

Treaty infringement claims for cumulative effects come to Alberta

AUGUST 29, 2022 5 MIN READ

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This July, the Duncan's First Nation (DFN) in northern Alberta filed a claim against the province alleging an unjustifiable infringement of their Treaty 8 rights on the basis of the cumulative effects of development in their traditional territories. The claim mirrors a successful, precedent-setting claim made by the Blueberry River First Nations (BRFN) in British Columbia last year and, if it succeeds in Alberta, could have important implications for the future of licencing and permitting for resource development in this province.

Background: the Blueberry River First Nations claim and agreement

Last July, we posted an [update](#) about the British Columbia Supreme Court (BCSC)'s decision in *Yahey v British Columbia*, a landmark case that modified the test for treaty rights infringement in British Columbia. In *Yahey*, the BRFN successfully advanced a claim against the Province of British Columbia for unjustifiable infringement of their Treaty 8 rights on the basis of the cumulative effects of resource development in their traditional territories. The Court found that the province had failed to adequately investigate or address the BRFN's concerns about the cumulative impacts of development on their ability to meaningfully exercise their treaty rights in their traditional territories.

The BRFN case was precedent-setting because it was the first case since the Supreme Court of Canada (SCC) laid out the test for treaty rights infringement in *Mikisew Cree First Nation v Canada (Minister of Canadian Heritage)* to address the question of when a "meaningful right to hunt" no longer exists in a First Nation's traditional territories. In *Yahey*, the Court held a treaty right is infringed when there is a "significant or meaningful diminishment of the rights" on the basis of the cumulative impacts of all past and present development in the First Nation's traditional territories (at para 529). The Court prohibited the province from continuing to authorize activities that breach BRFN's treaty rights, subject to a six-month suspension period to provide the parties the opportunity to negotiate changes to the regulatory regime that recognize and respect BRFN's treaty rights.

The Province of British Columbia did not appeal the BCSC's decision in *Yahey* and, as a result, permit applications in northeast British Columbia have been largely suspended since the decision was issued last summer. The Province of British Columbia, BRFN and other Treaty 8 First Nations in northeast British Columbia are actively negotiating a new regulatory framework that will address the Court's findings in *Yahey*, although the timing for a final agreement remains uncertain.

The Duncan's First Nation claim

The DFN claim adopts the wording used by Justice Burke in *Yahey* to claim that the Province of Alberta has, through its cumulative approval of resource development, agriculture, transportation, and settlement activities in DFN's traditional territories, "significantly diminished" DFN's treaty rights to the extent that those rights are now unjustifiably infringed. The DFN claim describes the impacted treaty rights as including the rights to hunt, fish and trap within their territory, as well as maintain their land-based cultural practices and way of life—a description of treaty rights similar to the one used by the BCSC to assess the cumulative impacts of development in *Yahey* (at para 540) and a more expansive description than the definition of treaty rights used by the SCC in *Mikisew*, which focused more narrowly on the specific rights to hunt, fish and trap (at paras 42–44, 48).

The DFN claim also seeks similar relief to that sought by the BRFN in *Yahey*, including court orders declaring that Alberta's regulatory mechanisms are ineffective to assess cumulative effects, directing the province to establish new mechanisms for the assessment of cumulative impacts of development, and prohibiting the province from permitting any activities that further infringe DFN's treaty rights.

Implications of the DFN claim to Alberta regulatory law

The DFN claim seeks to bring the broader view of treaty rights used in *Yahey* to Alberta by expanding the focus from the discrete hunting, fishing, and trapping activities commonly raised in treaty infringement claims to include the more general practice of a cultural way of life. If adopted in Alberta, this could materially increase the risks of successful treaty infringement claims against the province, affecting proposed projects, proposed project modifications, and other regulated activities across Alberta.

Adopting *Yahey* in Alberta could further result in a significant shift in the province's ability to engage in general land use planning without first effectively seeking the consent of affected First Nations. Notably, in *Yahey*, the Court found that the Province's disinclination to negotiate and adopt such a framework constituted evidence of its failure to address the cumulative effects of development in the BRFN's territory (at paras 1748–1749, 1808). The Court in that case mandated bilateral negotiations between the province and BRFN to establish a new regulatory framework, which, as noted, remains ongoing. Accordingly, *Yahey* signals a potential shift toward shared decision-making on land management decisions to address cumulative impacts of development to ongoing treaty rights.

However, the inclination of Alberta courts to adopt the treaty rights infringement test as laid out in *Yahey* awaits a decision on the DFN's claim. The decision in *Yahey* was made on the basis of extensive historical, anthropological, anthropogenic and oral evidence specific to the claim area, the BRFN's historic and contemporary use of the region, the specific developments approved by the province, and the province's permitting and licencing processes, which the Court classified as ineffective to address the cumulative effects of development on treaty rights. The same factual findings may not be made with respect to the DFN's claim.

Regardless of the result, the DFN claim has potentially precedent-setting implications for resource development and the regulatory framework for project assessment and approval in Alberta, and should be followed closely by project proponents and operators.