 513 (this would also track the trigger for the duty to consult and accommodate, which is triggered when the Crown has "real or constructive" knowledge of an Indigenous right and contemplates conduct that may impact it).

175 MacDonald, *supra* note 10.

176 *Yahey*, *supra* note 2 at para 1891.

way of life;" b) allow "195 forestry and oil and gas projects, which were permitted or authorized prior to the court decision and where activities have not yet started" to proceed; and c) prohibit 20 authorized developments "in areas of high cultural importance" from proceeding "without further negotiation and agreement from Blueberry."[177]

The six-month suspension on the prohibition of authorizations expired on December 29, 2021, however, at which time negotiations were still ongoing. Consequently, hundreds of permit applications and authorizations were on hold pending a revised land use management regime that would uphold Treaty 8 rights.[178] Pressure mounted on the Province to reach a negotiated agreement with Blueberry that would give meaningful effect to the treaty promise to protect the continuity of Blueberry's way of life while providing investment certainty for proponents of natural resource development in the region. Whereas the mid-trial adjournment negotiations in *Yahey* were arguably unfruitful because the failure to reach a negotiated settlement entailed no adverse consequences for the Crown, the declaration by Justice Burke enforced the duty to negotiate with real, material consequence that delivered substantive relief to Blueberry when they reached a final agreement with the Province on January 18, 2023.[179]

The Court's enforcement of the duty to negotiate in *Yahey* is also having other indirect effects. Recognizing that its existing ministries lacked the capacity to negotiate effectively and implement integrated land and natural resource management plans capable of mitigating the impact of cumulative effects on Aboriginal and treaty rights, British Columbia established a new Ministry of Land, Water and Resource Stewardship.[180] Additionally, in light of the broader cumulative effects of development within British Columbia's portion of Treaty 8 and the Court's findings regarding the triggering of the duty to negotiate in respect thereof, the Province has engaged

177 See Ministry of Indigenous Relations and Reconciliation, "B.C., Blueberry River First Nations reach agreement on existing permits, restoration funding", *BC Gov News* (7 October 2021), online: <news.gov.bc.ca/releases/2021IRR0063-001940> [Blueberry News Release].

178 See Justine Hunter, "How a tiny First Nation forced an overhaul of land use", *The Globe and Mail* (8 March 2022), online: <www.theglobeandmail.com/canada/british-columbia/article-how-a-tiny-first-nation-forced-an-overhaul-of-land-use>.

179 See Ministry of Water, Land and Resource Stewardship, "Province, Blueberry River First Nations reach agreement", *BC Gov News* (18 January 2023), online: <news.gov.bc.ca/releases/2023WLRS0004-000043>.

180 See "Ministry of Land, Water and Resource Stewardship" (last modified: 12 April 2022), online: *British Columbia Government Ministries* <news.gov.bc.ca/ministries/land-water-and-resource-stewardship>.

with several other affected Treaty 8 adherents to ensure they are "part of the development of a new approach to how natural resource activity is planned and authorized in the territory."[181] Whether these changes portend real and lasting change, and whether the effects will be seen in the parts of the Province outside of Treaty 8, will be seen with time.

Prosper and *Yahey* also have immediate implications for ongoing and future piecemeal treaty infringement claims. In 2018, West Moberly First Nation filed a statement of claim alleging the cumulative effects-based infringement of its Treaty 8 rights in response to the construction of the Site C Dam.[182] The trial was scheduled to commence on March 14, 2022, but the parties have agreed to adjourn and are in the process of negotiating a settlement. The return to negotiations is consistent with the proposition established in *Prosper* and *Yahey* that the honour of the Crown demands good faith negotiations as a matter of ongoing treaty implementation when it has notice that the cumulative effects of development are threatening the infringement of treaty rights. The Province has had notice since at least 2014, when a joint review panel found in its environmental assessment of the Site C Dam that "[t]he project would likely cause significant adverse cumulative effects on the current use of lands and resources for traditional purposes" and "there would be significant cumulative adverse effects on cultural heritage resources."[183] In light of the findings, the West Moberly notified the Minister of Environment that they believed the project would infringe their treaty rights, and that such an infringement would require justification, to which the Minister neglected to respond.[184] The Governor in Council responsible for the final decision subsequently approved the project on the grounds that any significant adverse environmental effects were "justified in the circumstances."[185]

West Moberly then applied for judicial review of the approval on the grounds that the Governor in Council erred in failing to consider whether their treaty rights would be unjustifiably infringed. The Federal Court and Federal Court of Appeal dismissed the applications on the basis that, among other things, the Supreme Court had moved away from the *Sparrow*-era's

181 Blueberry News Release, *supra* note 177.

182 See *West Moberly First Nations v British Columbia*, 2020 BCSC 1665 at para 2.

183 See *Prophet River First Nation v Canada (Attorney General)*, 2015 FC 1030 at para 20 (the same joint review panel report also notably found that the Site C Dam "would likely cause a significant adverse effect on [Blueberry's] traditional uses of the land…and that some of these effects could not be mitigated").

184 *Ibid* at para 23.

185 *Ibid* at para 25.

justified infringement approach to addressing adverse impacts on section 35 rights, towards preventing infringement through consultation and accommodation.[186] This finding is difficult to square with the compelling reasons of *Prosper* and *Yahey*. In the era of piecemeal infringement, the Crown's "reliance on the duty to consult to prevent an infringement…presupposes both the ability of those consultation processes to consider and address concerns about cumulative effects…as well as the success of those consultations."[187] Absent negotiations outside the context of consultation on individual projects, extinguishment will be brought about through cumulative effects.[188] And because extinguishments are constitutionally impermissible, the Crown may have been compelled to either justify or avert an infringement through negotiation.[189] While it remains to be seen how far reaching the impact of *Yahey* will be, it has established a compellingly reasoned blueprint for courts to require that negotiated outcomes be reached *before* substantial infringements of Aboriginal and treaty rights occur.[190]

B. Impacts in Other Treaty Regions

What might the impacts of *Yahey* be in other treaty areas and the development of treaty doctrine more generally? A comprehensive answer to this requires a paper of its own. A few indications of possible impact, though, can be drawn if we look at the facts and reasoning that supported the findings in *Yahey*. First, it was essential that Justice Burke held that Treaty 8 promised the continuity of a way of life associated with hunting, fishing,

186 See *Prophet River First Nation v Canada (Attorney General)*, 2017 FCA 15 at paras 33–36.

187 *Yahey*, *supra* note 2 at para 500.

188 *Prosper*, *supra* note 152 at paras 79, 81.

189 It is also worth noting that the environmental assessment approval at issue was governed by the *Canadian Environmental Assessment Act*, which has since been replaced by the *Impact Assessment Act*. The former required the final decision-maker to determine whether any "significant adverse environmental effects" were "justified in the circumstances." See *Canadian Environmental Assessment Act, 2012*, SC 2012, c 19, ss 52, 52(4). Conversely, final decisions under the *Impact Assessment Act* turn on whether any adverse effects indicated in the reviewing body's report can be justified "in the public interest." See *Impact Assessment Act*, SC 2019, c 28, ss 1, 62. Further, the "public interest" under the *Impact Assessment Act* must consider "the impact…on any Indigenous group and any adverse impact…on the rights of the Indigenous peoples of Canada recognized and affirmed by section 35 of the *Constitution Act, 1982*." See *Impact Assessment Act*, ss 1, 63(d).

190 Without wishing to be overly cynical, one wonders whether the decision not to appeal *Yahey* was based in part on the desire to avoid a similar decision from the Court of Appeal that might provide even more support for the application of these principles elsewhere in the province.

and trapping throughout the territory. The more substantial the treaty right at issue, the more likely it will be that an infringement of that right can be made out. In *Yahey*, there was clear evidence that a way of life was intended to be protected. Something analogous in other treaty regions would make it more likely that infringement based on cumulative impacts could be made out.

For example, Duncan First Nation's Treaty 8 piecemeal infringement lawsuit filed in 2022 against the Government of Alberta, frames the infringing conduct as having significantly diminished the meaningful exercise of their right to a *way of life* protected by the treaty.[191] Like Blueberry, Carry the Kettle First Nation's Treaty 4 infringement lawsuit against the governments of Saskatchewan and Canada frames the maintenance of the way of life practiced by their ancestors as a foundational right guaranteed by the treaty.[192] And, while Beaver Lake Cree Nation's Treaty 6 infringement lawsuit against the governments of Alberta and Canada does not invoke a right to a way of life *per se*, it frames the Crown's treaty obligations as requiring the maintenance of the land and resources within their traditional territory to sustain the meaningful exercise of their land-based rights that leaves room for characterizing the exercise of those rights as a way of life.[193]

Similarly, the presence of the "taking up clause" shaped the reasoning in the *Yahey* decision. Such clauses are present in all the numbered treaties and the Robinson treaties. The Vancouver Island treaties and Maritime Peace and Friendship treaties, by contrast, do not have taking up clauses. In *Yahey,* this clause was perceived to weaken the case for infringement, as it provided a textual basis for the balancing of Crown and Indigenous interests and recognized the right of the Crown to undertake development activities. The absence of a taking-up clause, then, should strengthen the protection afforded to Indigenous treaty rights unless they are subject to a comparable "internal limitation." Finally, the scale and degree of the impact on Blueberry's treaty rights was significant and something comparable may be required for other treaty nations to find similar success in the courts.

From a doctrinal perspective, the clarification by Justice Burke of the *Mikisew* standard is well reasoned and well-supported by precedent. In particular, the nuanced discussion of the spectrum along which infringements have been determined helpfully framed the issue and illustrated what an extreme outlier *Mikisew* would be if given the narrow interpretation

191 *Gladue SOC*, *supra* note 5 at para 5.

192 *Jack SOC*, *supra* note 5 at para 5.

193 *Lameman SOC*, *supra* note 5 at para 19.

advocated for by the Crown. It also aligns with the Supreme Court's repeated emphasis on the importance of fulfilling constitutional obligations pursuant to the honour of the Crown and repeated statements that section 35 ought to be interpreted in a way that recognizes and gives effect to the fact that Indigenous peoples lived in political communities prior to assertions of Crown sovereignty. While the decisions of future courts are hard to predict, *Yahey's* central conclusions that cumulative effects can be the basis for an infringement claim and that the narrow conception of *Mikisew* is untenable is a reasonable and doctrinally sound approach that may well find support at appellate level courts.

X. CONCLUSION

Indigenous peoples have consistently raised concerns over the profound impacts of the cumulative effects of development on the exercise of Aboriginal and treaty rights. To date, judicial doctrine has been able to offer only clumsy and partial solutions. By providing a substantive and nuanced reading of the common intention of the parties analysis, recognizing the need to consider the impacts of cumulative effects in assessing potential infringements, and disposing of exceedingly narrow interpretations of the *Mikisew* standard for infringement, Justice Burke provided the doctrinal clarity required for the judiciary to navigate complex treaty rights disputes in a way that reflects and enforces the Crown's obligations to act honourably in fulfilling and implementing treaty promises, especially in the face of repeated incursions and the gradual erosion of treaty rights.