BC Court Declines to Issue Injunction in Aboriginal Treaty Rights Case

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The Supreme Court of British Columbia recently released its decision in *Yahey v British Columbia*.[1] [*Yahey 2*] The Court clarified the requirements for Aboriginal groups seeking to enjoin or prohibit future industrial activity pending the resolution of treaty rights infringement claims.

Brief Overview

Blueberry River First Nation ("BRFN") is a Treaty 8 First Nation in Northern British Columbia. Significant industrial development has taken place in that area of the province, notably including oil and gas, and forestry. BRFN commenced a lawsuit against the Province alleging infringement of BRFN's constitutionally protected treaty rights as a result of cumulative effects of industrial activities taking place in BRFN's territory. Trial on the issue of infringement is set to proceed in March 2018, for more than 90 days duration.

In 2015, the Court declined to issue a more limited injunction of a specific auction of Timber Licences,[2] [*Yahey 1*] but left open the option of BRFN seeking to persuade the Court in a future application to prohibit industrial activities more broadly.

In 2016, BRFN followed up with a broader interlocutory injunction seeking to enjoin the Province from allowing further industrial development in its traditional territory. The proposed injunction would halt all pending or future authorisations.

The Court found that BRFN satisfied the first two branches of the *RJR-MacDonald v Canada (Attorney General)* injunction test. The Court found that there was a serious issue to be tried, and that there would be irreparable harm to BRFN without the injunction.[3] Importantly, the Court was persuaded by BRFN members' statements about the importance of the threatened areas for the practice of treaty rights from a cultural and spiritual perspective, and the likelihood of irreparable harm.[4] However, the Court declined to grant the injunction because second branch of the injunction test - the balance of public convenience - did not weigh in BRFN's favour.

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1 *Yahey v British Columbia*, 2017 BCSC 899. [*Yahey 2*]
2 *Yahey v British Columbia*, 2015 BCSC 1302. [*Yahey 1*]
3 *RJR-MacDonald v Canada (Attorney General)*, [1994] 1 SCR 311, and *BC (AG) v Wale (1986)*, 9 BCLR (2d) 333 at 345 (CA), aff'd [1991] 1 SCR 62.
4 *Yahey* 2 at paras. 88, 93.

Balance of Public Convenience

In weighing the balance of public convenience, BRFN urged the Court to consider:

- Harm of cumulative effects on treaty rights;
- Harm to treaty rights and culture; and
- The public interest in upholding Aboriginal treaty rights and the honour of the Crown.

The Province argued that the Court should consider the harm to the Province and the public interest, including:

- Undermining decisions made by the government and institutions that implement government policy;
- Economic harm from lost revenues and unemployment;
- Economic harm to third parties in industry; and
- Economic harm to neighbouring groups and Aboriginal individuals.

The Court found that the balance of public convenience weighed in favour of declining to grant the injunction. The Court acknowledged the importance of BRFN Affiants' statements that they had passed the point and had now lost the meaningful exercise of their rights.[5] However, ultimately the impact of an injunction on the local economy, particularly "business losses and individual job losses in a region said to be already hard hit by industry's downturn" tipped the scale in favour of not granting the injunction.[6]

The Court was concerned that the "lack of clarity and precision in the sought orders enjoining "further" permitting of industrial activity…" would make a vague and unenforceable order. According to the Court, clear and specific language is pre-requisite to granting an injunction…".[7]

The Door Left Open - Again

The Court considered that the "tipping point" of damage to BRFN's exercise of its rights may arrive before the main case on infringement of treaty rights can be heard and left open the possibility of another injunction should the trial in March 2018 be postponed.

Significance of Decision

The Court noted that courts have repeatedly said that Crown consultation and accommodation are the preferred means of resolution to the "all-or-nothing approach of injunction litigation."[8] The Court encouraged a collaborative path in this case.

Once again, the judiciary has stated the importance of honourable and meaningful consultation and accommodation on a project by project basis, and the timely settlement of claims.

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5 *Yahey* 2 at para 117.
6 *Yahey 2* at para 103.
7 *Yahey 2* at para 110.
8 *Yahey* 2 at para 125

The decision also highlights the need for a review and authorisation framework which better addresses cumulative effects. The Federal Discussion Paper on Environmental and Regulatory Reviews (June 2017) proposes an environmental assessment regime that includes more collaboration with Indigenous peoples, using science, evidence and Indigenous knowledge so that the cumulative environmental implications of individual projects and other activities combined can be identified and addressed. The *Discussion Paper* also highlights the need for regional assessments in areas of significant activity to guide planning and management of cumulative effects. The purpose of conducting a regional assessment is to avoid the circumstance of having to determine whether a single project would reach or go past a tipping point beyond which the right to meaningfully exercise treaty rights is lost.

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