Cumulative effects and Treaty rights

WHAT THE *YAHEY* CASE MEANS FOR YOU

What are cumulative effects?

Picture a small pond in the woods packed with perch. It is not a big deal if one person fishes there every weekend. But what about 20 people every weekend? What about when 20 people fish there every day? How about if 20 people bring motorboats to the pond and build cottages too?

When lots of little things add up it is called cumulative effects. In Canada, projects for mining, fishing, forestry, and oil and gas extraction are very important for the economy. When lots of these projects happen over the years, their impact adds up and can harm the treaty rights of Indigenous peoples. When your treaty rights as Indigenous Peoples are harmed you can fight for them in court. This pamphlet will tell you how to do that. It will also look at a recent court case where an Indigenous Nation in British Columbia ("BC") proved that cumulative effects breached their treaty rights.

What do treaty rights have to do with cumulative effects?

Some cumulative effects from things like forestry, fishing and mining have been so serious that they breach treaty rights: things like the right to gather traditional foods and the right to share traditional knowledge with the next generation. Indigenous Peoples have always known about cumulative effects and have tools to fix them. In the court case *Yahey v British Columbia* ("*Yahey*"), the Blueberry River First Nation ("Blueberry") proved that cumulative effects breached their treaty rights. Now, Blueberry will be able to use their tools to work with the Crown to fix the damage done by cumulative effects to their treaty rights.

What are treaty rights?

This pamphlet focuses on treaty rights. While the Constitution protects both Aboriginal rights and treaty rights, Aboriginal rights are not written down like treaty rights are and that makes them harder to prove in court. Treaties between Indigenous Nations and the Crown are enforceable legal documents.

But what is the Crown?

The "Crown" is a word used by lawyers that means the federal government or any Canadian territorial or provincial government. Since these governments represent the Crown, you can take any of them to court if you believe your treaty rights have been breached.

Should I go to court?

If you choose to go to court to argue that your treaty rights have been breached, you will need to prove what the treaty promises.

The first thing the court will look at is the treaty itself, but courts recognise that a written treaty does not always record everything that was discussed. When the written treaty is unclear, courts are supposed to be culturally sensitive, making sure that what was originally understood as the treaty right can still be exercised today. The court must also resolve any confusing treaty language to be in favour of the Indigenous Nation.

Elders and historians can help courts understand treaties, but courts do not always allow this.

Treaty rights infringement

If you prove that a right is guaranteed by treaty, you must also prove that the treaty right has been infringed (harmed) by the Crown. These infringements can be things the Crown has done or things the Crown has allowed to be done.

You can prove treaty infringement by:

- Showing that it appears the preferred way of exercising the treaty right has been interfered with by the Crown.
- Showing that the Crown has unreasonably limited exercise of that treaty right.
- Showing that the Crown has interfered with the treaty right causing undue hardship.

What happens next?

Once you prove that the Crown has infringed your treaty right, the Crown can still justify that infringement by arguing it had an important reason by law to do so. However, you can weaken the Crown's argument by showing the court how important the treaty right is to you and your nation.

You should also tell the court if you feel that the Crown breached your treaty right without first contacting your Indigenous Nation to discuss its plans.

You should carefully prepare if you want to go to court to show that your treaty right has been breached. This can be tricky if you believe that cumulative effects have breached your treaty right, but it can be done.

Yahey v British Columbia

In 1900, Blueberry's ancestors agreed to enter into Treaty 8 with the Crown. Treaty 8 guarantees Blueberry a treaty right to hunt, trap and fish throughout Treaty 8 land. At the same time the Crown has the right to regulate the treaty right to hunt, trap, and fish, and can prevent that treaty right from being exercised where Treaty 8 land has been "taken up" for "settlement, mining, lumbering, trading or other purposes".

When Treaty 8 was entered into, nobody expected that Treaty 8 lands would get a lot of settlement or industrial development. However, oil and natural gas was eventually discovered in Blueberry's traditional territory and the Alaska Highway was built, opening up Treaty 8 land for industrial development. In the years since, BC has allowed many industrial developments to occur on Blueberry's traditional territory. Only recently has BC considered the cumulative effects of these developments on the environment and treaty rights, but the damage has already been done.

Because of all this Marvin Yahey, the former chief of Blueberry, went to court to argue that the cumulative impact of the industrial developments authorized by BC breached Blueberry's treaty right to hunt, trap, and fish.

BC's defence

The most important part of BC's defence was that Blueberry's treaty right to hunt, trap and fish was only breached if Blueberry could no longer exercise those rights anywhere in its traditional territory. Unexpectedly, BC did not try to defend the case against it by saying that even if it breached Blueberry's treaty rights it was justified to do so.

After six years in court, the Supreme Court of BC ruled that Yahey proved his case.

Three important facts from the court decision:

- BC breached Treaty 8 by taking up so much land that Blueberry River cannot meaningfully exercise its treaty rights.
- Despite knowing for at least 10 years that Blueberry was concerned about breaches of their treaty rights, BC did not consider the cumulative impact of industrial development on Blueberry River's ability to meaningfully exercise its treaty rights.
- BC cannot keep breaching Treaty 8 by allowing activities to occur that will harm Blueberry's treaty rights.

So, what does *Yahey* mean for you and your nation?

What can be learned from *Yahey* to defend your treaty rights in court?

What does *Yahey* mean for you?

The importance of *Yahey* to your treaty rights case will depend on what your treaty with the Crown promises.

If your Indigenous Nation is within BC, the Supreme Court of BC and the Provincial Court of BC must apply the legal principles of *Yahey* to the facts of your treaty rights case. Your legal team should be prepared to show why the facts of your case are similar to the facts in *Yahey*.

If your Indigenous Nation is located in a different province or territory, you cannot tell a court that it must apply the legal principles of the *Yahey* decision. However, the *Yahey* decision will likely be very persuasive to any judge in Canada. You, your Indigenous Nation, and your legal team should know these important takeaways:

1. You must be able to meaningfully exercise your treaty rights

Over decades, BC's authorization of countless pipelines, powerlines, and logging roads, meant that over 91% of Blueberry's traditional territory was disturbed by an industrial feature. This left Blueberry without enough land to "meaningfully exercise" its treaty rights. But what does meaningfully exercise mean? *Yahey* says that Blueberry can no longer meaningfully exercise its treaty right when it has been "significantly or meaningfully diminished when viewed within the way of life from which they [Blueberry] arise and are grounded". This is different from what courts said before, which was that treaty rights could no longer be meaningfully exercised when they could not be exercised at all.

In other words, the court should analyze whether a treaty right has been infringed within the specific traditional territory of your Indigenous Nation. For perspective, that difference in Yahey was the difference between 38,000 square kilometres and 194,000 square kilometres. Would you rather drive an hour before you can find a moose, or ten hours?

2. The Crown cannot let cumulative actions harm your right to meaningfully exercise your treaty rights

In *Yahey*, the Court found that BC's permitting and licensing processes for industrial development failed to address the cumulative impact on Blueberry's treaty rights. BC was too slow to provide effective land management tools, let alone management of cumulative effects that would influence industrial development decisions.

This means that BC failed to meaningfully protect wildlife or wildlife habitat within Blueberry's traditional territory, and failed to stop industrial development from breaching Blueberry's treaty rights.

3. Evidence is the key

Usually, courts only look at information, or evidence, that you bring to the court, and do not do their own research. The strongest case in the world will fail if you do not show the court the evidence to prove it. Your legal team should discuss with you and your Indigenous Nation the rules of evidence and should also suggest arguments that may help you show that your treaty rights have been breached.

Three tips:

1. Consider negotiation before litigation, and don't forget UNDRIP!

Because Blueberry won in court, Blueberry and BC have formally agreed to work together to fix the damage done by cumulative effects, both to treaty rights and the land itself. Other Indigenous Nations are taking notice and are going to court to prove cumulative effects have breached their treaty rights. However, going to court is very expensive, and takes a lot of time. It can also be emotionally draining and hurtful as it does not guarantee the outcome that you want. Considering the aftermath of the *Yahey* decision and Canada's recent acceptance of the United Nations Declaration on the Rights of Indigenous Peoples ("UNDRIP") as domestic law ("UNDRIP Act"), you should always consider negotiating with the Crown before going to court.

You and your legal team should know about the UNDRIP Act because it will change how courts interpret the Crown's obligations to Indigenous Peoples. Importantly, the UNDRIP Act requires that the Crown get consent from Indigenous Peoples before taking actions that affect them, including treaty rights protected under the Canadian Constitution. This is different to how it used to be, where all the Crown had to do was talk to Indigenous Peoples before taking actions that affected them.

The UNDRIP Act is a new law, and there is not a lot of Canadian case law yet which deals with the UNDRIP Act. However, many industrial resource extraction businesses are taking notice of the UNDRIP Act, and are choosing to make consensual agreements with Indigenous Nations before extracting resources from their traditional territory.

Put another way, businesses do not want to infringe treaty rights. While this a fact and not the law, it could strengthen your nation's position if it chooses to negotiate with the Crown about an alleged breach of treaty rights.

Your legal team should remind the Crown that fair negotiation is the right way to address harm to treaty rights. Even the Crown says litigation is not the preferred approach to addressing breaches of treaty rights. If negotiating with the Crown does not work, litigation is an option.

2. If you choose litigation prepare for objections to your evidence

The law of evidence is very complicated. The best thing is to bring people into court to testify about factual things they personally saw and can say happen. Of course, that is hard with treaties that were written a long time ago.

Generally, courts do not allow out of court statements to be considered for proof of their contents. This is called the "hearsay rule". However, there are lots of exceptions to the hearsay rule. We will highlight two of them.

Documents prepared by a government regulator could be important evidence for your treaty rights case, especially if you are arguing that cumulative effects have breached that treaty right. These sorts of documents can be admitted as truth rather than opinion as an exception to the hearsay rule. To do that you must make sure that you know:

- What public official prepared the document.
- The document was prepared for a public function.
- The document it is available for public inspection.
- The document was meant to be a permanent factual record.

Indigenous Oral History technically goes against the hearsay rule. However, Oral History can be admitted to court as evidence if that Oral History is reliable and useful for proving a case.

Your lawyer should also be prepared to show that the person who first told the Oral History, or anybody who first saw it being told, cannot come to court.

3. Think carefully about expert witnesses

Expert witnesses, like historians, archaeologists, or biologists, are hired by people bringing a case or defending it, to give their opinion about things that are relevant to the case. Expert witnesses often give very important evidence in treaty rights cases.

For judges to accept the opinion evidence of an expert witness, the expert witness should:

- Be properly qualified.
- Have an opinion that is relevant and necessary to the legal issue.
- Be fair, objective, and impartial.
- Have a consistent opinion throughout trial and their behaviour on the stand should be non-argumentative.

Ideally, choose an experienced expert witness whose qualifications are relevant to the topic at issue and are unlikely to be questioned.

Your legal team should have advice about choosing credible expert witnesses and ideally will have worked with that expert witness before.

A final word

This pamphlet is not legal advice, and you should always find a qualified lawyer to help you argue a treaty rights case. However, we hope this pamphlet has assisted you in knowing how to start.

Be sure to research your province's available resources for assistance with bringing legal claims. Some provinces have legal resources specifically for Indigenous Peoples and resources for help collecting evidence of cumulative effects.

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