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Case Brief – *Yahey v. British Columbia* 2015 BCSC 1302

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In *Yahey v. British Columbia*, 2015 BCSC 1302, the Supreme Court of British Columbia dismissed Blueberry River First Nations' application for a pre-trial injunction to prevent the province from proceeding with a planned auction of 15 timber sale licences.

Impending trial concerned breach of treaty obligations

In March 2015, Blueberry River filed a lawsuit alleging that the British Columbia government had breached its treaty obligations.[1] Blueberry River claimed that the cumulative effect of industrial developments in its traditional territory, including forestry, mining, hydroelectricity and oil and gas developments would soon make, and in some cases had already made, it impossible for its members to meaningfully exercise their rights, such as hunting and fishing.[2] The First Nation claimed that the auction of timber sale licenses should not proceed before the action is heard. The Crown, on the other hand, asserted that it had consulted extensively with Blueberry River by undertaking to create a sustainable forest management plan and associated forest operation schedules.[3]

Blueberry River satisfied first two prongs of test for pre-trial injunctions

In the Court's analysis, Justice Smith applied the three prong *RJR-MacDonald* test for pre-trial injunctions. The judge considered (1) whether there is a serious issue to be tried, (2) whether irreparable harm would result if the injunction was not granted, and (3) whether the balance of convenience favoured granting an injunction.[4]

Blueberry River satisfied the first two branches of the test. Justice Smith found that the cumulative effect of industrial developments in the Treaty 8 area had become so extensive that it amounted to a violation of Treaty rights.[5] Justice Smith also found that irreparable harm may result if a pre-trial injunction was not granted.[6] The Court noted,

[1] BCSC at para 25.
[2] BCSC at para 2.
[3] BCSC at para 37.
[4] BCSC at para 36.
[5] BCSC at para 39.
[6] BCSC at para 45.

> Irreparable harm would clearly be the result if cumulative industrial development effectively eliminated any opportunity for [the First Nation] to meaningfully exercise its traditional way of life and its rights to hunt, trap and fish. These proposed logging operations are not alleged to be the cause of the harm in and of themselves, but as this court said in *Taseko Mines Ltd v. Phillips*, 2011 BCSC 1675 at para 65: "Each new incursion serves only to narrow further the habitat left to them in which to exercise their traditional rights. Consequently, each new incursion becomes more significant than the last. In that sense, any portion of the overall loss in this case, if it is found to exist, should be characterized as irreparable harm."[7]

Blueberry River failed to meet third prong of test for pre-trial injunctions

Justice Smith found that Blueberry River did not meet the balance of convenience test for an interlocutory injunction. He took into account the Crown's argument that an injunction would affect private interests and cause uncertainty and disruption to the Crown agency, BC Timber Sales, and other participants in the Fort St. John Pilot Project.[8] Justice Smith also highlighted the Crown's concern for the public interest in maintaining the certainty and predictability of forest management and operations.[9]

A critical factor for Justice Smith was the delay in raising the issue of the harmful cumulative effects of industrial developments on the First Nation's traditional way of life and its Treaty rights. Although the newly-elected First Nation leadership had the right to reconsider the matter of timber licences, the judge observed that there was no reason why the previous leadership had not raised any concern.[10] Justice Smith found that the Crown agency and others reasonably relied on the lack of objection from the First Nation and had a legitimate expectation that this logging would proceed.[11]

Finally, Justice Smith acknowledged that the size of the development project affected by the injunction was not necessarily determinative to the success of the application, as it could be the "tipping point" beyond which the right to meaningfully exercise Treaty rights is lost.[12] At the same time, Justice Smith determined that granting injunctions on individual projects was an ineffective means to achieve what appeared to be Blueberry River's broader goal of a wide-ranging hold on industrial activity.[13] He noted that, if a general or wide-ranging hold on industrial activity was needed to protect Treaty rights, it should be on an application that seeks

[7] BCSC at para 41.
[8] BCSC at paras 49-51.
[9] BCSC at para 53.
[10] BCSC at para 54.
[11] BCSC at para 55.
[12] BCSC at para 59.
[13] BCSC at para 63.

that result and allows the court to fully appreciate the implications and effects of what it is being asked to do. The public interest would not be served by dealing with the matter on a piecemeal, project-by-project basis.[14]

[14] BCSC at para 64.