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# CUMULATIVE RIGHTS INFRINGEMENT IN BRITISH COLUMBIA TREATY 8 TERRITORY: THE NEED FOR A RENEWED ENVIRONMENTAL DECISION-MAKING FRAMEWORK UNDER TREATY LAW

REBECA MACIAS GIMENEZ†

> We've always, always (my grandpa told me so), we've always seen the Treaty as a relationship agreement, not as surrender. It's a relationship based on the affirmation of who we are, as Indigenous peoples, our rights and our responsibility over the territory that's under Treaty.
>
> \- Member of a Treaty 8 First Nation in BC

## I. INTRODUCTION

The seeds of this article were conversations with members of Treaty 8 First Nations in British Columbia. The interviews were part of my dissertation addressing the Site C hydropower project decision-making process. In response to almost every question asked about the Site C impact assessment, including consultation and accommodation issues, First Nation interviewees would shift the conversation to the violation of Treaty 8 by the Crown's unilateral decisions to approve infrastructure and extractive projects and the cumulative impacts that encroached on Indigenous lands and communities.[1]

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[1] The interviews were conducted by the author as part of her doctoral research. I interviewed 21 research participants in Vancouver Island and

While environmental decision making may include an assessment of cumulative environmental impacts of specific projects on Indigenous lands and resources, individual project reviews rarely or inadequately investigate how cumulative impacts of development affect Aboriginal Treaty rights. This discussion has recently reached the courts with the *Yahey* case, a claim regarding Treaty rights infringement by the cumulation of projects approved by the province of British Columbia on Blueberry River First Nation's traditional territory on Treaty 8.[2]

Although the province has the discretionary power to "take up" land for development in Treaty territories,[3] when exercising this power, it rarely or insufficiently contemplates how the adverse effects of its present decision are combined with past decisions and, ultimately, how those choices amount to a cumulative infringement of rights. This type of analysis is often done concerning individual proposals only, without considering how much land has been assigned for other projects in the past or concomitant proposals.

Cumulative impacts portray the consequences of state-led decision making based on colonial laws and policies being historically and unilaterally applied across Canada. The lack of consideration for Indigenous worldviews is most evident in the issue of how colonial regulatory processes consider cumulative effects. As explained by O'Faircheallaigh and MacDonald:

> From an Indigenous worldview, it is the total sum of effects on Indigenous values over time that are important to consider when

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the Peace Region, in July 2018 and April 2019. Two interviewees were members of the joint review panel for the Site C environmental assessment, 11 were members of Treaty 8 First Nations, and 1 non-indigenous First Nation staff, from 5 different First Nations. Seven interviewees were activists allied to Indigenous peoples in the region. Interviews were confidential and anonymous. See Rebeca Macias Gimenez, *Hydro Dams and Environmental Justice for Indigenous People: A Comparison of Environmental Decision-Making in Canada and Brazil* (PhD Dissertation, University of Victoria, 2021), online: *University of Victoria Library* <hdl.handle.net/1828/12885>.

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

3 *Grassy Narrows First Nation v Ontario (Natural Resources)*, 2014 SCC 48 at para 4 [*Grassy Narrows*].

> determining whether a new project should be allowed to proceed. Cumulative effects alter the vulnerability and resilience of Indigenous peoples and the resources they rely upon in the pre-project situation.[4]

The issue urges lawmakers and policy makers to shift the focus from project-by-project reviews, which are highly reliant on consultation and accommodation, to the question of how Treaty Laws should guide decisions about land and resource development. By Treaty Law, I refer to the law that is authoritative from both settler and Indigenous legal perspectives.[5] When disputes between Indigenous peoples and settler governments arise in Treaty territory, the applicable law should be a negotiated one, reflective of the legal orders involved in the agreement. This issue will be discussed in more detail in the next section.

The problem of cumulative impacts of the Crown's environmental decision making on Aboriginal and Treaty rights raises the discussion about a Treaty relationship enabling Indigenous law and authority to be applied in land and resource matters. In other words, how can one ensure that environmental decision making in numbered Treaty territories deals with the problem of cumulative effects of development on Treaty rights?[6]

In this article, I provide an analysis of the inconsistencies between the British Columbia environmental decision-making regulatory framework, primarily through environmental

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4 Ciaran O'Faircheallaigh & Alistair MacDonald, "Indigenous Impact Assessment: A Quiet Revolution in EIA?" in Kevin Hanna, ed, *Routledge Handbook of Environmental Impact Assessment* (London: Routledge, 2022) 221 at 224 [emphasis added].

5 See Dayna Nadine Scott & Andrée Boisselle, "If There Can Only Be 'One Law', It Must Be Treaty Law: Learning From Kanawayandan D'aaki" (2019) 70 UNBLJ 230 at 256.

6 The texts of those historical treaties, including Treaty 8, contain a "take up" clause, allowing the Crown to allocate certain portions of land for developments such as mining, lumber, and settlements. See e.g. Canada, *Treaty No. 8 Made June 21, 1899 and Adhesions, Reports, Etc.*, (Ottawa: Queen's Printer and Controller of Stationery, 1966) at Treaty No 8, online: *Government of Canada; Indigenous and Northern Affairs Canada* <rcaanc-cirnac.gc.ca/eng/1100100028813/1581293624572> [*Treaty 8 and Adhesions, Reports, Etc.*].

assessments of proposed projects, and the constitutional protection of Treaty rights in Canada. It discusses how an inadequate understanding of the Treaty relationship has led to the duty to consult and accommodate consistently validating unilateral decisions and the uncontrolled taking of land and resources by the Crown on Treaty 8 territory. The article also identifies possibilities (albeit limited) for environmental assessment laws contributing to realizing Aboriginal and Treaty rights through recently enacted legislation and policies regarding Environmental Impact Assessment and the *United Nations Declarations on the Rights of Indigenous Peoples* (*UNDRIP*).

The primary body of literature that informs this article focuses on the Treaty relationship between Canada and Indigenous peoples, aiming at the treaty makers' original intent of sharing the land, especially regarding issues of land and natural resource extraction and development.[7] I have examined case law on Treaty rights infringement and cumulative effects of development, the duty to consult and accommodate, and the legislation and policy on environmental assessment in BC and Canada. The methodology also includes the analysis of interviews with members of First Nations on Treaty 8 territory, Northeast British Columbia, to portray some of their experiences with resource development and decision-making processes in the region.

Following this introduction, the article contains a discussion about the original purpose of historical Treaties in Canada and the prospect for a Treaty relationship informing a renewed view

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[7] Even though I adopt the mainstream colonial term "development", I am critical of the concept, which in fact leads to the suppression of community-based forms of development, especially the ones based on the Indigenous relationships with the lands and waters. I am aware that the colonial concept of development, centred around a capitalist logic of accumulation, justifies, through environmental decision making, the interference on the lives of the communities considered "less developed" on the basis of modernisation and economic growth, seeking social and cultural domination. See Aram Ziai, "Post-development 25 years after The Development Dictionary" (2017) 38:12 Third World Q 2547; Melanie K Yazzie, "Decolonizing Development in Diné Bikeyah: Resource Extraction, Anti-Capitalism, and Relational Futures" (2018) 9:1 Environment & Society 25.

of federalism and Treaty Law. The second part reviews case law regarding cumulative impacts of development on Indigenous people and lands possibly amounting to Treaty rights infringements. The third part describes the effects of BC's current decision-making framework for resource extraction and development on Indigenous peoples and lands in Northeast BC. Next, the article includes a description of recent Treaty rights infringement claims by local First Nations, including the *Yahey* case and decision. The conclusion addresses how provincial and federal impact assessment laws, including regional and strategic assessment tools, can contribute to making space for Indigenous jurisdiction and realizing Treaty Law.

## II. TREATY RELATIONSHIP AND SHARING THE LAND

Canadian courts have widely acknowledged the controversy regarding the intent of historical treaties, and in the case of numbered Treaties, whether they unequivocally transferred land to the Crown. In the 1999 Supreme Court of Canada *Marshall* decision, Binnie J referred to rules of interpretation of historical Treaties:

> The special rules are dictated by the special difficulties of ascertaining what in fact was agreed to [in historical treaties]. The Indian parties did not, for all practical purposes, have the opportunity to create their own written record of the negotiations.[8]

By articulating Treaty interpretation principles in the *R v Badger* decision,[9] the Supreme Court of Canada evinced that the texts of historical Treaties are only a partial view of the agreements and that the oral promises made to Indigenous peoples are a fundamental source of legal interpretation.[10] Some of the principles are worth mentioning: treaties are sacred, solemn agreements between First Nations and the Crown; "the honour of the Crown is always at stake"; any ambiguities in the Treaty will be resolved in favour of the First Nations; any

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8 *R v Marshall*, [1999] 3 SCR 456 at para 14, 177 DLR (4th) 513 [*Marshall*].

9 *R v Badger*, [1996] 1 SCR 771, 133 DLR (4th) 324 [*Badger* cited to SCR].

10 *Ibid* at para 52.

restrictions of rights under the Treaty will be narrowly construed; treaties must not be interpreted in a strictly technical sense but rather in the sense that the First Nations would have understood them at the time of the signing; verbal promises made by commissioners during negotiations are useful in treaty interpretation.[11]

Most relevant for this analysis is the principle of the common intention of the parties that entered into an agreement, as articulated in *R v Sioui*: "Defining the common intent of the parties on the question of territory in this way makes it possible to give full effect to the spirit of conciliation, while respecting the practical requirements of the British."[12] These principles contain open-textured concepts, such as the "honour of the Crown", which means that the process of negotiation of the practical terms of the agreement is ongoing and never-ending, creating a relationship of interdependence.[13] The parties will constantly need to acknowledge each other's authority and dialogue on the specific and concrete issues that arise under the original Treaty. The *Restoule v Canada* Ontario Court of Appeal decision is an interesting example of those principles' application in interpreting the intent of the parties as the circumstances evolved over time since the ratification of the Robinson Treaties: "In entering into the Robinson Treaties the Crown expressly undertook to revisit its promises and to refresh the annuities, where possible, 'to address both sides' contemporary needs and interests in relation to the treaty lands.'"[14]

Nevertheless, the Crown's approach to historical Treaties, especially numbered Treaties, has focused consistently on the "surrender of land" clause, arguing that Indigenous peoples have ceded control of their territories in exchange for guarantees that

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11 *Ibid* at paras 41, 52, 55.

12 *R v Sioui*, [1990] 1 SCR 1025 at 1071, 70 DLR (4th) 427.

13 See Aaron Mills / Waabishki Ma'iingan, "What is a Treaty?: On Contract and Mutual Aid" in John Borrows & Michael Coyle, eds, *The Right Relationship: Reimagining the Implementation of Historical Treaties* (Toronto: University of Toronto Press, 2017) 208.

14 *Restoule v Canada (Attorney General)*, 2021 ONCA 779 at para 502.

their rights to hunt, fish, and trap would be protected.[15] This approach facilitated the settlement and exploitation of Indigenous traditional territories. Misrepresentation of treaties was part of the colonization strategy, working to separate people from the land, commodifying land, water, and non-human beings. The reinvigoration of treaty oral traditions is thus necessary to establish and guide negotiation and cooperation between Indigenous peoples and settler governments.[16]

The Canadian Royal Commission on Aboriginal Peoples report contributes to the recovery and explanation of the oral treaty tradition:

> The Aboriginal world view of a universal sacred order, made up of compacts and kinship relations among human beings, other living beings and the Creator, was initially reinforced by the Crown's willingness to enter into treaties under Indian protocols. But subsequent denials of the validity and importance of the treaties have denigrated Aboriginal peoples' stature as nations and their substantial contribution to Canada. Unfortunately, non-Aboriginal people valued treaties as long as they continued to be useful, which often meant until land changed hands, settlements grew, and resources were extracted and converted into money. For their part, First Nations expected that treaties would grow more valuable with time, as the parties came to know each other better, trusted one another, and made the most of their treaty relationships.
>
> In the past, governments and courts in Canada have often considered these treaties instruments of surrender rather than compacts of co-existence and mutual benefit. This is the spirit of colonialism, the agenda of a society that believes it has no more need for friends because of its apparent wealth, power and superiority. The spirit of the treaties, by contrast, is the spirit of a time when the ancestors of today's Canadians needed friends and found them.
>
> It is time to return to the spirit of the treaties and to set a new course to correct the legalistic and adversarial attitudes and

15 See Shin Imai, "Treaty Lands and Crown Obligations: The Tracts Taken Up Provision" (2001) 27:1 Queen's LJ 1.

16 Gina Starblanket, "The Numbered Treaties and the Politics of Incoherency" (2019) 52:3 Canadian J Political Science 443.

> actions that have contributed to the badly deteriorated treaty relationships that exist between Aboriginal nations and Canada today.[17]

Michael Asch and a team of scholars examined a sample of historical Treaties, approaching what First Nation leaders and elders today say were the terms of the treaties and examining those understandings in the light of the historical (written) record of treaty negotiations.[18] Asch's team found that in the oral treaty tradition there is no mention of sovereignty, cession, or subjection, except mutual subjection to the agreed terms of treaties.[19] In examining the facts surrounding the negotiation of Treaty 4, for instance, Michael Asch concluded that the Treaty Commissioner presented the same intent as the Cree and Saulteaux—that the signature of the Treaty would begin a relationship to share the land. The Treaty established an open-ended agreement that the Crown would have permission to settle on lands, which were recognized as Indigenous lands and, in return, the Crown promised to ensure that the settlers' presence would benefit (or at least not harm) Indigenous peoples.[20]

For Heidi Kiiwetinepinesiik Stark, in Anishinaabe understandings, the Treaties were meant to protect the people's rights to the land and to "provide a base for a lasting relationship with the Crown."[21] Anishinaabe scholar John Borrows teaches that, in many Indigenous legal orders, Treaties with the Crown

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17 *Report of the Royal Commission on Aboriginal Peoples: Looking Forward, Looking Back*, vol 1 (Ottawa: Supply and Services Canada, 1996) at 164–65 [emphasis added].

18 See Michael Asch et al, "Treaty Relations as a Method of Resolving IP Issues", online: *Intellectual Property Issues in Cultural Heritage: Theory, Practice, Policy, Ethics* <sfu.ca/ipinch/project-components/community-based-initiatives/treaty-relations-method-resolving-ip-issues/>.

19 See James Tully, "On the Expression 'Sharing the Land' in Treaty Making" in *Festschrift for Michael Asch* at 2 [forthcoming in 2024].

20 See Michael Asch, *On Being Here to Stay: Treaties and Aboriginal Rights in Canada* (Toronto: University of Toronto Press, 2014) at 96–97.

21 Heidi Kiiwetinepinesiik Stark, "Respect, Responsibility, and Renewal: The Foundations of Anishinaabe Treaty Making with the United States and Canada" (2010) 34:2 American Indian Culture and Research J 145 at 152.

have their foundation in sacred law: "The laws surrounding Canada's formation in many treaty territories are profound because they are meant to encourage the spiritual, moral and legal capacities of all the people who would come to live here."[22]

Dayna Scott and Andreé Boisselle, in a study in collaboration with an Oji-Cree community (*Kitchenuhmaykoosib Inninuwug*) on Treaty 9, argued for the reinvigoration of historic Treaty interpretations to produce "one law"—Treaty Law, inclusive of Indigenous legal orders and authoritative from both settler and Indigenous legal perspectives.[23] The authors demonstrated that the application of settler law could not accommodate the community members' obligations under Indigenous law. Therefore, when disputes between Indigenous peoples and settler governments arise regarding environmental decision making in Treaty territory, the applicable law should be a negotiated one, reflective of the legal orders involved in the agreement. Thus, respecting the Treaty means accepting that Indigenous peoples' desires and plans for their traditional lands are as legitimate as settler governments' and that new arrangements for decision making and dispute resolution would have to be jointly designed.[24]

Adopting a Treaty Law approach, though, requires that we see Treaties more fundamentally as constitutional associations that coordinate the relationship of distinct political communities, as taught by Aaron Mills: "A treaty is the relationship itself, not the (always contingent) exchange of goods and services it empowers at any given time."[25] Canadian courts are not solely able to promote this "coordination of distinct constitutional orders", as they serve the internal interests of the Canadian colonial order through which they were created.[26] The courts have wrongly addressed Treaties as an exchange of goods, services, and land between the Crown and Indigenous peoples, leading them to see

[22] John Borrows, *Canada's Indigenous Constitution* (Toronto: University of Toronto Press, 2010) at 26.

[23] See Scott & Boisselle, *supra* note 5 at 256.

[24] See *ibid* at 278.

[25] Mills / Waabishki Ma'iingan, *supra* note 13 at 208.

[26] *Ibid* at 223–24.

their own role as one of assigning specific rights, not promoting the relationship between constitutional and legal orders.[27]

Joshua Nichols offers a historical analysis of the case law, drawing a picture of how Canadian courts have moved from the notion of Treaties as the basis of Canadian federalism to a "thick" understanding of the "Sovereignty of the Crown", based on the assumptions embedded in the Westphalian model. He explains that changes introduced by the Supreme Court of Canada in *Tsilhqot'in Nation v British Columbia*[28] and *Grassy Narrows* are an extended "trend" of provinces taking an increased amount of control over Indigenous peoples and lands.[29] Nichols argues that pluralizing the idea of the nation by decoupling the notions of "nation" and "state" allows a deeper engagement with the idea of federalism in Canada: "It helps us see the transformative potential that the treaties have when they are understood as constitutional documents and not a sui generis form of surrender."[30]

Considering that historical Treaties are open-ended ongoing agreements between distinct constitutional and legal authorities, how can settler governments and Indigenous peoples write together the missing lines that will guide their relationship in everyday decisions about land and resource development? What does it mean for the practice of environmental regulatory processes to say that Treaties are an ongoing relationship and not merely a contract about exchanging goods and land?

In this article, I approach Treaty Law's pluralizing and transformative potential. It is the framework to explore institutionalized spaces within which Indigenous laws would shape decisions about land and resources on Treaty 8 territory and contribute to accounting for the cumulative degradation of the land since its European settlement. According to this

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27 See *ibid* at 224.

28 2014 SCC 44 [*Tsilhqot'in Nation*].

29 Joshua Ben David Nichols, "A Narrowing Field of View: An Investigation into the Relationship between the Principles of Treaty Interpretation and the Conceptual Framework of Canadian Federalism" (2019) 56:2 Osgoode Hall LJ 350 at 368.

30 *Ibid* at 359.

approach, the "surrender of land" clause does not reflect the intent of the Treaty and is not the rightful basis of Canadian federalism. Thus, it follows that the restrictive view of Treaty rights as the rights to hunt, trap, and fish is not the complete picture of the promises made by the Crown to Indigenous peoples, as the assignment of specific rights presupposes a relationship of domination. This article aims to help develop the concept of Treaty Law, holding it as a space where Indigenous legal orders and jurisdictions shape legal and policy frameworks on land and resource decision making under historic treaties.

## III. CUMULATIVE TREATY RIGHTS INFRINGEMENT AND THE DUTY TO CONSULT

In the *Sparrow* decision, the Supreme Court of Canada developed a framework to determine whether a government interference of Aboriginal rights amounts to an infringement of section 35 of the *Constitution Act, 1982*[31] and if that infringement can be justified. According to this framework, Indigenous peoples must demonstrate a *prima facie* infringement, and if they are successful, the burden shifts to the Crown to justify that infringement. The criteria to identify whether a *prima facie* infringement has occurred are 1) is the limitation unreasonable?; 2) does the interference impose undue hardship?; and 3) does the limitation deny the rights holders their preferred means of exercising that right?[32] The criteria to establish whether an infringement is justified are 1) a valid legislative objective; 2) consistency with the honour of the Crown, specifically the Crown's fiduciary obligations to the Indigenous group; and other conditions as the circumstances might require, including minimal impairment, compensation, and consultation.[33] The approval of development and extractive projects has often been considered to be of public interest, as they generate energy or

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31 *Constitution Act, 1982*, s 35, Schedule B to the *Canada Act 1982* (UK) 1982, c 11.

32 See *R v Sparrow*, [1990] 1 SCR 1075 at 1112, 70 DLR (4th) 385.

33 See *ibid* at 1113–14.

contribute to a region's economic growth.[34] Those authorizations are therefore easily framed as valid legislative objectives, especially with the purpose of economic growth, allowing for the justification of an Aboriginal right infringement.[35]

The courts have extensively applied this framework, including in the *Mikisew Cree* decision, through which the Supreme Court of Canada held that a *prima facie* infringement triggering a justification analysis lay only "where the Crown has taken up land in bad faith or has taken up so much land that no meaningful right to hunt remains."[36] The main issue here is the high threshold to determine when incremental interferences on a Treaty right become an infringement, which places a heavier burden on Indigenous Nations to prove the existence of an infringement.

In *Mikisew Cree*, the Court then turned to the duty to consult as a procedural tool to protect the Treaty right and balance that burden. As a result, the central issue in *Mikisew Cree* became the duty to consult rather than the infringement of Treaty rights.[37] The Court did not elaborate on what the "meaningful" exercise of Treaty rights entailed, a question that was later addressed in the *Yahey* case.[38] Robert Hamilton and Nick Ettinger indicate that during the process of litigation and negotiation, in looking to mitigate the effects of extended litigation, the Supreme Court of Canada has generally "shifted the focus from proving whether a Crown action or law constituted a *prima facie* infringement toward the pre-emptive duty to consult and accommodate", as

34 See Lisa Dufraimont, "From Regulation to Recolonization: Justifiable Infringement of Aboriginal Rights at the Supreme Court of Canada" (2000) 58:1 U Toronto Fac L Rev 1 at 23–24.

35 See *R v Gladstone*, [1996] 2 SCR 723 at para 75, 137 DLR (4th) 648.

36 *Mikisew Cree First Nation v Canada (Minister of Canadian Heritage)*, 2005 SCC 69 at para 48 [*Mikisew Cree* SCC], citing *Mikisew Cree First Nation v Canada (Minister of Canadian Heritage)*, 2004 FCA 66 at para 18.

37 *Mikisew Cree* SCC, *supra* note 36 at para 63.

38 Robert Hamilton & Nick Ettinger, "*Yahey v British Columbia* and the Clarification of the Standard for a Treaty Infringement" (24 September 2021), online (blog): *ABlawg* <ablawg.ca/2021/09/24/yahey-v-british-columbia-and-the-clarification-of-the-standard-for-a-treaty-infringement/>.

shown in the *Haida Nation* and *Taku River* decisions.[39] The discussion about the duty to consult is essential here as it is at the centre of any decision making about land and natural resources that involves Indigenous peoples' interests and rights.

In the *Clyde River* decision, the Supreme Court of Canada held that the duty to consult has a constitutional dimension grounded in the honour of the Crown and a legal dimension "based in the Crown's assumption of sovereignty over lands and resources formerly held by Indigenous peoples."[40] Neil Craik explains that the exercise of the duty to consult in environmental assessment processes seeks to reconcile public values "of sustainability, environmental protection, and meaningful public engagement" with the recognition and accommodation of Aboriginal rights.[41] However, reconciliation of public values and Aboriginal rights is always context specific.[42]

Nevertheless, the duty to consult regarding individual extractive projects does not provide an appropriate level of protection for Aboriginal rights. While the Crown relies on consultation for reviewing projects and issuing permits, the duty to consult cannot address all Indigenous peoples' concerns regarding the long-term effects of a culmination of individual projects (past and present) on their territories and ways of life.[43] Even when Aboriginal title or Treaty rights afford a place for consultation at the end of the spectrum and provide the highest level of Indigenous jurisdiction currently accepted in Canadian law, "the protection of an Indigenous right to consent or refuse

39 See *ibid*, citing *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73 and *Taku River Tlingit First Nation v British Columbia (Project Assessment Director)*, 2004 SCC 74.

40 *Clyde River (Hamlet) v Petroleum Geo-Services Inc*, 2017 SCC 40 at para 19 [*Clyde River*].

41 See Neil Craik, "Process and Reconciliation: Integrating the Duty to Consult with Environmental Assessment" (2016) 53:2 Osgoode Hall LJ 632 at 643.

42 See *ibid*.

43 See Stephen M. Young, "The Deification of Process in Canada's Duty to Consult: Tsleil-Waututh Nation v Canada (Attorney General)" (2019) 52:3 UBC L Rev 1065 at 1067.

development projects on their territories is subject to the Crown justifying its infringement."[44]

State-led processes such as environmental assessment may include consultation with Indigenous communities about the potential impacts of a proposed project on their ways of life but do not address cumulative or broader watershed impacts.[45] The scope of the duty to consult is unclear regarding whether and how past impacts must be addressed in administrative processes such as environmental assessments.[46] This is especially challenging as administrative decision makers must consider the "larger aims of reconciliation in interpreting their jurisdiction".[47] Rightfully, Indigenous peoples participating in consultation through environmental assessments tend to shift the focus from the particular issues delimited through the screening and scoping procedures to bigger-picture discussions, including matters of historical land claims and Treaties.[48]

In the *Rio Tinto v Carrier Sekani* case, the Supreme Court of Canada held that past impacts are not capable of triggering the

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44 See Scott & Boisselle, *supra* note 5 at 260; *Tsilhqot'in Nation*, *supra* note 28 at paras 76–77; *Campbell v British Columbia (Forest and Range)*, 2012 BCCA 274.

45 See Deborah Curran, "Indigenous Processes of Consent: Repoliticizing Water Governance through Legal Pluralism" (2019) 11:3 Water 571 at 2 (Curran indicates that state-led processes often depoliticize environmental decision making by controlling how Indigenous communities must engage with the process, and restricting opportunities for Indigenous communities to express their laws and governance practices).

46 See *Chippewas of the Thames First Nation v Enbridge Pipelines Inc*, 2017 SCC 41 (confirming that the duty to consult "is not triggered by historical impacts" at para 41, and asserting "the subject of consultation is the impact on the claimed rights on the current decision under consideration" at 41 citing *Carrier Sekani*, *infra* note 49); Janna Promislow, "Irreconcilable?: The Duty to Consult and Administrative Decision Makers" (2013) 22:1 Const Forum Const 63 at 67–68; Ryan Ng, "Revitalizing Rights: Practicable Proposals for the Law of Section 35 Consultation and Environmental Assessment" (2022) 27 Appeal 82 at 87.

47 See Promislow, *supra* note 46 at 68.

48 See Aniekan Udofia, Bram Noble & Greg Poelzer, "Meaningful and Efficient?: Enduring Challenges to Aboriginal Participation in Environmental Assessment" (2017) 65 Environmental Impact Assessment Rev 164 at 170.

duty to consult on their own.[49] The duty to consult is only triggered if a Crown's decision leads to new impacts on rights. The Court held:

> The question is whether there is a claim or right that potentially may be adversely impacted by the *current* government conduct or decision in question. Prior and continuing breaches, including prior failures to consult, will only trigger a duty to consult if the present decision has the potential of causing a novel adverse impact on a present claim or existing right. [50]

Although this decision established that only current government decisions may trigger the duty to consult, the case opened the possibility of remedy for past and continuing breaches (including previous failures to consult) through the awarding of damages.[51]

Courts have acknowledged that consultation about individual projects cannot offer a big picture of cumulative environmental impacts on rights, considering that "the inclusion of past impacts within the scope of the duty to consult is inconsistent with the purpose for which the duty was designed".[52] It follows, then, that the Crown's reliance on the duty to consult does not prevent an infringement of Treaty rights.[53] For this reason, the Court in *Yahey* affirmed that a First Nation has the right "to bring an infringement claim when it believes the promises made in Treaty 8 are now in question and that it is reaching the point where it can no longer meaningfully exercise rights in its territory."[54] To this date, based on the *Carrier Sekani* and *Yahey* cases, damages have been established as the remedy for cumulative impacts on Treaty rights and an infringement claim as the proper process

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49 *Rio Tinto Alcan Inc v Carrier Sekani Tribal Council*, 2010 SCC 43 [*Carrier Sekani*].

50 *Ibid* at para 49 [emphasis in original].

51 See *ibid*.

52 *Adams Lake Indian Band v British Columbia (Ministry of Forests, Lands and Natural Resource Operations)*, 2013 BCSC 877 at para 51 [*Ministry of Forests*].

53 See *Yahey*, *supra* note 2 at para 500.

54 *Ibid* at para 500–01.

through which Indigenous peoples must argue cumulative effects in Court.

But the *Yahey* decision also includes relevant declaratory remedies that should contribute to pushing provincial governments to act preventively to avoid cases of Treaty rights infringement. One of those declaratory remedies is:

> The Province may not 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 that unjustifiably infringe Blueberry's exercise of its treaty rights.[55]

A correlated declaratory remedy may lead to the Crown seeking to integrate Indigenous peoples' principles of governance over lands and resources in their regulatory frameworks:

> The parties must act with diligence 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.[56]

In addition to *Yahey*, a recent BC Supreme Court decision could contribute to expanding the range of remedies for cumulative Treaty rights infringement. In the 2022 *Thomas and Saik'uz First Nation* decision, the BC Supreme Court declared that the plaintiffs do have an Aboriginal right to fish for food, social, and ceremonial purposes in the Nechako River watershed and reaffirmed the possibility of the First Nations requesting damages for continuous impacts by the Kenney Dam on their rights.[57] However, most notably for this article, the Court indicated that, where there may be a historical and ongoing Aboriginal right infringement, the Crown must review its regulatory process based on the posterior recognition of an Aboriginal right:

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[55] *Ibid* at para 1888(3).

[56] *Ibid* at para 1888(4).

[57] *Thomas and Saik'uz First Nation v Rio Tinto Alcan Inc*, 2022 BCSC 15 at paras 490, 661 [*Thomas and Saik'uz First Nation*].

> I acknowledge that the language in *Rio Tinto* 2010 can be interpreted to mean that historic infringements which continue to the present time (1) may be limited to claims for compensation and/or (2) may not trigger any "fresh duty to consult" (para. 49). I would note, however, the situation may change where damage to the resource continues after a formal declaration of an Aboriginal right and it is "necessary for the Crown to reassess prior conduct in light of the new reality" (*Tsilhqot'in* para. 92).[58]

Therefore, in circumstances where Aboriginal rights recognized through Treaties are being historically and continuously infringed by the cumulative impacts of development, the Crown has an obligation to review and adapt its regulatory processes (in addition to providing compensation). The existence of a Treaty inevitably imposes on the Crown the obligation to revise its environmental regulatory framework as industrial growth, settlement, and proposed infrastructure represent increasing threats to the exercise of Treaty rights. As discussed later in the article, Treaty Law requires that the Crown acts proactively to prevent its decisions from amounting to interference with First Nations' meaningful exercise of Treaty rights rather than waiting for Indigenous peoples to claim rights infringement in Courts or request compensation for historic infringements.

## IV. TREATY 8 AND BRITISH COLUMBIA'S CURRENT FRAMEWORK FOR RESOURCE EXTRACTION AND DEVELOPMENT

In 1899, the Crown signed Treaty 8 with Indigenous peoples down the Lesser Slave Lake.[59] In the following years, the Sekani, Beaver (Dunne-zaa), the Cree, and the Slavey peoples adhered to the Treaty under the assurance that the agreement would protect their modes of life.[60] According to the text of the Treaty, Indigenous peoples "cede, release, surrender and yield up to the

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[58] *Ibid* at para 583 [emphasis added].

[59] See *Treaty 8 and Adhesions, Reports, Etc.*, *supra* note 6 at Treaty No. 8.

[60] *Ibid* at Order in Council to Ratifying Adhesions to Treaty 8.

Government of the Dominion of Canada, for Her Majesty the Queen and Her successors for ever, all their rights, titles and privileges whatsoever, to the lands included within the following limits."[61] The Crown would be able to "tak[e] up" tracts of land "from time to time for settlement, mining, lumbering, trading or other purposes."[62] Nevertheless, the report by the Treaty Commissioner to the Crown assured "that they would be as free to hunt and fish after the treaty as they would be if they never entered into it. We assured them that the treaty would not lead to any forced interference with their mode of life."[63] Treaty 8 territory covers only a small portion of the province's total area.[64]

The Crown's primary purpose with Treaty 8 was to allow Euro-Canadian settlers to access the land and develop the "extraction of oil, gas, and minerals" in the region, including the Peace River watershed.[65] In 1923, a mining engineer recorded that:

> The important known mineral-deposits of the Peace River Division consist of coal and placer gold. . . . The possible occurrence of petroleum in the rocks of this Division has been the subject of some investigation. Geologic reconnaissances have been made by a number of oil companies and leases have been taken up.[66]

In 1952, James MacGregor stated, "[g]reat are the riches of the Peace River Country. In good black soil, gas and oil, coal and

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61 *Ibid* at Treaty No. 8.

62 *Ibid*.

63 *Ibid* at Report of Commissioners for Treaty No. 8. The text of the Treaty is accompanied by this report by the Treaty Commissioners, who has negotiated with Indigenous peoples on behalf of the Crown.

64 Government of Canada "Archived—Treaty 8" (4 July 2008), online: *Library and Archives Canada* <collectionscanada.gc.ca/treaty8/020006-1000-e.html>.

65 Hugh Brody, *Maps and Dreams: Indians and the British Columbia Frontier* (Vancouver: Douglas & McIntyre, 1981) at 63–64.

66 John D Galloway, "A Mining Engineer Reports" in Gordon E Bowes, ed, *Peace River Chronicles* (Vancouver: Prescott Publishing Company, 1963) 389 at 391–92.

water power, timber and pulp wood it is physically rich."[67] Since the signature of Treaty 8, the provincial government has been authorizing several industries to explore resources in the Northeast of the province of BC without a regional strategic framework.[68]

The Crown's discretionary power to take up land for development has created the setting for various industrial activities to prosper in Northeast BC, where there are many government branches reviewing projects and issuing permits (i.e., BC Ministry of Energy, Mines and Petroleum Resources, BC Oil and Gas Commission, BC Ministry of Environment, BC Environmental Assessment Office).[69] While all those government branches have jurisdiction, depending on the project proposal, they do not necessarily communicate with each other to define a comprehensive picture of the region and a strategic framework for development that would sustain land and resources.[70] In this framework (or the lack of framework), the duty to consult and accommodate is the only real avenue for First Nations to influence the decision, where Nations have declared constantly that they do not have real decision-making power about project approvals.

One analogy offered by John Borrows fits well into this reality. Professor Borrows explains that the duty to consult and accommodate works the same way as if I said to you: *I will cut off your arm. But don't worry, I will do that in a proper environment, with a good team of surgeons and nurses. And after that, I will compensate you generously for your arm*.[71] Consultation and accommodation, primarily through Impact Benefit Agreements (IBA), have been used to pay for the loss of many "arms" of

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67 Gordon Bowes, ed, *The Peace River Chronicles* (Vancouver: Prescott Publishing Company, 1963) at back cover.

68 See *Yahey*, *supra* note 2.

69 See *ibid* at paras 46, 983, 1392, 1393, 1587, 1588; *Ministry of Forests*, *supra* note 52.

70 See *Yahey*, *supra* note 2 at para 543.

71 See John Borrows, "Canada's Colonial Constitution" in John Borrows & Michael Coyle, eds, *The Right Relationship: Reimagining the Implementation of Historical Treaties* (Toronto: University of Toronto Press, 2017) 17 at 34.

Indigenous Nations on Treaty 8 territory. Many Indigenous peoples in the region depend on those industrial activities and IBAs to have jobs and provide for their families.[72] In my research, I heard from several First Nations' leaderships that they are not against development but against processes that cause destruction to the region and exclude First Nations from the processes.

Scholars have discussed how uncontrolled and unstructured industrial development in Northeast British Columbia, without substantial consideration for cumulative impacts, has been harming the exercise of traditional practices and food access to Indigenous communities.[73] Interviews with Indigenous peoples of the region reveal details about the problems related to the cumulative effects of industrial development and the long-lasting exclusion of First Nations from deciding whether to approve projects on Treaty territory.[74]

As one First Nation councillor explained, environmental impacts from infrastructure and industry cannot be separated from the effects on the exercise of Treaty rights, "[i]t's pretty hard to pinpoint one [impact] because the environment has to do with the Treaty, everything under the Treaty has to do with the environment—habitat, water, where the water comes from (...) all those things contribute to our part in the Treaty."[75] Since the signature of Treaty 8, Indigenous communities have been forced to adapt to the growing industrial activities and settlements in their traditional territories, as one elder explains: "[A] lot [of] who we are as people—how we utilize the forest, how they saw the forest and wildlife—changed over the years because of

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72 Caleb Bhen and Karen Bakker, "Rendering Technical, Rendering Sacred: The Politics of Hydroelectric Development on British Columbia's Saaghii Naachii/Peace River" (2019) 19:3 Global Environmental Politics 98.

73 See *ibid*; Annie L Booth & Norm W Skelton, "'You spoil everything!' Indigenous Peoples and The Consequences of Industrial Development in British Columbia" (2011) 13 Environment Development & Stability 685.

74 See Macias Gimenez, *supra* note 1 at 205–24.

75 *Ibid* at 227 (SC05) [anonymized interview participants are referred to in parenthesis in this and subsequent footnotes].

industrial impacts, what we call cumulative impacts."[76] As a result, community members are left with few and small pockets of areas where they can exercise their traditional practices:

> It's not as simple as 'if you can't do that here, why don't you go do that someplace else.' That is hard to do because the whole countryside has oil and gas wells, pipelines, power lines, cut blocks for logging, areas clear for windmill operations, even for mining.[77]

Indigenous interviewees also spoke of the outcomes of the uncontrolled implementation of industrial facilities in the region:

> Our lands are nude! The moose numbers are down, and everywhere you look, you see large clear cuts. With all the focus on oil and gas and LNG, they're still mining and still logging and the [power] plants (...) Their plans continue, and they even go faster. They have no plans for slowing down.[78]

A First Nation government official expressed their concern about the survival of the community:

> The animals will move away and affect our right to hunt. Not many moose and caribou are left in this area. It will impact more the wildlife left for us to survive from and in the future for our younger generation. Once all the resources are taken, we'll be left with nothing to survive on.[79]

One First Nation councillor referred to the accumulation of adverse effects from industry in traditional territories as a 'topocide'—a complete alteration of the landscape to the point that Indigenous traditions are not possible anymore:

> The Peace River valley is a massive ecosystem that provides life and habitat for so many animals and different species that we have a relationship with. Animals, moose, (...) . . . . So taking out a massive ecosystem like that or transforming it from a river system into a reservoir, introducing methyl mercury into that whole system, it's gonna change how the First Nations people are

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76 *Ibid* at 227 (SC06).

77 *Ibid* at 228 (SC06).

78 *Ibid* at 228 (SC02).

79 *Ibid* at 228 (SC17).

> gonna relate to that land. For example, I fish in this lake. I go there regularly. We catch fish, take them home, take them to our elders, eat them, smoke them. If I know that there is a potential for mercury contaminant in the fish, to access this lake, it's gonna change how I feel about doing those practices. I'm gonna move away from fishing here and look further abroad. It creates a disconnect between our community and people and the land and the resources that we're familiar with (...) It's slowly turning people away from, like our kids, home, the elders will tell stories, but those places won't be available. The stories won't have the same meaning as if an elder could take somebody there and explain [that] we hunted here because it will be a big reservoir.[80]

The WAC Bennet dam and the Site C dam are inserted in this region of intense industrialization. The Bennet dam, one of the largest dams in North America, was constructed in the 1960s without environmental assessment or consultation with Indigenous peoples.[81] Just a few kilometres downstream of the Bennet dam, Site C is currently being built. Site C is one example of a faulty decision-making process that lacked consideration for the cumulative effects of the project over Aboriginal Treaty rights. BC Hydro, the Crown corporation responsible for building and operating Site C, has signed IBAs with a number of the local First Nations to ensure their 'consent' to the project.[82]

During the Site C review process, some Indigenous communities required BC Hydro to make it more transparent how it would conduct cumulative effects assessment at the

80 *Ibid* at 228–29 (SC04).

81 Sarah Cox, "BC Hydro Apologizes for Bennet Dam's 'Profound and Painful' Impact on First Nations at Gallery Opening", *The Narwhal* (10 June 2016), online: <thenarwhal.ca/bc-hydro-apologizes-bennett-dam-s-profound-and-painful-impact-first-nations-gallery-opening/>.

82 See Dayna Nadine Scott, "Extraction Contracting: The Struggle for Control of Indigenous Lands" (2020) 119:2 South Atlantic Q 269 (discussing the privatization of the relationship between industry, the Crown, and Indigenous communities through the negotiation of Impact Benefit Agreements, which are in fact "part of the larger legal architecture of settler colonial capitalism" at 272).

regional planning level.[83] Others also indicated potential downstream effects of the dam "on water flow and water levels, including in the Peace River, Slave River, McKenzie River, Salt River, Great Slave Lake and the Peace-Athabasca Delta."[84] They requested BC Hydro to extend "the scope of the spatial boundaries for downstream studies" to include "all potential downstream effects, as far as the Peace-Athabasca Delta and/or the Great Slave Lake".[85]

The Athabasca Chipewyan and Mikisew Cree First Nations, in Alberta, argued in their submissions to the review panel that Site C would cause potential changes to water flow rate and that minimal changes in water level in the Peace-Athabasca Delta (PAD), downstream, could result in massive changes in the microclimate and ecology of the area.[86] Those two First Nations filed a complaint to the UNESCO World Heritage Centre, based on information from community-based monitoring programs, pointing to the importance of the PAD for the Wood Buffalo National Park and the exercise of Treaty rights.[87] Since 2008,

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83 See BC Hydro, *Site C Clean Energy Project: Complete Environmental Impact Statement including Amendments*, vol 1 (Vancouver: BC Hydro, 2013), s 9 at 9-39 [*Site C Complete EIS*]; Site C Clean Energy Project, *Environmental Impact Statement Addendum #2 Aboriginal Group Amendment Report* (Treaty 8 Tribal Association: 17 June 2013) at 9–10, online (pdf): <projects.eao.gov.bc.ca/api/public/document/5887e17ed876de1347b512fe/download/Environmental%20Impact%20Statement%20Addendum%232%20-%20Aboriginal%20Group%20Amendment%20Report%20dated%20June%2017%2C%202013.pdf>.

84 *Site C Complete EIS*, *supra* note 83, s 9 at Appendix H, 45.

85 *Ibid*, s 9 at Appendix H, 46.

86 See Review Panel Established by the Federal Minister of the Environment and the British Columbia Minister of Environment, *Report of the Joint Review Panel - Site C Clean Energy Project, BC Hydro* (Ottawa: Federal Ministry of Environment; Victoria: BC Ministry of Environment, 2014) at 116, 310–11.

87 See "UNESCO" (3 July 2019), online: *Mikisew Cree First Nation* <mikisewgir.com/projects>. The UNESCO Wood Buffalo National Park Reactive Monitoring Mission Report disagrees with conclusions from the Site C assessment: "Given the enormous complexity of both the effects of river regulation and the PAD itself, the mission respectfully disagrees with this simplistic approach. From a technical perspective, it is clear that there

those community-based programs have used scientific methods and local Indigenous Knowledge to report activities that may harm Indigenous peoples' traditional lands and resources in the PAD.[88] Still, their data was not considered in the Site C dam decision making.

Conversely, BC Hydro argued that it was not reliable to predict the cumulative impacts that Site C would contribute to through a 'pre-development' case, in other words, by analyzing the effects of the dam as if there were no development in the area:

> The area in the vicinity of the Project has been subject to a wide variety of relatively intense development activities for a long period of time . . . Creating a pre-development case for the Project would require hind-casting over a century. The resulting uncertainty would make the results meaningless for the purpose of an environmental assessment.[89]

The Site C joint review panel report concluded:

> [T]he Project, combined with past, present and reasonably foreseeable future projects would result in significant cumulative effects on fish, vegetation and ecological communities, wildlife, current use of lands and resources for traditional purposes, and heritage. *In some cases, these effects are already significant, even without the Project*.[90]

Cumulative effects assessments are usually embedded in project-by-project reviews and bound to specific predetermined valued components (e.g. wildlife species, fish, habitat, or air

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are important effects which should be understood to inform decision making, including as regards mitigation options": *Report of the joint WHC/IUCN Reactive Monitoring mission to Wood Buffalo National Park, Canada 25 September - 4 October 2016*, UNESCO, 41st Sess, (2017) at 17.

88 See "Community-Based Monitoring Programs" (website), online: *Mikisew Cree First Nation* <mikisewgir.com/initiatives/community-based-monitoring/>.

89 BC Hydro, *Response to Working Group and Public Comments on the Site C Clean Energy Project Environmental Impact Statement: Technical Memo: Cumulative Effects Assessment* (Vancouver: BC Hydro, 2013) at 6.

90 Review Panel Established by the Federal Minister of the Environment and the British Columbia Minister of Environment, *supra* note 86 at v [emphasis added].

quality), being therefore ineffective in reviewing the combination of impacts of other past and present projects at a regional level.[91]

Dams, oil and gas extraction, logging, and other activities on Indigenous traditional territories affect local nations' health and social relationships:

> An Indigenous activist described the connection between industrial development in the region and adverse effects on communities' health and wellbeing, indicating a spike in cases of diabetes, cancer, illnesses, and suicides, as well as drugs and alcohol abuse.[92]

There are specific and profound impacts of industrial development on Indigenous women, who most strongly experience the violence caused by the increase in the number of male transit workers.[93] The region has one of the highest numbers per capita of murdered and missing Indigenous women and girls in Canada.[94]

Since 2014, the province has an agreement with seven First Nations in Northeast BC to collaborate in the Regional Strategic Environmental Assessment (RSEA) of resource extraction projects through the government-led Environmental Stewardship Initiative.[95] Members of the Treaty 8 Tribal Association, along with representatives from the energy industry and provincial government, formed the RSEA Management Committee. The Committee's purpose was to gather information

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91 See Bram Noble, "Cumulative Effects Assessment" in K Hanna, *supra* note 4, 42 at 43, 55.

92 Macias Gimenez, *supra* note 1 at 228 (SC03).

93 See *National Inquiry into Missing and Murdered Indigenous Women and Girls Reclaiming Power and Place: The Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls*, vol 1a (2019) at 584–85, online: <mmiwg-ffada.ca/wp-content/uploads/2019/06/Final_Report_Vol_1a-1.pdf>.

94 Kyle Edwards, "How We Treat Women", *Maclean's* (13 May 2019), online: <macleans.ca/how-we-treat-women>.

95 See *2018 Regional Strategic Environmental Assessment Renewal Agreement*, 1 April 2018, online (pdf): *Government of British Columbia* <gov.bc.ca/assets/gov/environment/natural-resource-stewardship/consulting-with-first-nations/agreements/esi_consolidated_signed_enabling_agreements_final_rsea.pdf>

about cumulative impacts of energy development and apply it to reduce or prevent adverse effects on First Nations.[96] According to its 2019 report, at the time, the Environmental Stewardship Initiative was conducting a regional strategic assessment, reviewing the cumulative impacts on old forest, water, moose, peaceful enjoyment and environmental livelihoods, as identified by the First Nations as necessary to the practice of Treaty 8 rights.[97] One of the RSEA Management Committee's goals was to "[i]dentify potential management responses that avoid, minimize, mitigate, offset or respond to the effects identified on the ecological function and the exercise of Treaty 8 rights".[98] However, there is no publicly available information on how (or whether) that assessment has been used in regulatory processes in the region. The RSEA Management Committee could be a space to reinvigorate the Treaty relationship by prioritizing jointly designed and implemented processes.

## V. TREATY RIGHTS INFRINGEMENT CLAIMS IN THE REGION

### A. PROPHET RIVER AND WEST MOBERLY FIRST NATIONS

Prophet River and West Moberly First Nations applied for judicial review of the Governor-in-Council's decision that the significant adverse environmental effects from Site C were justified under the circumstances.[99] The Nations argued that they sought judicial review of the certificate and the decision because administrative decision makers should have decided whether the Site C project infringed the petitioners' Treaty rights before issuing the

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[96] See David Natcher et al, "Scenario Planning Tools for Mitigating Industrial Impacts on First Nations Subsistence Economies in British Columbia, Canada" (2022) 17 Sustainability Science 469 at 470.

[97] See British Columbia, Ministry of Energy, Mines and Petroleum Resources: Strategic and Indigenous Affairs Division, *Environmental Stewardship Initiative: Progress Report: November 2019*, by Tom Lee (Victoria, BC: Ministry of Energy, Mines and Petroleum Resources, 10 November 2019) at 40.

[98] *Ibid* at 41.

[99] See *Prophet River First Nation v British Columbia (Minister of the Environment)*, 2017 BCCA 58.

approvals. But both the provincial and federal courts held that discussions around unjustifiable infringement should be addressed in a separate action. They confirmed that the Governor-in-Council or the Minister has no power to address any matter of Treaty interpretation.[100] The First Nations argued that there was no justification for infringing rights (particularly on the taking of land) and that the government failed to consult and accommodate Indigenous peoples adequately.[101] The Federal Court of Appeal held that it is not under the Cabinet's jurisdiction to determine whether the project's cumulative impacts amounted to an infringement of Treaty rights.[102] It concluded that environmental assessment is an information-gathering process, not intended to determine Aboriginal or Treaty rights, and established that judicial review was not the proper forum to decide whether rights were justifiably infringed.[103]

West Moberly First Nations then issued a civil claim, arguing Treaty rights infringement, and an interlocutory injunction to request the halt of the project construction while the Court was dealing with the infringement claim.[104] In the interlocutory injunction, West Moberly argued that:

> [D]espite the long history of regulatory review and litigation concerning the Project, no decision-maker yet has agreed even to consider, let alone resolve, whether the Project unjustifiably infringes West Moberly's treaty rights, despite West Moberly's repeated efforts to have that issue addressed.[105]

For the West Moberly case, the Crown did not justify the infringement under the test set out in *R v Sparrow*.[106] The Court held that the "injunction would be likely to cause significant and

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[100] See *ibid* at paras 30–33; *Prophet River First Nation v Canada (Attorney General)* 2017 FCA 15 at paras 69–74 [*Prophet River* FCA].

[101] See *Prophet River* FCA, *supra* note 100 at paras 20, 57.

[102] See *ibid* at paras 22, 69.

[103] See *ibid* at paras 46, 78.

[104] *West Moberly First Nations v British Columbia*, 2018 BCSC 1835 at paras 46–50 [*West Moberly*].

[105] *Ibid* at para 287 [emphasis added].

[106] See *ibid* at para 239.

irreparable harm to BC Hydro",[107] and that the possibility "of such harm weighs heavily against granting [the injunction]".[108]

In October 2019, West Moberly amended the statement of civil claim to include consideration for the impacts of the project on the First Nations' Seasonal Round. In the statement, the Nation explains that Seasonal Rounds are how the Nation manages its territory, "based on traditional knowledge of the land, waters, wildlife, and fish", adapting their practices to conserve resources for future generations.[109] West Moberly sought relief through a determination that, in approving Site C, the Crown failed to uphold the Honour of the Crown, breached fiduciary obligations and obligations under Treaty, and unjustifiably infringed Treaty rights.[110] The Nation also argued that the decision to approve Site C violates Charter rights to "manifest, express, and teach religious beliefs", "engage in the transfer of traditional knowledge", and "pursue self-realization and . . . self-fulfillment" in engaging with traditional knowledge and traditional modes of life.[111] West Moberly's amended statement of civil claim indicated that the exercise of Treaty rights could not be categorized in the way BC Hydro and the courts have requested Indigenous Nations to demonstrate. Seasonal rounds are an essential feature of adaptation and resource conservation based on traditional knowledge, which cannot be constrained in specific and fixed areas of the Treaty.[112]

In June 2022, West Moberly entered into an agreement with BC to pause the civil claim on the matters related to the Treaty rights infringement and negotiate a

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[107] You read it correctly, BC Hydro.

[108] *West Moberly*, *supra* note 104 at para 316.

[109] West Moberly First Nation, *Amended Notice of Civil Claim in the Supreme Court of British Columbia*, (Vancouver: Supreme Court of BC Vancouver Registry, 2019) at paras 46–49.

[110] See *ibid* at para 149.

[111] *Ibid* at para 170.

[112] For considerations on seasonal round in common law, see Alan Hanna, "Making the Round: Aboriginal Title in the Common Law from a Tsilhqot'in Legal Perspective" (2013) 45:3 Ottawa L Rev 365.

"government-to-government" solution.[113] The *Prophet River* and *West Moberly* court cases are evidence that environmental reviews of individual development projects are at odds with the Crown's constitutional obligations towards Indigenous peoples. Environmental assessment excludes concerns about Aboriginal and Treaty rights infringement through consultation and accommodation and forces First Nations to access courts through lengthy and expensive judicial processes regarding treaty infringement. Those colonial processes have not been able to prevent or remedy the damages caused by the encroachment of industrial activities on the land and waters of Treaty 8 territory.

### B. BLUEBERRY RIVER FIRST NATION AND THE *YAHEY* CASE

In 2015, the Blueberry River First Nation (BBRFN), a few kilometres away from Prophet River and West Moberly First Nations, filed a Treaty right infringement claim due to the cumulative impacts of development on their territory.[114] It is worth noting that, in its defense, BC argued that BBRFN had signed several IBA agreements, arguably consenting to individual projects on their territory and receiving compensation for Treaty rights infringement.[115] The province's position raises various concerns regarding the inconsistency between the province's discourse about reconciliation and its actions, showing its real intent to restrain First Nations from exercising actual authority over their territories. But for this article, the most critical concern refers to the province's lack of understanding of the

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113 Ministry of Energy, Mines and Low Carbon Innovation et al., News Release, 2022EMLI0042-001009, "West Moberly First Nations, B.C., BC Hydro and Canada reach settlement related to the Site C project", (27 June 2022), online: <archive.news.gov.bc.ca/releases/news_releases_2020-2024 /2022EMLI0042-001009.htm>.

114 See "First Nations Communities", online: *Government of British Columbia* <governmentofbc.maps.arcgis.com/apps/webappviewer/index.html? id=18c1c33d5b6040c5b81acb44d972e503> (showing relative proximity of the three First Nations); Giuseppe Amatulli, "Cumulative Effects of Industrial Development and Treaty 8 Infringements in Northeastern British Columbia: The Litigation Yahey v. BC (S151727)", Case Comment, (2022) 13 Arctic Rev on Law & Politics 160 (describing the timing of the litigation).

115 Scott, *supra* note 82 at 278–79.

Treaty relationship and managing land to respect this relationship (assuming it has been acting in good faith).

At the core of the *Yahey* case is one critical question: what is the 'tipping point' where Treaty rights are not meaningful anymore? The decision disputed the idea that Treaty rights infringement happens only when no meaningful right is left to be exercised when, in fact, the definition of meaningful right had never been established in the courts. Justice Burke held that it would not be acceptable to require Indigenous peoples to prove that no rights remain after the Crown's interference: "I find that *Mikisew* left the door open for holders of treaty rights to bring actions alleging their rights have been infringed, but did not set the threshold for such infringement claims as requiring proof that no rights remain."[116]

Justice Burke listened to a range of BBRFN members of different genders and generations to understand how that community's traditional ways of life would shape the definition of meaningful exercise of Treaty rights.[117] One conclusion was that their "rights to hunt, fish and trap as part of their way of life [had] been significantly and meaningfully diminished" by the cumulation of industrial projects.[118] A second conclusion was that Indigenous communities' ways of life are the primary factor in defining the threshold for meaningful Treaty rights.[119] The conclusion that Treaty 8 protects a way of life was key to finding that an infringement had occurred. The Court then ordered the province to consult and negotiate with BBFN to establish a regulatory mechanism to manage and address the cumulative impacts of development on Treaty 8 rights.[120]

Following the court decision, in October of 2021, the province of BC announced an initial agreement with BBRFN to provide $65 million to support restoration work of the Nation's cultural way

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116 *Yahey*, *supra* note 2 at para 508.

117 See *ibid* at para 351.

118 See *ibid* at para 1132.

119 See *ibid* at para 1751.

120 See *ibid* at para 1894.

of life.[121] The agreement allows for 195 forestry and oil and gas projects, permitted or authorized before the court decision, to start their activities. However, twenty approved authorizations for projects in areas of high cultural importance will be subject to further negotiations with BBRFN. The announcement also stated that "[m]eeting the full direction of the court will require the development of a robust and enduring cumulative impacts framework that can be integrated into provincial decision-making processes over the longer term."[122] The provincial government indicated that it will collaborate with all Treaty 8 Nations through the Regional Strategic Environmental Assessment project and the Provincial Cumulative Effects program "to ensure they are part of the development of any new approach to authorizations in Treaty 8 territory."[123]

On 18 January 2023, BBRFN and the province of BC finally signed an Implementation Agreement, with the main purpose to "initiate a new approach to resource management and the protection of Treaty Rights".[124] One of its specific goals is to "collaboratively [establish] measures intended to address the cumulative effects of past and future reproduce disturbances on BRFN's exercise and evaluation of Treaty Rights".[125] Days after the signature of this agreement, BC also announced an initial partnership approach with other local First Nations (Fort Nelson, Saulteau, Halfway River, and Doig River) for the planning and management of lands and resources.[126]

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121 See British Columbia, *Industry Bulletin* (Victoria, BC: 7 October 2021), online: <gov.bc.ca/assets/gov/environment/natural-resource-stewardship/consulting-with-first-nations/industry_bulletin.pdf>.

122 *Ibid*.

123 *Ibid*.

124 *Blueberry River First Nation Implementation Agreement*, 18 January 2023, art 2.1(a), online (pdf): *Government of British Columbia* <gov.bc.ca/assets/gov/environment/natural-resource-stewardship/consulting-with-first-nations/agreements/blueberry_river_implementation_agreement.pdf>.

125 *Ibid*, art 2.1(a)(ii).

126 See Office of the Premier, "B.C., Treaty 8 First Nations Build Path Forward Together" *BC Gov News* (20 January 2023), online: *Government of British Columbia* <news.gov.bc.ca/releases/2023PREM0005-000060>.

The *Yahey* case circles the problem of cumulative infringement of rights from the courts back to its roots—colonial environmental decision making about land and resources in a Treaty relationship—and mandates the coordination between the Crown and Indigenous peoples' interests through administrative processes. As mentioned earlier in this article, in Treaty Law, the Crown has an obligation to act in advance to review its regulatory processes to prevent the accretion of development projects amounting to a right infringement. In a Treaty relationship, as first envisioned in Canadian federalism by settlers and Indigenous parties, it is evident that the review of those processes must not be done unilaterally. Unilateral processes and decisions were, in fact, the reason why right infringements happened in the first place. The Treaty relationship portrayed in the *Yahey* case opens a new door to argue for Indigenous peoples to exercise jurisdiction over lands and resources by recognizing that Indigenous law and governance must be authoritative in Treaty Law. Therefore, it's not only the coordination of political interests between the Crown and First Nations that is necessary but also the coordination of legal orders and jurisdictions overlapping on that same territory. The following section focuses on environmental assessment processes as one tool of coordination.

## VI. ENVIRONMENTAL ASSESSMENT LAWS AND *UNDRIP*

The *Yahey* decision comes concurrently with new Canadian and BC laws declaring *UNDRIP*'s legal effect and federal and provincial governments' commitment in implementing it.[127] Also, new environmental assessment laws have provided for the possibility of addressing cumulative adverse effects through regional and strategic assessments and allowing more opportunities for Indigenous peoples to participate in those processes. A critical development in Canadian law would then be coordinating those two bodies of legislation, under the light of

[127] See Brenda L Gunn, "Legislation and Beyond: Implementing and Interpreting the UN Declaration on the Rights of Indigenous Peoples" (2021) 53:4 UBC L Rev 1065 (discussing the role of legislation in implementing and interpreting international declarations).

Treaty Law, in order to address the problem of cumulative Aboriginal and Treaty rights infringement through environmental decision making.

At the provincial level, the *BC Environmental Assessment Act, 2018*[128] introduced provisions for the recognition of Indigenous jurisdictions, an obligation for the provincial government to seek consensus in various stages of the assessment, a requirement for consent in some cases where the province has agreements with Indigenous Nations, and a mandate for all stages of the review to be consistent with Indigenous and provincial land-use plans.[129] The province has issued guidance for the participation of Indigenous Nations in project reviews, including a guide for consensus-seeking, which recognizes that "Indigenous nations make decisions on consent based on their own laws and traditions; this is an expression of their right to Indigenous self-determination and self-government".[130]

The BC Environmental Assessment Office (BCEAO) signed its first collaboration agreement under the *BC Environmental Assessment Act, 2018*, in November 2021.[131] The agreement with Lake Babine Nation incorporates the Nation's Sustainability Analysis Framework with decision-making criteria based on their legal order. One standard refers to cumulative impacts of projects, establishing that:

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128 *Environmental Assessment Act*, SBC 2018, c 51.

129 The wording related to consent, in the new *BC Environmental Assessment Act*, should be read in accordance with the *Declaration on the Rights of Indigenous Peoples Act*, SBC 2019, c 44, s 7 [*DRIPA*]. According to subsection 7(1) of the BC Declaration, the BC government and Indigenous governing bodies may negotiate and enter into agreements regarding statutory joint decision-making power and consent of the Indigenous governing body.

130 British Columbia, Environmental Assessment Office, *Guide to Consensus-Seeking under the Environmental Assessment Act, 2018* (Victoria, BC: EOA, 2020) at 6.

131 See *Lake Babine Nation-British Columbia Environmental Assessment Collaboration Agreement* (23 November 2021), online (pdf): *Government of British Columbia* <gov.bc.ca/assets/gov/environment/natural-resource-stewardship/environmental-assessments/working-with-other-agencies/eao-mous-and-agreements/lbn-bc-_collaboration-agreement-2021.pdf>.

> If the project is likely to have a negative impact on any of Lake Babine's needs for sustaining its *niwh be 'ondzin* and *nts'enah yinkak hadeelhts'iyh*, will any of those effects be significant, taking into account the extent to which any needs are already compromised by the cumulative impacts of other land and resource development and climate change?[132]

In June 2022, the Tahltan Central Government and the province entered into the first consent-based decision-making agreement under the *BC Declaration on the Rights of Indigenous Peoples Act*[133] related to the environmental assessment of the Eskay Creek Revitalization Project.[134] It is highly relevant to observe how BC will implement those agreements, especially whether it will uphold the Tahltan's and Lake Babine Nation's laws and policies.

At the federal level, the changes brought forth by the *Canada Impact Assessment Act, 2019*[135] include acknowledging the jurisdiction of Indigenous Nations under certain circumstances, the possibility that Indigenous-led assessments could be a substitute for state-led assessments, and the establishment of more rigorous criteria for the decision makers to justify their decision.[136] Policy under the new federal act provides a spectrum

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[132] *Ibid* at 26. *Niwh be 'ondzin* are the nations rights and *nts'enah yinkak hadeelhts'iyh* are their traditions, culture and way of life. See *ibid* at 25.

[133] *DRIPA*, *supra* note 129.

[134] See *Declaration Act Consent Decision-Making Agreement for Eskay Project*, online (pdf): *Tahltan Central Government* <tahltan.org/declaration-act-consent-decision-making-agreement-for-eskay-creek-project/>.

[135] See *Impact Assessment Act*, SC 2019, c 28, s 1. In October 2023, the Supreme Court of Canada answered a reference question made by Alberta's Lieutenant Governor in Council regarding whether the legislation is ultra vires the federal powers, as certain activities listed in Schedule 2 relate to matters entirely within the legislative authority of the provinces. The Supreme Court of Canada decided that the Act was partially unconstitutional. See *Reference re Impact Assessment Act*, 2023 SCC 23. In the coming months, one expects to see an effort by the federal government to amend the legislation or to propose a new bill to replace the *Impact Assessment Act*, 2019. Nevertheless, the provisions regarding the recognition of Indigenous governing bodies as valid jurisdictions for carrying out impact assessments should remain in place.

[136] See *ibid*, ss 2(e), 2(f), 2(g), 22, 31(1).

of engagement of Indigenous peoples from participation, through collaboration, to partnership. The legislation and policies still lack clear direction on how those provisions would function in practice.[137] So far, Canada has issued a practitioner's guide to impact assessment, which includes superficial guidance on collaboration with indigenous peoples and integration of traditional knowledge.[138] One obstacle to the exercise of Indigenous decision-making power in both the provincial and federal laws is that the final decision on whether to approve a project, after an impact assessment is concluded, still rests with the Ministers, who must consider Indigenous peoples' consent (or lack of consent) and provide reasons for their decision in light of the Indigenous Nations' positions.[139]

The BC *Declaration on the Rights of Indigenous Peoples Act*[140] and the Federal Act to implement *UNDRIP*[141] should aid the courts in interpreting provincial and federal laws and holding lawmakers accountable for their obligation to ensure laws become consistent with *UNDRIP* over time.[142] It follows, thus,

137 See Anna Johnston et al "Is Canada's *Impact Assessment Act* Working?" (May 2021) at 30, online (pdf): *West Coast Environmental Law* <wcel.org/sites/default/files/publications/2021-impact-assessment-act -report-en-web.pdf>. The new Act does not provide solutions to address the inconsistency and to recognize Indigenous legal orders as legitimate. See also Lauren E Eckert et al, "Indigenous Knowledge and Federal Environmental Assessments in Canada: Applying Past Lessons to the 2019 *Impact Assessment Act*" (2020) FACETS 6 (identifying the obstacles for integrating indigenous knowledge in EIA under the new Impact Assessment Agency; the inconsistencies between indigenous and State-based law being one of the obstacles at 76).

138 See Canada, Impact Assessment Agency of Canada, *Interim Guidance: Collaboration with Indigenous Peoples in Impact Assessments* (Ottawa: Impact Assessment Agency of Canada, 2022).

139 See *Impact Assessment Act*, *supra* note 135, s 60(1); *Environmental Assessment Act*, *supra* note 128, s 29.

140 *DRIPA*, *supra* note 129.

141 *United Nations Declaration on the Rights of Indigenous Peoples Act*, SC 2021, c 14 [*UNDRIP*].

142 See Nigel Bankes, "Implementing *UNDRIP*: An Analysis of British Columbia's *Declaration on the Rights of Indigenous Peoples Act*" (2021) 53:4 UBC L Rev

that the policy-making process under the provincial and federal impact assessment laws must also be in harmony with *UNDRIP*. Canadian law offers a few tools for lawmakers, policy makers, and decision makers to ensure the realization of *UNDRIP* in environmental decision making. Here I explore two of those impact assessment tools—regional assessment and strategic assessment—and their potential for integrating Indigenous authority, knowledge, and perspectives, with the view of articulating and upholding Treaty Law.

### A. REGIONAL ASSESSMENTS

Regional assessments offer an approach to the review and analysis of biophysical, social, and health impacts affecting the environment on a regional spatial scale, broader than the area affected by individual projects. The definition of regional assessments and their scope is usually contingent on the specific circumstances of a particular region and development proposals. It may aim "to provide information on the cumulative impacts of proposed developments within a region, or to assist with strategic land-use planning or decision making by way of exploring future regional land-use scenarios".[143] Regional assessments can provide data to conduct other types of assessments, such as those related to social, health, and economic aspects. Most importantly to the purposes of this article, regional assessments are important for providing a

971 at 1015. The Supreme Court of Canada has not yet provided a clear interpretative framework for implementing *UNDRIP* in courts. See e.g. *Thomas and Saik'uz First Nation*, *supra* note 57 at para 212:

> It remains to be seen whether the passage of *UNDRIP* legislation is simply vacuous political bromide or whether it heralds a substantive change in the common law respecting Aboriginal rights including Aboriginal title. Even if it is simply a statement of future intent, I agree it is one that supports a robust interpretation of Aboriginal rights. Nonetheless, as noted above, I am still bound by precedent to apply the principles enunciated by the Supreme Court of Canada to the facts of this particular case and I will leave it to that Court to determine what effect, if any, *UNDRIP* legislation has on the common law.

[143] Lauren Arnold et al, "Regional Assessment" in K Hanna, *supra* note 4, 166 at 168.

bigger picture of how development projects should be planned to prevent or mitigate cumulative impacts over one area.[144]

Agreements between the Crown and Indigenous peoples on regional assessments may be an opportunity for a renewed understanding of the critical aspects, thresholds, and physical areas relevant for the exercise of meaningful Treaty rights and Indigenous authority. In the Ontario's Ring of Fire regional assessment, for instance, a group of scholars, supported by Indigenous Nations, submitted in April 2022 a report to the Federal Impact Assessment Agency demanding, among other aspects, that people in the communities be recognized as the real authority in the process. It indicates that a collective of affected First Nations should be the Indigenous Governing Authority in the region and that an Elders Advisory Council should be an integral element in all stages of decision making. The report recommends:

> The recommended model includes a semi-permanent Ring of Fire Commission to be established by agreement between the federal Minister of Environment and Climate Change and an Indigenous Governing Authority made up of impacted and interested First Nations. The Commission, in conjunction with an Elder Advisory Council, should develop a framework for cumulative effects; baseline data (including on the ongoing social emergency); criteria for a modified 'positive contribution to sustainability' test; and a regional plan. Under the umbrella of the Commission, we recommend a joint panel review process for making subsequent decisions about individual projects proposed for the region, within the parameters established by the Commission. Decisions on individual projects will subsequently be made independently by each relevant governing authority.[145]

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[144] See *ibid*.

[145] Dayna Nadine Scott et al, "Synthesis Report: Implementing a Regional, Indigenous-Led and Sustainability-Informed Impact Assessment in Ontario's Ring of Fire" (14 April 2020) at 2, online (pdf): <registrydocumentsprd.blob.core.windows.net/commentsblob/project-80468/comment-58425/SCOTT.Final-Synthesis-report.pdf>.

The adoption of those recommendations would mean significant progress in implementing a Treaty Law approach to the practice of environmental decision making in Ontario.

### B. STRATEGIC ASSESSMENTS

Developing strategic assessments of plans and policies that affect traditional Indigenous territories could create space for Indigenous legal orders and jurisdictions to shape institutionalized land and resource decision-making processes.[146] Strategic assessments can make space for analyzing and discussing "generic and high level policy issues before individual projects are proposed and designed".[147] Meinhard Doelle and Rebecca Critchley argued "[t]hey can improve the effectiveness of [environmental assessments] and project approvals by ensuring decisions at the project level are made within an appropriate policy context."[148] For Indigenous peoples, that could mean being engaged early on in the process and having the opportunity to shape the policy context within which individual projects are considered.

Strategic environmental assessment has not been extensively applied in Canada despite its promising benefits. Bram Noble indicated that:

> [A]lthough . . . often intended to influence higher-level decisions or [plans, policies, or programs], or to inform subsequent project assessment input and decisions, few strategic assessments

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[146] See e.g. A John Sinclair, Meinhard Doelle & Peter N Duinker, "Looking Up, Down, and Sideways: Reconceiving Cumulative Effects Assessment as a Mindset" (2017) 62 Environmental Impact Assessment Review 183; Robert B Gibson et al, "Strengthening Strategic Environmental Assessment in Canada: An Evaluation of Three Basic Options" (2010) 20:3 J Environmental L & Practice 175.

[147] Meinhard Doelle & Rebecca Critchley, "Role of Strategic Environmental Assessments in Improving the Governance of Emerging New Industries: A Case Study of Wind Developments in Nova Scotia" (2015) 11:1 JSDLP 87 at 87.

[148] *Ibid* at 89.

deliver on these objectives or contain the legislative means to do so.[149]

Courts have not considered strategic assessments, focusing on the legal requirements of individual development projects instead. A recent federal court case illustrates just that. The Mikisew Cree challenged the Minister's decision to not designate Horizon Oil Sands Mine North Pit Extension Project for an environmental assessment.[150] The Mikisew Cree expressed "concerns about significant adverse environmental effects of the project on the Athabasca River, Wood Buffalo National Park [WBNP] (part of which is a world heritage site), the PAD, and the cumulative effects on Aboriginal or Treaty rights."[151] They also expressed concerns that the provincial environmental assessment process could not adequately address the project's potential environmental and cumulative effects.[152] A strategic environmental assessment was developed in 2018 to assess the cumulative impacts of all developments on the Wood Buffalo National Park World Heritage Site, following the Mikisew Cree's petition to have the park added to the List of World Heritage in Danger.[153] However, the strategic environmental assessment findings "were not included in the Analysis Report nor the Minister's reasons for the Decision."[154]

In the *Clyde River* case, the appellants and other Inuit communities stated that the duty to consult had not been fulfilled concerning the review of seismic testing but that the issue could be remedied by completing a strategic environmental assessment.[155] The project posed a high risk to Treaty rights:

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[149] Bram F Noble, "Strategic Environmental Assessment in Canada" in Thomas B Fischer & Ainhoa González, eds, *Handbook on Strategic Environmental Assessment* (Cheltenham, UK: Edward Elgar, 2021) 305 at 315.

[150] See *Mikisew Cree First Nation v Canadian Environmental Assessment Agency*, 2022 FC 102.

[151] *Ibid* at para 12.

[152] *Ibid*.

[153] *Ibid* at para 17.

[154] *Ibid* at para 61.

[155] See *Clyde River*, *supra* note 40 at para 13.

> The [National Energy Board's] environmental assessment concluded that the project could increase the mortality risk of marine mammals, cause permanent hearing damage, and change their migration routes, thereby affecting traditional resource use. Given the importance of the rights at stake, the significance of the potential impact, and the risk of non-compensable damage, the duty owed in this case falls at the highest end of the spectrum.[156]

While the Supreme Court of Canada held that the consultation process conducted by the National Energy Board was inadequate,[157] the discussion about the need for a strategic assessment to better integrate the Inuit's concerns was lost in the litigation process and not addressed in the decision.

Nevertheless, strategic and regional assessments have the potential to address some of the Indigenous peoples' concerns with the exercise of their Treaty rights and, if done in cooperation between settler governments and Indigenous governments, they may lead to the creation of joint decision-making bodies. They are tools that can help settler governments review their environmental decision-making framework under a Treaty Law and avoid claims about Treaty rights infringement due to the cumulative effects of development.

I believe Canada has little experience with strategic and regional assessments in cooperation with Indigenous peoples because settler governments may fear the loss of control over their discretion in deciding about development projects. But that is precisely the goal—easing settler governments' control and discretion over the decision-making process. Coordinating legal authorities on equal footing should be the focus of environmental regulatory processes in the Treaty context. How we make decisions together says a lot about the Treaty relationship and whether we can recognize and realize our interdependency in concrete ways.

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156 *Ibid* at para 44.

157 See *ibid* at para 4.

## VII. CONCLUSION

Canadian and British Columbian legal and policy frameworks for environmental decision making have not addressed the cumulative impacts of development and extractive projects on Treaty 8 First Nations' Aboriginal rights, in Northeast British Columbia, over the years. As acknowledged in the *Yahey* decision, while the uncontrolled and unstructured industrial development in the region has affected Indigenous communities' meaningful exercise of their Treaty rights, infringement claims in courts have had little impact in changing the situation. The *Yahey* and *Thomas and Saik'uz* cases indicate that the provincial government has a legal obligation to review its regulatory processes in light of cumulative impacts of development that affect Indigenous peoples and prevent the occurrence of Treaty rights infringement. Under a Treaty Law approach, changes in the framework require that lawmakers, policy makers, and decision makers work with Indigenous governments and communities to design and implement regulatory processes that reflect a Treaty relationship of interdependence, with the coordination of legal orders and jurisdictions.

The newly enacted federal and BC environmental assessment legislation provide tools that could be used to inform the revision of environmental decision-making frameworks. The realization of Treaty Law through strategic and regional environmental assessments requires that those tools be applied in all their transformative potential to help build future contexts for development, not merely as technical means to anticipate the environmental effects of projects.[158] Strategic and regional environmental assessments can have a relevant social and political function of ensuring that government plans and programs reflect the collective view of the desires for the region. Northeast BC already has a collaborative forum, the Regional Strategic Environmental Assessment table, that could help implement a reinvigorated and collaborative decision-making

[158] See Maria Rosario Partidario, "Strategic Environmental Assessment: A Spectrum of Understandings" in K Hanna, *supra* note 4, 22 at 30.

framework at a regional level. The *Yahey* case pointed in that direction.

As I write these lines, I am painfully aware that the changes to the Canadian and BC laws are not enough to ensure that Indigenous laws are respected on Treaty 8 territory, especially regarding the future of industrial development in the region. Extractive capitalism has shaped the very structure of the Canadian legal system, and there is no long-term and substantive change if there is no disruption to the colonial system. There is no genuine Treaty federalism without returning dispossessed land back to Indigenous peoples.[159] Indigenous peoples regaining sovereignty over their traditional territories in competitive and cooperative relation to settler governments is an essential component of the idea of 'sharing the land'.[160]

My purpose is not to provide the state with fuel to create more institutionalized processes of reconciliation, which offer an appearance of change to maintain the control in the hands of the settler governments. The objective of the article is to offer one more angle through which Indigenous peoples can demand that the intent of the Treaties is restored and implemented in environmental decision making—for Indigenous Nations to be able to exercise their authority and fulfill their laws on Treaty territories, as legitimate parties of the Treaty. I am hopeful that the provisions from the *Yahey* and the *Thomas and Saik'uz* decisions will find open ears among lawmakers, policymakers, and decision makers to realize the Crown's obligation under Treaty Law—to create frameworks to prevent that Crown's decisions amount to interference on First Nations' meaningful exercise of Treaty rights, rather than to wait for Indigenous peoples to claim rights infringement in courts or request compensation for historic infringements. Renewing the Treaty

159 See generally Leanne Betasamosake Simpson, *As We Have Always Done: Indigenous Freedom through Radical Resistance* (Minneapolis: University of Minnesota Press, 2017); "Land Back: A Yellowhead Institute Red Paper" (October 2019), online (pdf): *Yellowhead Institute* <redpaper.yellowheadinstitute.org/wp-content/uploads/2019/10/red-paper-report-final.pdf>.

160 See Tully, *supra* note 19.

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relationship means that those processes will not be unilateral anymore and that consent will mean envisioning and planning together on an ongoing basis and at all levels of assessment and decision making.