What a Ground-breaking Legal Victory Means for Regional Assessment in Canada: *Yahey v British Columbia* (2021)

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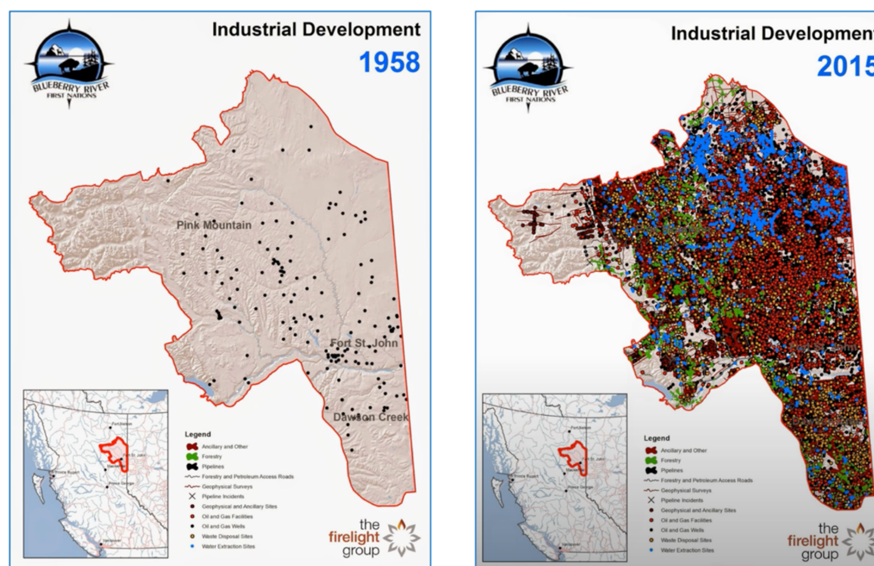
Much has been written in Canada about the British Columbia Supreme Court's lengthy (2,000 paragraphs), complex, and ground-breaking decision in *Yahey v British Columbia,* 2021 BCSC 1287 (CanLII) (*Yahey*).[2] In *Yahey*, the Court agreed with the Blueberry River First Nation (BRFN) that, in the context of BFRN's traditional territory in Northeastern British Columbia, "the cumulative effects of industrial development authorized by [British Columbia] have significantly diminished the ability of Blueberry members to exercise their rights to hunt, fish and trap in their territory as part of their way of life and therefore constitute an infringement of their treaty rights" (at para 3). This brief paper focuses on the Court's findings with respect to British Columbia's approach to resource development, and specifically its failure to *effectively* manage the cumulative effects associated with oil and gas and forestry (see Figure 1, below, which illustrates the extent of industrial development in the BRFN's traditional territory since the 1950s).[3] As further set out below, these findings and analysis are relevant to every level of government in Canada (federal, provincial, territorial, Indigenous, and municipal) and indeed to governments around the world as they continue to grapple with cumulative effects management. The first part sets out a brief primer on cumulative effects. Part II summarizes the Court's key findings with respect to British Columbia's resource management regimes and their failure to effectively manage cumulative effects. Part III discusses some of the decision's implications for the rest of Canada.

Figure 1: Industrial Development in the BRFN's Territory (British Columbia, Canada)



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[2] See *e.g.* Robert Hamilton and Nicholas P. Ettinger, "The Future of Treaty Interpretation in *Yahey v British Columbia*: Clarification on Cumulative Effects, Common Intentions, and Treaty Infringement," 2023 54-1 Ottawa L Rev 109.

[3] See https://www.youtube.com/watch?v=s5LizUgzDyA for a time-lapse illustration of this development.

I. A Brief Primer on Cumulative Effects

Cumulative effects have been defined as "the changes in the environment caused by multiple interactions among human activities and natural processes, which accumulate across time and space" (Hegmann, G. et al. Cumulative Effects Assessment Practitioners Guide, 1999). When discussing the problem of cumulative effects, it is useful to drawn on the work of American ecologist William E. Odum, who once described cumulative effects as "the tyranny of small decisions" (William E Odum, "Environmental Degradation and the Tyranny of Small Decisions" (1982) 32:9 Bioscience 728). For example, with respect to the eutrophication of lakes, *i.e.*, excessive plant growth that leads to a depletion of oxygen necessary for aquatic life, Odum noted that

> [f]ew cases…are the result of intentional and rational choice. Instead, lakes gradually become more and more eutrophic through the cumulative effects of small decisions: the addition of increasing numbers of domestic sewage and industrial outfalls along with increasing run-off from more and more housing developments, highways, and agricultural fields. (Odum 1982 at 728)

There are even simpler analogies and metaphors for understanding the mechanics of cumulative effects. Canadian courts have long understood cumulative effects as a "death by a thousand cuts" (*R v Panarctic Oils Ltd*, 1982 CanLII 4944 (NWT TC), 12 CELR 29). Another useful metaphor is "the straw that broke the camel's back," which has been described as "a minor happening, circumstance, etc. which, when added to a whole string of other annoyances, is finally too much to bear."[4] In the resource management context, we can think of each 'straw' as a form of land disturbance: an oil or gas well, a pipeline, a road, a mine, a cut block, etc., and the 'camel' as the region, territory, or watershed in which they are located.

In addition to simplifying what in practice can be a complex exercise, these metaphors can help to convey the basic problem with resource management regimes throughout most of Canada: governments' inability, which as *Yahey* shows is often actually an intentional refusal, to assess and describe the ecological conditions of any given region or watershed (whether to Indigenous peoples or the Canadian public more broadly) – ostensibly in order to avoid being constrained by such conditions. In other words, governments generally refuse to find out: (i) how many straws a given region, territory, or watershed might reasonably be expected to carry; (ii) how many straws a given region, territory, or watershed is currently carrying; and (iii) how many further straws will be managed in light of existing straws in those regions, territories or watersheds? Where they do make such attempts, the results often appear deliberately more complex and opaque than necessary.

II. British Columbia's Resource Management Regimes: "Ships Passing in the Night"

Justice Emily M. Burke summarizes *Yahey*'s primary conclusions at the outset of her decision. Three are most relevant here:

> *The Province has not, to date, shown that it has an appropriate, enforceable way of taking into account Blueberry's treaty rights or assessing the cumulative impacts of development*

[4] See https://www.idioms.online/the-straw-that-broke-the-camels-back/

> *on the meaningful exercise of these rights*, or that it has developed ways to ensure that Blueberry can continue to exercise these rights in a manner consistent with its way of life. *The Province's discretionary decision-making processes do not adequately consider cumulative effects and the impact on treaty rights…*
>
> …The extent of the lands taken up by the Province for industrial development (including the associated disturbances, impacts on wildlife, and impacts on Blueberry's way of life), means there are no longer sufficient and appropriate lands in Blueberry's territory to allow for the meaningful exercise by Blueberry of its treaty rights.
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> …*Despite having notice of these legitimate concerns*, *the Province failed to respond in a manner that upholds the honour of the Crown* and implements the promises contained in Treaty 8. The Province has also breached its fiduciary duty to Blueberry by causing and permitting the cumulative impacts of industrial development without protecting Blueberry's treaty rights. (at para 3, emphasis added)

Justice Burke's detailed analysis and discussion of British Columbia's regulatory regimes for oil and gas, forestry, and wildlife management ought to be required reading for regulators throughout Canada. For example, the two administrative agencies in charge of oil and gas – the Ministry of Energy, Mines and Petroleum Resources and the BC Oil and Gas Commission (now the BC Energy Regulator) – are described as "'ships passing in the night,' each erroneously assuming the other accounted for cumulative impacts on treaty rights" (Hamilton and Ettinger, 2023).

Overall, with respect to oil and gas, Justice Burke concluded:

> Although the Province has identified certain measures that it says take into account treaty rights and/or cumulative effects, a review and consideration of the evidence reflects this is not the case. I find there is a significant disconnect between the tenuring and permitting decision makers, such that each believes the other considers treaty rights and/or cumulative effects to a greater degree than they actually do. This disconnect has created a gap through which Blueberry's rights have fallen.
>
> *What tools the Province does have in place* – including tenure caveats, permit conditions and the Area Based Analysis as presently structured and used by the Oil and Gas Commission – *are largely ineffective*… (at paras 1197-1198, emphasis added)

Similarly, with respect to forestry:

> …I find that the Province's forestry regime is built upon the fundamental goal of maximizing harvest and replacing all the natural forests with crop plantations that will create efficiencies for the next harvest cycle.
>
> I also find that the operational decisions of district and resource managers are connected to higher level plans and processes that have already zoned much of the Blueberry Claim Area for high intensity forestry.

> Finally, *I find that decision makers lack authority to manage cumulative effects, or take into account impacts on the exercise of treaty rights*. As Blueberry points out that, at the end of the day, it is the forestry companies…who hold much of the power regarding what cutblocks to harvest, how and when. (at paras 1562-1564, emphasis added)

Two points are worth making here. The first, admittedly anecdotal one but based on my fifteen years of practice and research in this area, is that Justice Burke's findings are broadly applicable to the vast majority of regulatory regimes in every province in Canada, as well as those at the federal level, where, despite some sporadic improvements, the overwhelming focus has always been – and continues to be – on individual project assessment and approval without sufficient regard to cumulative effects, whether within or between sectors.

Indeed, the province of Alberta appears to have recognize this problem over fifteen years ago, when it first introduced its Land Use Framework, which recognized that there were "more and more people doing more and more activities on the same piece of land…. [putting] stress on the finite capacity of our land, air, water and habitat" and that "the old rules will not produce the quality of life we have come to expect": (Government of Alberta, "Executive Summary", *Land-Use Framework*, (2008) at 1). Unfortunately, this Framework has never reached its potential and has since withered from deficiencies and disuse.

The second point is that such deficiencies are not inevitable, as the evidentiary record in the *Yahey* litigation makes clear. Critical to Justice Burke's conclusions with respect to infringement were several products from a "Regional Strategic Environmental Assessment" [RSEA]. In contrast to project-specific impact assessments, which focus on one project at a time, such assessments can be understood as "a means to assess the potential environmental effects, including cumulative effects, of strategic policy, plan and program alternatives for a region" (Canadian Council of Ministers of the Environment, "Regional Strategic Environmental Assessment in Canada: Principles and Guidance" (2009)). One such product of the RSEA was a map that reflected all of the disturbance in BRFN's territory, as explained by Justice Burke:

> This [RSEA] process is a broad collaborative planning process involving seven Treaty 8 First Nations and the Province, and also includes representatives from industry (primarily from the forestry and oil and gas sectors) as observers. Blueberry joined the Regional Strategic Environmental Assessment process in 2016.
>
> […] It was recognized that, in order to progress the work of RSEA, all parties would need one source of data they could use and trust. A data working group was constituted with representatives from both the Province and participating Treaty 8 First Nations.
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> The data working group was cognizant that *disturbance data associated with certain activities such as oil and gas development and forestry are held in separate government departments. The data are stored and updated differently, and departments do not reference each other's data in a comprehensive way*. For example, if someone wanted to know how many roads there were in northeast BC, they would have to access and review all the datasets,

> but they would not necessarily know if they had retrieved all the available datasets, or whether they overlapped such that they were double counting.
>
> *One of the primary tasks of the data working group was to establish a layer of disturbance information that gathered into one place all the relevant datasets stored and utilized by the Province*. Therefore, it was decided that other RSEA work should be put on hold until this reliable disturbance data was generated. […]
>
> Dr. Holt requested that Gregory Khem, a GIS technician, calculate the overall disturbance in Blueberry's territory. In other words, take the shape file from the RSEA disturbance layer, "clip" the data from the 25 million hectare dataset included in the RSEA study area to focus on the approximately 4 million hectares that make up the Blueberry Claim Area, and run the calculations (i.e., map the disturbances) applying first a 250-metre, and then a 500-metre, buffer.
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> The buffering process was described as simple math: the computer draws either a 250metre line or a 500-metre line around everything in the data layer, and then it adds up how much area is within those areas and uses the total Blueberry Claim Area as the denominator. This shows how much of the Blueberry Claim Area is affected by disturbance. *The results of these calculations indicated that 85% of the Blueberry Claim Area is within 250 metres of a disturbance, and 91% of the Blueberry Claim Area is within 500 metres of a disturbance.* (at paras 868, 879-881, 888-889, emphasis added)

For environmental lawyers, understanding this evidence may require its own primer in GIS (geographic information systems). For my purposes here, it is sufficient to note that GIS is simply "a computer system for capturing, storing, checking, and displaying data related to positions on Earth's surface".[5] Such data is commonly displayed in the form of a map. Maps can be simple or can combine data from multiple sources, which can then be viewed individually or in various combinations. Such data can also be manipulated using various tools. The buffering tool referred to in *Yahey*, above, is commonly used in forestry, e.g., to determine what percentage of a harvestable area is within 15 or 25 metres of a watercourse (and therefore potentially restricted to logging), or which percentage is within a certain proximity of existing roads (and therefore most economical). As one example from *Yahey*, having 85% of the Blueberry River First Nation's claim area within 250 metres of a disturbance exceeds the scientifically-based thresholds for caribou recovery (at para 1710).

The key takeaway from the above passage in *Yahey*, and further reflected throughout the decision, is this: British Columbia *had all the relevant data* but did not diligently try to use it in a way that would actually manage cumulative effects and protect BRFN's treaty rights. As summarized by Justice Burke:

> I find that the Province's work on the development of a cumulative effects framework has been plagued by inordinate delay… The Province has been unable to show that it is effectively considering or addressing cumulative effects in its decision-making. *Current condition reports from the Regional Strategic Environmental Assessment process, whether*

[5] See https://education.nationalgeographic.org/resource/geographic-information-system-gis/.

finalized or in draft, are not currently being incorporated into decision-making and there is a lack of guidance for decision-makers as to how the various tools that are anticipated to emerge from the work on developing a cumulative effects framework are to be used… (at para 1783, emphasis added).

Again, and at the risk of stating the obvious, the same "inordinate delay" has occurred throughout Canada.

III. Implications for Resource Management throughout Canada

One of the more interesting discussions following *Yahey* relates to its potential impact as a matter of precedent. My focus is on the findings with respect to cumulative effects and their effective management, or lack thereof. I am not an Indigenous rights scholar, but the logic and direction of that jurisprudence and Canadian doctrine over the past thirty years suggests that an obligation to *effectively* manage cumulative effects cannot logically be restricted to traditional territories such as BRFN's that have been so heavily disturbed. In my view, wherever First Nations have *credible* concerns about cumulative effects and their potential impacts on their Aboriginal or treaty rights, *Yahey* strongly supports the triggering of the 'duty to consult and accommodate' (*Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73 (CanLII)) with respect to those concerns, independent of any individual permit or project-related consultations that may already be occurring (the constitutional requirement for which was established in Canada by the Supreme Court in its 2004 *Haida* decision). Instituting *effective* processes and regimes for managing cumulative effects or, where some such regimes exist, improving them would be the most obvious ways to accommodate such concerns.

Yahey makes painfully clear what many First Nations have long-since known: the decision to develop processes to *effectively* assess and manage cumulative effects – or more accurately the decision to delay or not develop such processes – is a strategic, higher-level decision that will impact Indigenous claims and rights in a way that cannot be fully addressed later. And while such a development (i.e., essentially a legal obligation to effectively manage cumulative effects as part of the protection provided to Indigenous rights by section 35 of Canada's *Constitution, 1982*) may seem jarring to some, contemporaneous developments such as the implementation of the *United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIP) are bound to point in the same basic direction.

Fortunately, there are several functioning land-use planning regimes throughout Canada, especially in the north, which governments can learn from (see e.g., Peel Watershed Regional Land Use Plan). The federal government has also recently entered into the regional assessment arena, including in Ontario's Lake of Fire area and for Offshore Wind Development in Nova Scotia, although provincial and territorial governments should undoubtedly remain the *presumptive* leads in the regional planning space. Last but certainly not least, there is the new regulatory regime agreed to by British Columbia and the BRFN in the wake of the *Yahey* decision. And, of course, Justice Burke's decision sets out many of the deficiencies to look out for. Assessing and learning from all these efforts, including efforts in other jurisdictions, will be a longer-term endeavor, but one that in Canada has now taken on increased urgency.