WEST COAST Environmental Law

Tipping Points: The Far-Reaching Implications of *Yahey v British Columbia* for Stopping the Degradation of Ecosystems and Biodiversity

July 2021 | By Gavin Smith, Staff Lawyer and Jack Jones, Law Student

Photo credit: Province of BC

On June 29, 2021, Blueberry River First Nations ("Blueberry") won a ground-breaking case that provides urgent legal direction to the BC Government to stop the "death by a thousand cuts" resulting from its disconnected, piecemeal approvals for activities like logging, oil and gas development, dams and mining, in order to respect the constitutionally-protected rights of Indigenous peoples.

In *Yahey v British Columbia*,[1] the British Columbia Supreme Court finds that the Province has violated its treaty obligations to Blueberry not by virtue of a single project or decision, but rather "by allowing industrial development in Blueberry's territory at an extensive scale without assessing the cumulative impacts of this development and ensuring that Blueberry would be able to continue meaningfully exercising its treaty rights in its territory".[2]

The Court prohibits the Province from continuing to authorize activities that breach its treaty promises to Blueberry (the prohibition will kick in six months from the judgment), and orders the parties "to consult and negotiate for the purpose of establishing timely enforceable mechanisms to assess and manage the cumulative impact of industrial development on Blueberry's treaty rights, and to ensure these constitutional rights are respected".[3]

Barring a successful appeal (at the time of publication the Province has not yet announced whether it will appeal), this case will have profound and long-lasting implications in a number of ways. Observers have noted the importance of this case in holding the Crown accountable to meet its treaty obligations to Indigenous peoples, while others have flagged the ramifications for BC's natural gas ambitions as well as the Site C dam.

Here we focus on the implications of this case for broadly transforming the way the Province manages (or does not manage) the cumulative effects of human development. West Coast has followed this case closely since its inception because it has the potential to be an important driver for change in BC's environmental decision-making regime. The decision in *Yahey* delivers on this potential, clearly cataloguing the Province's current failed approach to cumulative effects characterized by fragmentation, lack of accountability, unenforceability and delay. *Yahey* also propels us towards new integrated legal approaches that begin by looking at the big picture, prioritizing Indigenous rights, and protecting the needs of ecosystems and communities.

> **"I find that the Province's conduct over a period of many years – by allowing industrial development in Blueberry's territory at an extensive scale without assessing the cumulative impacts of this development and ensuring that Blueberry would be able to continue meaningfully exercising its treaty rights in its territory – has breached the Treaty."**
>
> - *Yahey v British Columbia*, at para 3

[1] *Yahey v British Columbia,* 2021 BCSC 1287 ("*Yahey*")
[2] *Yahey,* at para 3
[3] *Yahey,* at para 1894

Treaty 8 and Blueberry Territory

The *Yahey* decision is the result of Blueberry's determination and dedication to the well-being of its territories in the face of adversity. Blueberry's territory is in what is now known as the Upper Peace region in northeastern British Columbia. Its territory includes the Montney basin (a location of significant oil and gas exploration and extraction), the Site C dam, and various other sites of forestry, mining, and agriculture. Blueberry's ancestors adhered to Treaty 8 in 1900 at Fort St. John, after its original signing in 1899 at Lesser Slave Lake.

The written text of Treaty 8 contains promises from the Crown that the Indigenous signatories "shall have right to pursue their usual vocations of hunting, trapping and fishing" within the geographic area of the treaty, subject to "such regulations as may from time to time be made by the Government of the country, acting under the authority of Her Majesty, and saving and excepting such tracts as may be required or taken up from time to time for settlement, mining, lumbering, trading or other purposes." These promises are enforceable against the Province as an emanation of the Crown.

The Face of Cumulative Effects in Blueberry's Territory

Cumulative effects (or cumulative impacts) refer to changes to the environment (and related social, cultural and economic well-being) caused by the combined impact of past, present and potential future human activity.

While the conversation about cumulative effects is sometimes obscured in technical jargon, the real-world consequences of these changes in Blueberry's territory couldn't be clearer. In the judgment, Justice Emily Burke summarizes the extensive human disruption of ecosystems in Blueberry's territory:

> I have concluded that, the landscape over which Blueberry is seeking to exercise its treaty rights has been significantly impacted by industrial development… 73% to 85% of the Blueberry Claim Area is within 250 metres of a disturbance, and between 84% to 91% of the Blueberry Claim area is within 500 metres of a disturbance. That scale, even give or take a percent or more, is fundamentally not what was agreed to at Treaty.[4]

The impacts of this level of disturbance are alarming. For example, the Court finds that "the caribou populations in the Blueberry Claim Area are in serious decline, and are unlikely to reach self-sustaining levels… anthropogenic disturbance, including industrial disturbance, has largely caused or contributed to that decline".[5] With respect to moose, the Court states:

> I accept the evidence that moose populations have declined on the whole across the Blueberry Claim Area, despite increases in some individual Wildlife Management Units. I further accept that the likely cause of this decline is anthropogenic habitat disturbance including substantial industrial development.[6]

The Court goes on to note, "[w]ith respect to marten and fisher, I find it likely that industrial activities, which lead to loss of canopy cover, have had negative impacts on marten and fisher in the Blueberry Claim Area".[7]

[4] *Yahey,* at paras 1076-1077
[5] *Yahey,* at paras 736-737
[6] *Yahey,* at para 789
[7] *Yahey,* at para 810

The Court observes that a key question in the case is whether "the time has come" – in other words, whether these disturbances and impacts have crossed a threshold that leaves Blueberry without meaningful rights to hunt, fish, trap and maintain its way of life. The Court leaves no doubt about the answer to this question:

> **On the basis of all this evidence and my findings, I conclude that the time has come, the tipping point has been reached, and that Blueberry's treaty rights (in particular their rights to meaningfully hunt, fish and trap within the Blueberry Claim Area) have been significantly and meaningfully diminished when viewed within the way of life in which these rights are grounded.**[8]

How did this case get here?

In March 2015, Blueberry filed its case. The nature of the proceeding is succinctly summarized by the Court:

> The allegations of infringement are not focused on one piece of legislation, let alone one regulatory regime. It is a cumulative impacts case. It alleges various kinds of activities, projects and developments the Province has authorized, including: oil and gas, forestry, mining, hydroelectric infrastructure, roads and other infrastructure, agricultural land clearing, land alienation and encumbrance and other industrial development have resulted in significant adverse impacts to the lands, water, fish and wildlife, and to the exercise of Blueberry's treaty rights. It also alleges that the Province has authorized these developments without regard to the potential cumulative effects and consequent adverse cumulative impacts on the exercise of treaty rights.[9]

After the case was filed, there was a flurry of proceedings attempting to stop the Province from authorizing further activities that would infringe Blueberry's treaty rights pending trial.

In June 2015, Blueberry sought a limited injunction to prevent the Province from auctioning several timber sale licences. This application was denied in July 2015 by Justice Smith, who reasoned that while "BFRN may be able to persuade the court that a more general and wide ranging hold on industrial activity is needed to protect its treaty rights until trial…[t]he public interest will not be served by dealing with the matter on a piecemeal, project by-project basis".[10]

In August 2016, Blueberry filed a second injunction application along the lines suggested in the Court's first injunction decision; namely, to prohibit the Province from approving a broader array of further industrial development while the case was underway (including oil and gas development as well as logging). This application was dismissed in May 2017 on the balance of convenience, which the Court ruled was weighted in favour of the Province.

Blueberry also brought an application for judicial review of the Province's decision to enter into an agreement for long-term oil and gas royalties in the North Montney region, which was dismissed in March 2017. This dismissal was based on the conclusion that the issues were not "separate and discrete and amenable to

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[8] *Yahey,* at para 1116 (emphasis in original)
[9] *Yahey,* at para 1843
[10] *Yahey,* at para 34, citing *Yahey v. British Columbia*, 2015 BCSC 1302, at para 64

determination in a separate judicial review proceeding", given Blueberry's ongoing, broader legal action in relation to cumulative effects.

These rulings follow a concerning pattern identified in [a study by the Yellowhead Institute](), wherein "82 percent of injunctions filed by First Nations against the government were denied." The manifold problems with injunctions in Canada are a topic for another day, however it is worth noting that these interim rulings allowed treaty infringements to continue in the lead-up to and during the trial. Indeed the "legal teeth" of the Court's ruling are largely forward-looking, thus many activities permitted in the interim between the 2015 filing of Blueberry's case and its recent victory, which are contributing to the infringements found by the Court, are likely ongoing as we write.

Widening cracks in the Crown's "prove-it" approach to the rights of Indigenous peoples

The context of the *Yahey* case is a further example of the Crown's "prove-it" approach to the constitutionally-protected rights of Indigenous peoples. As West Coast has previously noted, "the Crown's resistance to concluding agreements that meaningfully recognize title and rights, while making important decisions unilaterally in the meantime, has enabled the Crown to benefit from its own long-term failure to respect the Constitution." This approach forces Indigenous nations into court, where the practical barriers they face in pursuing litigation – in terms of costs, years of legal wrangling and other burdens both practical and emotional – help maintain unilateral Crown decision-making as an indefinite norm.

Indeed, in Blueberry's case, arriving at the major milestone of the *Yahey* decision took six years, and required over 160 days of trial between 2019 and 2020, more than 2000 pages of submissions from the parties, thousands of pages of exhibits, and testimony from over 20 witnesses. All of which resulted in a judgment that is 1900 paragraphs long. After all that, Blueberry may still face appeals.

However, as a result of the perseverance of Blueberry, as well as other Indigenous nations upholding their rights, title and governance both inside and outside of courtrooms, cracks in the Crown's "prove it" approach are widening. As we explore below, the Court in *Yahey* singles out the Province's delay and deflection tactics as part of a pattern of conduct that violates Blueberry's rights, and strengthens the legal hand of Blueberry (as well as other Indigenous nations that may point to this precedent) to force the Crown to change course. Moreover, as we elaborate further below, the *Yahey* decision helps illustrate what is necessary to implement the United Nations Declaration of the Rights of Indigenous Peoples ("UN Declaration"), as required provincially in the *Declaration of the Rights of Indigenous Peoples Act* (*"DRIPA"*) and federally in the *United Nations Declaration of the Rights of Indigenous Peoples Act*.

The UN Declaration includes, among other things, recognition of Indigenous peoples' right to conserve and protect the environment and the productive capacity of their territories and resources, and the right to determine and develop priorities and strategies for the development or use of their territories and resources. It also calls for consultation and cooperation in good faith to obtain free, prior, and informed consent. A key aspect of implementing the UN Declaration is to *proactively* take action to prevent the "tipping point" described in *Yahey* from being reached in the first place; it is obviously grossly inadequate for the Crown to delay until the cumulative effects of its approvals have already infringed rights, as the Crown has done with Blueberry.

The *Yahey* decision significantly adds to legal pressures on the Crown to take meaningful action to respect Indigenous decision-making, as well as proactively address the big picture of the cumulative effects of its approvals.

The profound failure of the Province's current approach to cumulative effects

The Court in *Yahey* states: "I have concluded that the provincial regulatory regimes do not adequately consider treaty rights or the cumulative effects of industrial development." While acknowledging that "this is not a commission of inquiry on the Province's policy choices in managing industrial development",[11] the Court nonetheless delves deeply into several of BC's key legal and policy regimes to decide the case, and, in so doing, the Court systematically dismantles the Province's claims that it is adequately managing cumulative effects.

For example, following a lengthy critique of BC's oil and gas regulatory structure, the Court states:

> In sum, the Province has no substantive measures in place to protect the Blueberry Claim Area against cumulative impacts from oil and gas development. The Province also scarcely considers treaty rights in its oil and gas regime.[12]

Then, in an eviscerating analysis of BC's forestry regime, the Court concludes:

> 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 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.[13]

"The Province has been unable to show that it is effectively considering or addressing cumulative effects in its decision-making."

- *Yahey v British Columbia*, at para 1783

Regarding legal designations for wildlife management and protection, the Court states: "…there are clear gaps in the Province's wildlife management regime within the Blueberry Claim Area" including structural flaws such as "exceptions and discretionary room [that] allow for development inside of every type of designated area; there are ultimately no "firm" thresholds or limits that actually inhibit development… [and] there is no direction as to what concrete steps should occur if a disturbance threshold is reached".[14]

The Court is also largely dismissive of BC's Cumulative Effects Framework, a policy approach that the Province leans on to claim it is adequately managing cumulative effects (and which West Coast has previously criticized). According to the Court, "the Cumulative Effects Framework and the guidance provided about it did not result in a paradigm shift in the way the Province was taking into account cumulative effects. It was largely

[11] *Yahey,* at para 1179
[12] *Yahey,* at para 1404
[13] *Yahey,* at para 1562 and 1564
[14] *Yahey,* at para 1710

business as usual, as applicable legislation and policy remained unchanged".[15] The Court notes that "the Province's cumulative effects framework does not set out thresholds, or limits, beyond which decision makers will start being concerned about the status of a particular value, and take action".[16] Further, the Court adds that: "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".[17]

The Court also identifies overarching failings in BC's approach to cumulative effects, which go beyond any one policy, law, Ministry or industry. Key flaws identified by the Court include:

- **The Province gives itself too much discretion and flexibility, without firm requirements and accountability to manage cumulative effects.** The Court finds that: "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 on the meaningful exercise of these rights… The Province's discretionary decision-making processes do not adequately consider cumulative effects and the impact on treaty rights".[18]

- **Provincial legislation gives Crown decision-makers narrow and fragmented authority, so no decision-maker has the necessary power to address cumulative effects**. The Court observes that, when it comes to cumulative effects:

  > …while certain officials appeared sincere in recently trying to address these concerns, they candidly admitted they had no tools to do so. The best they could do was "mitigate" an adverse effect. They could not say no to a permit or activity based on an identified concern about impacts on the exercise of treaty rights. That persistent reality has contributed to a compilation of adverse effects – or as is said – "death by a thousand cuts".[19]

- **Different Crown decision-makers persistently deflect responsibility to other individuals or forums.** The Court is unforgiving with regard to the "inadequate, circular" nature of the Province's response to cumulative effects concerns,[20] observing that the Crown's correspondence can "read like the

"I find a persistent pattern of redirection on the part of government officials in resource sectors, including oil and gas and forestry, as well as those involved in Indigenous relations, telling Blueberry that its concerns regarding the cumulative effects of development on the exercise of its treaty rights would be addressed elsewhere, at other tables, through other policies or frameworks."

- *Yahey v British Columbia*, at para 1779

[15] *Yahey,* at para 1628
[16] *Yahey,* at para 1774
[17] *Yahey,* at para 1783
[18] *Yahey,* at para 3
[19] *Yahey,* at para 1780
[20] *Yahey,* at para 1200

Joseph Heller novel, Catch-22".[21] The Court states: "Based on the whole of the evidence, I find a persistent pattern of redirection on the part of government officials in resource sectors, including oil and gas and forestry, as well as those involved in Indigenous relations, telling Blueberry that its concerns regarding the cumulative effects of development on the exercise of its treaty rights would be addressed elsewhere, at other tables, through other policies or frameworks".[22] It is clear that the Court views this practice to often be an intentional attempt to avoid the real issues and maintain the status quo. For example, the Court finds that: "the Province had a practice of deferring real engagement and referring Blueberry to processes that were fledgling and inoperative rather than dealing substantively with their concerns about further development being continuously authorized".[23]

- **The Province relies on the duty to consult as a means to address cumulative effects, but fails to provide the mandate and legal tools necessary to manage cumulative effects through consultation.** The Court expresses skepticism about "the ability of those consultation processes to consider and address concerns about cumulative effects as opposed to simply single projects or authorizations".[24] It finds that:

> The problem with the Province's emphasis in this case that consultation is the route to protect treaty rights, is that despite years of engagement, their processes have not resulted in a consequential way to assess the cumulative effects of development in the Blueberry Claim Area. The processes do not consider the impacts on the exercise of treaty rights or implement protections other than occasional site specific mitigation measures. The Province has long been on notice that a piece-meal project-by-project approach to consultation will not address Blueberry's concerns. To date, there is a lack of mechanisms to meet and implement the substantive rights and obligations contained in the Treaty.[25]

- **The Province acts at cross-purposes by claiming to address cumulative effects while aggressively promoting increased resource development.** Regarding BC's oil and gas regime, the Court finds that "the evidence shows that the Province has not only been remiss in addressing cumulative effects and the impacts of development on treaty rights, but that it has been actively encouraging the aggressive development of the Blueberry Claim Area through specific royalty programs… and Jobs Plan policies".[26] The Court later notes that this represents a pattern whereby decision-makers are not given tools or guidance to address cumulative effects, "[m]eanwhile, as pointed out by Blueberry, the Province has continued to promote intensive use and authorized development on a project-by-project basis without regard to the scale of cumulative impacts on Blueberry's rights from forestry, oil and gas and other industries".[27]

- **The Province maintains the status quo by virtue of delay and unenforceable commitments.** The Court concludes:

> Delay in dealing with these matters and the continuation of the status quo has benefitted the Province. While interim measures can be helpful, they are only so if permanent measures are

[21] *Yahey,* at para 1330
[22] *Yahey,* at para 1779
[23] *Yahey,* at para 1749
[24] *Yahey,* at para 500
[25] *Yahey,* at para 1735
[26] *Yahey,* at para 1413
[27] *Yahey,* at para 1782

> developed in a timely way. In the end, these processes are at the discretion of the Province and its agencies, with no clear ability for Blueberry to enforce its treaty rights. That has to change… The Province continues to have all the power, and ultimately little incentive to change the status quo. There is a clear need for timely, definitive, enforceable legal commitments that recognize and accommodate Blueberry's treaty rights. The delay in implementing such legally enforceable commitments must therefore come to an end.[28]

The bulk of the laws, policies and overarching failings that the Court analyzes in *Yahey* are applicable elsewhere in BC as well. Therefore, although the Court is only considering Blueberry territory, its thorough accounting of BC's failure to address cumulative effects has significant implications throughout the province.

What does the *Yahey* decision mean for stopping "death by a thousand cuts" elsewhere in BC?

Regardless of whether it appeals, the BC government will not want to admit that its massive failure to manage the cumulative effects of development applies throughout the province, because that would require the Province to fundamentally change (read: strengthen) its legal regime throughout BC. However, by virtue of the Court's very thorough and often scathing analysis of BC's approach to managing cumulative effects, it will be difficult for the Province to contain and geographically limit the transformative change that this case requires. Indeed, other legal commentators have similarly observed that "[t]he effects of *Yahey* will likely not be confined to northeast B.C.", and that this case and others like it "could significantly change the future of resource and infrastructure development in Canada."

> **"The Province continues to have all the power, and ultimately little incentive to change the status quo. There is a clear need for timely, definitive, enforceable legal commitments that recognize and accommodate Blueberry's treaty rights. The delay in implementing such legally enforceable commitments must therefore come to an end."**
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> - *Yahey v British Columbia*, at para 1417

The *Yahey* decision has broad implications for transforming Crown decision-making to account for the cumulative effects of human development, and stop "death by a thousand cuts", in light of a combination of at least four factors:

1) **The failures found with BC's regulatory regimes are generally applicable throughout BC.** While the Court of course focuses on Blueberry territory, the bulk of the provincial laws, policies and processes that the Court finds to be failing to manage cumulative effects generally apply throughout BC. Either the exact same laws apply elsewhere, or the approaches and patterns of conduct that the Court thoroughly details and criticizes are clearly replicated elsewhere.

2) **Potential for infringement of constitutionally-protected rights, by virtue of Crown failure to manage cumulative effects, is not limited to treaty nations.** While Blueberry's case focuses on

[28] *Yahey,* at paras 1416-1417

infringement of its Treaty 8 rights, all Indigenous nations in BC hold constitutionally-protected title and rights. Legally speaking, the rights and title of Indigenous nations without a treaty are also susceptible to being infringed by the type of failure to manage cumulative effects that occurred in Blueberry's case. Of course, Aboriginal title and governance also includes, in the words of the Supreme Court of Canada in *Tsilhqot'in Nation v British Columbia*, "the right to proactively use and manage the land" and "the right to determine the uses to which the land is put". Thus by denying the decision-making authority of Indigenous nations, the Crown is already infringing their title and rights, which "exist prior to declaration or recognition", as noted by the BC Court of Appeal in *Saik'uz First Nation v Rio Tinto Alcan*. Consequently, the Crown is exposed to significant legal risk that current and future Crown approvals will be invalidated due to disregard of Indigenous governance, regardless of whether any cumulative effects "tipping point" is ever crossed. However, the *Yahey* decision provides an important, complementary precedent demonstrating that the Crown must immediately transform its failed cumulative effects approach in order to stop death by a thousand cuts throughout BC, in a manner that respects Indigenous decision-making, lest it cause or continue infringements of the rights and title of other Indigenous nations that will have serious legal ramifications for the Crown.

3) **The Court's blanket prohibition on future approvals, until cumulative effects are properly addressed, creates massive legal risk for the Crown if it fails to take this issue seriously elsewhere.** Whether or not it publicly admits it, the Province will certainly be concerned that other Indigenous nations could pursue similar lawsuits and potentially obtain the same outcome, including an order halting further provincial resource approvals. The *Yahey* precedent is a legal "stick" that should motivate the Province to proactively address cumulative effects more broadly, so as to avoid the considerable legal risk of its decision-making powers being frozen by Court order elsewhere too.

4) **Permitting extensive and harmful cumulative effects is also inconsistent with the UN Declaration, which BC faces increasing legal and political pressure to fully implement.** *DRIPA* requires the Province to "take all measures necessary", in cooperation and consultation with all Indigenous nations in BC, to ensure the laws of BC are consistent with the UN Declaration. The fact that BC's laws allow and arguably encourage violation of Blueberry's treaty rights, by facilitating the approval of harmful cumulative effects, is clearly also inconsistent with the UN Declaration. For example, Article 29 states "Indigenous peoples have the right to the conservation and protection of the environment and the productive capacity of their lands or territories and resources" and goes on to affirm obligations on States to establish related programmes and effective implementation measures. BC's failure to address cumulative effects is not an isolated problem specific to Blueberry, thus pressure will likely continue to grow to address this systemic failure through legal reform in consultation and cooperation with *all* Indigenous nations in BC, as *DRIPA* requires.

Opportunities abound to confront "death by a thousand cuts" with strong new legal tools

The Court in *Yahey* concludes "[i]t is critical that the Province have a way of assessing and managing the cumulative effects of development",[29] and its order emphasizes the need for "timely enforceable mechanisms to assess and manage the cumulative impact of industrial development".[30] While the Court's judgment is focused on Blueberry territory, such "timely enforceable mechanisms" to address cumulative effects, and

[29] *Yahey,* at para 1776
[30] *Yahey,* at para 1894 (our emphasis)

confront the considerable legal and systemic failings summarized above, are also seriously needed throughout BC.

Fortunately, as West Coast has previously emphasized, there are already practical legal options and approaches to manage cumulative effects, which can be co-developed with Indigenous nations in a manner tailored to the needs and circumstances of the communities and ecosystems in their territories. A number of existing commitments made by the Province, as well as the federal government, provide significant opportunities for the Crown to work with Indigenous nations to fix its broken approach to cumulative effects and implement the timely, enforceable mechanisms envisioned by the BC Supreme Court. All that is needed to do so is the will on the part of the Crown to fully live up to its own promises.

While by no means an exhaustive list, these opportunities include the following:

- **Consent-based decision-making agreements under *DRIPA*.** Under *DRIPA* section 7, the Province and an Indigenous nation may enter into an agreement whereby specified provincial statutory decisions must be made jointly, or require the consent of the Indigenous nation. BC has committed to pursue these agreements in its draft *DRIPA* Action Plan. West Coast has noted that these agreements could incorporate "new co-governance arrangements and regional strategic planning, such as land- and marine-use plans that can take into account cumulative effects in a holistic way."
- **Establishing clear legal requirements and tools to implement outcomes of BC's promised regional assessment and planning processes.** The Province is partway into its commitment to modernize land use planning in BC, and it has promised to enact a new regulation under the *Environmental Assessment Act* to set out requirements and processes for regional assessments (although it has so far failed to uphold this promise). As West Coast has noted when it comes to regional assessment and planning:

  > At the end of the day, what matters is not terminology, but whether clear, binding limits on human activities are set and whether the limits can be expected to sustain important values and rights... we recommend that low risk, measurable management objectives for values and rights at a regional scale be identified based on best available science and Indigenous knowledge as part of a Regional Impact Assessment process, as input to land use planning and to guide project-level assessment, tenuring and regulatory decision-making. We also recommend that these objectives be given legal effect in Canadian and provincial law so as to ensure they do so.

  Despite its commitments to regional assessment and planning, to date the Province has not set out a clear legal pathway to demonstrate how the outcomes of these processes will be applied in an enforceable manner across sectors. This is evident in the *Yahey* decision itself, where an ongoing Regional Strategic Environmental Assessment provided important information, yet it was not embedded in an enforceable legal framework. The Court hits the nail on the head in terms of the change that is needed:

  > While the Province has made some recent efforts, particularly in the Regional Strategic Environmental Assessment process, these initiatives have no definitive timelines and are ultimately discretionary. The Province continues to have all the power, and ultimately little

incentive to change the status quo. There is a clear need for timely, definitive, enforceable legal commitments that recognize and accommodate Blueberry's treaty rights.[31]

- **Legal recognition of Indigenous-led assessment and planning**. The Province promised to recognize Indigenous-led assessments during its process to revitalize environmental assessment in BC, and has also committed to partner with Indigenous governments in modernizing land use planning. Indigenous nations such as the Gitanyow are leading the way in developing Indigenous-led assessment and planning regimes that address cumulative effects and care for their territory in its entirety. Indigenous-led assessment and planning regimes may be recognized by the Province through *DRIPA* agreements, as well as agreements under section 41 of the provincial *Environmental Assessment Act* or through other appropriate government-to-government arrangements.

- **Legal recognition of Indigenous Protected and Conserved Areas (IPCAs)**. The Indigenous Circle of Experts defines an IPCA as "lands and waters where Indigenous governments have the primary role in protecting and conserving ecosystems through Indigenous laws, governance and knowledge systems." West Coast and colleagues have argued that, "[a]s the interconnected climate and ecological crises deepen, IPCAs can serve as places of refuge to curb biodiversity loss and to serve as buffers in the face of a drastically changing climate." The Crown, in particular the federal government, has committed itself to recognition of IPCAs. However, West Coast has noted that IPCAs "live in a legal grey zone" when it comes to Crown law because, for one thing, the provincial and federal governments do not have legislation establishing any clear requirements or process for how the Crown must respect IPCAs. As Indigenous nations increasingly exercise their inherent jurisdiction to establish IPCAs, and express how the Crown must respect them, there will be opportunities (and a need) for new legal mechanisms that hold the Crown accountable to practically respect IPCAs in all its decision-making.

- **Meeting BC's commitment to enact an overarching law to prioritize biodiversity and ecosystem health across all sectors.** Premier John Horgan has committed to "implement the full slate of proposals from the Old Growth Strategic Review Panel." One of the signature recommendations of the Old Growth Strategic Review Panel is that BC: "Declare the conservation and management of ecosystem health and biodiversity of British Columbia's forests as an overarching priority and enact legislation that legally establishes this priority for all sectors." West Coast has noted that this has the potential to be transformational: "If the government is true to its word, this new law could usher in a long-overdue reorientation in BC's decision-making – shifting towards protecting biodiversity and ecosystem health as the foundation for long-term community and economic well-being."

- **Legally implementing BC's commitment to a new Coastal Marine Strategy.** The mandate letter for provincial Minister of State Nathan Cullen directs him to "develop a new provincial coastal marine strategy – in partnership with First Nations and federal and local governments – to better protect coastal habitat while growing coastal economies." West Coast has argued that the patchwork of provincial laws and regulations for coastal management is inadequate to ensure the long-term health of coastal and marine ecosystems. The development of a new coastal marine strategy is a major opportunity to "address the current fragile state of shoreline habitats, and the cumulative and ongoing harms they face", adding that "it is crucial that the strategy be legally implemented by an accompanying law."

[31] *Yahey,* at para 1417

These examples highlight the considerable opportunities that exist to bring about the transformation necessary to address and recover from cumulative effects. The *Yahey* decision is a significant part of a growing set of factors propelling us towards this change, and it is time for the Crown to step up. In the Court's words: "[t]he delay in implementing such legally enforceable commitments must therefore come to an end".[32]

Moving forward

While we do not yet know whether the Province will appeal *Yahey,* the decision should have lasting implications for the interactions between Crown governments and Indigenous peoples. The decision clearly illustrates that BC's current regulatory regime is built for facilitating various types of development and extraction, while remaining profoundly ill-equipped for the big-picture work of managing the cumulative effects of those activities on ecosystems, communities and the rights of Indigenous peoples.

The Court in *Yahey* calls out the Province for a persistent pattern of delay, deflection and half-measures, and creates a legal hammer to finally require strong, enforceable mechanisms to address cumulative effects on an urgent timeline. This should serve as a wake-up call for the Province that the status quo is no longer an option, and that it will face growing legal risk if it continues its inadequate, piecemeal approach to respecting Indigenous rights and managing cumulative effects in BC.

The Court is requiring the Province to fundamentally change its approach. But this transformation is achievable. Pathways exist to develop effective, enforceable legal tools to manage cumulative effects in a manner that respects Indigenous governance. Moreover, the Province can largely do so by meaningfully implementing a number of its existing commitments.

In the face of growing biodiversity and climate crises, what is needed from the Province is the political will to follow those pathways and seriously address cumulative effects. As the judgment in *Yahey* makes abundantly clear, the delay must come to an end.

Representatives of Blueberry River First Nations and allies outside the Law Courts in Vancouver/Musqueam, Squamish & Tsleil-Waututh Territories. (Photo credit: Trevor Leach/David Suzuki Foundation)

[32] *Yahey,* at para 1417

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