**Case Brief July 2017**

**No Injunction to Protect Treaty Rights in B.C.**

***Yahey v. British Columbia,* 2017 BCSC 899**

In this case, the Supreme Court of British Columbia dismissed the application of Blueberry River First Nation for an interlocutory injunction. The First Nation asked that the Province stop all further permitting of industrial development in segments of its traditional territory pending trial of its action for treaty rights.

**Procedural History**

In March 2015, the Blueberry River First Nations’ filed a lawsuit claiming that the British Columbia government breached its treaty obligations pursuant to Treaty 8 as well as its fiduciary duties. Blueberry River alleged that adverse impacts to the land, water, fish and wildlife caused by industrial development in its traditional territory have infringed their ability to exercise their treaty rights within their traditional territory.[[1]](#footnote-1) Blueberry River’s claim states that the “cumulative effects” of the industrial development in its traditional territory, including forestry, processing, transportation, mining, hydroelectricity and oil and gas developments, made it impossible to meaningfully exercise their constitutionally protected cultural and economic activities.[[2]](#footnote-2)

In July 2015, Blueberry River sought a pre-trial injunction in July 2015, to prevent the province from proceeding with a planned auction of 15 timber sale licences. The injunction was rejected. The Court noted, in the context of the limited injunction sought against the 15 timber sale licenses, that granting injunctions on individual projects was an ineffective means to achieve Blueberry River’s broader goal of a broader restraint on industrial activity in its traditional territory. Instead, the Court stated that the application should seek this wide-ranging hold on industrial activity to protect Treaty rights, as it would allow the court to fully appreciate the implications and effects of what it is being asked to do.

With a 90-day trial now scheduled for March 2018[[3]](#footnote-3), Blueberry River filed another interlocutory injunction with the British Columbia Supreme Court. Relying on the Court’s reasons with regards to the 2015 timber sale licence injunction[[4]](#footnote-4), Blueberry River sought a much broader injunction against the Province. This injunction primarily sought to put a wide-ranging hold on any further industrial activity in the critical area of the First Nation’s traditional territory.[[5]](#footnote-5)

**Legal Principles**

In its analysis, the Court applied the three-prong *RJR-MacDonald Inc v Canada (Attorney General)[[6]](#footnote-6)* test for interlocutory injunctions. The Court considered (1) whether there is a serious question to be tried, (2) whether irreparable harm would result from the denial of the injunction, and (3) whether the balance of convenience favoured an injunction.[[7]](#footnote-7)

**Serious Question to be Tried & Irreparable Harm**

As with the first injunction with respect to the 2015 timber sale licenses, Blueberry River met the first and second prongs of the test.

The Court found that Blueberry River had sufficient evidence, case law, and framework to fairly question “whether the cumulative effect of all industrial development in the Blueberry River’s traditional territory has become so extensive that it amounts to a breach of treaty rights.”[[8]](#footnote-8)

On the second prong of the test and as noted in *RJR-MacDonald,* the Court must analyse whether irreparable harm would result from the denial of the injunction. The term “irreparable harm” refers to the nature of the harm suffered and not the magnitude of the harm itself; it is a harm that cannot be quantified in monetary terms or cannot be cured.[[9]](#footnote-9) The Court found that Blueberry River was once again able to demonstrate the reasonable likelihood of irreparable harm.[[10]](#footnote-10) The Court cited the persuasiveness of the affidavits of community members which showed that important critical areas for the practice of treaty rights were likely to be further harmed if an injunction was not granted.[[11]](#footnote-11)

**Balance of Convenience**

The third prong of the *RJR-MacDonald* test requires the Court to weigh the harm to the plaintiff against the harm to others, including the Province. Though each case presents unique factors to weigh, common factors include the consideration of public interest[[12]](#footnote-12), any potential adverse effects on third parties, as well as the preservation of the status quo.[[13]](#footnote-13) In this case, the Court found that the balance of convenience weighed in favour of the Province citing three reasons.

First, the Court found that the Province would suffer economic harm as a result of lost revenues such as bonuses paid to the province, annual rent and royalties, authorization process fees, and various tax-based revenues.[[14]](#footnote-14)

Second, the Court found that the injunction would have adverse effects on third parties. Many third-party companies in the oil and gas and timber industries attested to severe impact to their businesses, an inability to continue certain operations that could result in a shutdown.[[15]](#footnote-15)

Finally, the Court held that the lack of clarity and the overbroad nature of the relief sought was against the public interest.[[16]](#footnote-16) Though Blueberry River argued that the injunction would only affect activities in the critical area, the Court held that pre-existing projects requiring future authorizations would be halted.[[17]](#footnote-17) Moreover, the halting of transportation projects (such as pipelines) in the area would halt or diminish projects outside the area, affecting third parties to the action and beyond the region.[[18]](#footnote-18) Accordingly, the Court found that these potential effects were contrary to the public interest.

The Court did find that the public has “an interest in the fair and orderly settlement of Aboriginal claims.” However, it ruled that this consideration would require “findings of fact that are essentially the basis for and at issue at trial.”[[19]](#footnote-19)

**Why this Case Matters**

Though the Court cited different motives than in the 2015 injunction decision, it found once again that the balance of convenience weighed in favour of the Crown. While First Nations plaintiffs have been successful in meeting the first two prongs of the *RJR-MacDonald* test, the weighing of the balance of convenience has been difficult to sway in favour of Aboriginal rights claims when public economic interests are at risk.

The Courts have been encouraging parties to move away from injunction litigation since the *Haida Nation v British Columbia (Minister of Forests)[[20]](#footnote-20)* decision. This case highlights the importance of consultation and accommodation as a means to a collaborative resolution pending trial. In fact, the Court notes in this case that consultation and accommodation “can exceed the all-or-nothing approach of injunction litigation”[[21]](#footnote-21). However, the Crown must do so in good faith, must have an open mind, and cannot exclude any form of accommodation from the start.[[22]](#footnote-22)

Finally, although consultation and accommodation is the favoured approach, the Court must remember to consider Aboriginal interests when weighing the balance of convenience. In this case, the Court cited *Haida* when stating that the impact on the economy “does not alone tip the scales.”[[23]](#footnote-23) But potential economic harm to public finances and third-party companies were at the core of all three of the reasons justifying the weighing of the balance in favour of the Province. A thorough balance of convenience must properly weigh Aboriginal interests, as they too form a significant part of the public interest.

1. *Yahey v British Columbia*, 2017 BCSC 899 at para 21 [*Yahey*]. [↑](#footnote-ref-1)
2. *Ibid,* at 21. [↑](#footnote-ref-2)
3. *Ibid,* at 4. [↑](#footnote-ref-3)
4. *Ibid,* at 6. [↑](#footnote-ref-4)
5. *Ibid,* at 3. [↑](#footnote-ref-5)
6. *RJR-MacDonald Inc v Canada (Attorney General),* [1994] 1 SCR 311, 164 NR 1 [*RJR-MacDonald*]. [↑](#footnote-ref-6)
7. *Yahey, supra* note 1 at paras 34 & 35. [↑](#footnote-ref-7)
8. *Ibid,* at para 42. [↑](#footnote-ref-8)
9. *Ibid,* at para 47 citing *RJR-MacDonald, supra* note 8at para 59. [↑](#footnote-ref-9)
10. *Ibid,* at para 93. [↑](#footnote-ref-10)
11. *Ibid,* at para 88. [↑](#footnote-ref-11)
12. *Ibid,* at para 49. [↑](#footnote-ref-12)
13. *Ibid,* at para 52. [↑](#footnote-ref-13)
14. *Ibid,* at para 99. [↑](#footnote-ref-14)
15. *Ibid,* at paras 103-104. [↑](#footnote-ref-15)
16. *Ibid,* at para 106. [↑](#footnote-ref-16)
17. *Ibid,* at para 111. [↑](#footnote-ref-17)
18. *Ibid,* at para 112. [↑](#footnote-ref-18)
19. *Ibid,* at para 113. [↑](#footnote-ref-19)
20. *Haida Nation v British Columbia (Minister of Forests),* 2004 SCC 73, [2004] 3 SCR 511 [*Haida*]. [↑](#footnote-ref-20)
21. *Yahey, supra* note 1 at para 125 citing *Haida, supra* note 26 at para 14. [↑](#footnote-ref-21)
22. *Mikisew Cree First Nation v Canada (Minister of Canadian Heritage)*, 2005 SCC 69 at para 54, [2005] 3 S.C.R. 388 [*Mikisew Cree First Nation*]. [↑](#footnote-ref-22)
23. *Yahey, supra* note 1 at 105 citing *Haida, supra* note 26 para 73. [↑](#footnote-ref-23)