

# Death by a Thousand Clearcuts - Cumulative Impacts on Treaty Rights; *Yahey v. British Columbia*

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The “Numbered Treaties” in Canada are a series of eleven post-Confederation Treaties that were concluded between Canada and the signatory First Nations from 1871 to 1921. Together, they cover a swath of land from Central Ontario to the Yukon and the Northwest Territories. The traditional legal view is that these Treaties resulted in the surrender of Aboriginal title in exchange for setting aside tracts of land for the establishment of Reserves, and other promised benefits. Most of the Numbered Treaties include a right on the part of the First Nations to hunt and fish on unoccupied Crown land within the Treaty area.



Those Treaties also included what has been referred to as the “taking up clause”. This allows the Crown to grant land over which the signatory First Nations exercise their harvesting rights for purposes of settlement and resource development. For instance, Treaty 3 provides:

... they, the said Indians, shall have the right to pursue their avocations of hunting and fishing throughout the tract surrendered as hereinbefore described... saving and excepting such tracts as may, from time to time, be required or taken up for settlement, mining, lumbering or other purposes by Her said Government of the Dominion of Canada, or by any of the subjects thereof duly authorized therefor by the said Government.

Since the days of the signing of the Treaties there has been a lot of taking up. Settlers have arrived receiving Crown grants, the railways received enormous areas of land, resource development has taken up still more Crown land. For a long time, the question has been asked, “At what point does the taking up effectively nullify the Treaty right to exercise traditional harvesting activities?”

Justice Burke of the British Columbia Supreme Court tackled this very issue in her monumental (in both length and scope) decision in *Yahey v. British Columbia*.

The facts (drawn from Justice Burke’s synopsis) are:

- The claim was launched by the Blueberry River First Nations (Blueberry) whose territory is located in northeastern British Columbia;
- In 1900, Blueberry became a party to Treaty No. 8, which was first signed in 1899;
- Blueberry alleged the cumulative effects of industrial development within its territory have had significant adverse impacts on the meaningful exercise of their treaty rights, and that this resulted in a breach of the Treaty;
- Treaty 8 protects the Indigenous parties' rights to hunt, trap and fish in the Treaty area, subject to regulations made by the government, and except over areas the government may have "taken up" for settlement, mining, lumbering, trading or other purposes;
- At the time the Treaty was entered into, the Indigenous parties were promised by the Treaty Commissioners that they would remain free to hunt and fish in the Treaty area;
- Over the 120 years since the Treaty was signed, Blueberry witnessed extensive industrial development in its territory;
- Blueberry's evidence was that industrial development (logging, mining, settlement, oil and gas, hydroelectricity, agriculture) pushed Blueberry's members to the margins of their territory to seek to exercise their constitutionally protected treaty rights;
- Certain species of wildlife (caribou, marten and others) were particularly impacted by development;
- Blueberry also said that the effects of the industrial development are well beyond what was contemplated at the time of its adherence to the Treaty.

In response, BC argued that the infringements did not leave Blueberry without any meaningful hunting and fishing rights. BC pointed to the consultation process that is undertaken for each new development. BC decided not to present evidence of justification of its regulatory actions, saying that it first needed to have Blueberry present the scope of its Treaty rights and their infringement.

Justice Burke determined, based on the 160 days of evidence and argument at the hearing, that BC's failure to consider the cumulative effects of infringements by industrial development and other taking up amounted to a breach of Treaty 8. BC's power to take up lands could only be exercised in a manner that respects the promises in the Treaty, and those promises included protecting Blueberry's rights to hunt, fish and trap in their territory. BC had not adjusted its approvals processes despite decades of concerns expressed by Blueberry. She found that it was not necessary for the full scope of the Treaty rights to be proved before a breach could be asserted.

BC failed to establish that the industrial developments were permitted under legislation that "furthered a compelling and substantial purpose", that there was as little infringement as possible, that its actions were consistent with the honour of the Crown and its fiduciary duties to Blueberry, and that it was monitoring and taking into account cumulative effects of prior developments.

The Court declared that:

- BC had breached its obligations under Treaty 8 and failed to meet its duties to Blueberry.
- there are no longer sufficient lands in the Blueberry territory to allow it to meaningfully exercise its rights.

- BC may not authorize any further activities that breach its promises.
- BC and Blueberry must diligently consult and negotiate an enforceable agreement for the assessment and management of industrial developments such that Blueberry's treaty rights are respected.

The Government of BC publicly announced that it would not appeal this precedent-setting ruling of broad implication. It is now a statement of the law of BC. The same positions have been put forward by other First Nations who are parties to the other Numbered Treaties. Although this decision is not binding upon the courts of other provinces, and the evidence and arguments presented in litigation can vary significantly, the case will be highly persuasive in its reasoning and analysis. It will be years before the full breadth of its impacts on resource development in Western Canada are known.

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