

British Columbia and Blueberry River First Nations Reach Implementation Agreement in Response to Cumulative Effects of Resource Development

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On January 18, 2023, the Government of British Columbia (BC) announced the Blueberry River First Nations Implementation Agreement (the Agreement) which includes joint planning and partnership with regard to resource stewardship in the BRFN traditional territory. The Agreement follows a negotiation period which began following the British Columbia Supreme Court (BCSC) ruling in *Yahey v. British Columbia (Yahey)*.¹

Yahey v. British Columbia

BRFN's traditional territory is located in Northeastern British Columbia, spans approximately 38,000 square kilometers, and includes the areas surrounding Fort St. John and Dawson Creek. The territory is located near the Montney gas basin, a major site of oil and gas exploration and extraction in the province, and forms part of the area covered by Treaty 8, which BRFN's ancestors signed in 1900. Under Treaty 8, the Crown promised signatories the right to hunt, trap, and fish throughout Treaty 8 territory, subject to regulation and the "taking up of lands" by the province from time to time for settlement, and other industry purposes.

In March 2015, BRFN filed a claim against BC alleging it had authorized industrial development without regard for BRFN's Treaty 8 rights and that "the effects of industrial development have had significant adverse impacts on the meaningful exercise of their treaty rights, breached the Treaty, and infringed their rights."² At the heart of the claim was a novel issue: the proper test for infringement of treaty rights where the infringement in question was not alleged to have occurred from one specific project or event, but rather the cumulative effects of multiple projects over an extended period of time.

Justice Burke of the BCSC found the cumulative effects of industrial development permitted by BC within BRFN's traditional territory unjustifiably infringed the ability of BRFN to meaningfully exercise rights guaranteed to them under Treaty 8.³ The Court found as a fact that 85 percent of BRFN's territory was within 250 meters of an industrial disturbance and 91 per cent was within 500 meters, including forestry and natural gas development.⁴ BC had argued that Treaty 8's "taking up" provision allowed the province to take up lands for industrial development. The Court held, however that the taking up power given to the province under Treaty 8 was "not infinite" and that it "must be exercised in a way that upholds the promises and

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protections in the treaty.”⁵

The Court ordered that, among other things, the province was not entitled to 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 activities that unjustifiably infringed Blueberry’s exercise of its treaty rights.⁶

On July 28, 2021, then Attorney General David Eby announced the province would not appeal the decision.

The Interim Agreement

On October 7, 2021, BC and BRFN announced they had reached an initial \$65 million agreement to begin to “support healing the land” and to “provide stability and certainty for forestry and oil and gas permit holders” in the territory subject to the declarations granted in the *Yahey* decision.⁷ The initial agreement was a first step in BC and BRFN’s work together to develop land management processes in BRFN territory that restored and protected the ability of the land to support Indigenous ways of life, and ensure future development authorizations manage cumulative effects on land and wildlife and their impact on the BRFN’s treaty rights.⁸

The initial agreement confirmed the 195 forestry and oil and gas projects authorized before the *Yahey* decision would proceed, and that twenty other projects which had also been approved were to remain on hold pending further negotiation and agreement with BRFN, as those projects were located in areas of significant cultural importance.⁹

The Agreement

The Agreement responds directly to the *Yahey* decision and sets out how BC and BRFN will work in partnership to protect and manage land, water, and wildlife in a way that allows BRFN to meaningfully exercise rights under Treaty 8 while providing stability and predictability for industry operating in the region.¹⁰ The Agreement provides a framework for resource management and stewardship between BC and BRFN as well as a financial package to assist with restoration to heal the land and an opportunity for increased benefits from resource revenue-sharing.

Measures under the Agreement, aimed at achieving its goals as well as supporting and advancing BC’s climate strategy, include:

- a \$200-million restoration fund by June 2025, which supports healing of the land from decades of legacy industrial disturbance;

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- an ecosystem-based management approach for future land-use planning in Blueberry River's most culturally important areas, with ambitious timelines to complete new local and watershed level, land use plans;
- limits on new petroleum and natural gas (PNG) development and a new planning regime for future oil and gas activities;
- protections for old forest and traplines during and through planning;
- land protections in Blueberry River's high-value areas, which includes more than 650,000 hectares of protection from new PNG and forestry activities and will advance BC's 30 per cent land protections goal by 2030; and
- wildlife co-management efforts, including moose management through licensed hunter restrictions to support population recovery.¹¹

In addition, BRFN will receive a \$87.5 million financial package (above and beyond the \$65 million pledged in the 2021 initial agreement) over three years with an opportunity for increased benefits based on PNG revenue-sharing and provincial royalty revenues.¹² Finally, the Agreement provides for annual reviews of implementation progress and effectiveness, as well as a formal three-year review, and for a series of timber harvesting and oil and gas activities to proceed through BRFN's territory. BC is currently looking to the federal government, private companies, and other organizations to potentially provide some of the money committed.¹³ No further details on these possible funding commitments has been provided.

The Agreement will limit overall new land disturbance in the BRFN territory to 750 hectares (1,853 acres annually).¹⁴ BC has not announced how this allocation will be made to various resource development projects or other interests, although Premier David Eby, in announcing the Agreement, indicated that permitting in the region had already resumed thanks to negotiations between BC and BRFN and the conclusion of the Agreement.¹⁵

The Agreement makes it clear that further industrial and resource development in the Treaty 8 will be subject to the new interim regulatory and consultation framework and the future land use planning and management regimes to be negotiated in the future. Premier Eby stated that industry will need to be more innovative in that oil and gas projects will need to adapt to find ways to work with less land disturbance. He emphasized the Agreement "is not a cap on production, it is a cap on land disturbance."¹⁶

Key Takeaways

While the *Yahey* decision was decided in British Columbia, it has the potential to inspire other claims across Canada. Government may need to consider their resource planning decisions to better account for the cumulative effects of industrial development on the exercise of Aboriginal and treaty rights, recognized and affirmed by the *Constitution Act, 1982*.

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Project proponents face considerable uncertainty in the face of litigation such as *Yahey*. Additionally, since BC did not appeal the *Yahey* decision, it is yet to be seen how appellate courts will deal with the question of cumulative effects. Further, BC declined to argue in *Yahey* that the alleged infringements were justified and, as a result, there was no holding from the Court on whether the infringements could have been legally justified. Justice Burke suggested in obiter, however, that from her review of the evidence at trial, “it would have [...] been difficult for the Province to justify the infringements of [BRFN’s] treaty rights.”¹⁷

Agreements such as this may provide a clearer path forward for project planning and development, but it remains to be seen how similar agreements could impact the ability of the province to uniformly approach resource development and land management in BC, particularly given the yet unanswered questions regarding justification of potential infringements.

The Agreement represents a positive step forward to reconcile existing Aboriginal rights with industrial development and may inspire similar agreements between other Indigenous nations and provinces. The Agreement represents the latest development in the nearly decade-long effort by BRFN to have their treaty rights recognized and to negotiate a collaborative approach to land management and natural resource development with BC.

This Agreement between BC and BRFN not only brings more predictability for the region and local economy but helps ensure that land management decisions are made in partnership with affected Indigenous nations.

¹ *Yahey v. British Columbia*, 2021 BCSC 1287 [*Yahey*].

² *Ibid* at para. 2.

³ *Ibid* at paras. 3, 1116, 1132, and 1881.

⁴ *Ibid* at para. 889.

⁵ *Ibid* at paras. 3 and 1809.

⁶ *Ibid* at para. 1894.

⁷ British Columbia, “B.C., Blueberry River First Nations reach agreement on existing permits, restoration funding” (October 7, 2021), *News Release*, online: <<https://news.gov.bc.ca/releases/2021IRR0063-001940>>.

⁸ *Ibid*.

⁹ *Ibid*.

¹⁰ British Columbia, “Province, Blueberry River First Nations reach agreement” (January 18, 2023), *News Release*, online: <https://news.gov.bc.ca/releases/2023WLR0004-000043> [Agreement Announcement].

¹¹ *Ibid*.

¹² *Ibid*.

¹³ CBC News, “Province reaches deal with Blueberry River First Nations on natural resource development” (January 18, 2023), *CBC News*, online: <<https://www.cbc.ca/news/canada/british-columbia/bc-agreement-natural-resource-development-blueberry-first-nations-1.6718204>>.

¹⁴ Agreement Announcement, *supra* note 10.

¹⁵ *Ibid*.

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¹⁶ *Ibid.*

¹⁷ *Yahey* at para. 1855.

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