IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Yahey v. British Columbia*,
2021 BCSC 1287

Date: 20210629
Docket: S151727
Registry: Vancouver

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Between:

Marvin Yahey on his own behalf and on behalf of all other Blueberry River First Nations beneficiaries of Treaty No. 8 and the Blueberry River First Nations

Plaintiffs

And

Her Majesty the Queen in Right of the Province of British Columbia

Defendant

Before: The Honourable Madam Justice Burke

Reasons for Judgment

Counsel for the Plaintiff:

Maegen M. Giltrow
Gregory J. McDade, Q.C.
Lisa C. Glowacki
Jamie Arbeau
John R. Rich
F. Matthew Kirchner
Michelle L. Bradley

Counsel for the Defendant:	Rick Williams Patrick G. Foy, Q.C. Tim Pritchard Hugh Gwillim Chris Robb Jeff Echols Ramsey Glass Andrea Jarman
Place and Date of Trial:	Vancouver, B.C. May 27-31, 2019 June 3-7, 10-14, 2019 July 29-31, 2019 August 1-2, 6-7, 9, 12-16, 27-30, 2019 September 3-6, 9-13, 23-24, 27, 30, 2019 October 1-4, 7-11, 21-25, 28-31, 2019 November 1, 4-8, 25-29, 2019 December 2-6, 2019 January 23-24, 27-31, 2020 February 3-7, 18-21, 24-27, 2020 March 2-6, 9-13, 2020 June 17-19, 22-26, 29-30, 2020 July 2-3, 20-24, 27-31, 2020 August 4-6, 2020 October 19-23, 26-30, 2020 November 2-6, 16-20, 23-27, 30, 2020
Place and Date of Judgment:	Vancouver, B.C. June 29, 2021

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I. OVERVIEW

[1] This is a claim brought by the Blueberry River First Nations ("**Blueberry**" or "**Plaintiffs**"), whose territory is located in northeastern British Columbia. Blueberry is a party to Treaty No. 8 ("**Treaty 8**" or "**Treaty**"), which was first signed in 1899 and to which Blueberry's ancestors adhered in 1900. The claim is based on the rights and obligations contained in Treaty 8.

[2] In this claim, Blueberry alleges that Her Majesty the Queen in Right of the Province of British Columbia ("**Province**" or "**Defendant**") has authorized industrial development without regard for Blueberry's treaty rights. Blueberry alleges the cumulative effects of industrial development have had significant adverse impacts on the meaningful exercise of their treaty rights, breached the Treaty, and infringed their rights.

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[3] This case is novel and the judgment lengthy. For ease of reference, I set out below a very condensed overview of the facts of the claim, the parties' positions and my essential conclusions on the issues raised.

- In 1899, Commissioners acting on behalf of Her Majesty the Queen ("**Crown**") and the Chiefs and headmen of the Cree, Beaver and Chipewyan as well as other Indigenous people gathered at Lesser Slave Lake and entered into Treaty 8. In 1900, Blueberry's ancestors adhered to the Treaty.
- Treaty 8 protects the Indigenous signatories' and adherents' rights to hunt, trap and fish in the Treaty area, subject to regulations made by the government, and except over areas the government may have "taken up" for settlement, mining, lumbering, trading or other purposes.
- At the time the Treaty was entered into, the Indigenous people were also promised that there would be no forced interference with their mode of life. They would be as free to hunt and fish after the Treaty, as they would be if they never entered into it.
- Much has changed over the last 120 years. This case raises questions about what was intended in 1899 and 1900, how much change was anticipated, and how promises made over one hundred years ago are to be honoured and upheld today.
- Over the last several decades, Blueberry has witnessed extensive industrial development in its territory. It alleges that it has become harder to exercise its rights to hunt, trap and fish and to maintain its way of life. It says provincially authorized industrial development has pushed its members to the margins of its territory to seek to exercise their constitutionally protected treaty rights. It says the effects of the industrial development are well beyond what was contemplated at the time of the Treaty.

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- Blueberry brings this claim alleging that the cumulative impacts from a range of provincially authorized industrial developments in its territory have breached the Treaty and infringed its rights.
- The Province denies that Blueberry's rights have been infringed or that the Treaty has been breached. It relies on the taking up clause contained in the Treaty, which gives the government the power to take up lands within the Treaty territory for specific purposes. The Province frames the issue as to whether it has taken up so much land, in the territories over which Blueberry members traditionally hunted, fished and trapped and continue to do so today, that no meaningful rights remain.
- The Province also points to the provincial regulatory regimes for managing forestry, wildlife, oil and gas and to policies and processes for the consideration of cumulative effects, which it says, take into account Blueberry's treaty rights. It says that it consults with Blueberry to avoid infringement of its rights and to mitigate potential effects of development.
- Aboriginal and treaty rights, and the infringement of these rights, have often been considered in the context of regulatory prosecutions, and the applicable tests have been developed in that setting. To date, the cases in which First Nations have alleged infringements of their Aboriginal and treaty rights have focussed on single authorizations or specific provisions in statutes and regulations.
- In this case, however, Blueberry alleges that it is not one single impact from one single regulation or project that has infringed its rights. Rather, it is the cumulative effects from a range of provincially authorized activities, projects and developments (associated with oil and gas, forestry, mining, hydroelectric infrastructure, agricultural clearing and other activities) within and adjacent to their traditional territory that has resulted in significant adverse impacts on the meaningful exercise of their treaty rights, and that amount to a breach of the Treaty.

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- This therefore is a case of first instance with constitutional implications.

Conclusions

- Courts have noted that Treaty 8 is not a final blueprint. It established the beginning of an ongoing relationship. It was recognized that the relationship would be difficult to manage. The promises contained in Treaty 8 have become harder to keep as time has gone on, and the Court has been called upon to assist the parties in understanding their obligations under the Treaty.
- I find that Treaty 8 protects Blueberry's way of life from forced interference, and protects their rights to hunt, trap and fish in their territory.
- I recognize that the Province has the power to take up lands. This power, however, is not infinite. The Province cannot take up so much land such that Blueberry can no longer meaningfully exercise its rights to hunt, trap and fish in a manner consistent with its way of life. The Province's power to take up lands must be exercised in a way that upholds the promises and protections in the Treaty.
- I find that the Province's conduct over a period of many years – by allowing industrial development in Blueberry's territory at an extensive scale without assessing the cumulative impacts of this development and ensuring that Blueberry would be able to continue meaningfully exercising its treaty rights in its territory – has breached the Treaty.
- I conclude that the extent of the lands taken up by the Province for industrial development (including the associated disturbances, impacts on wildlife, and impacts on Blueberry's way of life), means there are no longer sufficient and appropriate lands in Blueberry's territory to allow for the meaningful exercise by Blueberry of its treaty rights. The cumulative effects of industrial development authorized by the Province have significantly diminished the ability of Blueberry members to exercise their rights to hunt, fish and trap in their territory as part of their way of life and therefore constitute an

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infringement of their treaty rights. The Province has not justified this infringement.

- I find that, for at least a decade, the Province has had notice of Blueberry's concerns about the cumulative effects of industrial development on the exercise of its treaty rights. Despite having notice of these legitimate concerns, the Province failed to respond in a manner that upholds the honour of the Crown and implements the promises contained in Treaty 8. The Province has also breached its fiduciary duty to Blueberry by causing and permitting the cumulative impacts of industrial development without protecting Blueberry's treaty rights.
- The Province has not, to date, shown that it has an appropriate, enforceable way of taking into account Blueberry's treaty rights or assessing the cumulative impacts of development on the meaningful exercise of these rights, or that it has developed ways to ensure that Blueberry can continue to exercise these rights in a manner consistent with its way of life. The Province's discretionary decision-making processes do not adequately consider cumulative effects and the impact on treaty rights.
- The rights, obligations and promises made in Treaty 8 must be respected, upheld, and implemented today. Time is of the essence. Relief will follow.

[4] Prior to delving into the details of this case I will address two things.

[5] First, this case is extraordinary for the amount of data and detail it involves and the breadth of the topics it addresses including: history, ethnography, wildlife science, geology, geography, forestry, land use planning, and the functioning of various governmental regulatory regimes. The Court does not address and/or resolve all the differences in these details; nor is it necessary to do so.

[6] The Court has focused on determinative evidence and issues, and has dealt with these as necessary to resolve this matter. This has been a remarkably difficult, but necessary task to undertake in a timely manner due to allegations of the

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continuing nature of the impacts alleged to occur on Blueberry territory. I thank counsel for marshalling and compiling the evidence in a logical manner, and for setting out in detail and cross-referencing the material they relied on in their thorough closing submissions.

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[7] Second, it is important that these reasons be accessible. While lengthy, I will attempt not to use the acronyms that are typically used by the participants in the forestry, oil and gas and other natural resource industries, as well as in government. To shorten long names, I will paraphrase these names in an identifiable, understandable way.

[8] The persistent use of acronyms creates a closed community in which others cannot easily participate. It impedes understanding, and impacts on communication with others outside these communities. It is therefore important for the understanding and accessibility of all that acronyms not be persistently used in these reasons.

[9] I also note maps were used and are central to this case. Some of those are set out in the decision. Colour copies of most of the maps however, are reflected in the online version of this judgment.

II. BACKGROUND

A. Blueberry

[10] Blueberry is a community that is predominantly of Dane-zaa ancestry. Many Blueberry members, including some who testified at trial, have both Cree and Dane-zaa ancestry and identify as Dane-zaa. Dane-zaa people are also sometimes referred to in the written historical record as “Beaver Indians.” I will occasionally use that term when quoting from those materials.

[11] Blueberry’s territory is located in the upper Peace River region of northeastern British Columbia and is located in what is referred to as the Peace River Regional District. The main reserve community today is Indian Reserve 205 (“IR 205”), which is

located approximately 65 kilometres north of what is now the modern-day city of Fort St. John.

[12] Blueberry's claimed territory extends, roughly, from the Alberta border in the east to the foothills of the Rocky Mountains in the west, south to and including the Peace River, and north and east to Pink Mountain, Sikanni Chief, Lily Lake and Tommy Lakes. The Alaska Highway, which was built in the 1940s, runs roughly from the south to the northwest through the territory.

[13] The territory lies right over the Montney gas basin (also referred to in these proceedings as the Montney play), which has become a location for significant oil and gas exploration and extraction.

[14] Blueberry delineates its traditional territory for the purpose of this claim at Schedule 1 to their Notice of Civil Claim. Blueberry has asserted its traditional territory in this action to be "some 38,000 square kilometres in the upper Peace River region." I will refer to this area as the Blueberry Claim Area.

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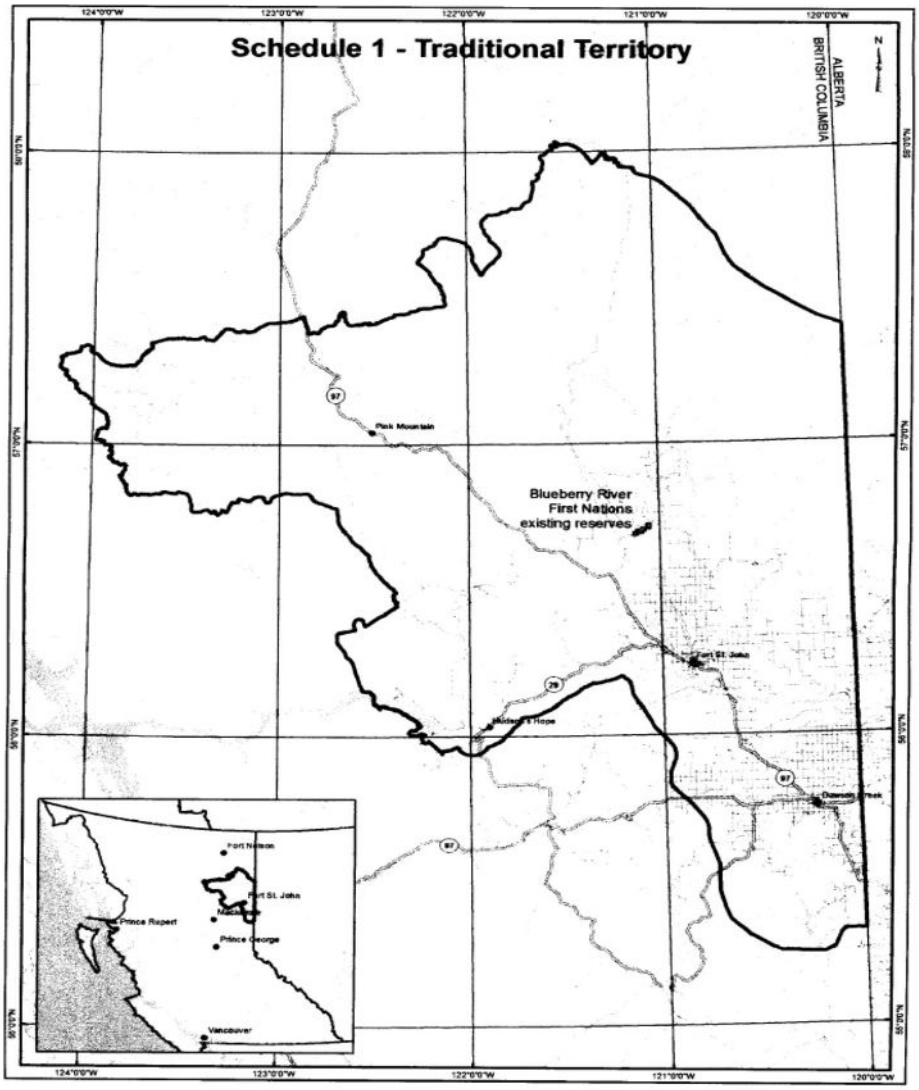

Schedule 1 of the Notice of Civil Claim. This area is referred to in these Reasons for Judgment as the "Blueberry Claim Area."

[15] Blueberry's description of the history of industrial development in its territory and what led them to file this action was succinctly summarized in its 2016 application for an interim injunction, and referred to in my reasons in *Yahey v. British* Columbia, 2017 BCSC 899 [*Yahey 2017*] at para. 24:

> Since the construction of the Alaska Highway opened up the Upper Peace to industrial development, the Province of British Columbia has authorized a wide variety of Industrial developments in the traditional territory…

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> … [resulting] in a wide range of physical works and activities… Collectively, the Industrial Developments have transformed the physical landscape in the traditional territory.
>
> In recent years, the cumulative impact of the Industrial Developments in BRFN's traditional territory has had a profound and negative effect on BRFN members' ability to exercise their treaty rights.

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B. The Province

[16] The Defendant, the Province, is the emanation of the Crown that holds the beneficial interest in the land that is material to the issues in this proceeding (subject to any third-party rights).

[17] The Province has exclusive power to manage and regulate the lands, and the resources under those lands, pursuant to ss. 92(5), 92A and 109 of the *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3.

C. Treaty 8

[18] Treaty 8 is a treaty within the meaning of s. 35 of the *Constitution Act*, *1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

[19] As noted in the overview, Treaty 8 was made between the Crown and various Indigenous peoples in June 1899 at Lesser Slave Lake. Following the June 1899 signing, Treaty Commissioners representing the Crown met with other Indigenous people living in the territory covered by Treaty 8 and sought their adhesion to the Treaty. Blueberry's ancestors, the Dane-zaa at Fort St. John, adhered to Treaty 8 in 1900.

[20] Treaty 8 provides, in part, as follows:

> …And Her Majesty the Queen HEREBY AGREES with the said Indians that they shall have right to pursue their usual vocations of hunting, trapping and fishing throughout the tract surrendered as heretofore described, subject to such regulations as may from time to time be made by the Government of the country, acting under the authority of Her Majesty, and saving and excepting such tracts as may be required or taken up from time to time for settlement, mining, lumbering, trading or other purposes.

[21] The promises made in Treaty 8 were promises of the Crown. The Province was not a signatory to Treaty 8 but, along with Canada, holds the duties and benefits of this treaty. Both levels of government are responsible for fulfilling these promises when acting within the division of powers under the *Constitution Act, 1867*. The issues in this case concern the responsibilities of the Province.

[22] A body of case law outlines judicial findings and commentary on Treaty 8. Three general points bear review.

[23] First, Treaty 8 covers a large area. The Treaty 8 area covers parts of northeastern British Columbia, northern Alberta, northwestern Saskatchewan, and a southern segment of the Northwest Territories. Its size "dwarfs France": *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, 2005 SCC 69 [*Mikisew*] at para. 2. The region encompasses the traditional territories of many signatories and adherent First Nations. The lands over which signatory and adherent First Nations could pursue their "usual vocations" were not "from a practical point of view" the entire expanse of Treaty 8, but their respective traditional territories within the larger expanse (*Mikisew* at paras. 47 and 48):

> [47] … While the Mikisew may have rights under Treaty 8 to hunt, fish and trap throughout the Treaty 8 area, it makes no sense from a practical point of view to tell the Mikisew hunters and trappers that, while their own hunting territory and traplines would now be compromised, they are entitled to invade the traditional territories of other First Nations distant from their home turf (a suggestion that would have been all the more impractical in 1899). The Chipewyan negotiators in 1899 were intensely practical people, as the Treaty 8 Commissioners noted in their report (at p. 5):
>
> > The Chipewyans confined themselves to asking questions and making brief arguments. They appeared to be more adept at cross-examination than at speech-making, and the Chief at Fort Chipewyan displayed considerable keenness of intellect and much practical sense in pressing the claims of his band.
>
> *Badger* recorded that a large element of the Treaty 8 negotiations were the assurances of *continuity* in traditional patterns of economic activity. Continuity respects traditional patterns of activity and occupation. The Crown promised that the Indians' rights to hunt, fish and trap would continue "after the treaty as existed before it" (p. 5). This promise is not honoured by dispatching the Mikisew to territories far from their traditional hunting grounds and traplines.

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> [48] … The "meaningful right to hunt" is not ascertained on a treaty-wide basis (all 840,000 square kilometres of it) but in relation to the territories over which a First Nation traditionally hunted, fished and trapped, and continues to do so today. If the time comes that in the case of a particular Treaty 8 First Nation "no meaningful right to hunt" remains over *its* traditional territories, the significance of the oral promise that "the same means of earning a livelihood would continue after the treaty as existed before it" would clearly be in question, and a potential action for treaty infringement, including the demand for a *Sparrow* justification, would be a legitimate First Nation response.
>
> (emphasis in original)

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[24] While the Treaty covers a large area, the rights are exercised in the areas over which a First Nation traditionally hunted, fished and trapped, and continues to do so today. In this case, the focus is on the Blueberry Claim Area.

[25] Second, as noted in *R. v. Badger*, [1996] 1 S.C.R. 771 [*Badger*] at paras. 39 and 55, the Indigenous signatories and later adherents to the Treaty had a strong interest in securing their traditional livelihood. The written terms of the Treaty referred to these traditional activities as "their usual vocations" of hunting, trapping and fishing. Oral promises made by the Crown supplemented the text of the Treaty: the Indigenous signatories and adherents "would be as free to hunt and fish after the treaty as they would be if they never entered into it."

[26] Third, the Treaty foreshadowed change and provided a framework for managing relations and changes in land use (*Mikisew* at paras. 27, 31 and 63). The Crown sought to secure this land for settlement (*Badger* at para. 39) while expecting that the First Nations' "means of earning a livelihood would continue after the treaty as existed before it" due to the lands' overall unsuitability for agriculture (*Mikisew* at para. 30; *Badger* at para. 55).

III. PROCEDURAL HISTORY

A. Pleadings

[27] Blueberry filed its Notice of Civil Claim on March 3, 2015. In the Notice of Civil Claim Blueberry alleges that the cumulative effects of a variety of provincially authorized industrial developments within their traditional territory have damaged the

forests, lands, waters, fish and wildlife on which they rely, and which are integral to their mode of life (paras. 5, 30, 32). Blueberry says the cumulative effects of these industrial developments have had significant adverse impacts on the meaningful exercise of their treaty rights, and that the Province has breached the Treaty and infringed Blueberry's treaty rights (paras. 27, 28, 35).

[28] Blueberry's claim seeks various declarations relating to the Province's alleged breaches of the Treaty, infringement of Blueberry's treaty rights, continuing authorizations, and breach of fiduciary obligations.

[29] Specifically, in its Notice of Civil Claim at page 9, Blueberry seeks the following relief:

> 1. A declaration that, in causing and/or permitting the cumulative impacts of the Industrial Developments on the Plaintiffs' Treaty Rights in their Traditional Territory, the Defendant has breached its obligations to the Plaintiffs under the Treaty;
>
> 2. A declaration that the Defendant has infringed upon some or all of the Plaintiffs' Treaty Rights by causing and/or permitting the cumulative impacts of the Industrial Developments on the Plaintiffs' Treaty Rights in their Traditional Territory;
>
> 3. A declaration that the Defendant may not lawfully continue to authorize activities that breach the promises made by the Crown to the Plaintiffs in the Treaty or that infringe the Treaty Rights;
>
> 4. A declaration that the Defendant has breached its fiduciary obligations to the Plaintiffs by undertaking, causing and/or permitting some or all of the Industrial Developments within and adjacent to the Plaintiffs' Traditional Territory;
>
> …

[30] In addition, at paras. 5 and 6 of the Relief Sought, Blueberry seeks interim and permanent injunctions restraining the Defendant from undertaking, causing and/or permitting activities that: (a) breach the Defendant's obligations to the Plaintiffs under the Treaty; (b) infringe the Plaintiffs' treaty rights, or (c) breach the Defendant's fiduciary obligations to the Plaintiffs. It also seeks costs, and such further and other relief I may deem appropriate.

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[31] The Province filed its Response to Civil Claim on April 24, 2015. The Province admitted it has authorized some industrial development in Blueberry's claimed traditional territory, but denied that Blueberry had almost no traditional territory within which to meaningfully pursue their cultural and economic activities, and denied that there has been any erosion of Blueberry's treaty rights (paras. 13, 14). At para. 23 of its Response, the Province denied that it has breached its obligations to Blueberry under the Treaty or infringed Blueberry's treaty rights. In the alternative, the Province said any such breaches or infringements were justified.

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B. Injunction Applications

[32] As part of its claim, Blueberry has twice sought to enjoin the Province from authorizing any activities that would infringe their treaty rights pending trial.

[33] In June 2015, Blueberry first sought a limited injunction to prevent the Province from auctioning several timber sale licences, which would have allowed logging of approximately 17 square kilometres of timber within their traditional territory (i.e., one-tenth of one percent of the Blueberry Claim Area). Blueberry argued that the planned logging would contribute to the existing cumulative effects from various industrial developments in their territory, which had or would soon make it impossible to meaningfully exercise their treaty rights.

[34] In July 2015, Justice Smith in *Yahey v. British Columbia*, 2015 BCSC 1302, concluded the balance of convenience did not support granting the injunction sought and dismissed the application. He reasoned at para. 64 that:

> [64] BFRN may be able to persuade the court that a more general and wide ranging hold on industrial activity is needed to protect its treaty rights until trial. However, if the court is to consider such a far-reaching order, it should be on an application that frankly seeks that result and allows the court to fully appreciate the implications and effects of what it is being asked to do. The public interest will not be served by dealing with the matter on a piecemeal, project by-project basis.

[35] Blueberry filed a notice of appeal of Justice Smith's decision but did not ultimately proceed with that appeal.

[36] Instead, in August of 2016, Blueberry filed a second notice of application, this time seeking to enjoin the Province from allowing a broader array of further industrial development, including oil and gas development, processing, and transportation, as well as logging in segments of its territory. I heard that application in October and November of 2016.

[37] In May 2017, in *Yahey 2017*, I dismissed that broader injunction application, holding that while Blueberry had shown a serious issue to be tried and had established irreparable harm, the balance of convenience ultimately weighed in favour of the Province. The issues raised needed to be dealt with and tested at trial. Noting that it is preferable for such claims to be negotiated rather than litigated, I encouraged the parties to pursue a collaborative path pending trial.

C. Application for Judicial Review

[38] Prior to making its second injunction application, Blueberry sought to judicially review the Province's decision to enter into a long-term royalty agreement with Progress Energy, an oil and gas company, and four other companies focused on natural gas extraction in the North Montney area.

[39] In March 2017, Justice Skolrood dismissed that application. In so doing, he referenced the comprehensive nature of the claims advanced in this underlying action and concluded that the issues raised were not "separate and discrete and amenable to determination in a separate judicial review proceeding" (*Blueberry River First Nations v. British Columbia (Natural Gas Development)*, 2017 BCSC 540 at para. 83).

D. Trial

[40] The trial of this action was originally set to begin in March 2018. It was adjourned in the spring of 2018 for approximately six months, and again in the fall of 2018, to allow the parties to pursue mediation and negotiations. Unfortunately, those efforts were not successful.

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[41] Ultimately, after a variety of pre-trial applications, on May 27, 2019, Blueberry opened its case. Blueberry's opening remarks reflect that they were seeking to prove that the Province had failed to uphold and had breached Treaty 8. Blueberry alleged that the cumulative impact of provincially authorized industrial development in their traditional territory had resulted in an unjustified infringement of their treaty rights. Blueberry recognized it had the onus to prove any infringements, and it put the Province on notice that it would have the onus, in this trial, to justify any infringements.

[42] In its opening, the Province denied any breach of Treaty 8, or any infringements to Blueberry's rights under the Treaty. While the Province indicated on the authorities that the justification analysis comes after a finding of infringement, it noted it would get to the justification test in the course of this case.

[43] The trial took place over 160 days between May 2019 and November 2020. Due to the COVID-19 pandemic, a portion of the trial from June to August 2020 took place remotely via Microsoft Teams.

[44] Over the course of the trial, Blueberry led evidence from six expert witnesses on a variety of topics including the history leading up to the entering of Treaty 8 (Gwynneth Jones); Dane-zaa way of life (Dr. Robin Ridington and Hugh Brody); spatial and geographic information system mapping and the soundness of the *Atlas of Cumulative Landscape Disturbance in the Traditional Territory of Blueberry River Fist Nations, 2016* (Dr. Brian Klinkenberg); and forest and wildlife ecology, including the state of habitat and population trends for caribou, moose and fur-bearers in northeastern British Columbia (Dr. Christopher Johnson and Dr. Scott McNay).

[45] Seven Blueberry members testified about their exercise of treaty rights and the Dane-zaa way of life, the impacts they had witnessed to their traditional territory, and their ability to continue exercising their rights and pass on knowledge to future generations (Jerald Davis, Raymond Appaw, Wayne Yahey, Georgina Yahey, Norma Pyle, Sherry Dominic and Kayden Pyle).

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[46] In addition, Norma Pyle and Dr. Rachel Holt testified about the referral, consultation and engagement processes in which Blueberry has been involved with various provincial ministries and agencies. Ms. Pyle and Dr. Holt also testified about Blueberry's efforts to develop a Framework for Land Use and to press the Province to take into account cumulative effects and impacts on treaty rights in all of its natural resource decisions. Dr. Holt's evidence included her perspective on the Province's development of frameworks and analyses for assessing cumulative effects. This evidence took approximately 55 days.

[47] The Province then led evidence from three expert witnesses on the following topics: the history leading up to the entering of Treaty 8 (Dr. Robert Irwin), the status of various wildlife species and habitat in northeastern British Columbia (Keith Simpson), and geographic information systems and the accuracy of Dr. Klinkenberg's analysis (Ann Blyth). Representatives from five provincial ministries or agencies testified: Ministry of Forests, Lands, Natural Resources Operations and Rural Development ("Ministry of Forests"), Peace Natural Resource District (Mark Van Tassel and Greg Van Dolah), Ministry of Indigenous Relations and Reconciliation (Geoff Recknell), Ministry of Environment (Dr. Jennifer Psyllakis), Ministry of Energy, Mines and Petroleum Resources (Chris Pasztor), and the BC Oil and Gas Commission (Sean Curry and James O'Hanley). Some of these witnesses had been employed by several provincial ministries over the course of their careers.

[48] The Province also called two individuals representing industry: Peter Baird representing Canfor (a lumber, pulp and paper company), and Nicole Deyell representing Petronas (an oil and gas company).

[49] The Province read-in transcripts from the examinations for discovery of Blueberry Chief Marvin Yahey. All of this evidence took approximately 70 days.

[50] The evidentiary record is voluminous, and the written submissions are lengthy. Indeed some of that argument was set out in appendices and footnotes. Blueberry's written submissions, with appendices, total nearly 700 pages. Their written reply is

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over 130 pages. The Province's written submissions, including its 12 appendices, total nearly 1,250 pages. There are 127 exhibits, but this number is misleading as most exhibits contain hundreds or even thousands of pages. For example, Exhibit 1, which has several tabs, consists of nearly 8,000 pages, and Exhibit 2 contains over 2,000 pages. The final oral argument took 25 days. It is not possible or necessary to refer to all of the evidence and argument. I have considered it all, but will only refer to the significant portions of the evidence and argument as part of my analysis.

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E. Central Arguments

[51] In its final oral and written submissions, Blueberry argued several related breaches of Treaty 8.

[52] First, it argues the Province has breached Treaty 8 in failing to uphold or implement the essential promise of the Treaty: that Blueberry would be able to continue its mode of life. In particular, it argues the Province has breached its honourable obligation to diligently implement the Treaty promise.

[53] Second, and relatedly, it says that in failing to diligently and honourably implement the essential promise of Treaty 8, the Province has significantly interfered with or undermined its mode of life, and thereby infringed its treaty rights.

[54] Third, it says the Province has not taken steps to manage its use and taking up of lands to ensure it remains within the bounds of the Treaty 8 bargain. Blueberry says the Province has breached its fiduciary obligations by encouraging extensive development of the Blueberry Claim Area, to Blueberry's serious detriment.

[55] Blueberry essentially argues the Province has a positive duty to diligently implement the Treaty by taking proactive measures to institute land use planning and cumulative impact assessments to take into account and protect Blueberry's treaty rights. As this has not occurred, despite Blueberry constantly raising these issues, the Province's inactions and actions have resulted in an unjustified infringement of

Blueberry's rights, breach of the Treaty, and breach of the honourable and fiduciary obligations associated with it.

[56] The Province's final arguments emphasized that Treaty 8 includes not only rights for the Indigenous beneficiaries to pursue their usual vocations of hunting, trapping and fishing, but also rights for the Province to take up land from time to time for settlement, mining, lumbering, trading or other purposes, and thus reflects a balancing of interests.

[57] The Province emphasizes that the theme of balance runs through the jurisprudence dealing with the protection of treaty rights in s. 35 of the *Constitution Act, 1982* and with consultation. The idea of balance, says the Province, is also reflected in the evidence. The Province points out Blueberry members testified about their efforts to find a balance between their work obligations and the ability to meaningfully hunt and gather, on weekends and evenings. Blueberry also, in the past, entered into agreements with the Province to share the revenues from certain industrial activities in a defined area.

[58] More fundamentally, the Province notes that the test for treaty infringement is whether so much land has been taken up in Blueberry's traditional territory that its members can no longer meaningfully exercise their treaty rights to hunt, trap and fish. The Province says that Blueberry has not established on the evidence that the Treaty has been breached or that its rights have been infringed. The Province says Blueberry members maintain the ability to meaningfully exercise their rights within their traditional territory.

[59] The Province points to consultation and "collaborative reconciliation initiatives" as the way forward. It is through these processes, says the Province, that it can obtain specific information on the impacts of decisions on Blueberry and other affected First Nations, that it can balance conflicting claims, and that it can identify what is required to maintain the honour of the Crown and effect reconciliation. The

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Province points out that Blueberry has not, in this case, sought to challenge the consultation associated with any particular project or statutory decision.

[60] While the Province has pleaded justification in the alternative, it did not in final submissions argue that the Province's actions, inactions or regulatory regimes were justified, despite being alerted by Blueberry of this need. Blueberry says, as a result, if an infringement is found, the Province has effectively not justified its actions, conduct, or regulatory regimes and Blueberry's remedies must be granted.

IV. STATEMENT OF ISSUES

[61] This case raises four main issues.

[62] First: What are the rights and obligations in Treaty 8?

[63] Blueberry and the Crown are parties to Treaty 8. Blueberry relies upon the rights in Treaty 8, which it maintains includes a right to continue its mode of life free from interference. In ascertaining these rights and obligations, the Court must consider the historical context and the promises of the Treaty, including oral promises that accompany the written text. It must also consider Blueberry's mode or way of life, and whether this was protected. The Court must consider the Crown's rights to pass regulation and to take up lands for specific purposes, and how these rights interact with those of the Indigenous signatories and adherents. In addition, the Court must consider the change foreshadowed by the Treaty.

[64] Second: What is the test for finding an infringement of treaty rights?

[65] The parties fundamentally disagree on what is the applicable test for infringement of a treaty right. While they agree the Supreme Court of Canada's decision in *Mikisew* is applicable, they dispute how that case, and in particular the reasoning at para. 48, should be interpreted and applied in these proceedings. Accordingly, the Court's analysis of the infringement issue also considers what it means for a First Nation to have "no meaningful right…remain[ing] over *its* traditional territories."

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[66] Third: Have Blueberry's treaty rights have been infringed? As part of this, I must consider whether sufficient and appropriate land in Blueberry's traditional territory exists to allow for the meaningful exercise by Blueberry of its treaty rights?

[67] Fourth: If the Plaintiffs can no longer meaningfully exercise their Treaty 8 rights, has the Province breached the Treaty in failing to diligently implement the promises contained therein in accordance with the honour of the Crown? The Court will also consider whether the Province has breached its fiduciary obligations associated with the Treaty.

[68] To answer the third and fourth questions, findings of fact are required regarding: the state of the lands over which Blueberry seeks to exercise its rights; the Province's "taking up" of lands; and, the Province's management of wildlife and natural resources, as well as its efforts to develop processes and frameworks for taking into account cumulative effects and to consult with Blueberry.

V. LEGAL FRAMEWORK AND PRINCIPLES

[69] The parties largely agree on the relevant principles and frameworks which I will now briefly set out. They differ, however, on the interpretation and application of these principles in this case. I will outline expand on this in the applicable sections of this judgment.

A. Section 35(1) of the *Constitution Act, 1982* and Reconciliation

[70] I begin with s. 35(1) of the *Constitution Act, 1982*, which says:

> 35(1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.

[71] Section 35(1) of the *Constitution Act, 1982* did not create rights. What s. 35(1) did was give Aboriginal and treaty rights – which it explicitly recognizes as already "existing" – constitutional protection (*R. v. Van der Peet*, [1996] 2 S.C.R. 507 [*Van der Peet*] at paras. 28-29).

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[72] The Supreme Court of Canada has often recognized that s. 35(1) must be interpreted in a purposive way (*R. v. Sparrow*, [1990] 1 S.C.R. 1075 [*Sparrow*] at 1075; *Van der Peet* at paras. 21-22; *Manitoba Metis Federation Inc. v. Canada (Attorney General)*, 2013 SCC 14 [*Manitoba Metis*] at para. 76).

[73] In *Van der Peet*, the Supreme Court of Canada stated that s. 35(1) provides the constitutional framework through which to acknowledge the fact that when Europeans arrived in North America, Indigenous peoples were already living on the land in distinctive societies with their own cultures, and to reconcile this with the Crown's assertion of sovereignty (at paras. 30-31).

[74] Much of the common law governing the relationship between the Crown and Indigenous people in Canada is aimed at reconciling the pre-existence of Indigenous societies with the assertion of Crown sovereignty. In *Mikisew*, the Supreme Court of Canada noted that the "fundamental objective" of the modern law of Aboriginal and treaty rights is reconciliation (at para. 1). Treaties were one way that reconciliation happened.

[75] The process of reconciliation did not end at the time treaties were entered into. It is ongoing. As noted below, treaties must be interpreted in a way that achieves their purposes and that promotes their reconciliatory function (*Manitoba Metis* at para. 71).

B. Principles of Treaty Interpretation

[76] A treaty represents an exchange of solemn promises between the Crown and one or several Indigenous nations (*Badger* at para. 41). It is an agreement whose nature is sacred (*Badger* at para. 41).

[77] The goal of treaty interpretation is to uncover the parties' common intention in entering into the treaty. This is done by considering the treaty in its unique historical and cultural context (*R. v. Morris*, 2006 SCC 59 [*Morris*] at para. 18).

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[78] In *R. v. Marshall*, [1999] 3 S.C.R. 456 [*Marshall*] at para. 78, Justice McLachlin (as she then was, and writing in dissent) summarized the legal principles governing treaty interpretation. They include the following:

> 1. Aboriginal treaties constitute a unique type of agreement and attract special principles of interpretation.
>
> 2. Treaties should be liberally construed and ambiguities or doubtful expressions should be resolved in favour of the Aboriginal signatories.
>
> 3. The goal of treaty interpretation is to choose from among the various possible interpretations of common intention the one which best reconciles the interests of both parties at the time the treaty was signed.
>
> 4. In searching for the common intention of the parties, the integrity and honour of the Crown is presumed.
>
> 5. In determining the signatories' respective understanding and intentions, the court must be sensitive to the unique cultural and linguistic differences between the parties.
>
> 6. The words of the treaty must be given the sense which they would naturally have held for the parties at the time.
>
> 7. A technical or contractual interpretation of treaty wording should be avoided.
>
> 8. While construing the language generously, courts cannot alter the terms of the treaty by exceeding what "is possible on the language" or realistic.
>
> 9. Treaty rights of aboriginal peoples must not be interpreted in a static or rigid way. They are not frozen at the date of signature. The interpreting court must update treaty rights to provide for their modern exercise. This involves determining what modern practices are reasonably incidental to the core treaty right in its modern context.
>
> (citations omitted)

[79] These principles have been cited and relied on in subsequent cases.

[80] In *Manitoba Metis*, the Court stated that a purposive approach to treaty interpretation must give meaning and substance to the Crown's promises (at para. 76). It cannot be a legalistic interpretation that divorces the words from their purpose (*Manitoba Metis* at para. 77).

C. Honour of the Crown

[81] The honour of the Crown is a constitutional principle, enshrined in s. 35(1) of the *Constitution Act, 1982*, which recognizes and affirms existing Aboriginal and

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treaty rights (*Beckman v. Little Salmon/Carmacks First Nation*, 2010 SCC 53 at para. 42; *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, 2004 SCC 74 [*Taku*] at para. 24; *Manitoba Metis* at para. 69).

[82] The principle of the honour of the Crown arises from the Crown's assertion of sovereignty in the face of pre-existing Indigenous sovereignty, occupation and control of those lands (*Taku* at para. 24; *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73 [*Haida*] at para. 32; *Manitoba Metis* at paras. 66-67). The underlying purpose of the honour of the Crown is to facilitate the reconciliation of those interests (*Mikisew Cree First Nation v. Canada (Governor General in Council),* 2018 SCC 40 [*Mikisew 2018*] at para. 22; *Manitoba Metis* at paras. 66-67).

[83] In all its dealings with Indigenous peoples, the Crown must act honourably, in accordance with its historical and future relationship with the Indigenous peoples in question (*Taku* at para. 24). The honour of the Crown is always at stake in such dealings (*Sparrow, Badger*).

[84] The honour of the Crown is a fundamental concept governing treaty interpretation and application (*Mikisew* at para. 51).

[85] Four years before Treaty 8 was entered into, Justice Gwynne of the Supreme Court of Canada noted that the honour of the Crown was pledged to the fulfilment of its treaty obligations to Indigenous peoples (*Mikisew* at para. 51 citing Gwynne J. in dissent in *Province of Ontario v. Dominion of Ontario* (1895), 25 S.C.R. 434). The honour of the Crown infuses every treaty and the performance of every treaty obligation (*Mikisew* at para. 57). The Crown's honour cannot be interpreted narrowly or technically but must be given full effect in order to promote the process of reconciliation mandated by s. 35(1) (*Taku* at para. 24).

[86] In *Manitoba Metis*, the Supreme Court of Canada reviewed the concept of the honour of the Crown in detail and reasoned that when it comes to implementing constitutional obligations to Indigenous people, this principle requires the Crown: (1)

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take a broad and purposive approach to the interpretation of the promise; and (2) act diligently to fulfill it (*Manitoba Metis* at para. 75).

[87] The law assumes the Crown intends to fulfill its solemn promises (*Manitoba Metis* at para. 79). Because the Crown's honour is pledged to the fulfillment of its obligations, it must endeavour to ensure its obligations are fulfilled (*Manitoba Metis* at para. 79; see also *Restoule v. Canada (Attorney General)*, 2018 ONSC 7701 [*Restoule*] at para. 3). The Crown is expected to carry out the work required with due diligence, as good governance requires decisions to be taken in a timely way (*Manitoba Metis* at para. 79). Crown servants must seek to fulfill the obligation in a way that pursues the purpose behind the promise (*Manitoba Metis* at para. 80). Indigenous people must not be left "with an empty shell of a treaty promise" (*Manitoba Metis* at para. 80; *Marshall* at para. 52).

[88] Perfection is not required. Nor is there a guarantee that the purposes of the promise will be met. However, a persistent pattern of errors and indifference that substantially frustrates the purpose of the solemn promise may constitute a failure by the Crown to honourably fulfil its promise (*Manitoba Metis* at para. 82).

D. Fiduciary Duty

[89] The honour of the Crown gives rise to a fiduciary duty when the Crown assumes discretionary control over a specific or cognizable Aboriginal interest (*Manitoba Metis* at paras. 49, 51; *Wewaykum Indian Band v. Canada*, 2002 SCC 79 [*Wewaykum*] at paras. 79-83; *Williams Lake Indian Band v. Canada (Aboriginal Affairs and Northern Development)*, 2018 SCC 4 [*Williams Lake*] at para. 44).

[90] Fiduciary duty, where it exists, is called into existence to facilitate the supervision of the high degree of discretionary control gradually assumed by the Crown over the lives of Indigenous peoples (*Wewaykum* at para. 79). The Crown's fiduciary obligations are aimed at protecting the interests of Indigenous people, especially when the level of Crown discretion leaves these interests vulnerable to government ineptitude or misconduct.

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[91] The Supreme Court of Canada has recognized that the Crown's fiduciary duty includes the protection of Indigenous peoples' pre-existing, and still existing, Aboriginal and treaty rights within s. 35 of the *Constitution Act, 1982* (*Sparrow* at 1108; *Wewaykum* at para. 78; *Tsilhqot'in Nation v. British Columbia*, 2014 SCC 44 [*Tsilhqot'in*] at para. 13).

[92] The Crown as a fiduciary is, at a minimum, required to act with loyalty, good faith and ordinary prudence with a view to the best interest of its Indigenous beneficiaries.

[93] The Crown's fiduciary duty (along with its duties arising from the honour of the Crown) should guide its actions when seeking to take up lands under a treaty (*Grassy Narrows First Nation v. Ontario (Minister of Natural Resources)*, 2014 SCC 48 [*Grassy Narrows*] at paras. 50-51).

E. Infringement of Treaty Rights

[94] In *Sparrow*, the Supreme Court of Canada set out the test for establishing an infringement of Aboriginal rights. In *Badger*, the Court confirmed that the test also applies to alleged infringements of treaty rights.

[95] The analysis focuses on whether the limitation on the right is unreasonable, whether the regulation or limitation imposes an undue hardship, and whether the regulation or limitation denies the holders of the right their preferred means of exercising their right. The First Nation has the onus to prove the infringement of its right.

[96] In *Mikisew*, the Supreme Court of Canada held that, within the context of a taking up of land under Treaty 8, before exercising this right, the Crown had an obligation to consult with the First Nation regarding the potential impacts and, if appropriate, accommodate their concerns (at paras. 34, 55, 56). The Court also noted, however, that if the time comes when, in the case of a particular Treaty 8 First

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Nation no meaningful right to hunt, fish or trap remains in its territory, an action for treaty infringement would be a legitimate response (at para. 48).

F. Justification of Infringement

[97] Once an infringement has been established, the onus shifts to the Crown to demonstrate that the infringement is justified.

[98] *Sparrow* lays out a two-stage analysis with respect to justification. This is also applicable to infringements of treaty rights (*Badger*, *Mikisew*). The infringement must be in furtherance of a legislative objective that is compelling and substantial, and it must be consistent with the special fiduciary relationship that exists between the Crown and Indigenous peoples.

[99] As previously noted, there is a difference between the parties as to whether justification is engaged in this trial and at this time.

[100] Finally, I note at the outset that much of the jurisprudence in these areas of Aboriginal law has been developed in the context of regulatory prosecutions and in some cases, applications for judicial review. As a result, some of the frameworks are not easily transferable to an action such as this where cumulative impacts of development are argued to have resulted in a breach of a treaty and infringement of rights. I may have to modify aspects of the analysis in the context of the present action, as will become evident.

G. Evidentiary Principles

[101] As set out by Justice Garson, as she then was, in *Ahousaht Indian Band and Nation v. Canada (Attorney General),* 2009 BCSC 1494 [*Ahousaht*] at para. 55, the task facing courts in certain Aboriginal rights and title cases is usually reserved for "historians, anthropologists, archaeologists and ethnographers." This may require proof of facts from long ago. While this is a treaty rights case, not an Aboriginal rights case, certain aspects of this case also raise difficult historical and ethnographic issues; in particular the questions of traditional territory, Treaty 8 promises, and mode

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or way of life. As a result, the principles set out in foundational Aboriginal rights cases such as *Van der Peet*, *R. v. Sappier; R. v. Gray*, 2006 SCC 54 [*Sappier*] and *Mitchell v. Minister of National Revenue,* 2001 SCC 33 [*Mitchell*], and succinctly summarised in *Ahousaht*, are helpful to recall when dealing with this evidence.

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[102] The Court in *Ahousaht* noted at paras. 58-60:

> [58] In *Van der Peet*, at para. 62, Lamer C.J. acknowledged "the next to impossible task of producing conclusive evidence from pre-contact times about the practices, customs and traditions of their community." He recognized that the burden of proof must not be applied in such a way as to conflict with the spirit and intention of s. 35(1) of the *Constitution Act*, *1982*. At para. 68, he wrote:
>
> > [A] court should approach the rules of evidence, and interpret the evidence that exists, with a consciousness of the special nature of aboriginal claims, and of the evidentiary difficulties in proving a right which originates in times where there were no written records of the practices, customs and traditions engaged in.
>
> [59] The Supreme Court of Canada has also held that owing to the difficulties in proving aboriginal rights, courts must be prepared to draw inferences from what evidence is available:
>
> > Flexibility is important when engaging in the *Van der Peet* analysis because the object is to provide cultural security and continuity for the particular aboriginal society. This object gives context to the analysis. For this reason, courts must be prepared to draw necessary inferences about the existence and integrality of a practice when direct evidence is not available.
> >
> > *Sappier*, at para. 33
>
> [60] This flexible approach to the evidence does not, however, negate the operation of general evidentiary principles. In *Mitchell*, McLachlin C.J. stated, at para. 38:
>
> > … it must be emphasized that a consciousness of the special nature of aboriginal claims does not negate the operation of general evidentiary principles. While evidence adduced in support of aboriginal claims must not be undervalued, neither should it be interpreted or weighed in a manner that fundamentally contravenes the principles of evidence law …

[103] At para. 62 of *Ahousaht*, the Court set out certain evidentiary principles applying to Aboriginal rights cases. Taking into account that the issue of continuity with a pre-contact activity is not an issue here, these principles are also broadly applicable in a treaty rights case such as this:

> [62] From the foregoing authorities, I draw the following evidentiary principles that have special application in cases involving claims to aboriginal rights and title:
>
> - As in all civil cases, the burden of proof rests on the plaintiff. The material facts must be proven on a balance of probabilities, with due regard to the rules of evidence.
> - While evidence must be sufficiently clear, convincing, and cogent to satisfy the balance of probabilities test, it may be necessary to draw inferences where appropriate, such as inferring from post-contact activity that the same activity took place before contact.
> - Traditional rules of evidence regarding the admissibility, reliability and weight of evidence continue to apply. However, the Court must also recognize the evidentiary challenges inherent in proving events and circumstances that took place hundreds of years ago, and apply those rules flexibly in a manner that is consistent with the spirit and intent of s. 35(1) of the *Constitution Act, 1982*.
> - Finally, the Court must be sensitive to not only the European perspective but also the aboriginal perspective when examining evidence about aboriginal peoples as recorded by Europeans.

VI. WHAT ARE THE RIGHTS AND OBLIGATIONS IN TREATY 8?

[104] As noted above, the goal of treaty interpretation is to uncover the parties' common intention (*Marshall* at para. 78). This is done by considering not only the text of the treaty but also by taking into account the context in which the treaty was negotiated, concluded and committed to writing (*Badger* at para. 52; *Marshall* at paras. 78 and 81; see also *West Moberly First Nations v. British Columbia*, 2020 BCCA 138 [*West Moberly 2020*] at para. 367). This includes considering its unique historical and cultural context (*Marshall* at para. 78; *Morris* at para. 18).

[105] Finding the common intention of the parties who entered into a treaty over 120 years ago is not an easy or straightforward task. The negotiations of historical treaties, including Treaty 8, were marked by significant differences in the signatories' languages, concepts, cultures, modes of life, and world views (*Quebec (Attorney General) v. Moses*, 2010 SCC 17 at para. 108 (per LeBel and Deschamps JJ., dissent); *Restoule* at para. 326). As Chief Justice Bauman has noted with respect to the interpretation of Treaty 8, "[a] twenty-first century court has no ability to question those individuals who were party to the Treaty's signing in 1899" (*West Moberly 2020*

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at para. 295). The Court must instead examine what records remain from before and after the Treaty was entered into.

[106] Representatives of the Crown drafted Treaty 8 in English. While interpreters were on hand for the negotiations in 1899, the text was not, at that time, translated in written form into the languages spoken by the Indigenous signatories who had a history of communicating only orally. Recognizing this reality, the Supreme Court of Canada has stated that the words in the Treaty are not to be interpreted in their strict technical sense, but rather in the way the Indigenous peoples would have naturally understood them at the time (*Badger* at para. 52).

[107] The promises contained in the Treaty are reflected not only in its written text but also in the oral assurances made by the Crown at the time the Treaty was entered into. Treaty 8, as a written document, recorded an agreement that had already been reached orally (see *Badger* at para. 52). As Justice Cory noted in *Badger* at para. 55: “The Indian people made their agreements orally and recorded their history orally. Thus, the verbal promises made on behalf of the federal government at the times the treaties were concluded are of great significance in their interpretation.”

[108] The Supreme Court of Canada has also repeatedly stated that the treaty rights of Indigenous peoples must not be interpreted in a static or rigid way. They are not frozen at the date of signature. The interpreting court must “update” treaty rights to provide for their modern exercise by considering the modern practices that are reasonably incidental to the exercise of the right (*Marshall* at para. 78; *R. v. Sundown*, [1999] 1 S.C.R. 393 at paras. 29-30). A right to hunt, for example, is not restricted to be exercised only in accordance with the tools and practices used in the late 1800s, it must be capable of being exercised today.

[109] The process of interpreting and understanding rights in their modern context ought not denude or disappear the rights (see *Marshall* at para. 40). Recognizing that rights are not frozen does not mean that rights can be whittled away or made

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meaningless because of changes to the environment where they were once exercised. Indigenous peoples are not to be left with an empty shell of a treaty promise (*Marshall* at para. 52; *Manitoba Metis* at para. 80).

[110] The nature and scope of the rights protected and promises made in Treaty 8 must be understood as Blueberry's ancestors and the Crown's treaty makers would have understood them when the Treaty was made and adhered to. That understanding is to be derived from the language used in the Treaty, informed by the report of the Commissioners, and the available oral history (*West Moberly First Nations v. British Columbia (Chief Inspector of Mines)*, 2011 BCCA 247 [*West Moberly 2011*] at para. 128).

A. History of Treaty 8

[111] I now turn to the history of Treaty 8.

[112] The history leading to the signing of Treaty 8 is recorded in correspondence, reports, and books, most of which are written from the perspective of Crown officials or missionaries. Occasionally these reports include observations and recollections of what the Indigenous signatories said at the time the Treaty was entered into in 1899. The Indigenous signatories and adherents to Treaty 8 spoke Cree, Dane-zaa and Chipewyan and practiced a culture and way of life different from that of European settlers and missionaries. Missionaries and settlers referred to theirs as a "forest and river" way of life.

[113] There is a significant amount of jurisprudence interpreting Treaty 8. It is generally accepted in that jurisprudence that the intent of the original 1899 signatories should guide the court in its review of the Indigenous intent in entering Treaty 8 (*West Moberly 2020* at para. 399, see more broadly paras. 394-404). That original intent is ascertained by a careful review of the pertinent history.

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[114] Ms. Gwynneth Jones provided an expert report setting out an in-depth review of the historical record that forms the context of the negotiation and signing of Treaty 8 and subsequent adhesions.

[115] Ms. Jones is a historian who has produced expert reports and testified as an expert witness in a number of prior proceedings dealing with issues regarding treaty interpretation, reserve lands, and Métis people, including: *R v. Powley*, [1999] 1 C.N.L.R. 153; *R v. Hirsekorn*, 2010 ABPC 385; *Daniels v. Canada*, 2013 FC 6; *Southwind v. Canada*, 2017 FC 906; *West Moberly First Nations v. British Columbia*, 2017 BCSC 1700 [*West Moberly 2017*]; and *Restoule*. Ms. Jones was qualified in this proceeding as an expert historian with expertise with respect to interpretation of the documentary record of the interaction between the Canadian government and Aboriginal peoples.

[116] Dr. Robert Irwin produced an expert report on behalf of the Province setting out the history within which Treaty 8 was entered into. Dr. Irwin is a history professor at MacEwan University in Edmonton. He has published numerous papers and taught courses on various topics dealing with Canadian history and Indigenous and settler relations. He has produced expert reports and testified as an expert witness in prior proceedings dealing with treaty interpretation and treaty rights, including: *Benoit v. Canada*, 2002 FCT 243; and *West Moberly 2017.* Dr. Irwin was qualified in these proceedings as an expert on the history of western Canada and Indigenous peoples in that region. As discussed later, Ms. Jones also produced a reply report to Dr. Irwin's report.

[117] Ms. Jones and Dr. Irwin agreed on the relevant historical facts leading to the signing of Treaty 8 in 1899 and later adhesion at Fort St. John in 1900. The differences between them are slight, and generally a matter of emphasis. The parties agree that these differences in emphasis have no significant bearing on the issues in this case. There is, however, a difference as to the extent of the promises in Treaty 8 and the extent to which change was foreshadowed as part of these promises.

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1. 1871-1877: Treaties 1 to 7

[118] Dr. Irwin and Ms. Jones set out the history leading up to Treaty 8.

[119] Between 1871 and 1877 Canada entered into Treaties Nos. 1 to 7, covering the territory known as the "fertile belt" and to the area around Lake Winnipeg. While the text of these treaties and the circumstances of the negotiations differ, generally speaking, in entering into these treaties, the Crown sought to open up land for settlement and other activities by way of agreement with the Indigenous peoples who lived on those lands (*Badger* at para. 39; *Grassy Narrows* at para. 1).

[120] Dr. Irwin's report noted in the twenty years following the signing of Treaty No. 7, treaty-making ground to a halt. With very little non-Indigenous settlement in the northwest of Canada, there was little motivation on the part of the government to enter into a treaty in that region.

2. 1897-1899: The Lead up to Treaty 8

[121] In 1897, the Klondike gold rush led to an influx of miners travelling through what is now northern Alberta and British Columbia en route to the goldfields. The Northwest Mounted Police ("Police") was sent to the region. The Police had received several reports in 1897 that the Indigenous peoples of these areas were dissatisfied with the influx of non-Indigenous people into their territories, including the Police themselves. In a letter written on December 2, 1897, Police Commissioner L. W. Herchmer opined that the time had come for Canada to take "immediate" steps to enter into a treaty with the Indigenous peoples who lived in this area. He wrote:

> I have the honour to draw your attention to the advisability of the Government taking some immediate steps towards arranging with the Indians not under Treaty, occupying the proposed line of route from Edmonton to Pelly River. These Indians although few in number, are said to be very turbulent, and are liable to give very serious trouble when isolated parties of miners and travelers interfere with what they consider their vested rights.
>
> At the present time the Half-breeds of Lesser Slave Lake are dissatisfied with the presence of the Police in that District, and the numerous parties of Americans and others between that point and Peace River will not improve the situation. The Beaver Indians of Peace River and the Nelson are said to be

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> inclined to be troublesome at all times, and so also are the Sicannies and Nahanies, and the Half-breeds are sure to influence them…
>
> Rich mines are liable to be discovered at any time on the Peace, Nelson and Liard Rivers, when trouble would almost certainly arise.

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[122] This letter was forwarded to Clifford Sifton, the federal Minister of the Interior and Superintendent General of Indian Affairs. The Department of Indian Affairs had limited information about the land in question, and the people who inhabited it. It sought further information from Indian Commissioner, A. E. Forget.

[123] The Klondike gold rush, in part, prompted the Crown to consider forming a treaty north of the area covered by Treaties 6 and 7. As Dr. Irwin noted, the government had a few motivations for entering into the Treaty: bringing the territory under the administration of the territorial government, ensuring peaceful exploitation of resources, and preparing for a transition from an economy based on fur trading to one based on agriculture.

[124] Writing on January 12, 1898, Indian Commissioner Forget said he was "convinced the time has now come" to pursue a treaty but acknowledged the "somewhat meagre information obtainable with regard to the condition of the tribes to be treated with."

[125] Minister Sifton incorporated some of what Police Commissioner Herchmer and Indian Commissioner Forget had reported in a report to the Privy Council recommending negotiation of Treaty 8.

[126] On June 27, 1898, by Order in Council 1703, Canada authorized three Commissioners to conclude a new treaty. The Order in Council noted that the treaty could not be undertaken in 1898, but that steps had been taken to inform Indigenous and Métis people that a Treaty Commission would meet with them in the summer of 1899. The Order in Council also noted that, as the Department of Indian Affairs possessed "so limited knowledge of the conditions of the country, and of the nature and extent of the claims likely to be put forward by its Indian inhabitants," the

Commissioners should be given discretionary power as to the annuities to be paid and the reservations of land to be set apart.

[127] Order in Council 1703 provided, in part, as follows:

> [A] report was some time ago received from the Commissioner of the North West Mounted Police as to the advisability of steps being taken for the making of a treaty with the Indians occupying the proposed line of route from Edmonton to Pelly River. He intimated that these Indians – though few in number – were turbulent and liable to give trouble should isolated parties of miners or traders interfere with what they considered their vested rights…
>
> …
>
> He expressed the conviction that the time had come when the Indian and Halfbreed population of the tract of territory North of that ceded to the Crown under Treaty No. 6 and partially occupied by whites either as miners or traders, and over which the Government exercised some measure of authority, should be treated with for the relinquishment of their claim to territorial ownership.
>
> …
>
> The Department [of Indian Affairs], however, possesses so limited a knowledge of the conditions of the country, and of the nature and extent of the claims likely to be put forward by its Indian inhabitants that the undersigned considers that the Commissioners should be given discretionary power both as to the annuities to be paid to and the reservations of land to be set apart for the Indians, with the understanding that no greater obligations will, on the whole, be assumed in either respects than were incurred in securing the session of the territory covered by the treaties which were made with the Indians of the other portions of the North West.
>
> The Undersigned also considers that, as to the territory to be ceded, the Commissioners will likewise have to be given discretionary power, for its extent will depend upon the conditions which are found to exist as a consequence of the inroads of white population: but he is of opinion that the territory to be treated for may in a general way be restricted to the Provisional District of Athabasca, and such of the country adjacent thereto as the Commissioners may deem it expedient to include within the treaty.

[128] As Ms. Jones noted at page 10 of her report, immediately following the issuance of the Order in Council, there were reports of Indigenous peoples in northeastern BC demanding a treaty:

> The day after Order in Council no. 1703 was issued, on 28 June 1898, a report was received by Forget from Fort St. John that “five hundred Indians...camped at Fort St. John...refuse to let police and miners go further north until a treaty has been signed with them. They claim that some of their

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> horses have been taken by miners and are also afraid that the advent of so many men will drive away the fur." On 6 July, J. A. J. McKenna, secretary to Clifford Sifton (and future Treaty Commissioner for the negotiation of Treaty Eight), wrote to Forget assuring him that "the Minister is quite convinced that it will be necessary to take immediate steps to ensure the Indians that the Government has no intention of ignoring their rights and has already arranged for the making of a treaty with them."

[129] By late summer 1898, it was apparent that the rush to the Klondike was over, but this did not end Canada's interest in entering into a treaty. Canada issued Order in Council No. 2749 notifying the Province of its intent to negotiate a treaty.

[130] Word of a potential treaty and the implications of this spread among the Indigenous people living in the area. What Dr. Irwin referred to as "rumours" about forcing Indigenous people to live on reserves, and curtailment of their hunting and fishing privileges were being circulated, and the government was struggling to answer those questions and address the concerns.

[131] In his report, Dr. Irwin set this out as follows at pages 12-13:

> The documentary record shows that many of the First Nations in the Peace River and Athabasca country were familiar with the treaty process and were in receipt of information about the government's "Indian Policy."…the documentary record shows an ongoing concern among First Nations that they would be confined to reserves (the pass system), that illegitimate children of fathers of Métis ancestry might be excluded from kinship groups…, and that their right to pursue a livelihood would be restricted (restrictions on commerce including those related to hunting, trapping and fishing designed to impose social and economic change). First Nations and Métis were informed of the government's intention to make a treaty in 1898 and spent the winter of 1898-1899 discussing the treaty and seeking clarification of its implications – the notion that they would be confined to reserves and thus prevented from pursuing a livelihood appeared to be foremost among these issues. First Nations of the Athabasca and Peace River country consequently entered into the treaty recognizing that it would open their territory to white resource developers and prospectors. In consideration, they sought to retain their freedom from governmental interference in their lives, secure governmental assistance with regard to destitution and sickness, and secure promises with regard to their economic livelihood in the changing environment.

[132] In the fall of 1898, missionaries and others began writing to Ottawa expressing the concerns of the Indigenous people they knew or came into contact with about the

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possibility of treaty. For example, the Indigenous people at Wapiscow Lake had questions about the enforcement of game and fishery laws and whether they would "be free after taking treaty money to roam about the country hunting or will they have a reserve allotted for them?"

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[133] The response from Minister Sifton in January 1899 was that "there would be no general prohibition in consequence of the treaty of the freedom of the Indian in roaming and hunting over the country. Of course when settlement advances there will be the restriction which necessarily follows, and it is to meet such contingencies that reserves are set aside."

[134] As Ms. Jones said:

> Missionaries, traders, and Mounted Policemen handed out the Treaty notices to Aboriginal people and tried to explain their meaning. At Fort Smith, Corporal Trotter [of the Police] reported to his superiors at the end of October 1898:
>
> > The Indians in this locality are very jealous of whitemen, trappers and miners coming in their country and wanted them forbidden to do so. Another thing they are very much troubled about is that they should be compelled to take treaty and live on reserves. They do not seem to understand the nature of the treaty at all, and from what I can learn the Government will have a great deal of trouble before they will get them to accept of it. Whitemen and Halfbreed Traders are I believe importuning them not to do so, by telling them that they will be put on a reserve and kept there, and not be allowed to go off it, nor to hunt, and that if they have to depend on the amount of provisions that they get from the Government that they will die from hunger...I also informed them that they would not be compelled to take treaty, and that their freedom would in no wise [sic] be interfered with so long as they obeyed the laws. At the wind up of the meetings they thanked me for the information which I gave them, and they seem to be quite satisfied to accept of the Governments intentions with them on those conditions…

[135] As noted by Ms. Jones, by early February 1899, the Department of Indian Affairs knew that it had problems to address with a dissatisfied Indigenous and Métis populations in the proposed treaty area. On February 3, 1899, Chief Commissioner David Laird prepared an important circular (i.e., notice) that was intended to be widely

circulated and used by Police officers and Hudson's Bay factors to explain the treaty to the Indigenous and Métis populations in the proposed treaty area, and to allay their concerns.

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[136] Treaty Commissioner Laird wrote to Police Commissioner Herchmer from Winnipeg, thanking him for the Police's efforts to reassure Indigenous people, and enclosing the circular the Police could use in explaining the idea of treaty. This notable document stated that under the treaty, Indigenous people would continue to be allowed to hunt and fish, subject to certain laws intended to protect fish and wildlife:

> You may explain to them that the Queen…while promising by her Commissioners to give them Reserves, which they can call their own…yet the *Indians will be allowed to hunt and fish all over the country as they do now, subject to such laws as may be made for the protection of game and fish in the breeding season*; and also so long as the Indians do not molest or interfere with settlers, miners or travellers…
>
> (emphasis added)

[137] A few months later, on April 17, 1899, Treaty Commissioner James McKenna wrote a memorandum to Minister Sifton addressing some of the key issues that were arising with regard to the proposed treaty, including Indigenous fear or hesitancy about what a treaty would mean for them. He also wrote about what he had been able to learn of the Indigenous people living in the proposed treaty area:

> …From information which has come to hand it would appear that the Indians who we are to meet fear that the making of a treaty will lead to their being grouped on reserves. Of course, grouping is not now contemplated, but there is the view that reserves for future use should be provided for in the treaty. I do not think this is necessary.
>
> From what I have been able to learn of the North country, it would appear that the Indians there act rather as individuals than as a nation, and that any tribal organization which may exist is very slight. They live by hunting, and by individual effort, very much as the halfbreeds in that country live. *They are averse to living on reserves, and that country is not one that will ever be settled extensively for agricultural purposes it is questionable whether it would be good policy to even suggest grouping them in the future. The reserve idea is inconsistent with the life of a hunter, and is only applicable to an agricultural country*. The most the Indians are likely to require in the way of reserves are

> small fishing stations at certain points which they might desire to have secured to them…
>
> (emphasis added)

[138] Treaty Commissioner McKenna went on to comment on the condition of the land to be acquired and potential impacts to the Indigenous peoples' means of livelihood and mode of life:

> …The former land [referring to land in Manitoba covered by Treaty 3] was admirably suited for agriculture. Its settlement was necessary for the real making of the Dominion. The building of the transcontinental railway made the wiping out of the Indian title urgent; and the changing condition interfered with the Indians means of livelihood and mode of life. There were, therefore, good reasons for giving them the maximum compensation. *The latter land* [referring to the area to be covered by Treaty 8] *is not of appreciable value agriculturally*. There is no urgent public need of its acquirement. *There may be mineral development and some consequent settlement in spots; but this will not bring sudden or great changes likely to interfere to any marked degree with the Indian mode of life and means of livlihood* [sic]. I think it would not be illiberal to answer the question by saying that half the amount which we agreed to pay under the former treaties would be ample compensation for the Indians who are to be parties to the proposed one. *And as the making of the treaty will not be the forerunner of changes that will to any great extent alter existing conditions in the country, and as the Indians will continue to have the same means of livelihood as they have at present*, it may fairly be laid down that the object of the Commissioners should simply be to secure the relinquishment of the Indian title at as small a cost as possible.
>
> (emphasis added)

[139] I note Dr. Irwin interpreted this part of the memorandum to mean that Commissioner McKenna did not believe settlement would actually affect the Indigenous people very much and that their mode of life would not be changed significantly by this process. In cross-examination, Dr. Irwin also agreed that mode of life could mean more than just their means of livelihood.

[140] Commissioner McKenna closed his April 17, 1899 memorandum by noting the importance of protecting the forests and wildlife on which the Indigenous people relied:

> … the Commissioners should, I think, be authorized to add that the Government will cause notice to be given to white men that the *forests and*

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> *game are to be protected and will be ready should occasion call for such action to send Mounted Police to secure such protection.*
>
> I am convinced that the forest fires caused by prospectors last year have so angered the Indians that some specific undertaking as to protection will have to be given. It may necessary to go further and say that the ear of the Government will always be open to well-grounded complaints from the Indians, and that when aid is asked and really required it will be forthcoming…
>
> (emphasis added)

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[141] In the spring of 1899, Treaty Commissioners David Laird, James Ross and James McKenna were formally appointed to negotiate a treaty with the Indigenous people in the district of Athabasca and adjoining country.

[142] In a May 1, 1899 letter, Commissioner Ross set out his views, including:

> They are very-small bands or families and can make a good livelihood by hunting and fishing for many years to come. The advent of population in that portion of the country would not decrease their facilities for making a livelihood. *A very small portion of the country will be taken up for farming and the Indian will be disturbed very little in respect of his hunting and fishing.*
>
> (emphasis added)

[143] On May 12, 1899, Minister Sifton wrote to the Commissioners with instructions, advising that "the terms of the treaty were left to their discretion" with the stipulation that obligations to be assumed under it shall not be in excess of those assumed in the treaties covering the North West territories.

3. June 21, 1899: The Signing of Treaty 8 at Lesser Slave Lake

[144] The discussions, negotiations and initial signing of Treaty 8 took place in the summer of 1899. The surviving written records of what occurred include the September 1899 Report of the Commissioners; Charles Mair's 1908 book entitled *Through the Mackenzie Basin: An Account of the Signing of Treaty No. 8 and the Scrip Commission, 1899*; published accounts from Bishop Grouard (in 1899 and 1925) and Father Breynat (in 1945), and letters from other missionaries who witnessed the events; reports from the Police officers and Hudson's Bay Company officials that accompanied the Treaty Commissioners; and newspaper reports.

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[145] Charles Mair was secretary to the Scrip Commission and an observer to the signing of Treaty 8 in June 1899. His book, *Through the Mackenzie Basin: An Account of the Signing of Treaty No. 8 and the Scrip Commission, 1899*, is a transcript of brief notes taken at the time. In a footnote to his book, Mair notes that his report is "necessarily much abridged." Dr. Irwin recognized that Mair was a reliable personal observer of the events at Lesser Slave Lake. Mair's work, setting out these observations, has been referred to and relied on in a number of cases dealing with Treaty 8, and I too rely on it here for his observations and recollections of the meetings in the summer of 1899.

[146] On June 20, 1899, the Treaty Commissioners met with Indigenous and Métis people assembled at Willow Point on Lesser Slave Lake. Dr. Irwin's and Ms. Jones' reports, which draw on Mair's account, paint a helpful picture of what took place over the course of this two-day meeting.

[147] Over one thousand people gathered at Willow Point to observe the Treaty proceedings. The Treaty table was arranged with Commissioners Laird, Ross and McKenna in the middle, Bishop Grouard and Father Lacombe on the left and Anglican missionaries on the right. Two Métis men, Albert Tate and Samuel Cunningham served as interpreters.

[148] Commissioner Laird rose and spoke for about an hour explaining previous treaties and the benefits they entailed. Mair noted Commissioner Laird's speech was as follows:

> …I have to say, on behalf of the Queen and the Government of Canada that we have come to make you an offer. We have made treaties in former years with all the Indians of the prairie, and from there to Lake Superior. *As white people are coming into your country, we have thought it well to tell you what is required of you. The Queen wants all the whites, half-breeds and Indians to be at peace with one another, and to shake hands when they meet. The Queen's laws must be obeyed all over the country, both by the whites and the Indians…*
>
> We understand stories have been told you, that if you made a treaty with us you would become servants and slaves; but we wish you to understand that such is not the case, but that *you will be just as free after signing a treaty as*

> *you are now.* The treaty is a free offer; take it or not, just as you please. If you refuse it there is no harm done; we will not be bad friends on that account. One thing Indians must understand, that if they do not make a treaty they must obey the laws of the land – that will be just the same whether you make a treaty or not; the laws must be obeyed…
>
> (emphasis added)

[149] Commissioner Laird then described the terms of the treaty, including as noted by Ms. Jones:

> …payments, gifts, and clothing for chiefs and headmen; the Indian Reserve entitlements in communal Reserves and severalty (emphasizing that "there will be no compulsion to force Indians to go into a reserve"); the choices offered in agricultural equipment, livestock, or ammunition and twine "if you do not wish to grow grain or raise cattle"; and the promises of schools and tools. … Although Laird's listeners were being offered a choice of Government supports for varying ways of life under the Treaty, and he also promised that everyone who took Treaty would be "free to hunt and fish" in addition to the other options for earning a livelihood. Laird was likely reflecting the views expressed during the preparations for the Treaty that only a limited portion of the territory being acquired was suitable for extensive settlement and agricultural development, and that hunting and fishing would continue to be the preferred, and the principal, means of support for many inhabitants of the country…

[150] In return for protecting their freedom to hunt and fish and ensuring they would be free from interference, Commissioner Lair told those assembled:

> … the Government expects that the Indians will not interfere with or molest any minister, traveller or settler. We expect you to be good friends with everyone, and shake hands with all you meet. If any whites molest you in any way, shoot your dogs or horses, or do you any harm, you have only to report the matter to the police, and they will see that justice is done to you.
>
> …These are the principal points in the offer we have to make to you. The Queen owns the country, but is willing to acknowledge the Indians' claims, and offers them terms as an offset to all of them. We shall be glad to answer any questions, and make clear any points not understood.

[151] Chief Kinsoayo (also spelled Keenooshayoo) and Headman Moostoos had been appointed spokespersons for the Indigenous people who had gathered from the Lesser Slave Lake area. Mair's account notes that following Commissioner Laird's speech, Chief Kinsoayo spoke:

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> You say we are brothers. I cannot understand how we are so. *I live differently from you*. I can only understand that Indians will benefit in a very small degree from your offer…Do you not allow the Indians to make their own conditions, so that they may benefit as much as possible? Why I say this is that we to-day make arrangements that are to last as long as the sun shines and the water runs. Up to the present I have earned my own living and worked in my own way for the Queen. It is good. The Indian loves his way of living and his free life…
>
> (emphasis added)

[152] In her testimony, Ms. Jones referred to what Bishop Faraud, another observer of the negotiations, had to say about Chief Kinsoayo's speech:

> …So this is after Kinsoayo's speech where Kinsoayo had said the Indian loves his way of living and his free life. And Faraud's observation at this point of the proceedings was that one could very much see that these poor people were holding themselves back, fearing that their liberty would not be safeguarded. So in other words, that they were reticent about signing the treaty because they were concerned that it wouldn't protect their freedoms as they knew them, particularly the freedom to hunt and fish.

[153] After Chief Kinsoayo spoke, Headman Moostoos spoke:

> Often before now I have said I would carefully consider what you might say. You have called us brothers. Truly I am the younger, you the elder brother. Being the younger, if the younger ask the elder for something, he will grant his request the same as our mother the Queen. I am glad to hear what you have to say. Our country is being broken up. I see the white man coming in, and I want to be friends. I see what he does, but it is best that we should be friends…

[154] Commissioner Ross answered the questions. He is reported to have said:

> I will just answer a few questions that have been put. Keenooshayo has said that he cannot see how it will benefit you to take treaty. *As all the rights you now have will not be interfered with, therefore anything you get in addition must be a clear gain.* The white man is bound to come in and open up the country, and we come before him to explain the relations that must exist between you, and thus prevent any trouble. You say you have heard what the Commissioners have said, and how you wish to live. We believe that men who have lived without help heretofore can do it better when the country is opened up. Any fur they catch is worth more...We think that as the rivers and lakes of this country will be the principal highways, good boatmen, like yourselves, cannot fail to make a good living, and profit from the increase in traffic...
>
> You say that you consider that you have a right to say something about the terms we offer you. We offer you certain terms, but you are not forced to take them. You ask if Indians are not allowed to make a bargain. You must

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> understand there are always two to a bargain. We are glad you understand the treaty is forever. If the Indians do as they are asked we shall certainly keep all our promises. We are glad to know that you have got on without any one's help, but you must know times are hard, and furs scarcer than they used to be. *Indians are fond of a free life, and we do not wish to interfere with it.* When reserves are offered there is no intention to make you live on them if you do not want to, but, in years to come, you may change your minds, and want these lands to live on…
>
> (emphasis added)

[155] In cross-examination, Dr. Irwin explored the concept of "clear gain" relied on by Commissioner Ross:

> Q: Just to be clear on the clear gain. Nobody on the record suggests that the Indians prior to treaty don't have a right to hunt and fish?
>
> A: Nobody.
>
> Q: So that's not the gain. The gain is what – the additional things they would get, the clear gain?
>
> A: So I want to understand clear gain, because in my mind all the things get better, right. So if I understand what they're arguing, is that you'll get better money for your furs, for example. So some things you already do will be improved. You'll get better money for your boating than you already do; some things you currently do will be improved. You'll be able to continue to hunt and fish, and I would argue sell game to the post. That will – right? All things will actually improve. I believe it's actually a very strong statement that the treaty will actually cause the improvement in the modes of life you currently have, the modes of living and the livelihoods that you currently have.
>
> Q: Yes. And that's a good selling point for Ross –
>
> A: Yes.
>
> Q: – in trying to – in persuading the First Nations people that the treaty is a good idea.
>
> A: Yes.
>
> Q: But at the same time, he's assuring them they're going to be able to continue with the hunting up to what they did?
>
> A: Yes.
>
> Q: So if they may be able to sell more, fine, but they can still do what they did and where they did it.
>
> A: Absolutely.

[156] Following Commissioner Ross' responses, Chief Kinsoayo stated:

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> Are the terms good forever? As long as the sun shines on us? Because there are orphans we must consider, so that there will be nothing to be thrown up to us by our people afterwards. We want a written treaty, one copy to be given to us, so we shall know what we sign for. Are you willing to give means to instruct children as long as the sun shines and water runs, so that our children will grow up ever increasing in knowledge?

[157] Commissioner Laird then replied:

> …Treaties last forever, as signed, unless the Indians wish to make a change. I understand you all agree to the terms of the Treaty. Am I right? If so, I will have the Treaty drawn up, and to-morrow we will sign it. Speak, all those who do not agree!

[158] Father Lacombe who was assisting the Commission and was also noted as an "old friend" of the Indigenous people then spoke:

> Knowing you as I do, your manners, your customs and language, I have been officially attached to the Commission as an advisor. To-day is a great day for you, a day of long remembrance, and your children hereafter will learn from your lips the events of to-day. I consented to come here because I thought it was a good thing for you to take the Treaty. Were it not in your interest I would not take part in it.…I urge you to accept the words of the Big Chief who comes here in the name of the Queen. I have known him for many years, and, I can assure you, he is just and sincere in all his statements, besides being vested with authority to deal with you. *Your forest and river life will not be changed by the Treaty*, and you will have your annuities, as well, year by year, as long as the sun shines and the earth remains…
>
> (emphasis added)

[159] The meeting was adjourned to the next day. That evening, the Commissioners prepared the text of the treaty. It was at that time they decided that they would make a single treaty covering the entire territory of the Indigenous people they would meet, and take adhesions at the various locations still to be visited.

[160] The next afternoon, on June 21, 1899, the discussions resumed. Commissioner Laird made some preliminary remarks then read the text of the Treaty, a portion of which is reproduced below:

> …AND WHEREAS, the said Indians have been notified and informed by Her Majesty's said Commission that it is Her desire to open for settlement, immigration, trade, travel, mining, lumbering and such other purposes as to Her Majesty may seem meet, a tract of country bounded and described as

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hereinafter mentioned, and to obtain the consent thereto of Her Indian subjects inhabiting the said tract, and to make a treaty, and arrange with them, so that there may be peace and good will between them and Her Majesty's other subjects, and that Her Indian people may know and be assured of what allowances they are to count upon and receive from Her Majesty's bounty and benevolence.

…

AND WHEREAS, the said Commissioners have proceeded to negotiate a treaty with the Cree, Beaver, Chipewyan and other Indians, inhabiting the district hereinafter defined and described, and the same has been agreed upon and concluded by the respective bands at the dates mentioned hereunder, the said Indians DO HEREBY CEDE, RELEASE, SURRENDER AND YIELD UP to the 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…

…

AND ALSO the said Indian rights, titles and privileges whatsoever to all other lands wherever situated in the Northwest Territories, British Columbia, or in any other portion of the Dominion of Canada.

TO HAVE AND TO HOLD the same to Her Majesty the Queen and Her successors for ever.

And Her Majesty the Queen HEREBY AGREES with the said Indians that they shall have right to pursue their usual vocations of hunting, trapping and fishing throughout the tract surrendered as heretofore described, subject to such regulations as may from time to time be made by the Government of the country, acting under the authority of Her Majesty, and saving and excepting such tracts as may be required or taken up from time to time for settlement, mining, lumbering, trading or other purposes.

…

FURTHER, Her Majesty agrees that each Band that elects to take a reserve and cultivate the soil, shall, as soon as convenient after such reserve is set aside and settled upon, and the Band has signified its choice and is prepared to break up the soil, receive two hoes, one spade, one scythe and two hay forks for every family so settled, and for every three families one plough and one harrow, and to the Chief, for the use of his Band, two horses or a yoke of oxen, and for each Band potatoes, barley, oats and wheat (if such seed be suited to the locality of the reserve), to plant the land actually broken up, and provisions for one month in the spring for several years while planting such seeds; and to every family one cow, and every Chief one bull, and one mowing-machine and one reaper for the use of his Band when it is ready for them; for such families as prefer to raise stock instead of cultivating the soil, every family of five persons, two cows, and every Chief two bulls and two mowing-machines when ready for their use, and a like proportion for smaller or larger families. The aforesaid articles, machines and cattle to be given once for all for the encouragement of agriculture and stock raising; *and for such Bands as prefer to continue hunting and fishing, as much ammunition and*

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> *twine for making nets annually as will amount in value to one dollar per head of the families so engaged in hunting and fishing.*
>
> …
>
> (emphasis added)

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[161] Mair noted that Chief Kinsoayo and Headman Moostoos both rose and made speeches assenting to the terms. Mair's account does not include any specifics of what was said, but does note that at one point there appeared to be some dissent from the Indigenous people. After lengthy discussions, however, the details of which are not noted, the parties signed the Treaty.

[162] Mair put it this way at page 64: "This looked critical; but, after a somewhat lengthy discussion, everything was smoothed over, and the chief and head men entered the tent and signed the Treaty after the Commissioners, thus confirming, for this portion of the country, the great Treaty which is intended to cover the whole northern region up to the sixtieth parallel of north latitude."

[163] Treaty 8 was signed on June 21, 1899, by Treaty Commissioners Laird, McKenna and Ross and by the Cree Chief and Headmen of Lesser Slave Lake and the adjacent territory by Chief Keenooshayoo, and headmen Moostoos, Felix Giroux, Wee Chee Way Sis, Charles Nee Sue Ta Sis, and Captain from the Sturgeon Lake.

[164] A significant portion of the historical evidence and the examinations of Dr. Irwin and Ms. Jones focussed on this meeting. The Indigenous people who signed the Treaty in the summer of 1899 were not the Indigenous people then living in the Blueberry Claim Area. Chief Kinsoayo and headman Moostoos were Cree from the Lesser Slave Lake area. As noted below, the Fort St. John adhesion to the Treaty did not occur until the following year as a result of Indigenous people in that area (i.e., Blueberry's ancestors) prioritizing hunting.

[165] The promises, however, made by the Treaty Commissioners to those assembled at Lesser Slave Lake, and the way they allayed concerns expressed by the Indigenous people gathered are relevant and constitute the oral promises

included within Treaty 8. They are solemn statements and promises made on behalf of the Crown. The same or similar assurances were made to other Indigenous signatories and adherents to Treaty 8.

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[166] Following the signing of the Treaty at Lesser Slave Lake, the Commissioners were running late. They agreed to divide their party: Commissioners Ross and McKenna would go to Fort St. John and Dunvegan, and Commissioner Laird would continue on to Peace River Landing and Vermillion. The Treaty Commission had been scheduled to arrive in Fort St. John on June 21, 1899. A special messenger was sent to explain the delay, advise that the Commissioners were on their way to meet them, and request that the Indigenous people wait at the Fort.

[167] When Commissioner McKenna neared Fort St. John, however, he was notified that the Indigenous people had left for their regular hunt. In a letter of July 7, 1899, Commissioner McKenna explained to Minister Sifton:

> When we got to within seventy miles of St. John we met our special messenger returning with a letter from the H. B. Co's officer there to the effect that the Indians had left on their annual hunt, that they were 150 miles off and that it was impossible to get word to them. To the Indians it meant failure to secure the year's food supply to await the Commissioner even until the date first fixed, and they naturally decided to take the hunt in preference to the Treaty…

[168] The September 22, 1899 Report of the Commissioners for Treaty 8 that was sent to Minister Sifton provides a useful recount of the summer's activities:

> … We met the Indians on the 20th, and on the 21st the treaty was signed.
>
> As the discussions at the different points followed on much the same lines, we shall confine ourselves to a general statement of their import. … *There was expressed at every point the fear that the making of the treaty would be followed by the curtailment of the hunting and fishing privileges*, and many were impressed with the notion that the treaty would lead to taxation and enforced military service. They seemed desirous of securing educational advantages for their children, but stipulated that in the matter of schools there should be no interference with their religious beliefs.
>
> *We pointed out that the Government could not undertake to maintain Indians in idleness; that the same means of earning a livelihood would continue after the treaty as existed before it, and that the Indians would be expected to make use of them*. We told them that the Government was always ready to give

relief in cases of actual destitution, and that in seasons of distress they would without any special stipulation in the treaty receive such assistance as it was usual to give in order to prevent starvation among Indians in any part of Canada; and we stated that the attention of the Government would be called to the need of some special provision being made for assisting the old and indigent who were unable to work and dependent on charity for the means of sustaining life.

…

Our chief difficulty was the apprehension that the hunting and fishing privileges were to be curtailed. The provision in the treaty under which ammunition and twine is to be furnished went far in the direction of quieting the fears of the Indians, for they admitted that it would be unreasonable to furnish the means of hunting and fishing if laws were to be enacted which would make hunting and fishing so restricted as to render it impossible to make a livelihood by such pursuits. But over and above the provision, we had to solemnly assure them that only such laws as to hunting and fishing as were in the interest of the Indians and were found necessary in order to protect the fish and fur-bearing animals would be made, and 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, that it did not open the way to the imposition of any tax, and that there was no fear of enforced military service. We showed them that, whether treaty was made or not, they were subject to the law, bound to obey it, and liable to punishment for any infringements of it. We pointed out that the law was designed for the protection of all, and must be respected by all the inhabitants of the country, irrespective of colour or origin; and that, in requiring them to live at peace with white men who came into the country, and not to molest them in person or in property, it only required them to do what white men were required to do as to the Indians.

…

In addition to the annuity, which we found it necessary to fix at the figures of Treaty Six, which covers adjacent territory, the treaty stipulates that assistance in the form of seed and implements and cattle will be given to those of the Indians who may take to farming, in the way of cattle and mowers to those who may devote themselves to cattle-raising, and that ammunition and twine will be given to those who continue to fish and hunt. The assistance in farming and ranching is only to be given when the Indians actually take to these pursuits, and it is not likely that for many years there will be a call for any considerable expenditure under these heads. The only Indians of the territory ceded who are likely to take to cattle-raising are those about Lesser Slave Lake and along the Peace River, where there is quite an extent of ranching country; and although there are stretches of cultivable land in those parts of the country, it is not probable that the Indians will, while present conditions obtain, engage in farming further than the raising of roots in a small way, as is now done to some extent. *In the main the demand will be for ammunition and twine, as the great majority of the Indians will continue to hunt and fish for a livelihood. It does not appear likely that the conditions of the country on either*

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> *side of the Athabasca and Slave Rivers or about Athabasca Lake will be so changed as to affect hunting or trapping, and it is safe to say that so long as the fur-bearing animals remain, the great bulk of the Indians will continue to hunt and to trap.*
>
> The Indians are given the option of taking reserves or land in severalty. As the extent of the country treated for made it impossible to define reserves or holdings, and as the Indians were not prepared to make selections, we confined ourselves to an undertaking to have reserves and holdings set apart in the future, and the Indians were satisfied with the promise that this would be done when required. There is no immediate necessity for the general laying out of reserves or the allotting of land. It will be quite time enough to do this as advancing settlement makes necessary the surveying of the land. Indeed, the Indians were generally averse to being placed on reserves. *It would have been impossible to have made a treaty if we had not assured them that there was no intention of confining them to reserves*. We had to very clearly explain to them that the provision for reserves and allotments of land were made for their protection, and to secure to them in perpetuity a fair portion of the land ceded, in the event of settlement advancing.
>
> (emphasis added)

4. May 30, 1900: Adhesion to Treaty 8 at Fort St. John

[169] On March 12, 1900, Privy Council Order 460 was issued, appointing James Macrae the new (and sole) Treaty Commissioner for the purpose of taking adhesions at Fort St. John, Fort Resolution, and elsewhere that year.

[170] Commissioner Macrae arrived in Fort St. John in late May 1900 and secured the Treaty adhesion of a portion of the Beaver Indians of the Upper Peace River on May 30, 1900. The record is very slim as to what transpired during the adhesion at Fort St. John.

[171] The adhesion notes the following:

> The Beaver Indians of the Upper Peace River and the country thereabouts, having met at Fort St. John, on this thirtieth day of May, in this present year 1900, Her Majesty's Commissioner, James Ansdell Macrae, Esquire, and having had explained to them the terms of the treaty unto which the Chief and Headmen of the Indians of Lesser Slave Lake and adjacent country set their hands on the twenty-first day of June, in the year 1899, do join in the cession made by the said treaty, and agree to adhere to the terms thereof, in consideration of the undertakings made therein.

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The adhesion was signed on behalf of the Beaver Indians at Fort St. John by: Muckithay, Aginaa, Dislisici, Tachea, Appan, Attachie, Allalie, Yatsoose.

[172] In the Report of the Treaty Commissioner for the year 1900, submitted to the Superintendent General of Indian Affairs on December 11, 1900, Commissioner Macrae described his work that summer. As pointed out by Blueberry, Commissioner Macrae commented that it was "not unwise" for the Indigenous peoples in that locale to be hunters rather than farmers:

> …there is little disposition on the part of most of the northern Indians to settle down upon land or to ask to have reserves set apart…
>
> *It appears that this disinclination to adopt agriculture as a means of livelihood is not unwisely entertained; for the most congenial occupations of hunting and fishing are still open, and agriculture is not only arduous to those untrained to it, but in many districts it as yet remains untried.* A consequent of this preference of old pursuits is that the Government will not be called upon for years to make those expenditures which are entailed by the treaty when the Indians take to the soil for subsistence.
>
> The health of the Indians in the treaty seems to vary with time. When game is plentiful it is good, when scarce, it is bad. The want of rabbits along the Peace and Hay Rivers caused suffering to the Beavers and Slaves in part of the western portion of the territory last winter…
>
> At nearly all the important points the chiefs and more intelligent men who were present at the making of treaty last year, asked for extended explanations of its terms, in order that those of their bands who had failed to grasp its true meaning might be enlightened, and that those who were coming into treaty for the first time might fully understand what they were doing. In the course of the councils held for this purpose, it was possible to eradicate any little misunderstanding that had arisen in the minds of the more intelligent, and great pains were taken to give such explanations as seemed most likely to prevent any possibility of misunderstandings in future.
>
> (emphasis added)

[173] Commissioner Macrae's report reflects an understanding that the Indigenous people of the northern Peace River area were engaged in hunting and fishing and this was how they sustained themselves, as such they were not interested in settling on reserves.

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B. Does Treaty 8 Promise a Right to Continue a Way of Life Based on Hunting, Fishing and Trapping?

[174] I will now consider whether, as Blueberry argues, the Treaty includes a promise that the Indigenous signatories and adherents shall have a right to continue their mode of life based on hunting, fishing and trapping throughout their territory. I will refer interchangeably to "mode of life" and "way of life" as Blueberry does, and as is reflected in some of the jurisprudence.

[175] On this point, I conclude for the reasons set out below that, based on the text of the Treaty and the history of the interactions leading to the signing of Treaty 8 in 1899 and the adhesions that followed, Treaty 8 guarantees the Indigenous signatories and adherents the right to continue a way of life based on hunting, fishing and trapping, and promises that this way of life will not be forcibly interfered with. Inherent in the promise that there will be no forced interference with this way of life is that the Crown will not significantly affect or destroy the basic elements or features needed for that way of life to continue.

[176] I will first set out my conclusions on the evidence and then review the jurisprudence on Treaty 8, which I have concluded, supports this determination. I begin by briefly reviewing the parties' arguments on this issue.

1. Parties' Positions

[177] Blueberry's central argument is that the fundamental promise, or essential element, of Treaty 8 is that the Indigenous peoples who signed and adhered to the treaty would be able to continue their way of life based on hunting, trapping and fishing.

[178] Blueberry says the Indigenous peoples were assured that while there would be settlement from time to time, this would not lead to forced interference with their way of life. Blueberry points out that the assurance of continuity of a way of life based on hunting, trapping and fishing has been called the "essential promise" of Treaty 8 by the Supreme Court Canada. Had this assurance not been given, the treaty

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negotiations may not have been successful, and later adhesions may not have occurred.

[179] Blueberry says its way of life is “a connection to the land that remains core to their identity.” It is “what they have learned and lived, and it is who they are.” This way of life based on hunting, trapping and fishing is not a way of life from a time long gone; but one that continues today.

[180] Blueberry acknowledges that the mode of life is amorphous and urges the Court to consider the features of its mode of life in anthropological terms, with reference to the evidence provided by Dr. Ridington and Mr. Brody. Blueberry says the features of its mode of life include: using a multiplicity of areas within its territory; having access to a broad availability of landscapes and habitats; being able to schedule use of resources and practice seasonality; and having an environment that was predictable and knowable. Blueberry submits that at the time the treaty was made, the Crown knew the way of life of the Indigenous peoples with whom it was treating was intricately woven into the landscape, and tied to the ability to roam, hunt, and live freely throughout their territory.

[181] Furthermore, Blueberry says the Crown was aware of the concerns expressed by Indigenous peoples that the Treaty would lead to the curtailment of their way of life and the prospect of being confined to reserves. Some settlement was anticipated, but the fundamental understanding was that it would happen in a way that would not threaten or displace a mode of life centred on the land.

[182] Blueberry says the extent of development and displacement in its territory today is fundamentally not what either party contemplated in entering into Treaty 8. The Treaty was premised on little settlement and disruption; the Crown was to protect, not displace, their mode of life.

[183] Moreover, argues Blueberry, the Crown reassured the Indigenous people that they would benefit from increased traffic and commerce – there would be a clear gain

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from entering into Treaty 8. They were not trading a free life for displacement with increased activity.

[184] Blueberry says the taking up clause contained in Treaty 8 through which the Crown can take up land from time to time for settlement, mining, lumbering, trading and other purposes did not and does not modify, diminish or abrogate from the essential promise of protecting its way of life. The taking up clause is subject to the fundamental promise made to the Indigenous peoples that they would be able to continue their way of life based on hunting, trapping, and fishing.

[185] In contrast, the Province says that the Treaty does not protect the mode of life that existed at the time the Treaty was made. Rather, it was designed for the fundamental purpose of opening up land for settlement and development and the taking up of lands by the Crown from "time to time" could not be clearer in foreshadowing change. The Province says the Treaty was centred on an understanding that settlers were coming, and that this would have a profound effect. Relying on *Mikisew*, the Province says Treaty 8 did not promise "continuity" of nineteenth century pattern of land use but, rather, signalled the dawn of a period of transition – Treaty 8 foreshadowed change.

[186] The Province recognizes that the Treaty promises Indigenous signatories rights to continue to hunt, trap and fish and that this promise was essential. However, the Province says these rights are not absolute, and are limited by the government's right to take up lands, and pass regulations for conservation purposes. The Province says the Indigenous signatories to the Treaty understood they would not be able to hunt, trap and fish on land that was taken up or was being used for incompatible purposes, and that those rights would be subject to certain government regulations.

[187] In addition, the Province says that Blueberry has failed to define the content of the mode of life protected by Treaty 8. The Province notes that Blueberry's mode of life or means of livelihood, even at 1900, was based on a mixed economy. Through the mid 1900s to today, Blueberry members have relied on and embraced a mixed

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and modern economy – participating in hunting and gathering while also engaging in opportunities in the forestry and oil and gas industries. While hunting, fishing and trapping were the primary means of livelihood at the time of Treaty 8 in 1900, they were not the sole ones.

[188] Furthermore, the Province says that Blueberry's argument ignores the "balance" established by the Treaty, and the fact that there were always "obstacles" to its mode of life.

2. Conclusion on the Evidence

[189] As noted, the Province maintains that the evidence reflected in the historical documents demonstrates the overriding purpose of Treaty 8 was to open up lands and facilitate settlement. The Province relies on the historical documents including comments made by Mair that there was an expected "incoming tide of settlement" and hope for "millions of settlers." It refers to other comments in Mair's book to say the Indigenous signatories and adherents understood this would interfere with their freedom to move, as they referred to a "broken up" and fragmented country. The "free life" referred to, the Province says, was a free commercial life as Indigenous people did not want the pass system used in Treaty 6, which restricted their ability to undertake commercial operations.

[190] In addition, the Province relied on a number of post–Treaty events, including a post–Treaty letter, the origin of which is unclear, apparently from Chief Kinsoayo and Councillors of the Lesser Slave Lake Band, requesting assistance as to how "best to go to work..." and saying "[t]he reason we accepted Treaty was that we saw we had to change our way of living, that furs were getting scarce and also moose, and that if we had cattle and had [po]tatoes & barley to eat we would be better off."

[191] Dealing with this latter document first, I note as Dr. Irwin candidly said "we don't know who the scribe is." This letter was sent to the Superintendent General of Indian Affairs in 1900 (the year after the Treaty was entered into) and very little is otherwise known about it. The letter appears to be associated with a request for

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reserve lands. In cross-examination, Dr. Irwin agreed that the language used in the letter did not sound like the phrases Chief Kinsoayo would have used. Dr. Irwin also agreed the scribe could have been a missionary who possibly added this rationale as to why a reserve should be granted on a more rapid basis. As a result, very little weight can be placed on this document.

[192] As for the Province's reliance on Mair's views of incoming settlement, while the Crown may have wished to open the land to settlement, it is not accurate to say, as the Province argues, that a "tide of settlement" was expected. Numerous comments were made in letters, reports and records of the Treaty negotiations that significant settlement was not expected. While there are references to mining in a January 25, 1899 letter from Minister Sifton to the Commissioners, imminent settlement was not contemplated at that time.

[193] Furthermore, Mair's comments regarding "millions of settlers" referred to and relied on by the Province are remarks included in the preface to his book. These comments are considered Mair's own surmising and editorializing and were not consistent with the many other written records. They were also not a record of what was said at the Treaty meeting in June of 1899. This has been accepted as reliable as Mair was an observer reporting on the event.

[194] As Ms. Jones noted in cross – examination, comments about the "millions" or a "tide of settlement" were likely made "to make it exciting for his readers…it was a pretty common way for people to talk about unexplored territory at the time." As is evident, millions of people are not in the territory even 120 years later.

[195] Further, the promises of the Treaty cannot be viewed through only one lens (i.e., that of the Crown). Each of the parties' understandings must be considered when ascertaining the promises and obligations of the Treaty. The Court must therefore view the matter through the lens of each party. Given the numerous references to Indigenous people fearing changes to their way of life on the land, the

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reference to the promise of retaining a “free life” by both the Indigenous people and the Commissioners cannot be confined to a “free” commercial context.

[196] The Province also relies on certain documents that it maintains point to the “foreshadowing of change” in the Treaty negotiations. While some change was no doubt expected to occur, it is difficult to reconcile the Province’s ultimate position with the many clear assurances made with respect to the continuation of hunting, trapping and fishing rights as is evident throughout the documented record of government communications. The documents relied upon by the Province are not consistent with these clear assurances made by the Crown in order to secure the Treaty.

[197] These documents (including in the Commissioners’ report) made clear that without assurances that hunting and fishing rights would not be curtailed and the Indigenous peoples would not be confined to reserves, it was doubtful a treaty would have been concluded.

[198] The change foreshadowed by the Treaty cannot be understood as eviscerating the fundamental promise that Indigenous peoples’ way of life would not be interfered with. To put this into perspective, the evidence has established that Indigenous peoples have lived on this land for thousands of years. It is not reasonable to conclude that the Dene – zaa agreed that their way of life would be “fundamentally altered” or eradicated by a Treaty that is now a little over 120 years old. They did not agree to adopt a settler’s way of life. This conclusion would not be consistent with viewing the matter through the lens of both parties.

[199] The Indigenous people specifically confirmed that the Treaty would be forever. The Treaty was made to preserve and protect certain rights in the face of change; not to see those rights erased by a tide of change. While change was foreshadowed, these cannot be empty promises.

[200] Although the text of Treaty 8 does not refer to “mode of life,” the Commissioners’ report makes clear that the Commissioners assured Indigenous people that their mode of life would not be interfered with.

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[201] I accept the points that Ms. Jones emphasized in her reports and testimony to support the conclusion that Treaty 8 promised the Indigenous peoples that their way of life would not be interfered with. I will set those points out here.

[202] First, the area covered by Treaty 8 was in large part not considered suitable for farming, and it was anticipated that Indigenous people would continue with their traditional pursuits of hunting, fishing and trapping. This is in contrast to other treaties – in particular the earlier treaties covering the prairies – which sought to open up the prairies or “fertile land” to extensive settlement and farming.

[203] Second, while treaties generally promised an opening up of the land for settlement, Treaty 8 set out a number of options in terms of pursuits, which Ms. Jones indicated was unlike previous treaties. As part of the negotiations, the Indigenous people were provided with three choices: farming, ranching, or continuing hunting and fishing, and were to be provided with necessary implements or supports consistent with their choice. Ms. Jones noted that, by offering Indigenous people these choices, Commissioner Laird was likely reflecting the views expressed during the negotiations of the Treaty that only a limited portion of the territory was suitable for extensive settlement and agricultural land development. Hunting and fishing would continue to be preferred and the principal means of support for many inhabitants of the country.

[204] Third, throughout their discussions, the Indigenous people consistently voiced their concern about the Treaty interfering with their rights to hunt and fish. The Crown consistently reassured the Indigenous people that their way of life would be free from interference.

[205] Fourth, the correspondence and reporting surrounding the negotiations of Treaty 8 consistently disclosed the view that limited reserve land would be needed as, by and large, Indigenous people in this area were more likely to hunt and fish rather than cultivate the land.

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[206] Fifth, the text of Treaty 8 referred to the Indigenous people as having the "right to pursue their usual *vocations* of hunting, trapping and fishing throughout the tracts of land surrendered…subject to such regulations as may from time to time be made by the government of the country… and saving and excepting such tracts as may be required to be taken up from time to time for settlement, mining, lumbering, trading or other purposes…" Ms. Jones pointed out that previous treaties had referred to hunting, trapping and fishing as avocations, which is a hobby or minor occupation. Treaty 8 referred to these activities as vocations, which requires dedication (per *The Oxford English Dictionary*, 2nd ed., *sub verbo* "vocation").

[207] Sixth, Ms. Jones noted in her report the importance of the circular prepared by Commissioner Laird to be distributed by the Police and Hudson's Bay Company explaining the concept of the Treaty. As is noted above, this circular explicitly reassured the Indigenous people that they "will be allowed to hunt and fish all over the country as they do now, subject to such laws as may be made for the protection of game and fish in the breeding season." Her report also noted the reassurances provided by Commissioner Laird in June 1899 that Indigenous people had the choice to take the Treaty or not, and that if they did take the Treaty they would be just as free to hunt and fish after the Treaty as before. Ms. Jones also emphasized Chief Kinsoayo's response to this reassurance, reminding the Commissioners that the Indigenous people were "fond of a free life, and do not wish to interfere with it."

[208] As noted earlier, Ms. Jones filed a reply report to Dr. Irwin's report. This report dealt with, among other things, the nature of the change contemplated in the Treaty. Ms. Jones indicated the essential difference between the two experts as to the significance of the changes associated with the Treaty was in the emphasis of some of the assumptions regarding changes to the economy and Indigenous way of life.

[209] Dr. Irwin noted the choices Indigenous people were offered (such as agricultural implements) suggested their way of life in hunting and fishing was to be superseded by agriculture or stock raising. Ms. Jones said she did not see the support for this proposition.

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[210] In her reply report Ms. Jones put it this way:

> Dr. Irwin and I disagree in our interpretation of the historical documents that address the understanding and statements of Crown representatives as to the anticipated changes to the economy and the Indigenous way of life in the area to be covered by Treaty Eight, particularly on the question of whether other ways of life would replace or supersede a way of life based on harvesting fish, furs, wild meat and other products.
>
> …
>
> Dr. Irwin quotes from several documents in his report at pages 91 through 97. As he states, Indigenous peoples prior to Treaty were concerned about the possibility of major changes to their way of life following the signing of a Treaty, especially about restrictions on their mobility and their ability to support themselves by harvesting meat, furs and fish. He characterizes the expression of these concerns as an understanding among Indigenous peoples that their way of life was about to change. However, the passages he cites should be placed in their original context. Prior to the Treaty negotiations, the Treaty Commissioners and other Government representatives, such as the North West Mounted Police, repeatedly gave these peoples assurances that their way of life would not be interfered with as a result of the Treaty. *During the Treaty negotiations, the Treaty Commissioners explicitly addressed the concerns of the Indigenous peoples regarding economic changes by assuring them that their harvesting economy and their way of life would continue, and that whatever they obtained under a Treaty would be a "clear gain", not a replacement, for that way of life.* The Treaty Commissioners emphasized that without this promise, they would not have been able to obtain Indigenous consent to Treaty and scrip.
>
> In their preparations for Treaty, the Treaty Commissioners and other Indian Department officials expressed the view that development in the future Treaty Eight area was likely to be different in character and scale than the rapid and massive conversion of Prairie Treaty lands to agricultural settlement and resource exploitation…
>
> (emphasis added)

[211] Dr. Irwin characterized the expressions of these concerns as an *understanding* among Indigenous peoples that their way of life was about to change. Ms. Jones pointed out, and I agree, it is clear these were expressions of *concern and fear* about potential change rather than an understanding, acknowledgment or acceptance of change, especially a change as fundamental as one observes to date. Concerns were expressed and consistent statements were made by the Commissioners and other government representatives, assuring Indigenous people that their way of life would not be interfered with as a result of the Treaty.

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[212] This has been reflected many times in the historical record referred to earlier. This is most evident in the September 22, 1899 Report of the Commissioners for Treaty 8 which refers to “fear,” and the chief difficulty being the apprehension that hunting and fishing privileges were to be curtailed. The report does not support the conclusion that Indigenous people accepted and understood great change was to come. Rather it reflects their fundamental desire to protect themselves from great change; without those assurances the signing of Treaty 8 would very likely not have occurred.

[213] The Province emphasizes that the promises in the Treaty were made for continuing hunting, trapping and fishing as an economic livelihood, not as a promise to protect a way of life. Ultimately this reflects a view that the Indigenous people were essentially agreeing to convert to a settler’s way of life.

[214] Even if “livelihood” was considered the sole basis of the promise (which I do not accept), the evidence in this case demonstrated that other activities underpinned the culture and enabled the opportunity to derive a livelihood from hunting, trapping and fishing. These activities included harvesting plants, skinning or cleaning fish and animals, smoking or drying the meat and hides, and preparing them for use or consumption. These aspects of the Indigenous peoples’ modes of life were in large part undertaken by women. Hunting, trapping and fishing were easily identifiable signposts or indicators of a mode of life supported by other cultural practices, which may not have been overtly visible to the government’s treaty negotiators. As a result, even if the Province says the Treaty promised only protection for “livelihood,” that “livelihood” was built upon and survived by virtue of the Indigenous way of life, including the work of all peoples who were part of that society.

[215] Way of life is about means of survival, as well as socialization methods, legal systems, trading patterns, cultural and spiritual beliefs and practices, patterns of land use, and ways of generating and passing on knowledge. To the Indigenous people who entered into Treaty 8, the meaningful exercise of these rights reflects how they live their lives, in their way, on their lands. These rights must be considered in a

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broader, more contextual way. Based on the evidence in this case, they are rights that are exercised at particular places, at particular times, in relation to particular species, and that are connected to a larger way of life. For the exercise of these rights to be meaningful, protection must also include recognition that the rights to hunt, fish and trap are, in essence, rights to maintain a culture and identity.

[216] Ultimately, as noted earlier, the Province's fundamental argument leads to the view that the Indigenous people who entered into Treaty 8 essentially agreed to move to or convert to what is in effect a settler's way of life. The Treaty did not require the Indigenous peoples to agree to a settler's way of life. This is simply not consistent with the documentary and expert evidence in this case. While the Treaty foreshadowed change, in order to achieve the Treaty, the Crown provided protection to the Indigenous peoples' ability to hunt, fish and trap as part of their way of life.

[217] I have reached these findings on the promise of Treaty 8 on the basis of the evidence presented in this case. The jurisprudence, however, also supports this understanding that the rights protected in the Treaty are part of a way of life. I turn to that now.

3. Key Jurisprudence on Treaty 8 and the Promises Contained Therein

[218] Treaty 8, and the promises contained therein, has been the subject of much judicial writing in this Court, the Court of Appeal, and the Supreme Court of Canada. A brief review of the Supreme Court of Canada's decisions in *R. v. Horseman*, [1990] 1 S.C.R. 901 [*Horseman*], *Badger* and *Mikisew*, and the British Columbia Court of Appeal's decisions in *Halfway River First Nation v. British Columbia (Ministry of Forests)*, 1999 BCCA 470 [*Halfway*] and *West Moberly 2011* helps to situate the arguments made in this case, and specifically those relating to the promises reflected in Treaty 8, in their jurisprudential context.

[219] It is important to note that none of the cases reviewed below were actions alleging a breach of the Treaty and infringement of treaty rights. Rather, they were

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either regulatory prosecutions where Treaty 8 beneficiaries were seeking to exercise their rights and were charged for violating provincial statutes, or were applications for judicial review brought by First Nations alleging government was making decisions that infringed their rights.

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a) *R. v. Horseman*, [1990] 1 S.C.R. 901

[220] The terms of Treaty 8 were first considered by the Supreme Court of Canada in *Horseman*. In that case, Mr. Horseman, a beneficiary of Treaty 8 living in Alberta, killed a grizzly bear in self – defence while hunting moose for food. At the time, he did not have a licence under the Alberta *Wildlife Act* to hunt grizzly bears or sell their hide. A year later, in need of money to support his family, he purchased a grizzly bear hunting licence and sold the hide. He was charged under s. 42 of the *Wildlife Act* with unlawful trafficking in wildlife. The issue before the Supreme Court of Canada was whether the hunting rights included in Treaty 8 included the right to hunt for commercial purposes, and whether the Alberta *Natural Resources Transfer Agreement* [NRTA] of 1930 (which does not apply in this case) modified Treaty 8, limiting the right to hunt for food only.

[221] Justice Cory, writing for the majority, held that the hunting rights included in Treaty 8 originally included rights to hunt for food and for commercial purposes, but these rights were subject to governmental regulation and had been modified and limited by the NRTA to a right to hunt for food only. The Supreme Court of Canada held that the courts below had correctly found that the sale of the bear hide was an act of commerce and not part of hunting for food. Because of the NRTA's limitation to the Treaty, the act of selling the bear hide was therefore no longer a right protected by Treaty 8. In the result, the majority held that the *Wildlife Act* applied, and Mr. Horseman had breached s. 42 of that Act in selling the bear hide.

[222] The reasons of Justice Wilson (in dissent) at pages 908 to 911 provide a careful examination of the context within which Treaty 8 was entered into. While Justice Wilson (writing for herself, Chief Justice Dickson, and Justice L'Heureux–

Dubé) dissented on the interpretation and impact of the NRTA and on the application of the *Wildlife Act*, her examination of the history and context of Treaty 8 was not contentious. This portion of her reasons is also referred to by the majority of the Court of Appeal in *West Moberly 2020* at para. 482.

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[223] Justice Wilson's reasons begin by referring to *Nowegijick v. The Queen*, [1983] 1 S.C.R. 29 and *Simon v. The Queen*, [1985] 2 S.C.R. 387 [*Simon*] and the proper approach to the interpretation of treaties: construing them as they would have been understood by the Indigenous people; giving them a fair, large and liberal construction; and being sensitive to the broader historical context in which such treaties were negotiated.

[224] In her discussion of Treaty 8 and the hunting rights protected therein, Justice Wilson referred to the work of Professor Arthur Ray who had noted that Indigenous peoples in the Treaty 8 area had developed a way of life that centred on wildlife resources. They hunted beaver, moose, caribou and wood buffalo with a view to consuming some portions of their catch and exchanging other portions. She then referred to other commentary and analysis on the history of the negotiations leading up to Treaty 8, in particular that by Richard Daniel in "The Spirit and Terms of Treaty Eight" in *The Spirit of the Alberta Indian Treaties* (Richard Price, ed., Montreal: Institute for Research on Public Policy, 1979), and René Fumoleau in *As Long as this Land Shall Last*: *A History of Treaty 8 and Treaty 11, 1870-1939* (1973), and the report of the Treaty Commissioners:

> Mr. Daniel's study of these negotiations reveals that the Indians were especially concerned that the most important aspect of their way of life, their ability to hunt and fish, not be interfered with. He points out that the Commissioners repeatedly sought to assure the Indians that they would continue to be free to pursue these activities as they always had. In the course of treaty negotiations at Lesser Slave Lake in June 1899 (negotiations that set the pattern for subsequent agreements with other Indian groups near Fort St. John, Fort Chipewyan, Fond du Lac, Fort Resolution and Wabasca), Commissioner Laird told the assembled Indians that "Indians have been told that if they make a treaty they will not be allowed to hunt and fish as they do now. This is not true. Indians who take treaty will be just as free to hunt and fish all over as they now are." (See: Daniel, op. cit., at p. 76). Similarly, Mr. Fumoleau has observed that "[o]nly when the Treaty Commissioners promised

> them that they would be free to hunt and trap and fish for a living, and that their rights would be protected against the abuses of white hunters and trappers, did the Indians at each trading post of the Treaty 8 area consent to sign the treaty" (Fumoleau, op. cit., at p. 65).
>
> The official report of the Commissioners who negotiated Treaty No. 8 (presented to the Minister of the Interior on September 22, 1899) confirms both that hunting and fishing rights were of particular concern to the Indians and that the Commissioners were at pains to make clear that the government of Canada did not wish to interfere with their traditional way of life. The Commissioners reported (at p. 6):
>
> > Our chief difficulty was the apprehension that the hunting and fishing privileges were to be curtailed. The provision in the treaty under which ammunition and twine is to be furnished went far in the direction of quieting the fears of the Indians, for they admitted that it would be unreasonable to furnish the means of hunting and fishing if laws were to be enacted which would make hunting and fishing so restricted as to render it impossible to make a livelihood by such pursuits. But over and above the provision, we had to solemnly assure them that only such laws as to hunting as were in the interest of the Indians and were found necessary in order to protect the fish and fur-bearing animals would be made, and that they would be free to hunt and fish after the treaty as they would be if they never entered into it.
> >
> > (underline added by Wilson J.)

[225] Justice Wilson noted that interviews done with elders of the Lesser Slave Lake area confirmed the critical role played by the promise with respect to hunting and fishing rights.

[226] From her review of these studies and evidence, Justice Wilson concluded that the Crown's promise that hunting, fishing and trapping rights would be protected forever was the "*sine qua non*" for obtaining the agreement of the Indigenous people to enter into Treaty 8 (at 911). She noted that: "hunting, fishing and trapping lay at the centre of their way of life" (at 911). As to the government's power to pass regulations with respect to hunting, trapping and fishing, Justice Wilson reasoned that such regulations would need to be designed "so as to ensure that the Indians' way of life would continue to be respected" (at 912). She goes on at 913:

> In other words, while the treaty was obviously intended to enable the government of Canada to pass regulations with respect to hunting, fishing and trapping, it becomes clear when one places the treaty in its historical context that the government of Canada committed itself to regulate hunting in a

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> manner that would respect the lifestyle of the Indians and the way in which they had traditionally pursued their livelihood. Because any regulations concerning hunting and fishing were to be "in the interest" of the Indians, and because the Indians were promised that they would be as free to hunt, fish and trap "after the treaty as they would be if they never entered into it", such regulations had to be designed to preserve an environment in which the Indians could continue to hunt, fish and trap as they had always done.

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[227] The majority's reasons briefly review the historical background to the negotiations of Treaty 8, with a focus on whether the rights contained in the treaty included a right to hunt for commercial purposes. The majority's reasons, like those of Justice Wilson, refer to Professor Ray's work and the difficulty in differentiating domestic hunting from commercial hunting, and to the report of the Treaty Commissioners. Justice Cory noted that in entering into Treaty 8, the Indigenous people sought to protect their pre-existing hunting rights and to continue their "usual vocations of hunting, trapping and fishing," and that Canada sought to protect "the native economy" which was based on those hunting rights (at 928). Justice Cory recognized that at the time the Treaty was entered into, for the Indigenous population, hunting and fishing for commercial purposes was "an integral part of their way of life" (at 928).

b) *R. v. Badger*, [1996] 1 S.C.R. 771

[228] The nature of the promises contained in Treaty 8 was also a central issue in *Badger*. The purpose of reviewing *Badger* at this point in these reasons is to consider how the Court, building on *Horseman*, characterizes the promises and protections contained in Treaty 8.

[229] In *Badger*, three Cree beneficiaries of Treaty 8 were each hunting moose for food on privately owned lands within the area covered by Treaty 8 within Alberta. Mr. Badger was hunting on scrub land near a run-down but occupied house. Mr. Kiyawasew was hunting on a posted, snow covered field. And Mr. Ominayak was hunting on uncleared muskeg where there were no fences, signs or buildings. Each was charged under the Alberta *Wildlife Act* for hunting without a licence and outside

the established hunting season. They challenged the constitutionality of the *Wildlife Act*, in so far as it affected their Treaty 8 rights.

[230] Justice Cory, again writing for the majority, discussed the context and history of Treaty 8 beginning at para. 39 of his reasons. He described the continuation of the Indigenous peoples' rights to hunt, fish and trap as "the essential element" that led to their signing the treaty:

> [39] Treaty No. 8 is one of eleven numbered treaties concluded between the federal government and various Indian bands between 1871 and 1923. Their objective was to facilitate the settlement of the West. Treaty No. 8, made on June 21, 1899, involved the surrender of vast tracts of land in what is now northern Alberta, northeastern British Columbia, northwestern Saskatchewan and part of the Northwest Territories. In exchange for the land, the Crown made a number of commitments, for example, to provide the bands with reserves, education, annuities, farm equipment, ammunition, and relief in times of famine or pestilence. However, it is clear that for the Indians the guarantee that hunting, fishing and trapping rights would continue was the essential element which led to their signing the treaties. The report of the Commissioners who negotiated Treaty No. 8 on behalf of the government underscored the importance to the Indians of the right to hunt, fish and trap…

[231] Justice Cory emphasized certain aspects of the Treaty Commissioners' 1899 report showing how the federal government responded to the concerns raised by Indigenous people about the impact on their hunting and fishing rights from entering into the Treaty. The reasons, at para. 39, cite the following sections of the report, with emphasis:

> There was expressed at every point the fear that the making of the treaty would be followed by the curtailment of the hunting and fishing privileges…
>
> We pointed out…that the <u>same means of earning a livelihood would continue after the treaty as existed before it</u>, and that the Indians would be expected to make use of them…
>
> Our chief difficulty was the apprehension that the hunting and fishing privileges were to be curtailed. The provision in the treaty under which ammunition and twine is to be furnished went far in the direction of quieting the fears of the Indians, for they admitted that it would be unreasonable to furnish the means of hunting and fishing if laws were to be enacted which would make hunting and fishing so restricted as to render it impossible to make a livelihood by such pursuits. But over and above the provision, <u>we had to solemnly assure them that only such laws as to hunting and fishing as were in the interest of the Indians and were found necessary in order to protect the</u>

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> fish and fur-bearing animals would be made, and that they would be as free to hunt and fish after the treaty as they would be if they never entered into it.
>
> (underline added by Cory J.)

[232] Justice Cory then considered the text of Treaty 8. He noted that Treaty 8 guaranteed that Indigenous people "shall have the right to pursue their usual vocations of hunting, trapping and fishing" subject to two limitations (at para. 40). The first is a geographic limitation; the right to hunt could be exercised "throughout the tract surrendered…saving and excepting such tracts as may be required or taken up from time to time for settlement, mining lumbering, trading or other purposes." The second provided that the right to hunt could be limited by government regulations passed for conservation purposes.

[233] At paras. 53 and 54, Cory J. considered how the Indigenous people would have understood the taking up provision of the Treaty. He concluded that the geographical limitation on the right to hunt should be based upon a concept of visible, incompatible land use (at paras. 54 and 58). Whether or not land has been taken up is a question of fact to be assessed on a case-by-case basis (at para. 58).

[234] In considering the negotiation of Treaty 8, Justice Cory noted that the Crown's verbal promises were of great significance and refers again to the work of René Fumoleau and Richard Daniel (earlier cited in *Horseman*) (at para. 55). He emphasized again that the "primary fear" expressed by Indigenous people was that the treaty would curtail their ability to pursue their livelihood as hunters, trappers and fishers (at para. 55). The Commissioners offered reassurances that they would be just as free to hunt and fish after the Treaty as before, and anticipated little impacts from settlement or mining. Justice Cory included a portion of Mr. Daniel's work citing reassurances made by the Commissioners and providing insight into the kind of change anticipated in 1899:

> [55] … The Indians' primary fear was that the treaty would curtail their ability to pursue their livelihood as hunters, trappers and fishers. Commissioner David Laird, as cited in Daniel, "The Spirit and Terms of Treaty Eight", at p. 76, told the Lesser Slave Lake Indians in 1899:

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> Indians have been told that if they make a treaty they will not be allowed to hunt and fish as they do now. This is not true. Indians who take treaty will be just as free to hunt and fish all over as they now are.
>
> In return for this the Government expects that the Indians will not interfere with or molest any miner, traveller or settler. [Emphasis added]

Since the Treaty No. 8 lands were not well suited to agriculture, the government expected little settlement in the area. The Commissioners, cited in Daniel, at p. 81, indicated that "it is safe to say that so long as the fur-bearing animals remain, the great bulk of the Indians will continue to hunt and to trap". The promise that this livelihood would not be affected was repeated to all the bands who signed the Treaty. Although it was expected that some white prospectors might stake claims in the north, this was not expected to have an impact on the Indians' hunting rights. For example, one commissioner, cited in René Fumoleau, O.M.I., *As Long as this Land Shall Last*, at p. 90, stated:

> We are just making peace between Whites and Indians – for them to treat each other well. And we do not want to change your hunting. If Whites should prospect, stake claims, that will not harm anyone.

[235] Just as the Commissioners did not expect that settlement or mining would have an impact on the rights protected in Treaty 8, neither did the Indigenous people. Referring to the oral history of Treaty 8, Justice Cory noted at para. 57, that "[t]he Indians understood that land would be taken up for homesteads, farming, prospecting and mining and that they would not be able to hunt in these areas or to shoot at the settlers' farm animals or buildings. No doubt the Indians believed that most of the Treaty No. 8 land would remain unoccupied and so would be available to them for hunting, fishing and trapping."

[236] Justice Cory interpreted the understanding regarding the rights to hunt, fish and trap as protecting Indigenous peoples' ability to pursue their livelihood. As will be discussed further, in the Court's view, the hunting, fishing and trapping rights in the Treaty protect a way of life based on hunting, fishing, and trapping rights. This is more than a livelihood if that concept is understood as solely physical and economic survival.

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c) *Halfway River First Nation v. British Columbia (Ministry of Forests)*, 1999 BCCA 470

[237] The context within which Treaty 8 was entered into at Fort St John in 1900 was discussed by the Court of Appeal in *Halfway*. In this case, the First Nation commenced a judicial review, seeking to quash the issuance of a logging permit on the basis that it infringed their hunting right under Treaty 8.

[238] The chambers judge took a contextual approach to understanding the right to hunt protected by Treaty 8. In applying the *Sparrow* test for determining whether there is an infringement of an Aboriginal or treaty right, the chambers judge noted that Halfway River's preferred means of exercising its treaty rights to hunt, trap and fish was to do so in an unspoiled wilderness in close proximity to its reserve lands. After considering Justice Cory's statements in *Badger*, she determined that *any* interference with the rights to hunt, fish or trap constitutes a *prima facie* infringement of Treaty 8 rights. Accordingly, she quashed the decision approving the logging permit. The Province and forestry company appealed.

[239] In his reasons at para. 15, Justice Finch considered how Halfway River's ancestors lived at the time they adhered to Treaty 8 (at para. 9). As to the area occupied by Halfway River and its ancestors, Justice Finch noted as follows:

> [15] The lands to the south and west of the Halfway River reserve were, in 1900 and 1914, unsettled and undeveloped wilderness. The Halfway River Nation referred to this area as the Tusdzuh. It is an area that the petitioners and their ancestors have used for hunting, fishing, trapping and the gathering of food and medicinal plants. The area was plentiful with game, and conveniently located for the purposes of the Halfway Nation. The petitioners or their forebears built cabins, corrals and meat drying racks in the area for use in conjunction with their hunting activities. The time of building, and the precise location of these structures, is not disclosed in the evidence.

[240] At para. 21, Justice Finch described the Tusdzuh as "vast areas in which, until fairly recent times, there has been limited industrial use or development."

[241] The Province argued on appeal that it had an "independent" right under the Treaty to take up lands. Justice Finch rejected this argument, reasoning the

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Indigenous peoples' rights to hunt, fish and trap and the Crown's right to take up lands and to regulate were "competing, or conflicting rights" that had to be balanced (at paras.134, 137). Justice Finch noted that, just as the right to hunt is subject to the geographical limitation (as set out in *Badger*), the Crown's right to take up land is also subject to limitations: "…the Crown's right to take up land cannot be read as absolute or unrestricted for to do so (as even the Crown concedes) would render the right to hunt meaningless" (at para. 134). He reasoned that the Crown's right "qualifies the Indians' rights and cannot therefore be exercised without affecting those rights" (at para. 136).

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[242] As to how to understand Halfway River's rights under Treaty 8, Justice Finch rejected the chambers judge's approach as being an overstatement. In his view, Halfway River was not entitled to exercise their "preferred means of hunting" in an "unspoiled wilderness." The area was not unspoiled, even in 1982 when treaty rights received constitutional protection (at para. 140). In *obiter*, Justice Finch observed that "preferred means" should be understood as referring to the methods or modes of hunting or fishing, and not to a preferred area or the nature of the area, where the rights might be exercised (at para. 141).

[243] Ultimately Justice Finch held that the chambers judge did not err in concluding that the approval of the logging permit constituted a *prima facie* infringement of the Treaty 8 right to hunt; the logging would limit or impair in some degree the exercise of that right (at para. 142). He agreed with her that any interference with the right to hunt is a *prima facie* infringement (at para. 144). He also upheld her finding that the infringement was not justified as the Crown denied the First Nation reasonable opportunities to consult (at paras. 165-167) and he dismissed the appeal.

[244] Justice Huddart, concurring in the result, departed from Justice Finch on the application of the *Sparrow* test for infringement and justification to this case. For her, the District Manager's failure to consult adequately was, in and of itself, a breach of the Crown's fiduciary obligations, making application of the *Sparrow* analysis premature (at para. 179). Justice Huddart's reasons emphasized that it is the First

Nation who will have information about the scope of their use of the land, and the importance of the use of the land to their culture and identity (at para. 180).

[245] Justice Huddart disagreed with the chambers judge's approach to "any interference" (at para. 186). In her view, the infringement analysis necessarily imports a judgment as to the degree and significance of the interference. On the issue of preferred means, Justice Huddart, in *obiter*, took a different view on the significance of particular land to Indigenous culture and identity:

> [187] Incidentally, as an aside, given the significance of particular land to aboriginal culture and identity, I would not preclude "preferred means" from being extended to include a preferred tract of land. Proof may be available that use of a particular tract of land is fundamental to a first nation's collective identity, as it is to many indigenous cultures. While it may be that "preferred area" for hunting is not relevant, "preferred area" for religious and spiritual purposes is likely to be. Such rights do not appear to have been included in the treaty-making one way or the other.

[246] The scope of the rights contained in Treaty 8, and how connected they are to particular places or species was discussed again in *West Moberly 2011*.

d) *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, 2005 SCC 69

[247] The Supreme Court of Canada's decision in *Mikisew* is of undoubted importance to this case. While now over 15 years old, it is the Supreme Court of Canada's most recent case dealing with the substantive content of Treaty 8. Justice Binnie, writing for the Court, reviewed and summarized the principles of treaty interpretation, interpreted the terms of the Treaty and how they interact with each other, and set out the Crown's obligations when it is exercising its rights to take up land under the Treaty. Although Justice Binnie considered what might constitute an infringement of a treaty right, the case was not decided on the basis of the infringement analysis. Instead, the Court applied the duty to consult to treaty situations.

[248] The facts underlying the *Mikisew* decision are as follows. The Mikisew Cree are signatories to Treaty 8 and their reserve is located in Wood Buffalo National Park

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in Alberta. In 2000, the federal government approved a 118-kilometre long winter road, which was to run through Mikisew's reserve, without consulting them. The total road corridor would take up approximately 23 square kilometres.

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[249] Mikisew applied for judicial review arguing that their treaty rights to hunt and trap would be impacted by the construction of the road, and that the decision to approve the road was made without adequate consultation. Mikisew also argued the road would result in, among other things, fragmentation of habitat, loss of vegetation, erosion, poaching and increased wildlife mortality. The Federal Court, Trial Division held that the Minister's decision to approve the road constituted an infringement of the Mikisew's rights to hunt and trap, and that the infringement was not justified. Canada appealed.

[250] Justice Rothstein (as he then was, writing for the majority of the Federal Court of Appeal) held that the approval of the winter road constituted a taking up within the meaning of Treaty 8. As such, Mikisew had no continued right to hunt on these lands, there was no violation of s. 35 of the *Constitution Act, 1982*, and therefore no need to apply the *Sparrow* analysis. He reasoned that Canada, as a matter of "good practice" ought to have consulted more extensively with Mikisew before approving the road, but was not constitutionally obliged to do so.

[251] By the time the case came before the Supreme Court of Canada, the issue was essentially whether, in taking up the land for the road, Canada had an obligation to consult. However, the context of this issue was whether the taking up of land for the road amounted to an infringement that triggers the need for a *Sparrow* justification, or whether Canada was just taking up lands as entitled to within the bounds of the Treaty. It is in this context that Justice Binnie discussed the content of Treaty 8.

[252] Justice Binnie began by noting that Treaty 8 is "one of the most important of the post-Confederation treaties" and covers 840,000 square kilometres (at para. 2). It recognizes that in exchange for the surrender of these lands, Indigenous people were

promised reserves and other benefits including “most importantly to them” the rights of hunting, trapping and fishing (para. 2).

[253] Justice Binnie framed the right to hunt, trap and fish within the overall context of the numbered treaties, and within the context of Treaty 8. He viewed the guarantee of such rights and the limitations on them as reflecting an “uneasy tension” that would need to be managed as part of an “ongoing relationship” that would transition and evolve into the future. At paras. 24-27, he stated:

> [24] The post-Confederation numbered treaties were designed to open up the Canadian west and northwest to settlement and development. Treaty 8 itself recites that “the said Indians have been notified and informed by Her Majesty’s said Commission that it is Her desire to open for settlement, immigration, trade, travel, mining, lumbering and such other purposes as to Her Majesty may seem meet”. This stated purpose is reflected in a corresponding limitation on the Treaty 8 hunting, fishing and trapping rights to exclude such “tracts as may be required or taken up from time to time for settlement, mining, lumbering, trading or other purposes”. The “other purposes” would be at least as broad as the purposes listed in the recital, mentioned above, including “travel”.
>
> [25] There was thus from the outset an uneasy tension between the First Nations’ essential demand that they continue to be as free to live off the land after the treaty as before and the Crown’s expectation of increasing numbers of non-aboriginal people moving into the surrendered territory. It was seen from the beginning as an ongoing relationship that would be difficult to manage, as the Commissioners acknowledged at an early Treaty 8 negotiation at Lesser Slave Lake in June 1899:
>
> > The white man is bound to come in and open up the country, and we come before him to explain the relations that must exist between you, and thus prevent any trouble.
> >
> > (C. Mair, *Through the Mackenzie Basin: A Narrative of the Athabasca and Peace River Treaty Expedition of 1899*, at p. 61)
>
> As Cory J. explained in *Badger*, at para. 57 “[t]he Indians understood that land would be taken up for homesteads, farming, prospecting and mining and that they would not be able to hunt in these areas or to shoot at the settlers’ farm animals or buildings”.
>
> [26] The hunting, fishing and trapping rights were not solely for the benefit of First Nations people. It was in the Crown’s interest to keep the aboriginal people living off the land, as the Commissioners themselves acknowledged in their Report on Treaty 8 dated September 22, 1899:
>
> > We pointed out that the Government could not undertake to maintain Indians in idleness; that the same means of earning a livelihood would

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> continue after the treaty as existed before it, and that the Indians would be expected to make use of them. [p. 5]
>
> [27] Thus none of the parties in 1899 expected that Treaty 8 constituted a finished land use blueprint. Treaty 8 signalled the advancing dawn of a period of transition. The key, as the Commissioners pointed out, was to "explain the relations" that would govern future interaction "and thus prevent any trouble" (Mair, at p. 61).

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[254] Justice Binnie's focus in *Mikisew* was largely on interpreting the taking up provision. He considered what it means for the Crown to have the right to take up land "from time to time" and the kinds of uses to which these taken up lands could then be put. As noted in the quote above, Justice Binnie contextualized the power to take up land within the changing relationship (i.e., settlers coming in) and anticipated the relationship would be difficult to manage. Accordingly, he reasoned that the treaty "could not be clearer in foreshadowing change" (at para. 31). However, as set out earlier, Mair's account of the negotiations of Treaty 8 is more nuanced and detailed than just describing it as being about the Crown informing Indigenous people about how to behave in the face of increasing settlement.

[255] Justice Binnie agreed with the Federal Court of Appeal that not every taking up of land will constitute an infringement of the Treaty (at para. 31). He distinguished *Halfway* and reasoned that "to the extent the Mikisew interpret *Halfway River* as fixing in 1899 the geographic boundaries of the Treaty 8 hunting right, and holding that any post-1899 encroachment on these geographic limits requires a *Sparrow*-type justification, I cannot agree" (at para. 32). He found that Treaty 8 does not promise continuity of nineteenth century patterns of land use, but foreshadowed a period of transition.

[256] At the same time, the Court in *Mikisew* recognized that a First Nation's rights to hunt, fish and trap arise and are exercised in a specific place, namely *its* traditional territories. At para. 47, Justice Binnie noted that "for aboriginal people, as for non-aboriginal people, location is important." While 23 square kilometres of land taken up for road purposes may not be significant when considered within the context of all 840,000 square kilometres of land encompassed by Treaty 8, it is significant if

included within those 23 square kilometres are the Mikisew's hunting grounds or trapline areas. Referring to *Badger*, Justice Binnie noted that "a large element" of the negotiations of Treaty 8 were the "assurances of *continuity* in traditional patterns of economic activity" (at para. 47). Continuity, noted Justice Binnie, "respects traditional patterns of activity and occupation" (at para. 47). Accordingly, the Crown's promise that the same means of earning a livelihood would continue after the Treaty as before could not be honoured by dispatching the Mikisew to territories far from their traditional hunting grounds and traplines to exercise their rights.

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[257] Justice Binnie went on to consider the "meaningful right to hunt." He wrote at para. 48 that "the 'meaningful right to hunt' is not ascertained on a treaty-wide basis…but in relation to the territories over which a First Nation traditionally hunted, fished and trapped, and continues to do so today."

[258] This passage can be understood as needing to respect the traditional territories of each signatory First Nation and not suggesting one nation is "entitled to invade" the territory of another. This passage is also capable of another interpretation, and one that aligns more closely with Indigenous peoples' sense of place. Here Justice Binnie was acknowledging that rights must be ascertained (that is understood, found out, discovered with certainty) with regard to the places in which they are exercised. Learning about the places where rights are exercised is more than a mapping exercise; it reveals the conditions that make the exercise of the rights possible and meaningful. For example, a right to hunt may be exercised in particular habitats that support specific kinds of wildlife.

e) *West Moberly First Nations v. British Columbia (Chief Inspector of Mines)*, 2011 BCCA 247

[259] The issue of the specificity of the rights contained in Treaty 8 was discussed in *West Moberly First Nations v British Columbia*, 2011 BCCA 247. In this case, the West Moberly First Nation brought a judicial review of the provincial government's decision to allow a mining company to engage in a bulk coal sampling and advanced exploration program. The First Nation argued the Province's decision was made

without proper consideration of their right to hunt caribou in the area as part of their traditional seasonal round. The chambers judge allowed the judicial review, finding the Province failed to adequately and meaningfully consult.

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[260] The Province appealed. Its main argument was that the chambers judge erred in interpreting the First Nation's Treaty 8 right to hunt as a "species specific right" and in holding the right could only be accommodated in one way. The mining company supported the Province's appeal, arguing the chambers judge also erred in holding that the scope of the Crown's duty to consult included consideration of the cumulative effect of past wrongs, and potential future developments, rather than focussing on the potential impact of the challenged permits. The majority of the Court of Appeal dismissed the appeal (Chief Justice Finch and Justice Hinkson, as he then was, concurring but writing separate reasons; Justice Garson dissenting), upholding the chambers judge's finding that the consultation provided was not meaningful.

[261] At paras. 22 to 25 of his reasons for judgment, Chief Justice Finch described West Moberly and its ancestors, and he contextualized the rights the First Nation was seeking to protect by describing their way of life, including details about the species hunted, when and where hunting would occur, how the animals were used, and the spiritual and cultural significance of these places, animals and practices:

> [22] Historically, the Mountain Dunne-Za were hunters who followed game's seasonal migrations and redistributions based on their knowledge and understanding of animal behaviour. In their seasonal round, the Dunne-Za hunted ungulate species, including moose, deer, elk and caribou, in addition to birds and fish. Moose appears to have been the most important food source, but caribou hunting was important, especially in the spring. The animals were taken in large numbers when available, and the meat was preserved by drying. Dry meat was an important food source for the Mountain Dunne-Za year round.
>
> [23] The Mountain Dunne-Za utilized all parts of the caribou, including the hide, internal organs, and bones. They used these materials to make clothing, bags, and a variety of tools and utensils.
>
> …
>
> [25] The Mountain Dunne-Za valued the existence of all species, including caribou, and treated them and their habitat with respect. They knew where the caribou's calving grounds were, and where the winter and summer feeding

> grounds were located. The people felt and feel a deep connection to the land and all its resources, a connection they describe as spiritual. They regard the depopulation of the species they hunt as a serious threat to their culture, their identity and their way of life.

[262] Chief Justice Finch also considered the text of Treaty 8 in context. At para. 54, he cited from the Treaty Commissioners' 1899 report to understand the nature of the rights protected in Treaty 8:

> There was expressed [by the Indians] at every point the fear that the making of the treaty would be followed by the curtailment of the hunting and fishing privileges ...
>
> We pointed out that the Government could not undertake to maintain Indians in idleness; that the same means of earning a livelihood would continue after the treaty as existed before it, and that the Indians would be expected to make use of them ...
>
> Our chief difficulty was the apprehension that the hunting and fishing privileges were to be curtailed. The provision in the treaty under which ammunition and twine is to be furnished went far in the direction of quieting the fears of the Indians, for they admitted that it would be unreasonable to furnish the means of hunting and fishing if laws were to be enacted which would make the hunting and fishing so restricted as to render it impossible to make a livelihood by such pursuits. But over and above the provision, we had to solemnly assure them that only such laws as to hunting and fishing as were in the interest of the Indians and were found necessary in order to protect the fish and fur-bearing animals would be made, and 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.
>
> (emphasis added by C.J.B.C. Finch)

[263] Most of these aspects of the Commissioner's 1899 report had been cited and discussed in earlier jurisprudence including *Horseman* and *Badger*. Here, however, the Court of Appeal emphasized an aspect of the report that had otherwise been overlooked in the jurisprudence – the assurance that the Treaty would not lead to forced interference with the Indigenous peoples' mode(s) of life.

[264] In examining the nature and scope of the right to hunt at issue, Chief Justice Finch noted that this was an existing right, not an asserted but yet unproven one (para. 129). Consultation must begin from the premise that the First Nation is entitled

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to what has been granted in the Treaty. Chief Justice Finch described the scope of the right as follows at para. 130:

> [130] The Treaty 8 right to hunt is not merely a right to hunt for food. The Crown's promises included representations that:
>
> (a) the same means of earning a livelihood would continue after the Treaty as existed before it, and that the Indians would be expected to continue to make use of them;
>
> (b) they would be as free to hunt and fish after the Treaty as they would be if they never entered into it; and
>
> (c) the Treaty would not lead to "forced interference with their mode of life"
>
> (see *R. v. Badger*, [1996] 1 S.C.R. 771 at para. 39)

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[265] Chief Justice Finch noted that just as the right to hunt must be understood as the Treaty makers would have understood it, so too must the taking up provision and its reference to mining (at para. 134). Referring to *Badger* at para. 55, Chief Justice Finch noted that "although it was expected that some white prospectors might stake claims in the north, this was not expected to have an impact on the Indians' hunting rights." These prospectors would have been using pack animals and working with hand tools; these mining efforts would not have involved road building, excavations, tunnelling, and the use of large vehicles, equipment and structures (at para. 135).

[266] Chief Justice Finch then considered what the assurance of continuity (referred to in *Mikisew* at paras. 47-48), meant. He reasoned as follows:

> [137] It is clear from the above passages that, while specific species and locations of hunting are not enumerated in Treaty 8, it guarantees a "continuity in traditional patterns of economic activity" and respect for "traditional patterns of activity and occupation". The focus of the analysis then is those traditional patterns.

[267] Chief Justice Finch noted that the result in *Mikisew* – that the Crown has a duty to consult with a First Nation when it seeks to take up land pursuant to Treaty 8, and to inform itself about the impact its project will have on the exercise of the First Nation's treaty rights to hunt, fish and trap – "is instructive on this point" (at para. 138). Consultation requires understanding a First Nation's traditional patterns of activity and occupation in order to consider potential impacts to their rights. The draft

environmental assessment report in *Mikisew* implicitly considered those patterns, as it acknowledged the road could diminish the quantity and quality of the wildlife harvested by Mikisew (including fisher, muskrat, marten, wolverine and lynx). It also acknowledged other potential impacts including: fragmentation of wildlife habitat, disruption of migration patterns, loss of vegetation, increased poaching because of easier motor vehicle access to the area, and increased wildlife mortality.

[268] In terms of whether the proposed mining activity would adversely affect West Moberly's rights, the evidence before the chambers judge was that the First Nation had historically hunted caribou in the area, had banned hunting in the 1970s to protect the species, and hoped to resume hunting caribou in the future. The evidence was that the proposed mining programs would have an adverse impact on caribou in the area. Chief Justice Finch concluded that the chambers judge did not err in considering the specific location and species when analysing the right to hunt at issue (at para. 140).

f) Observations Regarding the Jurisprudence

[269] This review of the jurisprudence shows that the Supreme Court of Canada has recognized that the guarantee that hunting, fishing and trapping would continue was the "essential element" that led Indigenous people to sign the treaty (*Badger*, at paras. 39, 82). For the Indigenous people, this was the most important of the promises made in Treaty 8 (*Mikisew*, at para. 2).

[270] The British Columbia Court of Appeal has also recognized that Treaty 8 is not merely about rights to hunt, fish or trap for food; the Crown's promises also included that: the same means of earning a livelihood would continue after the Treaty as existed before it; Indigenous people would be as free to hunt and fish after the Treaty as they had been before it; and the Treaty would not lead to forced interference with their mode of life (*West Moberly 2011* at para. 130).

[271] This recognition of the essential element of the Treaty reflects the common intentions of the parties, and best reconciles their interests at the time the Treaty was

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entered into. The Indigenous peoples were interested in continuing their way of life based on hunting, fishing and trapping, free from interference, as they had lived prior to Treaty; and the Crown was interested in securing a surrender of land, opening the area up for settlement, and ensuring the Indigenous people continued to live off the land and that the Crown would not be responsible for their support (i.e., "not undertake to maintain Indians in idleness" (*Mikisew*, para. 26 referring to the Commissioners' 1899 report)).

[272] While the Supreme Court of Canada in *Mikisew* indicated that Treaty 8 did not promise continuity of nineteenth century patterns of land use, this did not mean that both foundational and incidental elements of that way of life, including the continued existence of healthy environments used for hunting, trapping and fishing and the continuation of other cultural and spiritual practices connected with those activities were not also promised and protected. Indeed the Commissioners pointed to an ability to regulate for conservation purposes, which supports this conclusion. The rights to hunt, fish and trap presupposes those elements, as will become evident later in my analysis.

[273] As noted, Treaty 8 also sets out the government's power to make regulations and to take up land for certain purposes. The jurisprudence is clear that to interpret the regulation making and taking up provisions of the Treaty, the Court must look at what the parties would have understood and contemplated at the time the treaty was signed.

[274] As to the lands that would be "required or taken up from time to time," as set out in *Badger*, the government of the day recognized that the lands covered by Treaty 8 were not well suited to agriculture and expected little settlement in the area (at para. 55). In addition, there was anticipation that some prospectors might stake claims, but it was not expected this would have an impact on or harm Indigenous peoples' hunting, fishing and trapping rights (at para. 55). This point is reinforced by Chief Justice Finch in *West Moberly 2011* at paras.134-135, where he noted that those prospectors would have been using pack animals and working with hand tools

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– activities that bear no resemblance to today's mining and oil and gas efforts. From the perspective of the Indigenous people, they anticipated that most of the area covered by the Treaty would remain unoccupied and be available for hunting, fishing and trapping.

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[275] The courts have also clarified that the right to take up land is not an "independent" right, but rather one that exists in relation to or that is competing or conflicting with the protection of hunting, trapping and fishing rights (*Halfway*, at para. 136). In *Mikisew*, the Supreme Court of Canada referred to the "uneasy tension" presented by these opposing rights, and noted that this will need to be managed as part of an ongoing relationship (at para. 25). It is also clear that the right to take up lands is not absolute or unrestricted, and that it cannot be used to make the constitutional protection of Indigenous hunting, trapping and fishing rights meaningless. The Crown's power to take up lands must be exercised in a way that still honours the essential guarantee and promise to the Indigenous people.

[276] Similarly, in terms of the kinds of regulations the parties' anticipated the Crown would pass, these were intended to be laws that were "in the interests" of Indigenous people and were necessary to protect and conserve the wildlife on which they relied (*Badger*, at para. 39). Such regulations ought to ensure that the Indigenous way of life based on hunting, trapping and fishing is respected (*Horseman*).

C. The Concept of Way of Life

[277] I move now to consider Blueberry's way of life.

[278] The concept of "way of life" – like that of culture – is a difficult one. In *Mitchell*, Chief Justice McLachlin, citing Russel Lawrence Barsh and James Youngblood Henderson, noted that "[c]ultural identity is a subjective matter and not easily discerned" (at para. 32). In *Sappier*, Justice Bastarache noted "[w]hat is meant by 'culture' is really an inquiry into the pre-contact way of life of a particular aboriginal community, including their means of survival, their socialization methods, their legal systems, and, potentially, their trading habits" (at para. 45).

[279] In terms of the specific way of life that was protected by Treaty 8, I accept the definition put forward by Dr. Ridington that mode of life involves looking at how a people make a living, group organization and the relationship between culture and ecology (as discussed below).

[280] Providing specificity to what is meant by guaranteeing the continuation of a *way of life* based on hunting, fishing and trapping requires a consideration of the evidence presented by Blueberry members themselves about their way of life and by the anthropologists on whose opinions the Plaintiffs have relied. This evidence is to be considered for what it reveals of the "traditional patterns of activity and occupation" and "traditional patterns of economic activity" (*Mikisew*, para. 47); that is, the conditions existing at the time the Crown promised Indigenous people they would be just as free to hunt, fish and trap after the treaty as before and that there would be no forced interference with their way of life.

[281] In looking at the traditional patterns, I am mindful that way of life, like culture, should not be about a fixed inventory of traits or characteristics. It is not about looking for a "traditional" way of life frozen in the late nineteenth or early twentieth century.

[282] These "traditional patterns" reflected in their way of life necessarily evolve. As Mr. Brody noted: "[h]uman social and economic systems are never static; curiosity, invention and adaptability are always at work… the idea of a fixed 'tradition' that is compromised or fractured by the 'modern' is misleading." Nor did Treaty 8 promise unaltered or "fix[ed]" continuity of nineteenth century patterns of land use (*Mikisew*, at para. 32).

[283] Before moving on to discuss the particulars of Blueberry's way of life, it is necessary to include some of the Nation's history following its adhesion to Treaty 8. It should be noted that the history of the last 120 years since Blueberry's ancestors entered into Treaty 8 cannot be recounted in a few paragraphs. That said, certain aspects of this history must be summarized to provide context for the evidence provided by Dr. Ridington, Mr. Brody and Blueberry members.

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1. Brief History Since 1900

[284] In 1914, the Fort St. John Beaver Band (composed of what is now Blueberry River and Doig River First Nations) selected a reserve. The reserve was set aside for the Band in 1916. That reserve (referred to as Indian Reserve ("IR") 172, the Montney Reserve, and *Suu Na chii K'chi ge* in Dane-zaa) is known as the place where happiness dwells and was a very important place both ecologically and culturally to Blueberry's ancestors and to its members today.

[285] In the 1940s, IR 172 was surrendered to the Crown, and in the following years the land was distributed to veterans for settlement. Blueberry and Doig River were provided with replacement reserves, including Blueberry's main reserve, IR 205. Blueberry elders interviewed by Dr. Ridington in the 1960s and 1970s spoke about not understanding the transaction involving IR 172 and why this was no longer their land.

[286] In the late 1940s oil companies began exploring for oil and gas under the lands that were formerly IR 172. Oil and gas were discovered in 1976. Aspects of this history are discussed in *Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development)*, [1995] 4 S.C.R. 344 and *Doig River First Nation and Blueberry River First Nation v. Her Majesty the Queen in Right of Canada*, 2015 SCTC 6 and 2018 SCTC 5.

[287] In the late 1970s, a sour gas leak forced the evacuation of the Blueberry community from IR 205. The community was moved from beside the Blueberry River to a different location on IR 205. Community members who testified at trial referred to these locations as the "old reserve" and the "new reserve."

[288] Two other changes in the first half of the twentieth century affected Blueberry's land use: trapline registration and highway construction. In the mid-1920s, with non-Indigenous trappers moving into northern British Columbia, the provincial government first introduced a trapline registration system. As Mr. Brody noted, the introduction of the trapline system was an attempt to bring Indigenous practices in line with colonial

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ideas of ownership and exclusivity, and represented a “direct attack upon and restriction of Indian life.” Government officials, however, urged Indigenous people in northern BC to register traplines, and thus secure their right to harvest the furs of animals in those mapped and licenced areas. Elders informed Mr. Brody they did so believing this would secure their Treaty 8 rights. For Blueberry, eight traplines were registered. These traplines are understood to be group or extended family traplines.

[289] In the 1940s, the United States military completed construction of the Alaska Highway, running northwest from Fort St. John, providing overland access to Alaska. The highway opened up the Blueberry Claim Area to vehicles and settlement.

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2. Particulars of the Way of Life Based on Hunting, Fishing, and Trapping

[290] As reviewed, in the lead up to the Treaty and at the time the Treaty was signed, the Crown assured the Indigenous people that they would be able to continue their mode of life free from forced interference. The specifics of what that mode of life entailed, however, were not discussed or set out in depth, and the parties today bring different interpretations to what mode of life means and what it was.

[291] The Province argues that Blueberry has failed to define the content of the mode of life. This argument, however, fails to take into account Blueberry’s detailed June 9, 2017 responses to the Province’s demand for particulars; the evidence Blueberry led from Dr. Ridington, Mr. Brody and community members; as well as its final arguments that shed further light on how it understands the concept of mode of life.

[292] On February 10, 2017, the Province issued Blueberry a demand for particulars. The demand and Blueberry’s response were included in the Trial Record. The Province sought particulars on, among other things:

a) the specific cultural and economic activities Blueberry alleges could no longer be meaningfully pursued;

b) the specific locations where those cultural and economic activities were previously pursued; and,

c) Blueberry's preferred means of exercising their claimed treaty rights.

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[293] On June 9, 2017, Blueberry responded. In answer to question 1(a) about the cultural and economic activities Blueberry alleges can no longer be meaningfully pursued, Blueberry wrote as follows:

> The primary cultural and economic activity that the Plaintiffs can no longer meaningfully pursue is the carrying on of a mode of life based on a fundamental reliance on lands and waters within the Territory and traditional patterns of land use while engaging in the meaningful pursuit of traditional activities including hunting, trapping, fishing, gathering plants and berries, camping, processing that which was harvested, spiritual practices, and family/educational practices, including the teaching and passing on of knowledge to younger generations of plaintiff members as to how this mode of life is or may be properly conducted and continued. The plaintiffs say that the holistic pursuit of this mode of life is a single cultural and economic activity, protected by Treaty 8 (the "Treaty"), that can no longer be meaningfully pursued.
>
> For additional particulars on this mode of life, please see the answer to question 26 below concerning the plaintiffs' preferred means of exercising their right.
>
> Further and in the alternative, other or included cultural and economic activities that can no longer be meaningfully pursued are hunting, trapping, fishing, gathering plants and berries, camping, processing what which was harvested, spiritual practices and family/educational practices.

[294] In answer to question 1 about the specific areas within the territory where Blueberry alleges it can no longer meaningfully pursue its cultural and economic activities, Blueberry listed the following places within the Blueberry Claim Area:

- Lower Beatton River watershed;
- Lower Halfway River watershed;
- Upper Beatton River watershed;
- Upper Halfway River, Upper Sikanni Chief River and Upper Prophet River watersheds;
- Lower Sikanni Chief, Kiskatinaw River and Milligan Creek watersheds;
- Upper Peace River and Peace Arm watersheds; and

- Upper Peace River, Lower Peace River, Kiskatinaw and Pine River watersheds.

[295] At 1(b), Blueberry added:

> The cultural and economic activities were pursued throughout the Territory in the watersheds set out above, at times and places determined by personal or family preferences, personal or family knowledge of the Territory, the time of year, the seasonal availability of resources, the behaviour of wildlife, accessibility of specific regions within the Territory, the effort of pursuing these economic activities in a particular area versus the expected return or benefit of that effort, and the need to leave areas to fallow for rejuvenation.

[296] In answer to question 26, which sought particulars of Blueberry's preferred means of exercising treaty rights, Blueberry wrote as follows:

> The plaintiffs' preferred means of exercising their treaty rights, including those cultural and economic activities identified in response to question 1(a) above, are:
>
> - the freedom and ability to travel through the Territory for the purpose of going to and using places that the plaintiffs were taught by their families and ancestors to hunt, trap, fish, gather, camp, process that which was harvested, engage in spiritual practices, and family/educational practices, including the teaching and passing on of knowledge to younger generations of plaintiff members as to how this mode of life may be properly conducted and continued;; [sic]
> - the ability to return in the future to those places because of the inherent value in those places including the value established by proximity to the plaintiffs' home community, unobstructed travel ways (including rivers and trails), fresh clean water, mineral licks, and natural continuity in mature forest cover and edge habitat;
> - the ability to find those places in a sufficient state of ecological health that they can support the human and wildlife movement and habitation required for the uses described in response to question 1(a) above;
> - the ability to leave places undisturbed for a period of time to allow them to fallow and rejuvenate and move to other places to pursue the cultural and economic activities;
> - the ability to pursue this same pattern of land use in different places throughout the Territory so as not to exhaust the resources of a particular place;
> - the ability for different plaintiff members or families to pursue this mode of life in different areas of the Territory, such that the entire plaintiff collectivity is not focussed on or confined to a specific area at any one time; and

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- the ability to undertake these activities with the reasonable expectation that, with the reasonable exercise of skill and knowledge, the plaintiffs would be able to harvest wildlife and plants of a quantity and quality that the effort and expense of undertaking the activities was reasonably warranted.

[297] These responses identified specifics of a mode of life that was then testified to by Blueberry members, and their experts.

3. Crown Knowledge of Way of Life at the Time of Treaty

[298] The Treaty Commissioners did not have an in-depth understanding of the lives of the Indigenous people who lived in the area to be covered by Treaty 8. Theirs was not akin to the knowledge and understanding of the people themselves, who understand their culture innately, who could describe its elements, and who could say what that culture or mode of life means to them.

[299] The Commissioners did, however, understand the Indigenous people who lived in the area that would be covered by Treaty 8 “lived a free life.” Their freedom was important to them and they spoke about it regularly. They were concerned that entering into the Treaty would lead to being confined to reserves, and unable to access the territory on which they depended. They were also concerned that the Treaty may result in enslavement. The Commissioners understood that the Indigenous people wanted to be free to “roam” over their territory as part of their use of the territory.

[300] The Commissioners also understood that the Indigenous people were hunters, fishers and trappers, and that these activities provided for their subsistence. Theirs was a “forest and river” life and they depended on the various environments found within the territory to be covered by the Treaty. They recognized that “they live by hunting,” that these activities constituted their “vocations,” and they reassured Indigenous people that they “would be as free to hunt and fish after the treaty as they would be if they never entered into it.”

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[301] The Commissioners referred to protecting both the Indigenous peoples' "mode of life" and their "means of livelihood" (see, for example, the Commissioners' 1899 Report cited earlier in these reasons where both terms are used, and where reference to the Treaty not leading to any "forced interference with their mode of life" follows the discussion of being "free" to hunt and fish.) This suggests that the Commissioners recognized that mode of life and means of livelihood were related but distinct concepts. Part of the Indigenous peoples' mode of life was about how they made a living, but there was more to the idea of mode of life than economic and physical survival.

[302] In preparation for the Treaty, the Commissioners suggested advising settlers that the forests and game were to be protected (see, for example, McKenna's April 17, 1899 memorandum referred to earlier). They told the Indigenous people that they would be making laws and regulations to protect and conserve wildlife, and that the Indigenous people too would be subject to these laws. The government knew, from reports received from fur traders and the Police, that the Indigenous people living in and around Fort St. John were hunting people who relied on moose, deer, caribou, mountain sheep, and a variety of other resources including bear, rabbits and beaver. They knew that some years – particularly in the late 1880s and early 1890s – when game was not plentiful, starvation was not uncommon. In other years, such as 1899, hunting near Fort. St John along the Peace River was particularly good. Indeed, that year the Indigenous people who traded at Fort St. John decided to go hunting rather than wait for the Treaty Commissioners to visit. Fundamentally, the Commissioners understood that hunting and fishing was critical and was a key element of their mode of life.

[303] They also knew enough about their way of life to understand that it required freedom of movement throughout the land, a healthy environment, and ample wildlife upon which they could depend. It entailed all of the components that were well evident to the Treaty Commissioners who went out and who even sent word ahead to try and appease the First Nations and address their concerns about their way of life

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being curtailed. They didn't have any question about what this way of life was that they were promising would not be encroached upon or curtailed.

[304] There is no doubt that the documentary evidence and the expert testimony surveyed above supports the conclusion that the emphasis of the June 20, 1899 meeting at Lesser Slave Lake was on reassuring the Indigenous peoples that their freedom to carry on their mode of life as in the past, including through hunting, fishing and trapping, would be intact.

[305] While the Province has consistently maintained the Treaty foreshadows change and is about balance, this does not preclude a finding that the Treaty protects a way of life based on hunting, fishing and trapping. The Province's emphasis both that change was foreshadowed and that it is trying to achieve a balance must recognize and uphold that fundamental promise.

[306] This conclusion, as set out earlier, is also supported by the key jurisprudence on Treaty 8.

4. Blueberry's Evidence and Perspective on its Way of Life

[307] Seven Blueberry community members provided evidence in these proceedings. Some of that evidence related to their way of life, and some related to the difficulties they have experienced in exercising their treaty rights and the changes they have observed on the ground. As noted earlier, two anthropologists, Dr. Robin Ridington and Mr. Hugh Brody also testified. This section begins with the evidence provided by Dr. Ridington and Mr. Brody.

[308] I note at the outset that Blueberry is composed of descendants from both the Cree and Dane-zaa peoples. Many Blueberry members, including some who testified at trial, have both Cree and Dane-zaa ancestry, and identify as Dane-zaa. I accept Mr. Brody's evidence that, by and large, there is no difference in the way that Blueberry families with Cree ancestry or Dane-zaa ancestry use the land, or their

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patterns of seasonal movements. As the experts and witnesses referred to Blueberry's culture being a Dane-zaa culture, the Court will use similar terminology.

a) Dr. Robin Ridington

[309] Dr. Ridington was qualified as an anthropologist and ethnographer having particular expertise respecting the Dane-zaa people of northeastern BC. In 1964-1966, he spent 15 months living with the Dane-zaa communities of the Fort St. John Band (now Blueberry and Doig River First Nations), doing ethnographic research known as "participant observation." This work was the basis for his 1968 PhD thesis entitled "The Environmental Context of Beaver Indian Behaviour" which describes Dane-zaa hunting strategies, seasonal rounds, group formation, social organization and oral tradition.

[310] Dr. Ridington was a compelling witness who provided evidence, which I accept, based both on his studies and his direct experience.

[311] Dr. Ridington has maintained a connection with the Dane-zaa ever since his work in the mid 1960s. He has regularly participated in Blueberry and Doig First Nations culture camps. Dr. Ridington has had the opportunity to interview and record numerous Dane-zaa elders including Ray Acko (who was also known as Aku and who lived from 1879 to 1973), Charlie Yahey (who was Blueberry's last known prophet or dreamer, who lived from 1887 to 1976, and from whom many of the Blueberry witnesses who testified in this proceeding are descended), Mary Pouce Coupe (who lived from 1890 to 1977), Augustine Jumbie (who lived from 1895 to 1988), Marguerite Yahey Davis (who lived from 1924 to 2003), Tommy Attachie (who lived from 1943 to 2017), Billy Attachie, and William Davis.

[312] He has also written several books and articles about the Dane-zaa people including: *Trail to Heaven: Knowledge and Narrative in Northern Native Community* (1992) and *Where Happiness Dwells: A History of the Dane-zaa First Nations* (2013, with Jillian Ridington). He has been qualified as an expert anthropologist and

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ethnographer specializing in the Dane-zaa people in the BC Supreme Court in *West Moberly 2017* and in the Specific Claims Tribunal.

[313] Dr. Ridington's opinion on the Dane-zaa way of life in the 1900s was based on 50 years of fieldwork.

[314] Dr. Ridington described the concept of mode of life as dealing with the relationship between culture and the natural ecology, and being about how culture enables a people to make a living. He testified as follows:

> Q: … What is the mode of life? What do you take to be the mode of life?
>
> A: It's the economy that is how they make a living, being hunting and gathering people, and trapping as well. It's band organization, how groups come together and disburse. It's kinship. It's culture. But pretty much under the category of what I would call – an anthropologist would call cultural ecology, mode of life is the relation between culture and the natural ecology. So how people adapt to the limitations and opportunities provided by hunting and gathering economy. So mode of life is fundamentally how you make a living but also how your culture enables you to do that.

[315] In his report, Dr. Ridington noted that anthropologists who look at how humans interact with their natural environments do so through the perspective of "cultural ecology," and that this perspective views culture in relation to the limitations and opportunities provided by the natural environment.

> Q: And then you refer to cultural ecology…Dane-zaa cultural ecology. Could you explain what you mean by cultural –-
>
> A: Yeah, I cite Julian Steward here who coined the term. And cultural ecology is really how culture enables people to adapt to an environment. It is particularly applicable to hunting and gathering cultures…

[316] Dr. Ridington explained that one of the central themes of his work is the relationship between the culture of a hunting and gathering people and the environment on which they depend. He looks at how a people's world view (or religion or spiritual traditions) help them relate to their environment and are part of their adaptive strategy.

[317] Dr. Ridington noted that the Dane-zaa and their ancestors have lived in the upper Peace River area for over 10,000 years, and that the upper Peace River

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environment has been remarkably stable during that time. Dr. Ridington referred to the Dane-zaa as Arctic Drainage peoples who did not "claim" certain resource places, but rather shared them. He described the Dane-zaa as a linguistic group within which there are kinship relationships and cultural connections. These kinship relationships are distinct and not necessarily based on blood relationships. He described the flexibility of group organization historically among Dane-zaa. Group organization was responsive to and adapted to resource abundance and use. Dr. Ridington noted that the Dane-zaa people travelled and made contact across a wide area, though had lesser kinship the further away they were from the areas they habitually used.

[318] Dr. Ridington noted that central to understanding how the Dane-zaa lived at the time they signed Treaty 8 in 1900 were the concepts of: seasonality, scheduling of resources, and adaptation to edge zone environments.

[319] Practicing seasonality means moving to areas where resources are found in particular seasons, and taking advantage of resources that are available in one season, but not necessarily in another. Scheduling of resources requires planning seasonal rounds to ensure a steady supply of fish, game and plant resources. Adapting to edge zone environments means using resources from a variety of adjacent ecological zones (such as prairies, mountains, lakes and muskeg environments). Tying these concepts together, Dr. Ridington wrote: "[a]n important part of an edge zone strategy is the scheduling of resources to be harvested during a well-planned regime of seasonal rounds."

[320] Central to these concepts is movement. The Dane-zaa people were constantly moving throughout the territory to access a wide diversity of resources from different environments. They would move from one ecological zone to another selectively harvesting game, fish and plants in a way that both maintained and maximized the potential availability of resources for current and future subsistence needs.

[321] Dr. Ridington's evidence is that scheduling of resources was and continues to be integral to the way Dane-zaa think about their relationship to the environment.

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Hunters and elders maintain an awareness of an area's resource potential and are careful not to overhunt, so as to maintain healthy breeding populations.

[322] Much of Dr. Ridington's report focussed on what he had learned from the many elders he had interviewed over the years who shared their "wise stories" with him. He noted they eloquently described a way of life based entirely on hunting, fishing, gathering and trapping.

[323] In his report, Dr. Ridington included a lengthy transcript of an interview with Ray Acko (also known as Aku) who was a member of the Fort St. John Band and was living on the Doig River reserve in the 1960s. Aku, who was born in 1879, was a young adult at the time of the Treaty. He spoke about the Dane-zaa way of life at that time. Aku's story provides a rich description of a way of life governed by the seasons. (For ease of reading, I have inserted paragraph breaks, though these are not included in the transcript included in Dr. Ridington's report):

> Early spring, when the leaves start growing and the sap is on the poplar trees, when the leaves are full grown and the sap is full, people all get together and move to Charlie Lake, where the creek joins the lake. Where the town is now. Just a little ways up the creek, that's where they used to camp. People all get together, all the older people, they all get together. Lots of old ladies, lots of young boys. Lots of Dane-zaa there. Lots of people. …
>
> …In Charlie Lake, when the leaves are small, people used to camp there for the fish. They killed lots of fish there and then they fixed it up. They make fish drymeat. …
>
> When women make drymeat, they do the same thing with fish. They keep on making it and making it. When, after they make lots of fish drymeat, after the leaves are big, people all move up to wherever they are camping. There were no groceries. That time, no flour, the groceries you buy from the store now. There was nothing that time. With no groceries, what are the people going to eat. They just live on the fish drymeat. Fish and meat were our groceries.
>
> Then they moved way back in the bush. After they killed lots of moose and made lots of drymeat when the berries were all ripe, they went back to Dane-zaa nané?, Su Na chii k'chige [The Place Where Happiness Dwells, also the name for the Montney Reserve, former IR 172]. They picked berries on all those hills (east of the reserve). They crossed towards where there are lots of lakes, (*Megawontlonde*) towards Cecil Lake. All the women picked berries. All the days they just kept doing that and the men hunted bear. There were no white people that time. Some of the people hunted bears. There were lots of bears on the hills. Some of them were fat already. After the berries were over, then they made bear grease and drymeat.

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> Summertime when they moved camp, they brought all the drymeat and grease to where they would spend the winter. It was already winter.
>
> In the wintertime they made log tipis for themselves, where they were going to stay in the winter. They had lots of grease and drymeat. The berries, too, they dried them and made them like flour. Sometimes they lay the berries on a tarp and they dry them like that. They boiled the berries and then dried them flat. Where it was cracked, they patched it with berry juice.…They used birch bark to make panniers and baskets and they filled these up with berries. They fixed berries two different ways. One was dry and the other flat, like pemmican. Those berries and meat they put it in a cache where they are going to spend the winter. They are always doing these things and that's why they lived well in the wintertime. And they made pemmican too with the drymeat. Those women made the pemmican. Good pemmican. Drymeat pemmican. They made it with grease and dried berries mixed… Even a small piece of pemmican, you carry it when you go hunt. There were no groceries in the wintertime.
>
> That is how the people used to live. If a person doesn't do that, then he's hungry. Then we'd have to move out to the mountains to make drymeat. That's where we made drymeat. We'd eat the fish drymeat when we were traveling and then we got moose far away, the other side of Grande Prairie at *Tl'ok'ih Saahgii* river. The women picked berries and dried them for winter. We mixed it with bear grease. There were lots of bears in the saskatoon berries. It was around August time. We killed lots of bears and cached the berries and drymeat and we made log tipis for the wintertime.

[324] From Dane-zaa elders Dr. Ridington learned how access to fish, game and plant resources was important not only for subsistence, but also for cultural and spiritual reasons. Dr. Ridington referenced an interview with Charlie Yahey, Blueberry's last prophet or dreamer, making the connection between hunting and communal activities of singing and dancing. He said, in part, "…just like white people feed chickens, that's how God [*Yagesatiin* – Sky Keeper] feeds us moose. That's why we have to keep singing and dancing, so he will give us moose. If we don't, it will be hard to get moose. You will miss them, or they will run away, or it will be hard to see any."

[325] Dr. Ridington also noted the relationship between hunters and the spirits of the animals they hunt is an important part of Dane-zaa identity. Before going on a hunt, the hunter dreams of contact with the spirit of the animal – where their two trails meet. In order to succeed on a hunt, the hunter negotiates a relationship with the spirit of the animal to be encountered. Animals willingly give themselves to hunters

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who have treated the animals they have killed with respect and been generous in distributing meat.

[326] An important part of the Dane-zaa's cultural way of life included the summer gatherings where Dane-zaa people come together to camp, share stories, dance, drum and sing led by songkeepers or Dreamers.

[327] Dreamers are an important part of the culture. Charles Yahey was the last known Dreamer. As Dr. Ridington explained, these gatherings were and are of fundamental importance to maintaining Dane-zaa social and cultural identity. It was here that they developed, maintained and shared the language, culture, spiritual and other values that identified them as a people.

[328] He described how in the 1960s, Dane-zaa people held summer hunting camps which they would travel to by horseback, since few, if any, had drivers' licences. He noted that these camps were maintained today, but access was now by vehicle, rather than horse. He also noted how in winter, families maintained winter trapping areas and trapping cabins at various locations in the boreal forest.

[329] Dr. Ridington provided evidence about important Dane-zaa hunting, fishing and gathering locations. He referred to the Peace River, Beatton River (earlier called the Pine River) and tributaries such as the Doig and Blueberry rivers, Charlie Lake, Stoddard Creek (where there are weirs), Fish Creek (where there are weirs), the Many Lakes area (in the Beaver language, *Megawontlonde*), Cecil Lake and Boundary Lake as being important fishing areas. He noted that the Upper Beatton watershed, in particular, was an area used for hunting and trapping.

[330] As for species harvested, Dr. Ridington noted that in the mid to late 1960s and early 1970s, moose, deer, caribou, beaver, rabbits, and grouse were all regular parts of the Dane-zaa diet, along with berries picked in season. At this time, he estimated that more than half their food came from game (or "country food"), making it a substantial part of food supply and culturally important beyond its calories. By the 1960s and 1970s, farmers had begun to clear the land, but sufficient habitat

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remained within a day's travel from the reserve to sustain a regular supply of moose, fish, grouse, beavers, and rabbits. Dr. Ridington's report also sets out some of the plant species gathered by Dane-zaa, such as the inner bark of poplar trees (*k'anih or kinne*), cow parsnip (*tsuntle*), and a variety of berries (Saskatoon, blueberries).

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b) Mr. Hugh Brody

[331] Mr. Brody was qualified as having expertise in anthropology with particular experience of observing and recording aspects of Dane-zaa First Nations in the North Peace of British Columbia.

[332] Like Dr. Ridington, Mr. Brody engaged in participant observation. In particular, Mr. Brody's experience with the Dane-zaa dates back to 1978, when he spent three years living and working in northeastern BC coordinating land use occupancy mapping for certain Treaty 8 communities, including Blueberry.

[333] Mr. Brody's work in Indigenous communities in northeastern BC arose in the aftermath of the Berger Report into the proposed Mackenzie Valley Pipeline, for which he had been a consultant.

[334] In particular, in the mid 1970s, consideration was being given to routing an energy corridor along the Alaska Highway, through the territory covered by Treaty 8 in northeastern BC. At the time, there was very little anthropological literature about the Indigenous peoples of that area. The Union of BC Indian Chiefs advocated for gathering baseline data about the Indigenous communities who stood to be affected by such a large-scale development. Mr. Brody was hired to research this and conduct a study, and funding was provided by the federal department of Indian and Northern Affairs.

[335] He produced a report on his research for the Vancouver office of the Department of Indian and Northern Affairs in 1980. This research also formed the basis for his book, *Maps and Dreams: Indians and the British Columbia Frontier* (Vancouver: Douglas & McIntyre, 1981). Mr. Brody noted that at the time of his study

both governments and anthropologists were aware that northern hunting communities' connections with and reliance on their land and resources was hard to represent. Unlike farmers who seek to transform and control the landscape, Indigenous hunting people are committed to keeping everything the same and predictable. In addition, hunting people leave very little indication of having been on the land, and Mr. Brody's challenge with in the study was to make the invisible visible. The report and maps produced during the 1978-1981 time period sought to reveal the extent and nature of the Dane-zaa land based economy; and to "represent their relationship to their lands in some way that was visible."

[336] Mr. Brody lived with a family on the Halfway River reserve, and made visits to other communities, such as Blueberry where he also observed and participated in community life. As part of this work, Mr. Brody also conducted a household economic analysis to provide a profile of economic life within Treaty 8 families and communities.

[337] Mr. Brody provided direct evidence on a number of facts that are set out in his 1980 report and in *Maps and Dreams*. Mr. Brody's expert report filed in these proceedings provides his opinion on "the carrying on of the mode of life referenced in the terms of Treaty 8" and includes several of the maps included in *Maps and Dreams*.

[338] Mr. Brody also provided testimony from his studies and direct experience. He was a thoughtful and measured witness, whose testimony was helpful to this court.

[339] Mr. Brody's evidence countered the notion, expressed in some of the historical record, that the Indigenous people living in the territory covered by Treaty 8 "roamed" over the lands. Instead, according to Mr. Brody, the Dane-zaa seasonal round shows a planned and patterned movement on their territory, with certain activities occurring at certain places at certain times every year.

[340] In his report, Mr. Brody noted that the seasonal round is the starting point for understanding Dane-zaa's mixed economy. He testified as follows:

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> … I think I should begin by saying that one of the ways in which hunting peoples have often been misunderstood, and certainly you can see the Dane-zaa being misunderstood in the correspondence that we referred to earlier, in 1925 to '33, a misunderstanding that centres on the idea that they roam freely over a huge territory without – in a fully nomadic manner, and that they just go here or there where the spirit or mood takes them.
>
> In fact, their movements in their territories are very patterned and there's a set of areas that they like to go to at particular times of year. And if you look at the times of year, you can see a seasonal round with a dry meat hunting camp – set of camps, dry meat being the central activity in the autumn. So there are camps and areas of land use that pertain to that activity at that time of year.
>
> And then we move into winter, the tendency to shift to trapping for fine furs and hunting areas that are good in winter, the second phase of the year, in the middle of which there would usually be trading.
>
> And then a spring hunt centred on beaver, the third phase of the year. And again there will be ideal locations, and that's cabins that pertain to the spring hunt.
>
> And then a summer area which tends to be relatively slow in activity and often includes areas where people gather to meet in larger numbers on the gathering grounds.
>
> So you can understand this as a seasonal round and a typical pattern of activities in which different parts of the territory are being used at different times…

[341] What Mr. Brody's research revealed with regard to the seasonal round, and what is depicted on the maps and diagrams produced as part of his research, was the growing importance of the reserve, over time. In particular, in the 1960s and 1970s, the Dane-zaa people spent more time away from the reserve engaging in different land-based activities. In the late 1970s, while the Dane-zaa still engaged in the land based activities, they returned to the reserve in between activities in higher frequency.

[342] Mr. Brody noted that Dane-zaa considered the land to be abundant and the wildlife plentiful and they practiced selective harvesting. In the 1970s and 1980s, the Dane-zaa hunted moose, deer and rabbits, and trapped primarily beaver, but also lynx, marten and otter. Mr. Brody was aware of the Dane-zaa also hunting caribou, but he did not participate in any such hunts.

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[343] Mr. Brody's evidence on harvesting and abundance was:

> … That was very much part of a pattern of harvesting. People decided how much they wanted to take, how much they needed, how much they could process and that's what they would take. Opportunities to kill when they met that need were passed up on….
>
> And I think what's striking when I think back to these – to this experience I had of the Dane-zaa system were that they thought of themselves as living in a land that was pretty abundant of a – wild life was plentiful, the game they wanted to hunt was plentiful, and that when they needed to, they could go and get what they needed. And if they needed a lot, they could do that, and if they didn't need a lot, they wouldn't take a lot, they'd leave it.

[344] As to knowing where to hunt, Mr. Brody noted this depended on a whole range of information about where people have been hunting, and where they've been successful and unsuccessful in the last days, weeks and months. It also depended on information about where the animals tend to be at any time of year, looking at much longer time depth. All of this kind of information was shared through stories and would build a picture of information that would guide decision-making as to where to hunt and set up camps.

[345] Mr. Brody emphasized the importance of stability and "ecological conservatism" to hunting people, such as Blueberry. He noted their conservatism is because their knowledge of their environment depends on that environment being relatively stable:

> … Hunting societies are able to succeed because they know their territory. So the Dane-zaa have in their minds a whole web of information about where animals can be found, where fish might be lying at different times of year, where berries might be appearing. For this system to work, this body of information has to be predictable, so they have to be able to predict to some extent where the animals are, where the fish are. And for it to be predictable, it has to stay the same.
>
> So they need an ecology. They need an environment that is, broadly speaking, stable so that when they go out into the land, they go into somewhere they know. So their knowledge system works, their trails are still there, the fish is where they should be, the moose are using the areas that they've always used. That means that they have a profound commitment to the environment staying the same. That's what I mean by the term "ecological conservatism."

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> … it's helpful to understand it by looking at the contrast of agriculture and farming. Farmers prosper by transforming the land. They come to a landscape, clear the trees, drain the marshes and the fields. They also bring with them the animals and crop that they're going to depend on. The farmer is ecologically radical and will only succeed through this radicalism by transforming the land. Hunter gatherers, and the Dane-zaa are a very good example of this, are committed to the land not being transformed. Now, they can accommodate some degree of transformation by others, as we saw when I was working in northeast BC. There were parts of the territory that had been transformed. *And the people might express unhappiness about some of that, but there was enough of their territory that was not transformed; there was enough of their territory where their knowledge system worked for them to be able to continue to rely on the resources that they regarded as in the heart of their well-being. So to that extent the ecological conservatism of the Dane-zaa was very striking in 1978 to '81.*
>
> (emphasis added)

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[346] While Mr. Brody emphasized the importance of a stable environment for Blueberry's knowledge to have relevance, he also noted that evolution and adaptation to new circumstances was constantly occurring. He testified about the concept of a "traditional" mode of life, if used to suggest a fixed or unchanging way of life, misrepresenting the nature of human life. No human societies are unchanging – they are in a constant state of evolution to cope with the changes they are facing:

> In the case of the Dane-zaa, this is particularly relevant because there was a tendency when I first was working there for people to characterize the Dane-zaa as having been traditional in 1900 at the time of the treaty and by comparison with that they are now modern. *And in fact the literature shows and people themselves told me, that at the time of the treaty in 1900 and indeed long before that, they were already making use of many changes that Euro-Canadian society had brought. They had guns; they had metal knives; they were involved in the fur trade certainly from the 1820s onwards. So people are trading, which means that they are exchanging furs for European goods which means they are incorporating European and Canadian material into their society.* And that would include, as I've said, guns and knives but also things like sugar and tea, tobacco, fabric for making clothes, and in due course, certainly by 1900, debt or cash.
>
> So the so-called traditional economy as often characterized wasn't an Indian economy outside the influences of Euro-Canadian life. It didn't exist apart from or in some kind of defiance of Euro-Canadian culture, but rather was incorporating many elements of it. *So the Dane-zaa in 1900 already had a mixed economy with a profound reliance on their territories, the resources from their territories, but also a profound reliance on trading, on trade goods, and the earning of money*.

(emphasis added)

[347] In this way, change was incorporated into the Dane-zaa way of life.

[348] Mr. Brody described the household economic analysis study that he completed. He indicated the Dane-zaa land-based economy was to some extent invisible, and previously misunderstood. Stereotypes and partial realities held by white observers at the time tended to view the Indigenous people living in northeastern BC as poor and unemployed. This was not the reality he found. The communities were busily employed on their land in their seasonal rounds. It was just that their economic life had long been either concealed or disregarded. The study therefore provided an analysis of monetary value of the harvests from the land.

[349] This research on Dane-zaa social and economic life from the late 1970s and early 1980s revealed that Blueberry members earned nearly three times as much income from land-based activities (i.e., guiding, hunting, and selling furs and handicrafts) as they did from wages and transfer payments from government sources. Mr. Brody estimated that at this time period, hunting and trapping provided Blueberry with approximately 1.5 pounds of high quality meat per person per day.

[350] Mr. Brody noted a profound connection between land based activities and wellness among the Dane-zaa. Dane-zaa elders referred to being on the land as "good medicine." In his report, Brody noted that "[e]veryone thought that to be on the land was to be healthy, have the greatest chance of happiness and, in the end, to be themselves." In his view based on what he observed in the 1970s and early 1980s, engaging in a life based on the land and going on hunting trips contributed to community health and wellness.

c) Blueberry Members

[351] As noted, several Blueberry members testified at trial. At the time of their testimony, these witnesses ranged in age from 15 to 74. The evidence from these community members provided a description of Blueberry's way of life over the last 60

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plus years. They spoke about the places they hunted, fished and trapped, and where their parents and grandparents had done so before them. They also provided their observations of changes to the landscape and the wildlife in the area. They voiced concerns about what these changes would mean for future generations and whether they would continue to be able to sustain themselves from the land, hunt for game, and participate in the activities their grandparents had done.

[352] In setting out some of this evidence, I have quoted directly from the testimony, which more directly and eloquently describes the tenets of the Blueberry members' way of life. I found each of these witnesses compelling and sincere in their testimony.

i. Jerald Davis

[353] Jerald (Jerry) Davis was born in 1945 at Aitken Creek (Mile 26 on the Beatton River Road). He is the son of Margaret and Pete Davis, and the grandson of Charlie Yahey, the last of the Blueberry Dreamers. He is married to Alvina Davis with five children, and he is an elder in the community. He has worked as a guide outfitter, a farmhand, and a trapper. He is one of the people in the community who teaches the younger generation how to hunt and trap today.

[354] Mr. Davis provided evidence about hunting moose, buffalo and caribou, trapping lynx and other animals in the vicinity of the Yahey trapline and the Davis and Wolfe trapline, and about camping in the bush. He shot his first moose near the Blueberry reserve when he was 10 years old.

[355] Mr. Davis testified about how he grew up living off the land. He referred to this time as "wagon days," before many Blueberry members had cars. He recalled how they would saddle up the horses, and gather a team of horses for the wagon and head to Charlie Lake or other places in the territory to camp, picking different spots year to year.

[356] His testimony painted a picture of summers spent camping, hunting moose, and drying the meat for the winter. And he described how encroaching development,

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in particular oil and gas development and logging, has impacted that lifestyle. He noted the many busy radio-controlled roads built to service the development in the area. His testimony about the changes he has observed to the landscape and how this has affected the ability of Blueberry members to hunt and gather on the land, provided a sense of Blueberry's mode of life prior to such developments, and of the loss they feel.

[357] Mr. Davis testified about hunting for moose, drying moose meat, and the changes he has observed in moose populations over time:

> … People camp for the summer to make dry meat for the winter. After they make the dry meat they keep the dry meat. If they go travelling for a day they have to have that dry meat. But while on a site they kill moose, they keep killing moose to for fresh meat like all the time. That's why this – and those days are easy, easy to hunt. Moose, they don't scare the horses. And there's a lot of them.
>
> … nowadays it's a little tough getting moose. The traffic, and moose have disappeared, of all the noise and all the clear cuts. They – the forestry cleared an area where no animals will stay. If there's a timber in there, that's where they stay in the wintertime to be warm in the timber. After they clear the timber they can't stay in the open. They have to move somewhere elsewhere it's – where they can stay in the winter.

[358] Mr. Davis testified that, in his view, Blueberry's territory has been "destroyed," leaving little to sustain the younger generation:

> … But in this area, northeastern Peace River. That's why this – that's why this whole land itself is so important to us. Until today it's destroyed. What right now I have to say is it's destroyed. It's just like we have nothing left. I don't know what's – the next generation, I don't know what they are going to live on. They have to move – not move, but they have to go farther out to get something to eat. And after all the oil company stop drilling or – he shut everything down, everything went quiet, I don't know whether the animal is going to come back. How long it takes, nobody know.
>
> Right now as I'm speaking I have to say it's just like we are just living by the day or by the – not by the year, but by the day how our country is destroyed. They polluted our country so bad we cannot go out there by the creek and make tea. We cannot drink water anywhere in northeastern Peace River. We have to buy our own water from Fort St. John. So that's what we're – what's happening right now with our – in where we live. …

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[359] He also testified about how certain parts of Blueberry's territory, especially mineral licks and berry patches are no longer accessible because of the pollution from oil and gas development:

> … Moose comes in there, everything come to the lick. That's where close by we kill moose. We call that our fridge.
>
> So and today I cannot ride around anywhere. If I want to ride around I got to take horses up close to the mountain to go ride around down there because of the oil company. They have gates which say poison gas, do not enter. When you ride around by horse they only go 3 or 4 miles an hour. They walk. You can smell that poison gas steady until you go to another one. Keep smelling. And right now we do drive – we drive through those but no, we don't smell. And we cannot camp anywhere because of the polluted the area, there's no water.
>
> And another important thing is too the berries have all disappeared. There's no berries around. The Blueberry River, they call it Blueberry River because of blueberries. So today there's nothing.

[360] He went on to describe the hurt of remembering how things were in the past, and seeing the current reality:

> It is very sad for me to say this now. What will – that's why my kids, I have taught them how to hunt and trap, but what will they trap? What would they hunt for the future? Until oil and gas, what will they do? They cannot regrow nothing. Maybe they will but I don't know how. Nothing will be the same like years back.
>
> I – sometimes I drive around. Some places I can't remember because it's all flat, no trees. What happens if it's all clear cut? I was just hoping if our grandparents sees this today, they wouldn't be happy. Just like me today. I'm not happy what have happened to my country where we live for years. Even before me, my parents and their parents, they have chosen this place northeastern Peace River to survive, the Beaver Indian have picked this place to live…

[361] Mr. Davis also described the importance of the Dancing Grounds:

> A: Dancing Grounds is the place where all the dreamers meet at one time. And from in there Halfway, from Halfway too a bunch of people went in. From Prophet River a bunch of people went in there. From Doig. They all have a big gathering one time for the summer. That's why they have it. They call it Dancing Grounds. When they are singing, people dance. They – just from dancing they dug the ground that deep just from dancing. That's why they call it Dancing Ground. And it's – it's very important for us to save that place. I don't know how far around oil company is not supposed to go near. The chief probably know how far the oil company not supposed to go in there. It's

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> important that we have to save that. Even if we go in there we have to be like – I don't know how to explain it, but it's like you go in court you got to be quiet, you know, it's how it is to us.
>
> Q: Is that a place where Charlie Yahey, the dreamer, had been?
>
> A: Yeah. I mean all the dreamers. They gather. My Grandpa Charlie Yahey, him and all those dreamers. But the last time he put up that he was the last one… (Day 20, p. 45-46)

[362] Despite the changes to the land, Mr. Davis continues to teach younger generations how to hunt and trap and camp in the bush.

ii. Raymond Appaw

[363] Raymond Appaw was born in 1960 and grew up at Blueberry's old reserve. He has spent time hunting on the land every year since he was young. He was taught how to live on the land, how to hunt, and where to look for game by his elders, Charlie Yahey, John Yahey, Tom Appaw and Angus Davis.

[364] As a young child, Mr. Appaw grew up speaking the Dane-zaa language, but when he went to Indian day school speaking his language was forbidden. At the age of five he spoke little English but was beaten for speaking his own language. He was deeply affected by this experience. Mr. Appaw worked as a hunting guide for many years, starting in the mid-1970s, and in the mid-1990s was awarded a prize for his guiding skills. He has also worked in the oil and gas industry.

[365] Mr. Appaw described Blueberry's way of life as one where members supplied food for their families by hunting moose, and could do so by horseback from close proximity to the reserve. Mr. Appaw testified about how Blueberry members depend on the land – not only for what they can harvest from it, but also for the opportunity to teach younger generations:

> That land is how we raise our kids. What the elders taught us you cannot take that away from us, what we were taught. We depend on wildlife. We depend on everything. That's even the plants. Then if that land is destroyed where do we go? How are we going to teach our young, our generation, our youngest one? How do we teach our grandchildren? Where do you take them? There's clear cut, there's road all over the place.

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[366] Mr. Appaw, like several other witnesses, described Blueberry's hunting areas as their grocery store. He referred, in particular, to hunting on the Beatton River. He testified that moose meat is Blueberry's "main diet" and emphasized that they use all parts of the animal: flesh for eating, hide for making clothing, and bones for scraping. He testified about the abundance of moose in the 1960s and 70s and how scarce they are today. In the 1960s and 1970s, he said, a large family with 15 kids would go through 10 moose a year. These days, he said, large families have to make do with two moose.

[367] Mr. Appaw testified that in 2017, 2018 and 2019 he went out hunting at several different locations, but did not get a single moose. He described a decline in moose populations starting in the mid-1990s. He expressed concerns about the loss of moose habitat. He opined that the animals were ingesting chemicals from oil and gas development and pesticides from forestry and that this was making them sick.

[368] Mr. Appaw also noted how caribou had once been a main source of food and was one of the first animals they would hunt during the year since they were the first to gain weight in the spring. He testified that when he was young, they would hunt caribou around Pink Mountain.

[369] Mr. Appaw testified about how, in the past, he would go hunting on day trips from the reserve. He could also hunt two or three kilometres from the reserve, which is no longer possible. It's now more difficult and expensive to go hunting, as one must travel by car further from the reserve to get to hunting areas.

iii. Sherry Dominic

[370] Sherry Dominic was born in 1970 and at the time she testified was one of Blueberry's elected councillors. Her mother is Louise Cardinal and her father is Tommy Dominic. Her maternal grandparents are Margaret and Pete Davis, and Charlie Yahey is her great-grandfather. Jerald Davis is her uncle. She has two sons, Austin and Kayden Pyle.

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[371] Ms. Dominic testified about the various places she went with her family and later with her former partner (Stanley Pyle) to hunt and fish throughout the territory.

[372] Ms. Dominic testified that when she was younger she went out on the land on a daily basis, mostly with her maternal grandparents. She spoke about going to Mile 38 in the Upper Beatton area to camp, hunt moose and pick berries with her family, and about spending summers in the vicinity of the Wolfe/Davis trapline, near Prespatou. She also spoke about spending time on the land near the reserve and near Wonowon. She testified that these areas are now very different from how they were 30 to 40 years ago. There are now more roads, forestry, oil and gas development, and work camps.

[373] From 1985 onwards, she and Stan Pyle would hunt north of the Beatton River around Mile 43. She described this area as a good place for moose hunting. Like many other places in the territory, there are now more clearcuts near Mile 43. She said the last time they got a moose there was 10 years ago. She also testified about hunting in the Tommy Lakes Road area, but noted she was last there about 10 years ago. She doesn't hunt in that area now because there are too many roads and vehicles, and with that much traffic she doesn't expect to find game.

[374] She also testified how, in the last few years, she has been hunting and fishing at locations further away from the Beatton watershed, at places such as Pink Mountain, Halfway River, Robb Lake, Butler Ridge, and Dunlevy Inlet.

[375] Ms. Dominic spoke of the changes she has seen in the territory from the 1970s and 80s to today. She noted: more well sites, pipelines, compressor plants, clearcuts, and borrow pits.

[376] Ms. Dominic recalled how moose was the main meat growing up, and they would have one to three per year. Twenty years ago they would usually get two moose a year (one to freeze and one to dry). Over the last ten years that changed to one moose every second year.

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[377] Ms. Dominic testified about how she would bring her sons with her to hunt, camp and prepare the meat. They would learn by being present, watching, and helping:

> … we show them – like, when we kill moose they would be right in there, they would be skinning, helping. They know what to do now. Because that's just something we passed down from generation to generations, which is important for my kids. So that way when they have kids they can be able to pass that knowledge down to their children. Just like I was brought up knowing that. And so it is important for my kids to be able to know how to do that as well.

[378] She also spoke about how it's getting harder to teach those skills to the next generation:

> Q:…And is it something that you hope he can continue to do in the future?
>
> A: I'm hoping when he [Kayden] has children his children will be able to go out there and hunt – hunt and whatever they need to do, you know, in order to carry on our tradition way of life.
>
> And that's my hope that his kids can be able to do that because like it's been passed on to me and then so I'm passing it on to my child, and then I'm hoping my child can be able to pass it on to his children and so forth going forward.
>
> Because we're always going to be here. I mean, the First Nations we've always been here and it's something that has always been passed on to us from the generations from my great grandparents.
>
> Q: And is it as easy to teach those things today as it was when you were younger?
>
> A: No, it's not because it's less moose.
>
> Q: And are there as many places to go as when you were younger?
>
> A: No, there's not.

iv. Georgina Yahey

[379] Georgina Yahey was born in 1971 and has always lived on the Blueberry reserve, first at the old site, then relocating to the new site in the mid-1970s. Her parents are Mary Yahey and Harry Chipesia. She has four siblings, including Wayne Yahey. She is the great-granddaughter of Charlie Yahey, and had the opportunity to spend time with him as well as with other grandparents, her own parents, and aunts

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and uncles when she was young. She recalled her grandparents using a wagon and building a teepee whenever they went hunting.

[380] The evidence provided by Ms. Yahey described her early childhood in the 1970s and Blueberry's way of life at that time as a "good life" where community members were fed and sustained by the land. She was taught to respect the land, and described the connection to the land as fundamental to Blueberry's identity.

[381] Ms. Yahey said they used rivers and creeks for water and the woods for heat and were connected to the land and the wildlife. They picked berries and hunted and it was a natural life.

[382] Ms. Yahey described how when she was growing up in the 1970s and 1980s in the summer, hunting parties consisting of several families would head out by horse to hunt, fish, harvest and camp at different locations throughout the territory, including at spots along the Blueberry River, Upper Beatton River, and Aitken Creek. The hunting parties moved around, camping at different locations throughout the territory from year to year. They moved to allow wildlife to repopulate in an area, and because not everything they harvested would grow in one spot. Whole families were involved in these camps, each with duties: hunting, fishing, smoking and drying the meat, and berry picking. At night, they would tell stories of their people and there would be drumming and singing.

[383] Blueberry members hunted primarily moose, and selected camping places with access to water, forest cover, and mineral licks which would attract moose. moose was the main source of meat, and Blueberry members used moose hide to make clothing and crafts.

[384] Ms. Yahey identified and described a moose hide frame and the process for drying and using all parts of the moose. She also described the use of horses for hunting and berry picking. Ms. Yahey said she regularly went off reserve after school to pick berries and dig for roots. In the winter the family would use dog sleds to check the traps "all over the place."

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[385] Blueberry members fished in the lakes and rivers that are found in and flow through their territory, including Charlie Lake, Inga Lakes, Blueberry River, and the Beatton River. Ms. Yahey testified that, since the late 1980s no one fishes in Charlie Lake as the water quality is too poor. In addition, people no longer fish at Inga Lake as it is surrounded by too much development.

[386] Ms. Yahey testified that Blueberry members have cabins near Aitken Creek, which they used when trapping lynx, marten, wolverine, wolves and mink. She noted that Blueberry members no longer trap near Aitken Creek because of the oil and gas development in the area.

[387] Ms. Yahey testified about culture camps the Dane-zaa communities of Blueberry and Doig River have been holding at Pink Mountain since 2000, where community members gather to drum, tell stories, relay oral history, and talk about their hunting experiences. She testified that the communities hold culture camps: “to remind others too that we need to preserve our culture and our traditions, our way of life.” This included the process of drying and using all parts of the moose.

[388] She also testified about the importance of the Dancing Grounds. This was a place that Dane-zaa communities, their Prophets and Dreamers would gather as one, to have pow-wows, trade, and do their planning. She recalled as a child listening to Charlie Yahey sing, drum and tell stories. She testified that the Dancing Grounds are now private land, and cannot be accessed.

[389] Ms. Yahey’s evidence was that over the last 10 to 15 years, the land on which Blueberry relies has been heavily impacted by development. Forests are being logged, water quality is poor or water sources are drying up, lakes are polluted, there are fewer mineral licks, and they are finding increased developments. She noted that it has become harder to find berries and traditional medicines, and that the moose have moved on from certain places.

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[390] She said that she would not hunt near pipelines or gas wells as the air quality is poor and it is dangerous to do so, since a stray bullet could hit critical oil and gas infrastructure, such as compressor stations.

[391] She commented that there was increased heavy industrial traffic on roads, requiring members to have two-way radios to ensure their safety. Not all members can afford to purchase such radios. She noted it was dangerous as huge logging or other trucks have the potential to run drivers off the road if not aware.

[392] She gave an example of a Blueberry hunting party meeting early in the morning to plan and head out on a hunt, but it taking several hours to determine where they could go, since there was uncertainty as to what areas would be accessible, or were now under development, or, in her words “wiped out.”

v. Norma Pyle

[393] Norma Pyle was born in 1972, and grew up at Buick Creek, where she lived until she was 14. Her mother, Alice Pyle, was born at Horse Track on the Sikanni River, and her father, Amos Pyle, was born in Castor, Alberta, but his family moved to the Buick Creek area in the 1930s. Her maternal grandmother, Julian Oldman was Dane-zaa from Halfway River, and her maternal grandfather, Daniel Apsassin, was Cree from Grouard, Alberta, but was raised by a Dane-zaa woman in the North Peace area. Ms. Pyle is one of 11 children. Stanley (Guy) Pyle is her older brother, and Kayden Pyle is her nephew.

[394] Ms. Pyle moved away from Blueberry’s territory for a period to finish high school and work in the forest industry in Alberta. In 2006, she completed a degree in forestry at Lakehead University in Thunder Bay. She received her designation as a registered professional forester two years later. Over the years Ms. Pyle returned to the North Peace area to visit family and to take summer contracting positions. She returned to the Blueberry area permanently in 2006.

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[395] Between 2007 and 2018, Ms. Pyle has worked in various capacities including, as Blueberry's Lands Manager (2007 to 2010, and January 2016 to December 2018), for Canfor (from 2010 to 2013), and as a Blueberry councilor with responsibility for the Lands Portfolio (December 2013 to December 2015, and January 2018 to October 2018). At the time she testified in the summer of 2019, she was employed with Triple J Pipelines as Indigenous and local community relations coordinator.

[396] Much of Ms. Pyle's evidence focused on her work as Blueberry's Lands Manager and as an elected councilor. This section focuses on her evidence relating to the way of life she experienced when growing up at Buick Creek in the 1970s and 80s, and her experience of "relearning" how to hunt and prepare meat in the mid-2000s with her brother Stanley Pyle.

[397] Ms. Pyle recalled her father and brothers hunting moose a short horse ride away from her childhood home. That is no longer possible as farmers' fences prevent much of the access. She recalled how the children in her family starting learning around 5- or 6-years-old to hunt "chickens" (this is a reference to hunting certain birds) with a single-shot .22 rifle and to snare rabbits, weasles and martens. By the time the boys were 11- or 12-years-old they joined their father and grandfather on one or two day hunts for moose. They would head out northwest of Buick Creek by horseback. These were "purpose-driven" trips, as the family needed meat to survive.

[398] Ms. Pyle grew up eating moose, and, if times were tough, deer. The children all helped her mother to make dry meat. Her mother would also flesh the moose hide and make moccasins from it.

[399] Ms. Pyle testified that her family hunted up the Beatton River Road near Miles 21, 28 and 43. She noted "it used to be a prime hunting area for many families, not just ours." She noted that there was an old burn through Mile 43 during the late 1970s or early 1980s and that after the burn there was lots of moose that would come to the area for the new fresh browse, which made for good hunting. The area around Mile

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21 was a “go-to area” for families to camp, but cannot be accessed today, as it’s private agricultural lands.

[400] She referred to another major moose hunting area being the Umbach Creek area due north of their family farm: “that area was very, very good moose country in there. There was – the habitat was prime. So hunting was relatively easy at that time.” She described prime habitat as having creeks, mineral licks, and intact old growth forest which provided thermal cover or protection for the animals during the winter. Much of this area has also since been clearcut.

[401] Ms. Pyle noted that her family would also trap lynx and set snares for wolves in these same areas. In addition, Ms. Pyle also picked cranberries and Saskatoon berries with her family, and her mother would can them.

[402] Ms. Pyle described her experience being away from the territory, and then coming back for visits, and the changes she noticed:

> … I left kind of as a young teenager and coming back as an adult, the changes in that country was very, very stark. Very – like really harsh to me.
>
> I just remember kind of maybe ‘96 or 7, somewhere around there, I came back and my brother and I went out and he said let’s go hunting. I said okay. So we headed up the Beatton Airport Road, and he said well, let’s go down Mile 31. I said okay. So I’m driving and I ended up, I drove right past the road. And he said what is a matter with you, you drove past the road. And I said oh really.
>
> But the problem was for me was that there were so many new roads and clear cuts along that area and pipelines I couldn’t recognize Mile 31 road, because it had changed too. Back in my day it was just a small like one-land road. Now it could accommodate two logging trucks passing each other. It was a very different road. And was hard for me to recognize. It was – there were so many roads, it’s just they were not recognizable. The whole country was just changed.

[403] In the mid 2000s, having returned to the territory, Ms. Pyle got into hunting again and sought to relearn the skills. She described hunting in that time period as not being hard: “if we wanted to go get a moose we could go get a moose.” They would either go into the “really hard country” to get a “clean animal” that had not been around industrial development, or they would go to the mineral licks around Mile 31 or 43 or 81 and could get a moose there.

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[404] Ms. Pyle testified that starting in approximately 2006, she and her brother started paying closer attention to the availability of moose. She testified that into the 2010-2012 period there was a noticeable decline in the availability of moose. In particular, she saw fewer signs of moose. Their trails were not being used anymore and it was harder to find moose browses. In search for moose, they started heading further north to Pink Mountain, the Sikanni River, and the Tommy Lakes area to hunt. Still, they saw very few moose, or signs of moose.

[405] In cross-examination, she testified about how much of the "core" of Blueberry's territory has been destroyed and how members cannot use their "preferred areas" for hunting and trapping as they used to. Instead, in search of wildlife, she testified that members are seeking out opportunities further and further from the core of their territory.

[406] Ms. Pyle testified with much sadness about finding mineral licks in the territory, and particularly the one near Addick Creek, destroyed by people driving through it. She also expressed concern and anger when she recalled visiting the Blueberry River, downstream from the reserve, in 2017 only to find the water had stopped flowing. Ms. Pyle testified that no one in the Blueberry community was aware of that having ever occurred. She said she later learned the water was being piped to a water storage facility associated with oil and gas development several miles away.

[407] Ms. Pyle testified about the 2-day culture camp Blueberry holds at Pink Mountain every year. She described it as an opportunity for young children to be exposed to some of the important cultural traditions such as singing, drumming and tea dances. But she noted that attending a culture camp is not the same as learning culture as part of an everyday life based on growing up on the land. Looking at a photo of four elders drumming, Ms. Pyle said:

> So these individuals were able to learn the skill, these songs, the meanings of them, I guess the rights of them, they were able to learn those because it was part of their life. It wasn't a thing that happened twice a year or two days of a year at a culture camp. It is something that was their everyday life. It was part of them.

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> And they were taught those on this land in the places that they grew up on the land. And they were taught all the teachings that go along with living on the land. It was their life.
>
> Today it's very different. It's very complicated. The opportunities to go out to the land are very limited. The places to go to the land is very limited. The timings, you're really constricted to a very small window of opportunity.
>
> And now, I mean, today, this day and age, for me to go and take my daughter out to go and live on the land for even five days is a challenge. Number one, where are we going to go. Number two, what activity is going to be there to influence my activities and the whole point of being there to hunt.
>
> So these opportunities are very different from when these individuals were young to today. Those teachings were – I mean, it wasn't just something that you, okay, we're going to go to culture camp and learn to drum. These were part of their life. They lived it. That's the difference.

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[408] Ms. Pyle contrasted the culture camp experience with the teaching and learning that happens naturally when families camp and hunt together; learning that happens while choosing a place to camp, or when getting water, or making wood, or scouting.

vi. Wayne Yahey

[409] Wayne Yahey was born 1976 and grew up on the Blueberry reserve. At the time he testified he was one of Blueberry's elected councillors. He is Georgina Yahey's brother and shares her lineage. Mr. Yahey described growing up in the 1970s and 1980s living what he called "a really traditional lifestyle." This involved hunting by horseback to provide meat to the community.

[410] Mr. Yahey comes from a long line of hunters, and is teaching his children to hunt as well. He testified as follows:

> … I come from a long line of successful hunters. My blood, that's my bloodline. And I inherited that so my children inherited that. So that's just the way of life. That's just something I do. It's a lifestyle. It's something that I'm really passionate about, so my kids live that lifestyle too.
>
> Q: So you've been working to teach them how to hunt?
>
> A: I pass on the knowledge that's been taught to me from a lot of skilled bushmen over the years, like my father, my uncles, my grandpa. So a combination of all their skills I inherited, so I teach that to my kids.

> Q: And in doing that why do you take them to areas that you don't hunt anymore? Some of the areas that we've been talking about this morning?
>
> A: Well, I want them to understand and have knowledge of where I went or where I used to frequent. So, I mean, they could – they could have a sense when they're older this is where their dad took them, and this is where it used to be a good hunting area but now it ain't. So I want them to have that, I guess to have that knowledge. They got to know.

[411] Mr. Yahey stated that certain areas in Blueberry's territory have been "devastated," leading to changes in the lives of the Dane-zaa people, including: needing to go further west (and by vehicle) to hunt, which takes more time and money; needing to find new hunting areas and not having access to the "prime habitat" (or what his grandfather called his "freezer"); and losing access to trails Dane-zaa people have used for generations because of more privatization of property.

[412] Mr. Yahey referred to some of the traditional ecological knowledge he had received from his elders, including knowing when to hunt moose based on the presence of a certain leaf that grows and blossoms in mid-July.

[413] He testified about the importance of sharing moose meat, providing moose meat for elders, and of ensuring the meat is "clean." He spoke about the changes he observed in the health of the moose he has hunted and how he needs to hunt in areas further west, but that there is no guarantee of success:

> Around our areas – a few years back I was successful at a moose, but inside the moose the lungs and the liver there were spots; there were block spots and white spots. So I asked my mother, but she said no, we can't – you can't take that meat.
>
> So now every time I hunt for the elders they told me you got to go in the mountains, that's only where they have clean water. That's where they're clean. So that's the direction I've been given. So around the – close by, because of that very reason, the elders tell me I got to go farther west. So to go further west where there's no access by vehicle, by anything, you got to use horses. So you got to go further back in.
>
> Today, and I'm not successful at a moose too, there is no guarantee the further west you go. You see, moose have a lot of challenges today. They have – they have predators. Predators are one of the biggest I guess contributors to their – to their decline in moose. Grizzly bear. Wolf. And then

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> you have – on top of that you have resident hunters. They go back there with horses. So you got – they got a lot of challenges for their existence just to live. So going back there, I don't – back in the day there were a lot of moose.

[414] Mr. Yahey spoke about the importance of particular places, and how it's not always possible to simply take up hunting, trapping or gathering in another area if the one previously used is disturbed by development:

> … [indicating a homestead referred to by Mr. Yahey… where he used to camp in the summer as a child] used to be, like what I mentioned earlier, a prime habitat for the pine marten. Today no more.
>
> I asked my uncle is there another area that you think they moved to. He told me, you know, before how long did it take our ancestors to find that area. He said it's going to – it's going to take just as long for us to find another area to find a pine marten. Because he mentioned to me about a marten. He said when they are clearcutting that area, marten, their safety net is climb a tree. He said when that feller buncher grabs that tree the marten climbs it, what do you think is going to happen to that marten. So that's – that's his way of explaining to me about – because I told him could you just find another area. He kind of – he told me no. And he explained to me about that assessment, his – about his history, what his dad told him.
>
> So this area in particular when – it used to be a prime area where we get our necessities, food. It provided – we call it midnitsu. It's a certain wood that we gather for tanning a moose hide. Only – it only exists in big timber. Where my mother used to learn from her mother to harvest this wood, it's all logged. Nothing. I asked my mother let's go back to that place and she said no, it's logged. And I asked her could we find another place? She told me well, you know, I'm getting old. I can't walk. She said when I was a little girl my grandma showed me that place.
>
> *So the thing that people outside our culture don't understand, they say okay, why don't you just look somewhere else. That's what I asked my mother. That's what I asked my uncle. It's not like that. It's not the case what we do. Because it's a simple answer. I say well, can't you just look somewhere else. It took 100 years in evolution just for us to find it, and then another place, it's – it wouldn't happen. Not going to happen.*
>
> So just to give you a sense of how they explain it to me, how they conveyed their teachings to me, and when I asked them those questions could we just find another place, it's not as easy as it sound. All these areas have a significant value. Buick Creek, not far from our community there's a lake, there's a lake that produces certain – it's a certain plant, an herb. Throughout our whole territory there's the only lake in the northeast that produces that herb, and that herb is for cancer. It's for high blood pressure. It's our herb for everything we use. And that's only one lake. And it's what they – what happened in the last ten years they logged around it so that lake is going smaller. It's drying out. So that's the only – that's the only place in this whole northeast that grow that plant, and that's what we use as a medicine plant to

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> cure our sickness. So that's – when I explain to these areas that's what I'm talking about. There's no other place. They say okay, go find another lake.
>
> (emphasis added)

[415] Mr. Yahey added that the question of selecting another location to hunt or gather is not as straightforward as looking at a map and choosing another place. The important places within Blueberry's territory are ones that have been located over generations:

> … Just like I said, when I always tell my father, my grandpa, is there another place we could look at. It's just not like that. Within my culture it's not an easy answer. It's something I can't really give you answer. Okay, well, we'll go over here and pick a place on the map and we'll go over here, that look good. It's not like that. Over years – over the years when there were no settlers, when there were no people involved, these were the areas that were found. And I inherited that. And there's – I just can't go tomorrow go look for a new place. Say oh, okay, well, this is where they – this is a new place. I'm going to start a new – a new area. It doesn't work that way within my culture. I have – it's generations after generations. It's a place that is shown from me – I don't know how old is that area; probably since we're – God created us.

[416] Mr. Yahey spoke about the importance of trails, such as the one from the Dancing Grounds (at Mile 115) back to the reserve. These trails have been used and maintained by Dane-zaa people for hundreds of years and were the "gateway" to the hunting, trapping and harvesting areas. Mr. Yahey described these trails as being imbued with history and being the gateways to "all facets of the Dane-zaa life." But increasingly access is being blocked. Mr Yahey said:

> Q: And Blueberry River itself, if you follow it from here, does it lead to the Dancing Grounds and other areas?
>
> A: The Blueberry River, where it comes down at the Dancing Grounds, right up the river there's a main patch or a horse trail or wagon trail, dog team trail, and the Blueberry River is the main river. From there all the creeks that come in north Aitken, Aitken, that's where – that's where all the trails lead to.
>
> Q: Is that a trail that you still use today?
>
> A: I went there this fall because every couple of years – every couple of years I recut that trail from Blueberry to this area and from this area further up. I could go from 115, there's a trail that goes all the way down on Blueberry River past the Dancing Grounds. But now it's blocked off because of landowners buying land and no more trespassing, so I can't really go by there

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unless I ask for permission but a lot of times they don't want anybody on their land.

Q: And could you turn, please, to tab Exhibit 58, tab C11. This is the 2016 image of the area. Does this reflect what the area looked like at least in the last few years?

A: Yes, it sure does.

Q: Is the pack trail – is it visible on the map?

A: No, you can't see a pack trail on a map.

Q: Too small?

A: No.

Q: Is it on the north side of the river or the south side of the river?

A: It's on the north side. As you can see, it hits some fields and those are the fields that you can't cross. You can't cross because of landowners and they fence it off.

Q: Now, looking at the image it looks like there were some fields there in the mid-80s as well?

A: They are further up. In the mid-80s all that trail was open. We used to – I mean in the 90s we used to ride horses from 115 from the Dancing Grounds all the way down to Blueberry. We used to always make that pack trip.

Because we always – there's a lot of history involved in there, that pack trail, because it's really important to my family. It's, I don't know, hundreds of years old. And my uncles always – they always maintain it.They always have – there's always a connection to it.

And he's always – he's always expressing to us, he said we always got to have that trail open. And in his view he said one day you might have to use it. So we always have to maintain that trail but you can't really maintain it when people are blocking you. So ... it's really – I mean it's important for us. It's a lot of history to it. I mean generations before me, they use that trail. They set foot on that trail. They made that trail. Then again for my existence, that's how – that's how I'm here standing here today is that trail.

Q: What do you mean by that?

A: That trail has a lot of history. It's before even settlers here, before – my dad – my father said that trail is a gateway to all the areas we trap, where we hunt, where we gather berries, where we – at all facets of the Dane-zaa life, that's that trail is. It goes all over. That's how he explained it to me. Just like the horse, when I talk about horse, how important horse is to my nation, to my – to my tribe. When I talked to him he explained to me about how important a horse is to us. He said if it wasn't for a horse he said you won't be around. I won't be around. He said that's how important the horse is to us. Horses do all the work. That's our mode of transportation. That's how we get from A to B. Or else everything would be by walk. So a horse, I mean, that's how he explained to me – that's how he explained to me in terms of that trail.

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> Q: And does the horse remain important today now that you use vehicles as well?
>
> A: It's the only way I – it's the only way I go to areas where people can go is by horseback. I go where – remote areas where I don't see nobody. Nonetheless, somebody else is with horseback in that area too. So, you know, it's – when it's – when the hunting season open then you will see a lot of – a lot of people with horses in the back country. So.
>
> Q: Where do you mean by the back country?
>
> A: Back country I mean by past Pink Mountain.
>
> Q: Further west?
>
> A: Further west in remote areas. It's only – you know, it's only area that's accessible by horseback or by plane.
>
> Q: Do you ever any more use your horse in the Yahey family trapline?
>
> A: We go for rides and I show my children where important places. And I take them up the river, I take them up the trail, and I tell them this is the trail, like, what I'm talking about, up that Blueberry trail. The horseback trail. It's a wagon trail. It's a dog team trail. It's a trail that leads to hunting grounds. To sacred areas.
>
> That trail was kind of like the Alaska Highway to us. Where it's the Alaska Highway to somebody that's living in the Yukon, that's a main trail. It's sort of like that if you wanted to do comparison. So that's a really important trail.

[417] He described the Dancing Grounds as a spiritual spot where, for ten days and nights Dane-zaa people would gather, and the Prophets would drum, and the people would dance. He testified as follows: "A prophet means a dreamer. A dreamer is someone that has the ability to tell the future, someone that's connected with the creator. And it's not anybody is a prophet. It's the creator choses who is the prophet. And he tells the future for his nation, the Dane-zaa people." Dane-zaa people lead their lives based on the principles and guidance provided by their prophets. Following the Prophets is part of Blueberry's heritage and culture, and is "how we live our life."

[418] Mr. Yahey described the Dancing Grounds as a place Dane-zaa people gather to pray to the Creator. He noted it is a place identified by the Creator and communicated to the Dreamers. He recalled how his father had described the Dancing Grounds of his youth: "as far as your eye could see was teepees and there was smoke coming out of those teepees down that Blueberry River valley."

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[419] Mr. Yahey also referred to hunting Caribou when “there was lots.” He said “there’s something unique about their hide. They make the best drum for the singers, the traditional singers we have... [t]hey will make a different sound. So that’s – they will use the hide for the drums.”

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vii. Kayden Pyle

[420] Kayden Pyle was born in 2003, and was the youngest of the Blueberry members who testified. His parents are Sherry Dominic and Stanley Pyle. Mr. Pyle testified about how he learned to hunt and fish from his father who, along with his mother and other relatives, has been taking him camping and fishing since he was a baby.

[421] While growing up, Mr. Pyle spent most weekends moose hunting with his dad and he grew up relying on and eating wild game meat. He shot his first moose at a young age between IR 204 and IR 205. He spoke about some of the places he has hunted and been taught to hunt since he was young, including Pink Mountain, Beatton Airport Road, Aitken Creek, Graham River (past the Halfway Reserve), Blueberry River, Mile 98 Road, Mile 86 Road, and Gundy Road.

[422] Mr. Pyle testified that he feels grateful to get to learn how to hunt, fish, trap and skin animals, and generally to learn how to live off the land. He said:

> … every time I go out with my father I always learn something new. He’s taught me how to navigate from the trees, he showed me how to live off the land. What to eat, what not to eat. How to live off the land. And where to sleep, what to sleep with if I’m ever stuck in there, where to go. And just those things I have always learned and carried on with me ever since, he’s taught me. And every time I always go out with him, we go hunting, I always learn something new.

[423] Mr. Pyle now attends school in Fort St. John, but on weekends he returns to Blueberry and he goes out on his quad early in the mornings to do his “loop” through the territory, scouting for animals, looking for tracks, and hunting. He said he does this to ensure the animals are still alive as there is no one to protect the animals.

[424] Mr. Pyle spoke of feeling free and feeling himself when he's out on the land:

> Well, it gets me out of the house and I love just being outside. When I am outside I feel like I don't have anything stopping me. Like I have no limits. Like there's no one or anything to say of what I can and cannot do or who I have to be. I can be me. And it's all about the land, because when you're out there is nothing and no one to judge you or like – I don't know how to word this.

[425] In answer to why hunting is important to him and why he hopes to continue hunting, he stated:

> Because hunting is a very sacred thing to me. It's been in my family generation throughout years and it's something that I will always carry with me and it will always be a part of me. It's me, who I am. And it's just a way that I've been taught of how to make a living of how to live. So it's just the way that I'm always going to carry on with me.

[426] Mr. Pyle noted that he has had less success hunting moose over the last two years (2019 and 2018) than before, which he attributed to there being a very low moose count. This was the case even though he estimated spending over 50 hours hunting in 2018. He compared going hunting five to ten years ago with how it is now, and noted there are more large trucks hauling condensate on the roads now and noted this was the case at Gundy Road, north of Wonowon and at the Beatton Airport road.

[427] He spoke about some of the limitations he faces to hunting now. In particular, he worries about encounters with farmers and avoids shooting on private land. He also avoids hunting near oil and gas wells, as one wrong shot could wreck the lands and cause millions of dollars in damage. He also described how it was "heartbreaking" to go out on the land to places he used to hunt, only to find it turned into a cutblock.

D. Conclusions Regarding Blueberry's Way of Life

[428] The evidence provided by Dr. Ridington and Mr. Brody and the Blueberry community members who testified in this case establishes that Blueberry's ancestors are the Dane-zaa who have lived in the Upper Peace River area for 10,000 years.

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[429] As was discussed earlier, the features of Blueberry's Dane-zaa way of life include: travelling as family groups throughout their territory to access resources from a variety of environments; practicing seasonality and scheduling their resource use (such as by not returning to the same places every year, but letting areas rejuvenate); hunting, trapping and fishing for the wildlife species that have sustained them for generations; passing down knowledge generation to generation while on the land engaged in various activities; and engaging in spiritual practices that reflect the connection to the land and wildlife.

[430] The evidence was that for thousands of years, this way of life has involved moving throughout their territory to take advantage of the resources available in each season. They planned and scheduled where within the various ecological zones of their territory (the prairies, lakes, mountains and muskeg regions) they would go to ensure a steady supply of fish, game and plant resources.

[431] This way of life requires intimate knowledge of the areas within the territory and of their resource potential, so that care can be taken not to overharvest. This learning used to happen while out camping or hunting so that they could learn the essential knowledge (such as where to camp or get water and scout for animals) as part of everyday living on the land. These days, culture camps often take the place of everyday transmission of culture.

[432] For generations, Blueberry members have hunted moose, deer and, until the 1960s or 1970s, caribou, as well as beaver, rabbits and grouse. moose, in particular, is their primary diet. They hunt selectively, based on how much is needed and how much harvesting wildlife populations can sustain. They also trap beavers, martens, otters, wolves, wolverines and lynx. They fish suckers. They harvest berries and traditional medicines at various locations within their territory. Hunting traditionally took place at locations within close proximity to their homes. They use all parts of the animals, drying or freezing the meat, using the hides and furs for clothing and crafts, and bones for scraping.

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[433] I accept that Blueberry's knowledge and its ability to successfully hunt, trap, fish and gather depends on the health and relative stability of the environment. If forests are cuts, or critical habitat destroyed, it is not as simple as finding another place to hunt. The Dane-zaa have located these places over generations.

[434] Elders spoke of the bush being their store, and the wildlife their groceries. But the connection between Blueberry and the animals they harvest runs deeper than sustenance. One of the most important aspects of Dane-zaa identity is the maintenance of a relationship between hunters and the spirits of the animals they hunt. Hunters "dream" their prey, and animals willingly give themselves to hunters who uphold their responsibilities.

[435] The Dane-zaa communities gather in the summer to sing, drum, dance, share stories and do their planning. In years gone by, their Prophets or Dreamers would tell of the future of the nation and provide guidance to live by.

[436] Theirs is a way of life that is connected to, dependent on, and respectful of the land and wildlife. It is seen as a "good life," embodying a sense of freedom, health and wellness. Hunting, fishing and trapping is not a hobby, interest or pastime. It is a core aspect of Blueberry's identity and impairing it significantly harms their well-being.

[437] While some changes may occur, this way of life is dependent on the existence of healthy mature forests, wildlife habitats (such as mineral licks), fresh clean water, and access to these places. There must be healthy populations of moose and other wildlife so that Blueberry members have a chance of being successful on their hunts, and do not need to travel far from or outside of their territory to find game. In addition, this way of life depends on a relatively stable environment, so that the knowledge held by Blueberry members about the places to hunt, fish and trap is relevant and applicable.

[438] Now that I have concluded the Treaty promise included protecting Blueberry's way of life from interference and have set out the elements of that way of life, I turn to whether Blueberry's treaty rights have been infringed. While change was

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foreshadowed, this was only to the extent it did not interfere with Blueberry's ability to maintain this mode of life and meaningfully exercise rights protected by the Treaty.

[439] I must now resolve the question of the test to determine an infringement of treaty rights.

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VII. HAVE BLUEBERRY'S TREATY RIGHTS BEEN INFRINGED?

A. Introduction

[440] In support of its claim that its treaty rights have been infringed and that it cannot meaningfully exercise rights in its territory, Blueberry has appended to its Notice of Civil Claim, a map of its traditional territory, which I have referred to here as the Blueberry Claim Area. I will review the evidence of the area relied on by Blueberry for the exercise of its rights historically and today, and will deal with the Province's position that the Court does not need to determine the location or extent of Blueberry's traditional territory in this case.

[441] I will then review the question of whether the Blueberry Claim Area is, as argued by Blueberry, disturbed by extensive industrial development such that Blueberry's members are unable to meaningfully exercise their treaty rights in their traditional territory. This will be a two-part process because, as the Province points out, even if disturbance is established, Blueberry members may still be able to exercise their treaty rights within a disturbed area. First, I must assess the level of disturbances in the Blueberry Claim Area and the status of wildlife, and then I must examine the claim that Blueberry members can no longer meaningfully exercise their treaty rights in the Blueberry Claim Area. This involves a conclusion as to whether there are sufficient and appropriate lands in Blueberry's traditional territories to permit the meaningful exercise of their Treaty 8 rights.

[442] The Province defends itself in this case largely on this latter issue. It says not all disturbances have equal effect and, on a factual basis, Blueberry has not established that its members cannot exercise their treaty rights. Rather, the Province says the facts, including Blueberry members' own evidence, establish otherwise.

[443] As I noted in the overview and will expand on below, I do not accept that proposition. I will therefore then turn to whether the Province's actions, largely relating to authorizing activities that create these disturbances, have contributed to this situation. As part of this, I will examine the Province's various regulatory regimes at issue in this case, and will ultimately decide whether the Crown has diligently and honourably implemented the Treaty.

[444] I will then deal with whether the Province has justified the infringement of Blueberry's treaty rights, and set out the relief.

B. What is the Test for Infringement of Treaty Rights?

[445] The parties fundamentally disagree as to what is the applicable test for considering alleged infringements of treaty rights.

[446] Blueberry maintains the framework for considering an alleged infringement of treaty rights remains that set out by the Supreme Court of Canada in *Sparrow*. The Province says that in *Mikisew*, at para. 48, the Supreme Court of Canada moved away from and modified the *Sparrow* test when it comes to the infringement of treaty rights, and the test is now whether "no meaningful right" to hunt, fish or trap remains.

[447] While the parties agree that *Mikisew* applies and that Blueberry has the onus of proving infringement, the dispute is how the test of infringement is interpreted and applied in this case. As I understand their arguments, Blueberry's application of the test focuses on the meaningfulness of the exercise of rights, and the Province's application focuses on whether rights remain. While the Province says its position is not that "no meaningful right" to hunt, fish or trap must be established to find an infringement, the effect of its argument will be examined as part of the Court's analysis.

[448] This fundamental difference first warrants a review of the evolution of jurisprudence in this area. The Supreme Court of Canada has sought to set out a framework for infringement, and the jurisprudence has evolved based on the facts of the cases that have come before the courts.

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1. Jurisprudence

[449] In the section below, I review key cases discussing infringements of Aboriginal and treaty rights. Some of these authorities, including *Badger*, *Marshall*, *Halfway* and *Mikisew* and have already been discussed in the context of the approach to treaty interpretation, generally, and the interpretation of the rights contained in Treaty 8, specifically. The emphasis below is on the aspects of these decisions and others that discuss infringement.

[450] The infringement test was first developed in *Sparrow*. There, the Supreme Court of Canada considered the recognition and affirmation of Aboriginal and treaty rights contained in s. 35(1) of the *Constitution Act, 1982*. It reasoned that s. 35(1) – and the recognition and protection of rights therein – reflected a solemn commitment that must be given meaningful content.

[451] Aboriginal and treaty rights protected by s. 35(1) are, however, not absolute. While the *Constitution Act, 1982* protects against the infringement of Aboriginal and treaty rights, such rights may be infringed in certain circumstances, when justified.

[452] *Sparrow* dealt with the question of whether the net length restriction contained in Musqueam's food fishing license infringed their Aboriginal rights to fish for food, social and ceremonial purposes. To determine if Musqueam's Aboriginal rights had been interfered with such as to constitute a *prima facie* infringement of s. 35(1), Chief Justice Dickson at 1112 posed three questions:

> First, is the limitation unreasonable? Second, does the regulation impose undue hardship? Third, does the regulation deny to the holders of the right their preferred means of exercising that right?

[453] Chief Justice Dickson went on to note that the test, in the context of the *Sparrow* case, involved asking: whether either the purpose or effect of the restriction on net length unnecessarily infringed the interests protected by the fishing right; whether Musqueam members had to spend undue time and money per fish caught; and whether the net length restriction resulted in a hardship to Musqueam in catching fish (at 1112-1113). If so, this would constitute a *prima facie* infringement.

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[454] The onus to prove the infringement is on the party alleging the infringement. If a *prima facie* interference is found, the analysis moves to the issue of justification, where the onus is on the Crown to justify the infringing measures or actions.

[455] The Supreme Court of Canada in *Badger* confirmed that the *Sparrow* test for *prima facie* infringement also applied in the context of alleged infringements of treaty rights. Justice Cory noted that both Aboriginal rights and treaty rights are *sui generis* and both engage the honour of the Crown. The wording of s. 35(1) supports taking a common approach to infringements of Aboriginal and treaty rights (at para. 79). Justice Cory at para. 82 noted it was "equally if not more important to justify *prima facie* infringements of treaty rights."

[456] The alleged infringement in *Badger* arose from the licensing provisions contained in s. 26(1) of the Alberta *Wildlife Act*. Justice Cory noted that, at first blush, it appeared that the provisions were directed to questions of conservation, which would be within the government's regulatory powers and consistent with Treaty 8 (at para. 71). He went on to note, however, that "the routine imposition upon Indians… may not be permissible if they erode an important aspect of the Indian hunting rights" (at para. 90). Justice Cory observed that there can be no limitation on the method, timing and extent of Indian hunting under a treaty (at para. 90).

[457] Justice Cory considered whether the provisions were "clearly unreasonable" in their application to Aboriginal people (at para. 91), looking closely at the impact of the licensing scheme on beneficiaries of Treaty 8 seeking to exercise their rights to hunt for food (i.e., the treaty right modified by the NRTA):

> <u>*Prima Facie* Infringement of the Treaty Right to hunt as modified by the *NRTA*</u>
>
> …
>
> [92] Under the present licensing scheme, an Indian who has successfully passed the approved gun safety and hunting competency courses would not be able to exercise the right to hunt without being in breach of the conservation restrictions imposed with respect to the hunting method, the kind and numbers of game, the season and the permissible hunting area, all of which appear on the face of the licence. Moreover, while the Minister may determine how many licences will be made available and what class of licence these will be, no provisions currently exist for "hunting for food" licences.

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> [93] At present, only sport and commercial hunting are licensed. It is true that the regulations do provide for a subsistence hunting licence…However, its provisions are so minimal and so restricted that it could never be considered a licence to hunt for food as that term is used in Treaty No. 8 and as it is understood by the Indians. Accordingly, there is no provision for a licence which does not contain the facial restrictions set out earlier. Finally, there is no provision which would guarantee to Indians preferential access to the limited number of licences, nor is there a provision that would exempt them from the licence fee. As a result, Indians, like all other Albertans, would have to apply for a hunting licence from the same limited pool of licences. Further, if they were fortunate enough to be issued a licence, they would have to pay a licensing fee, effectively paying for the privilege of exercising a treaty right. This is clearly in conflict with both the Treaty and *NRTA* provisions.

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[458] Justice Cory concluded that since the licensing system denied holders of treaty rights the very means of exercising those rights, s. 26(1) of the *Wildlife Act* conflicted with the hunting right set out in Treaty 8, as modified by the NRTA (at para. 94). Accordingly, Mr. Ominayak had established the existence of a *prima facie* breach of his treaty right, and it fell to the Crown to justify the infringement (at para. 95).

[459] In *R. v. Gladstone*, [1996] 2 S.C.R. 723 [*Gladstone*] (a case dealing with Aboriginal rights to fish for commercial purposes), Chief Justice Lamer "clarif[ied]" the *Sparrow* framework so that it could apply to the different circumstances of that case (para. 21).

[460] In *Gladstone*, while the appellants were challenging s. 20(3) of the *Pacific Herring Fishery Regulations*, the Supreme Court of Canada recognized that the scope of the challenge was much broader, and effectively impugned the entire approach taken by the federal government to the management of the herring spawn on kelp fishery (at para. 40).

[461] Chief Justice Lamer noted that the questions suggested in *Sparrow* must be applied not only to s. 20(3) of the regulation, but also to other aspects of the regulatory scheme of which s. 20(3) was a part. Chief Justice Lamer also noted that the questions set out in *Sparrow* are just "factors" that may indicate if an infringement has taken place. While the questions assist in the analysis, there is no requirement

that they all be answered affirmatively to make out an infringement. At para. 43 Chief Justice Lamer said:

> [43] The *Sparrow* test for infringement might seem at first glance, to be internally contradictory. On the one hand, the test states that the appellants need simply show that there has been a *prima facie* interference with their rights in order to demonstrate that those rights have been infringed, suggesting thereby that any meaningful diminution of the appellants' rights will constitute an infringement for the purpose of this analysis. On the other hand, the questions the test directs courts to answer in determining whether an infringement has taken place incorporate ideas such as unreasonableness and "undue" hardship, ideas which suggest that something more than meaningful diminution is required to demonstrate infringement. This internal contradiction is, however, more apparent than real. The questions asked by the Court in *Sparrow* do not define the concept of *prima facie* infringement; they only point to factors which will indicate that such an infringement has taken place. Simply because one of those questions is answered in the negative will not prohibit a finding by a court that a *prima facie* infringement has taken place; it will just be one factor for a court to consider in its determination of whether there has been a *prima faci*e infringement.

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[462] Chief Justice Lamer reasoned at paras. 51 and 52 that the various parts of the government's scheme for regulating the herring spawn on kelp fishery (determining the amount of herring stock to be harvested in a given year; allotting the stock to the different herring fisheries including roe, spawn on kelp and other herring fisheries; allotting the herring spawn on kelp fishery to various user groups; and allotting the commercial herring spawn on kelp fishery) could be considered as a whole for the purposes of the infringement analysis. The reason for this was that: "at the infringement stage it is the cumulative effect on the appellants' rights from the operation of the regulatory scheme that the court is concerned with." Here, the cumulative effect of the regulatory scheme was that the total amount of herring spawn on kelp the Heiltsuk could harvest for commercial purposes was limited.

[463] Chief Justice Lamer found the Heiltsuk had discharged their burden of demonstrating a *prima facie* interference with their Aboriginal rights. Prior to the arrival of Europeans, they could harvest to the extent they desired; once Canada started regulating the fishery, the Heiltsuk could only harvest herring spawn on kelp for commercial purposes to the limited extent allowed by the government (at para.

53). The rest of the decision turned on whether Canada had justified its infringing actions, again using the test set out in *Sparrow*, with modifications given that the right at issue was a commercial one, not subject to "an inherent limitation" (at para. 57).

[464] The *Sparrow/Badger* approach to the infringement and justification of treaty rights was applied in *Marshall* at paras. 64 and 65. In this case, the Supreme Court of Canada considered whether certain prohibitions in the federal fishery regulations infringed Mr. Marshall's treaty rights in the peace and friendship treaties entered into between the Crown and the Mi'kmaq in 1760 and 1761. Justice Binnie, writing for the majority, concluded that the treaties protected the right to sell fish to secure "necessaries" (the modern equivalent of a moderate livelihood) and that Mr. Marshall was engaged in this activity when he was charged with three offences: selling eels without a licence, fishing without a licence, and fishing during the close season with illegal nets.

[465] At paras. 62-65, Justice Binnie analyzed the discretionary licencing regime at issue to consider whether it represented a *prima facie* infringement of the treaty right. Justice Binnie referred to the test for infringement set out in *Sparrow*, and to how the test had been applied to licensing schemes in *R. v. Adams*, [1996] 3 S.C.R. 101 [*Adams*]. In *Adams,* Chief Justice Lamer had reasoned that, in light of the Crown's unique fiduciary obligations towards Indigenous people, Parliament could not simply adopt an unstructured discretionary administrative regime which risked infringing Aboriginal rights. Instead, the statute or regulations had to provide specific guidance regarding the exercise of discretion which sought to accommodate the existence of the rights. The various fishery regulations at issue in that case placed the issuance of licences within the absolute discretion of the Minister, and there was nothing in the regulations which gave directions to government officials to explain how to exercise this discretionary authority in a manner that would respect treaty rights (at para. 64).

[466] In *Marshall*, Justice Binnie, applying *Adams*, held that the regulatory prohibitions at issue infringed Mr. Marshall's treaty rights (at para. 64). In addition, referring to *Badger*, Justice Binnie noted that there can be no limitation on the

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method, timing and extent of Indian hunting under a treaty, apart from a treaty limitation to that effect (at para. 65).

[467] In the absence of any justification by Canada of the regulatory prohibitions, Mr. Marshall was entitled to an acquittal.

[468] In a subsequent decision (*R. v. Marshall,* [1999] 3 S.C.R. 533 [*Marshall #2*]), the Court noted that it is always open to the Minister to seek to justify the limitation on a treaty right because of the need to conserve the resources in question or for other compelling and substantial public objectives (at para. 19).

[469] In *Halfway*, as previously discussed earlier in these reasons, one of the issues before the British Columbia Court of Appeal was what constitutes an infringement of Treaty 8 rights. The First Nation argued, among other things, that the decision to allow logging in a particular area infringed its hunting rights under Treaty 8. While *Halfway* is discussed quite extensively earlier, given its complexity, its discussion and application of *Sparrow*, and the fact it is commented on in *Mikisew* I will discuss it further here.

[470] The chambers judge in *Halfway* applied the test in *Sparrow* and reasoned that "any interference with the right to hunt, fish or trap constitutes a *prima facie* infringement of Treaty 8 rights." Accordingly, she found that the cutting permit constituted an infringement of Halfway's treaty rights, and that this infringement had not been justified.

[471] The Province and the logging company appealed. They argued that issuing the cutting permit was a permissible exercise of the Crown's right to take up land under the Treaty and that there was no infringement. The majority of the Court of Appeal (per Finch J.A., and Huddart J.A. concurring) dismissed the appeal.

[472] Justice Finch held that the chambers judge did not err in holding that *any* interference with the right to hunt was a *prima facie* infringement of the petitioners' Treaty 8 right to hunt (at paras. 138-144).

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[473] Justice Huddart issued concurring reasons dismissing the appeal but parted company with Justice Finch on the application of *Sparrow*. Justice Huddart held that consideration of whether consultation was adequate must precede any infringement or justification analysis under *Sparrow* (at paras. 180, 191-193). She noted, however, that common sense suggested the effects of the logging might be sufficiently meaningful to require the government to justify its decision, depending on the nature of the hunting right. Had the District Manager understood the extent of his obligation to consult, he might have concluded the logging activities would result in a meaningful diminution of the Treaty 8 right to hunt. At para. 186, Justice Huddart reasoned as follows:

> [186] My difference with the reasoning of Mr. Justice Finch flows from my view that the chambers judge was wrong when she found that "any interference" with the right to hunt constituted an "infringement" of the treaty right requiring justification. I cannot read either *Sparrow* or *Badger* to support that view. As my colleague notes at para. 124, in *Sparrow* the court stated the question as "whether either the purpose or effect of the statutory regulation unnecessarily infringes the aboriginal interest." In *Badger*, at 818, in his discussion as to whether conservation regulations infringed the treaty right to hunt, Cory J. indicated the impugned provisions might not be permissible "if they erode an important aspect of the Indian hunting rights." In *Gladstone*, *supra*, Lamer C.J.C. indicated that a "meaningful diminution" of an aboriginal right would be required to constitute an infringement. Each of these expressions of the test for an "infringement" imports a judgment as to the degree and significance of the interference. To make that judgment requires information from which the scope of the existing treaty or aboriginal right can be determined, as well as information about the precise nature of the interference.
>
> (emphasis in original)

[474] Justice Southin, dissenting, would have allowed the appeal on the basis that the case ought to have been dealt with in an action supported by proper evidence, not a petition for judicial review. On the application of *Sparrow*, Justice Southin reasoned as follows at paras. 224-225:

> [224] In my opinion the issue is not whether there is an infringement and justification within the *Sparrow* test, but whether the Crown has so conducted itself since 1900 as to be in breach of the Treaty…
>
> [225] The question in such an action would be whether what the Crown has done throughout the Halfway River First Nation's traditional lands by taking up land for oil and gas production, forestry, and other activities has so affected

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> the population of game animals as to make the right of hunting illusory. "To make the right of hunting illusory" may be the wrong test. Perhaps the right test is "to impair substantially the right of hunting" or some other formulation of words.

[475] As noted, this case ultimately was commented upon in *Mikisew*, in the decisions of the Federal Court, Federal Court of Appeal, and Supreme Court of Canada.

[476] In *Canada (Canadian Heritage) v. Mikisew Cree First Nation*, 2004 FCA 66, Rothstein J.A. (as he then was, and for the majority of the Federal Court of Appeal) allowed Canada's appeal. The majority held that the approval of the winter road through Mikisew's reserve constituted a taking up within the meaning of Treaty 8 and, as Mikisew did not have rights to hunt on lands that had been taken up, there was no violation of s. 35 and no need to apply *Sparrow* (at para. 2).

[477] Justice Rothstein noted that in order to determine whether there had been a *prima facie* infringement of a constitutionally protected treaty right, it was necessary to determine the scope of the treaty right (at para. 14). He then reasoned as follows at para. 18:

> [18] With the exceptions of cases where the Crown has taken up land in bad faith or has taken up so much land that no meaningful right to hunt remains, taking up land for a purpose express or necessarily implied in the treaty itself cannot be considered an infringement of the treaty right to hunt. Neither of these exceptions apply here. This is not a case where the Minister has acted in bad faith; nor, as the land required for the road corridor comprises approximately 23 square kilometres out of the 44,807 square kilometres of Wood Buffalo National Park or the approximately 840,000 square kilometres encompassed by Treaty 8, is this a case where no meaningful right to hunt remain.

[478] At paras. 21-23, Justice Rothstein reasoned that whether or not there was an infringement would fall to be determined on the basis of the limitations provided in the Treaty:

> [21] Where a limitation expressly provided for by a treaty applies, there is no infringement of the Treaty and thus no infringement of section 35. This is to be contrasted with the case where the limitations provided by the Treaty do not apply but the government nevertheless seeks to limit the Treaty right. In such

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> a case, the *Sparrow* test must be satisfied in order for the infringement to be constitutionally permissible.
>
> [22] Sharlow J.A. relies on the reasons of Finch J.A. in *Halfway River First Nation v. British Columbia (Ministry of Forests)* (1999), 64 B.C.L.R. (3d) 206, 1999 BCCA 470 as support for the proposition that a "taking up" could itself be a *prima facie* infringement of the Mikisew's treaty rights. However, I find that I am bound by the analysis of Cory J. in *Badger* which is directly applicable to the facts of this case.
>
> [23] As the approval of the road constituted a taking up within the meaning of Treaty 8, the Mikisew's treaty right to hunt on the road corridor is suspended for as long as it is being used for a purpose visibly incompatible with hunting. There therefore has been no infringement of Treaty 8, as constitutionalized by section 35, that requires the application of the *Sparrow* test.

[479] Mikisew appealed.

[480] By the time the case came before the Supreme Court of Canada, the issue was essentially whether, in taking up the land for the road, Canada had an obligation to consult. That obligation had been established by *Haida*, which was issued after the decision of the Federal Court of Appeal. However, the context of this issue was, as noted above, whether the taking up of land for the road amounted to an infringement that triggered the need for a *Sparrow* justification, or whether Canada was just taking up lands as entitled to under the Treaty.

[481] Justice Binnie considered the taking up clause in Treaty 8 and the relevance of the infringement and justification tests set out in *Sparrow*. He reasoned as follows at paras. 30-32:

> [30] In the case of Treaty 8, it was contemplated by all parties that "from time to time" portions of the surrendered land would be "taken up" and transferred from the inventory of lands over which the First Nations had treaty rights to hunt, fish and trap, and placed in the inventory of lands where they did not. *Treaty 8 lands lie to the north of Canada and are largely unsuitable for agriculture. The Commissioners who negotiated Treaty 8 could therefore express confidence to the First Nations that, as previously mentioned, "the same means of earning a livelihood would continue after the treaty as existed before it"* (p. 5).
>
> [31] I agree with Rothstein J.A. that not every subsequent "taking up" by the Crown constituted an infringement of Treaty 8 that must be justified according to the test set out in *Sparrow*. In *Sparrow*, it will be remembered, the federal government's fisheries regulations infringed the aboriginal fishing right, and

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> had to be strictly justified. This is not the same situation as we have here, where the aboriginal rights have been surrendered and extinguished, and the Treaty 8 rights are expressly limited to lands not "required or taken up from time to time for settlement, mining, lumbering, trading or other purposes" (emphasis added). The language of the Treaty could not be clearer in foreshadowing change. Nevertheless the Crown was and is expected to manage the change honourably.
>
> [32] It follows that I do not accept the *Sparrow*-oriented approach adopted in this case by the trial judge, who relied in this respect on *Halfway River First Nation v. British Columbia (Ministry of Forests)*(1999), 178 D.L.R. (4th) 666, 1999 BCCA 470. In that case, a majority of the British Columbia Court of Appeal held that the government's right to take up land was "by its very nature limited" (para. 138) and "that *any* interference with the right to hunt is a *prima facie* infringement of the Indians' treaty right as protected by s. 35 of the *Constitution Act, 1982*" (para. 144 (emphasis in original)) which must be justified under the *Sparrow* test. The Mikisew strongly support the *Halfway River First Nation* test but, with respect, to the extent the Mikisew interpret *Halfway River* as fixing in 1899 the geographic boundaries of the Treaty 8 hunting right, and holding that any post-1899 encroachment on these geographic limits requires a *Sparrow*-type justification, I cannot agree. The Mikisew argument presupposes that Treaty 8 promised continuity of nineteenth century patterns of land use. It did not, as is made clear both by the historical context in which Treaty 8 was concluded and the period of transition it foreshadowed.
>
> (emphasis added)

[482] Justice Binnie went on to discuss the content of Treaty 8 and, specifically, where the hunting, trapping and fishing rights were to be exercised. In the appeal, the federal Minister was arguing that the test for infringement of treaty rights ought to be "whether, after the taking up, it still remains reasonably practicable, within the Province as a whole, for the Indians to hunt, fish and trap for food [to] the extent that they choose to do so" (emphasis in original). The Attorney General for Alberta, an intervenor, suggested adding a *de minimums* element, arguing that the winter road would take up only 23 square kilometres out of the 840,000 square kilometres encompassed by Treaty 8. Binnie J. firmly rejected these territory-wide approaches to understanding the exercise of treaty rights. At paras. 47-48:

> [47] The arguments of the federal and Alberta Crowns simply ignore the significance and practicalities of a First Nation's traditional territory. Alberta's 23 square kilometre argument flies in the face of the injurious affection of surrounding lands as found by the trial judge. More significantly for aboriginal people, as for non-aboriginal people, location is important. Twenty-three

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> square kilometres alone is serious if it includes the claimants' hunting ground or trapline. While the Mikisew may have rights under Treaty 8 to hunt, fish and trap throughout the Treaty 8 area, it makes no sense from a practical point of view to tell the Mikisew hunters and trappers that, while their own hunting territory and traplines would now be compromised, they are entitled to invade the traditional territories of other First Nations distant from their home turf (a suggestion that would have been all the more impractical in 1899)…
>
> …
>
> *Badger* recorded that a large element of the Treaty 8 negotiations were the assurances of *continuity* in traditional patterns of economic activity. Continuity respects traditional patterns of activity and occupation. The Crown promised that the Indians' rights to hunt, fish and trap would continue "after the treaty as existed before it" (p. 5). This promise is not honoured by dispatching the Mikisew to territories far from their traditional hunting grounds and traplines.
>
> [48] What Rothstein J.A. actually said at para. 18 is as follows:
>
> > With the exceptions of cases where the Crown has taken up land in bad faith or has taken up so much land that no meaningful right to hunt remains, taking up land for a purpose express or necessarily implied in the treaty itself cannot be considered an infringement of the treaty right to hunt. [Emphasis added.]
>
> The "meaningful right to hunt" is not ascertained on a treaty-wide basis (all 840,000 square kilometres of it) but in relation to the territories over which a First Nation traditionally hunted, fished and trapped, and continues to do so today. If the time comes that in the case of a particular Treaty 8 First Nation "no meaningful right to hunt" remains over *its* traditional territories, the significance of the oral promise that "the same means of earning a livelihood would continue after the treaty as existed before it" would clearly be in question, and a potential action for treaty infringement, including the demand for a *Sparrow* justification, would be a legitimate First Nation response.
>
> (emphasis in original)

[483] The Supreme Court of Canada's decision in *Mikisew* was that while the Crown had a right under the Treaty to take up lands, the government must nevertheless engage in a meaningful process of consultation and accommodation when a proposed taking up may adversely affect the exercise of a First Nation's treaty right.

[484] Where a proposed taking up is challenged, the Court should consider the process by which the taking up is planned to go ahead, and ought not to move directly to a *Sparrow* infringement analysis (at para. 59). The Supreme Court of Canada upheld the trial judge's findings of fact that the Crown failed to show any

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intention of substantially addressing Mikisew's concerns (at paras. 67-68). The consultation process never got off the ground (at para. 65). In the result, the Supreme Court of Canada allowed Mikisew's appeal, quashed the Minister's approval order, and remitted the winter road project to the Minister to be dealt with in accordance with its reasons.

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[485] In *Morris*, the Supreme Court of Canada considered the meaning of the concept of *prima facie* infringement in the context of s. 88 of the *Indian Act*, R.S.C. 1985, c. I-5. The majority of the Supreme Court of Canada reasoned at para. 53 that a *prima facie* infringement requires a "meaningful diminution" of a treaty right, which includes "anything but an insignificant interference with that right." The other aspects of the Court's decision in *Morris* are not relevant to this case.

[486] In *Grassy Narrows* the issues were whether Ontario could, under Treaty 3, take up lands in the Keewatin area so as to limit the harvesting rights under that treaty, and whether it needed federal authorization to do so.

[487] On the issue of the Crown's power to take up lands, Chief Justice McLachlin applied *Mikisew* and held that the Crown's right to take up lands under Treaty 3 was subject to its duty to consult and, if appropriate, accommodate First Nations' interests beforehand. On the question of infringement, Chief Justice McLachlin stated as follows at para. 52:

> [52]…Not every taking up will constitute an infringement of the harvesting rights set out in Treaty 3. This said, if the taking up leaves the Ojibway with no meaningful right to hunt, fish or trap in relation to the territories over which they traditionally hunted, fished, and trapped, a potential action for Treaty infringement will arise (*Mikisew*, at para. 48).

[488] As is evident from the foregoing, the *Sparrow* framework for infringement can and has been modified to fit the circumstances of given cases. It has been broadened to consider the effects caused by a regulatory regime (*Gladstone,* see also *Ahousaht*), as opposed to a specific provision. The regulatory and legislative context is relevant to understanding how the infringement arises. Context can also be

relevant to understanding the effect and significance on the exercise of Aboriginal or treaty rights of a specific regulatory regime or proposed development. While the Province argues that challenges to specific aspects of a regulatory regime can and should have been addressed by way of judicial review and not in a trial, the Supreme Court of Canada has indicated that a treaty infringement claim should be dealt with in an action.

[489] I turn now to a brief summary of the parties' positions on the test for infringement of treaty rights.

2. Test for Infringement

a) Parties' Positions

[490] Blueberry maintains that the *Sparrow/Badger* test for infringement applies, and that *Mikisew* must be considered in its jurisprudential context, with an eye to the purpose of the protection of Aboriginal and treaty rights in s. 35 and to the nature of the promise contained in the Treaty.

[491] It says the way to interpret and apply the Court's statement at para. 48 of *Mikisew* that a potential action for treaty infringement arises if "no meaningful right" remains, is to focus on whether there is no *meaningful* right left, not on whether the rights can be exercised *at all*.

[492] To be meaningful, Blueberry says, its members must be able to exercise their rights as part of a mode of life that has not been significantly diminished. Focussing on whether its mode of life has been significantly diminished, says Blueberry, is important in a case such as this, where the allegation of infringement isn't made with respect to one specific interference with the right to hunt, fish or trap, but rather with the cumulative effects of hundreds or thousands of interferences with Blueberry's exercise of rights.

[493] The Province says the identification of the proper test for the infringement of treaty rights is a key part of this case. It maintains the legal test for a claim of

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infringement of Treaty 8 rights is now expressly set out by the Supreme Court of Canada in *Mikisew*, and takes into account the Province's right to take up lands from time to time.

[494] The test, says the Province, is not to look for "anything more than an insignificant infringement" or a "*prima facie* infringement" with rights as argued by Blueberry. Rather, the Province says that the Supreme Court of Canada in *Mikisew* modified and rejected the *Sparrow* approach, and that the test for infringement is: whether the Crown has taken up so much land that "no meaningful right" to hunt, fish or trap remains.

[495] In other words, the Province says an alleged infringement of treaty rights must be measured against lands taken up, i.e., transferred from the inventory of lands over which rights to hunt, fish and trap are retained, into the inventory of lands over which no rights exist. It is only when so much land has been taken up that no meaningful right to hunt, fish or trap remains within a First Nation's traditional territory that an infringement will be made out.

[496] Blueberry is critical of the Province's approach to infringement and submitted in oral argument that the Province is essentially starting at nothing (i.e., no rights) and is "counting up from nothing" to find specific instances of Blueberry members exercising their treaty rights, thereby confirming the Province's position that rights remain. Blueberry argues the Court should start from the premise that their way of life was not to be interfered with and that their rights were to be protected by the Treaty and, weighing the evidence of loss and conducting a qualitative assessment, determine whether there has been a significant diminution or significant diminishment in Blueberry's way of life.

[497] The Province points out, as noted in *Prophet River First Nation v. Canada (Attorney General)*, 2017 FCA 15 [*Prophet River (FCA)*] at para. 34, that the Supreme Court of Canada has moved away from the *Sparrow*-based infringement approach and imposed on the Crown a duty to consult and accommodate prior to taking up

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lands. The duty to consult is triggered at a low threshold, where a taking has the potential to impact the exercise of rights. The obligation to consult is imposed as a serious and substantive restraint on Crown action, and was developed and applied to avoid infringements.

[498] The Province adds that *Sparrow* recognized that context was important and that modifications of the infringement test would occur, depending on the context.

b) No Rights Remaining is Not the Test

[499] I agree with the Province that an important reason for triggering the duty to consult and accommodate at a low threshold is to avoid infringement situations. As noted by Justice Greckol of the Alberta Court of Appeal in concurring reasons in *Fort McKay First Nation v. Prosper Petroleum Ltd*, 2020 ABCA 163 [*Fort McKay*] at para. 81:

> [81] …the Crown's obligation to ensure the meaningful right to hunt under Treaty 8 is an *ongoing* one. Proper land use management remains a perennial concern for the Crown, as "none of the parties in 1899 expected that Treaty 8 constituted a finished land use blueprint": *Mikisew 2005* as [sic] para. 27. Reconciling this "inevitable tension" (para 33) between Aboriginal rights and development in Treaty 8 territory has, first and foremost, been a matter of the Crown adhering to its duty to consult on individual projects, as mandated in *Mikisew 2005*. Acting honourably in this fashion has promoted reconciliation, in part, by "encouraging negotiation and just settlements as an alternative to the cost, delay and acrimony of litigating s. 35 infringement claims" (*Mikisew 2018* at para 26), much as *Haida Nation* had counselled with respect of unproven Aboriginal rights claims. And yet, as this record itself attests, the long-term protection of Aboriginal treaty rights, including the right to hunt under Treaty 8, is increasingly thought to require negotiation and just settlement of disputes outside the context of individual projects in order to address the *cumulative effects* of land development on First Nation treaty rights.
>
> (emphasis in original)

[500] The Province's reliance on the duty to consult to prevent an infringement here, however, presupposes both the ability of those consultation processes to consider and address concerns about cumulative effects as opposed to simply single projects or authorizations, as well as the success of those consultations.

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[501] As myriad cases have shown, consultation is often marred by both procedural and substantive defects. While the obligation to consult is important, it does not erase the right of a First Nation 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. It cannot be that the consultation duty outlined in *Mikisew* precludes a First Nation from bringing an infringement claim in appropriate circumstances, or that it has to wait until it has no ability to exercise rights to do so.

[502] The Province's reliance on the duty to consult, and its insistence that an action for infringement requires proof of no meaningful right to hunt, fish or trap, does not address circumstances where impacts are at a "'tipping point' beyond which the right to meaningfully exercise treaty rights is lost" (Smith J. in *Yahey v. British Columbia*, 2015 BCSC 1302 at para. 59, and *Yahey 2017* at paras. 114 and 122).

[503] While the Province says it does not take the position that the Treaty is not infringed until "no" meaningful right to hunt, fish or trap remains, the effect of its argument and reliance on the phrase noted, easily leads to that conclusion.

[504] While *Mikisew* is of undoubted importance to this case, it is difficult to rely on it as a guide to the infringement analysis, since it was not decided on that point. *Mikisew* did not *apply* the *Sparrow* infringement and justification tests, as was done in *Badger*, *Marshall* and *Halfway* (which are treaty rights cases) or *modify* these tests, as was done in *Gladstone* (with respect to justifying the infringement of Aboriginal rights that are not subject to internal limitations). While there was evidence that, if executed, the road would have impacts on Mikisew's exercise of hunting and trapping rights (at paras. 44 and 55), the Court specifically did not decide whether this road if constructed would have breached Mikisew's substantive rights and constituted an infringement (at paras. 57 and 59).

[505] *Mikisew* was decided on the basis of the Crown's procedural obligations. The Court concluded that even where a treaty gives the Crown the right to take up land,

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the Crown has a duty to consult prior to taking up lands where the taking could adversely affect the exercise of rights. As this had not been done, the Crown failed to discharge its obligation.

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[506] The Province says *Mikisew* expressly rejected the *Sparrow* test at para. 32 where Justice Binnie said he did not accept the *Sparrow*-oriented approach adopted by the chambers judge who relied on *Halfway*. Justice Binnie, citing the reasons of Justice Finch, referred to the holding of the majority of the Court of Appeal as finding "'that *any* interference with the right to hunt is a *prima facie* infringement of the Indians' treaty right as protected by s. 35 of the *Constitution Act, 1982*'…which must be justified under the *Sparrow* test." In rejecting this, Justice Binnie noted to the extent this interpretation presupposes the promised continuity of nineteenth century patterns of land use, he could not agree. It therefore seems that Justice Binnie was being mindful that Treaty 8 allows for the taking up of land by the Crown, and was recognizing that viewing "any interference" with a First Nation's treaty right as a *prima facie* infringement would not work in that context, given the limitation in the treaty.

[507] Justice Binnie made a similar comment at para. 65 of *Marshall* where he added his own gloss to Justice Cory's reasoning in *Badger*:

> [65] …as noted by Cory J. in *Badger*, *supra*, at para. 90: "This Court has held on numerous occasions that there can be no limitation on the method, timing and extent of Indian hunting under a Treaty", *apart, I would add, from a treaty limitation to that effect.*
>
> (emphasis added)

[508] In my view, in paras. 32 and 48 of *Mikisew* Justice Binnie was not ruling that because the "any interference" test was inappropriate, the test for infringement of treaty rights would shift to the other end of the spectrum, namely proof that no rights remain. Had that been the intended result, the Supreme Court of Canada would have been explicit that neither the infringement test nor the justification test developed in *Sparrow* and applied in *Badger* applied. 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.

[509] To a great extent, the Province's argument on the test for infringement isolates portions of *Mikisew* from the body of case law developed by the Supreme Court of Canada on s. 35, the principles of treaty interpretation, and the honour of the Crown. These principles matter in this case, and must be woven into and guide the answer to the question of what constitutes the proper test for considering alleged infringements of treaty rights resulting from cumulative impacts.

[510] The jurisprudence on Treaty 8 which was developed over the years has recognized that this treaty provides an essential promise to its First Nation signatories and adherents – a promise that their way of life based on hunting, fishing and trapping would not be interfered with.

[511] The Province puts forward an approach to infringement that essentially relies on an unfettered taking up clause and disregards the essential element of Treaty 8. I agree that, unchecked, this interpretation could leave Blueberry with no ability to meaningfully exercise treaty rights in their traditional territory. Such an interpretation would not uphold the promise of Treaty 8 or the honour of the Crown.

[512] An interpretation that accepts 'no rights remaining' as the sole standard to establish an infringement of treaty rights, runs afoul of numerous principles established in the jurisprudence on treaty rights, including the protection afforded in s. 35, the requirement for strict proof of fact of extinguishment and a clear and plain intention on the part of government to extinguish rights, and condemnation of approaches or interpretations that result in a "disappearing treaty right" or an "empty shell of a treaty promise" (*Badger* at para. 41; *Marshall* at paras. 40 and 52).

[513] Furthermore, while *Mikisew* notes a difference between treaty rights and Aboriginal rights, the effect of the Province's argument is to establish a fundamental difference between the treatment of these two kinds of rights. Using the standard of no rights remaining would be inconsistent with the standard for infringement that

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applies to Aboriginal rights cases. This is not supported by the jurisprudence and is not consistent with s. 35 and the principles of reconciliation. As noted by Justice Cory in *Badger*, the wording of s. 35 supports a common approach to infringement of Aboriginal and treaty rights, and it is equally if not more important to justify *prima facie* infringements of treaty rights.

[514] If I were to accept that the test for infringement of Treaty 8 requires proof that no meaningful rights remain (i.e., that rights have effectively been extinguished), this would upend the terms of the Treaty and prioritize the Crown's right to take up lands over the promise made to Indigenous people that their rights to hunt, fish and trap would continue. This could not have been the intent or effect of *Mikisew*. It is illogical and, ultimately, dishonourable to conclude that the Treaty is only infringed if the right to hunt, fish and trap in a meaningful way no longer exists. Courts should not be limited to adjudicating treaty right infringement claims once a First Nation has already lost its ability to exercise its rights and carry on its way of life. If such was the case, the courts would have limited ability to issue an effective remedy.

[515] Accordingly, I do not accept that to make out an infringement, Blueberry would need to show that it has *no* ability to exercise its treaty rights. A more nuanced and contextual understanding of what the Supreme Court of Canada meant when it said the search was to see if "no meaningful right …remains" is appropriate.

c) Cumulative Effects and Infringements

[516] The Supreme Court of Canada in *Mikisew* said two things which, together, suggest that courts should consider the context within which an infringement claim is made and should take into account the cumulative effects of previous developments. First, Justice Binnie noted that not every taking up will constitute an infringement (at para. 31); and second, he recognized that "if the time comes" when a First Nation can no longer meaningfully exercise its rights, a potential action for infringement would be a legitimate response (at para. 48).

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[517] The reference to "if the time comes" suggests the existence of a tipping point after which the exercise of treaty rights either becomes less meaningful or impossible. It also suggests that the promise made to Indigenous signatories and adherents over 120 years ago that they would be just as free to hunt, trap and fish after the Treaty as before will be more difficult to honour as time goes on. These points have been recognized by the Alberta Court of Appeal in litigation involving the Fort McKay First Nation.

[518] In *Fort McKay First Nation v. Prosper Petroleum Ltd.*, 2019 ABCA 14 (a decision on application for permission to appeal) Justice Khullar commented on the test for infringement of treaty rights, and reasoned that the adjudicator is implicitly required to take into account the cumulative effects of previous developments and assess if a certain threshold is met or exceeded:

> [56] *Mikisew* considered, at para. 48, when a particular "taking up" of Treaty 8 land would infringe a particular Treaty 8 right. It held that there will be an infringement if the "taking up" deprives the First Nation of "meaningful" rights to hunt, trap and fish over its traditional territories. *This test of infringement implicitly requires the adjudicator to take into account the cumulative effect of previous development on the traditional territories of Treaty 8 First Nations. The test sets a threshold (are meaningful rights left?) and asks whether a current "taking up" or use will exceed that threshold (no meaningful rights left).* That inevitably requires an adjudicator to take into account previous development activity. But it still requires the adjudicator to ask whether a current project will have the effect of leaving no meaningful opportunities for exercise of treaty rights over traditional territory.
>
> (underline in original, italics added)

[519] In *Fort McKay* – the appeal decision – Justice Greckol (in concurring reasons) noted that individual takings will rarely constitute infringements, but that the "extinguishment" of rights will be brought about through cumulative effects:

> [79] As later clarified in *Mikisew 2005*, however, not every "taking up" by the Crown constitutes an infringement of Treaty 8: para. 31. Instead, an action for Treaty infringement will only arise once, as a result of the Crown's power to take up land, "no meaningful right to hunt" remains over the Aboriginal group's traditional territories: *Mikisew 2005* at para. 48; *Grassy Narrows First Nation v Ontario (Natural Resources)*, 2014 SCC 48 at para 52, [2014] 2 SCR 447. This raises the prospect that the effects of any one "taking up" of land will rarely, if ever, itself violate an Aboriginal group's Treaty 8 right to hunt;

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> instead, the extinguishment of the right will be brought about through the *cumulative effects* of numerous developments over time. In other words, no one project on FMFN's territory may prevent it from the meaningful right to hunt – however, if too much development is allowed to proceed, then, taken together, the effect will be to preclude FMFN from being able to exercise their treaty rights.
>
> [80] The right to hunt (in a meaningful way) in Treaty 8 is a "solemn promise" (*Badger* at para. 41) made by the Crown, just as the promise of land in *Manitoba Metis* was a solemn constitutional obligation. And yet it is clear that, given the nature of the respective rights, their implementation will necessarily look very different. The obligation in *Manitoba Metis* was met at the point in which the Crown distributed the 1.4 million acres of land to Metis children (and would have accorded with the honour of the Crown had it been done diligently). Conversely, the "promise" of hunting – given the reality of large-scale oil and gas developments in Treaty 8 territory, which is incompatible with Aboriginal hunting – is not fulfilled definitively. Rather, the promise is easy to fulfill initially but difficult to *keep* as time goes on and development increases.
>
> (italics in original)

[520] I agree with the reasoning of the Alberta Court of Appeal that *Mikisew* implicitly requires that the Court take into account the effects of past development on the exercise of a First Nation's rights. This context is critical. I also agree that with more and more takings and development it becomes harder and harder for the Crown to fulfill its promise to Indigenous people that their modes of life would not be interfered with. However, I do not agree that the Court, when considering a claim for infringement, is searching to see if the First Nation is "preclude[d]" from being able to exercise its rights, or is considering whether "extinguishment" has been brought about. (Nor do I think that is the thrust of Greckol J.A.'s judgment.)

[521] In addition, it is clear from the jurisprudence that infringement can be brought about from the whole of a regulatory regime (*Gladstone* and *Ahousaht*). In *Ahousaht*, (an Aboriginal rights case) which dealt with the federal fisheries regime on the west coast as it applied to Indigenous food, social and ceremonial fisheries as well as commercial fisheries, it was the "cumulative effect of the scheme" on the exercise of rights that was significant for the purposes of the infringement analysis (at paras. 518 and 689). In other words, when looking at infringement, the governmental scheme

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can be considered as a whole, as can the history of development on the lands and the historical use and allocation of the resources and the impacts this has caused.

d) The Degree of Interference Necessary to Establish Infringement

[522] The Supreme Court of Canada in *Mikisew* did not precisely define the degree of interference that would amount to an infringement of a treaty right within the *Sparrow* framework. Although some direction can be taken from the words and passages referenced therein, these cannot be characterized as a clear standard. Rather these words were commentary in the context of the Supreme Court of Canada further refining the development of the duty to consult a year after the release of *Haida.*

[523] While having "no meaningful right" left would no doubt constitute a *prima facie* infringement of treaty rights, the question is what level of interference *less than* extinguishment would constitute an infringement. The concept of a spectrum within the *Sparrow* framework may be helpful as a way to conceive of degrees of infringement, from *prima facie* interference, to significant interference, to no rights remaining.

[524] Having reviewed much of the jurisprudence that has considered the *Sparrow* infringement test as applied to both Aboriginal and treaty rights situations, the Court makes the following observations.

[525] The idea of rights being subject to potential infringements arises from the reality that rights, even rights recognized by the *Constitution Act, 1982*, are not absolute (*Sparrow*). The power of governments to infringe rights, however, is reconciled with their duty to prove that any infringement is justified.

[526] The concept of infringement exists in the middle ground between no interference with an Aboriginal or treaty right and extinguishment of the right. At the lower end of the infringement spectrum lies the idea that "*any* interference" constitutes a *prima facie* infringement or *prima facie* interference (both phrases are

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used in *Sparrow*) of Aboriginal or treaty rights. This was the standard applied by the chambers judge and accepted by Justice Finch in *Halfway*. Given the Crown's power to take up lands under Treaty 8 (i.e., a "limitation" in the Treaty), Justice Binnie in *Mikisew* held that the "any interference" standard was inappropriate.

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[527] At the upper end of the infringement spectrum lies the idea expressed in *Mikisew* and repeated in *Grassy Narrows* that treaty rights are infringed when "no meaningful right" – be it to hunt, fish or trap – remains within a First Nation's traditional territories.

[528] In the middle ground between these two poles lie various articulations of the degree and significance that may be required to find an infringement, including: a "meaningful diminution" of the right (*Gladstone*, *Morris*, and Justice Huddart in *Halfway*), "more than an insignificant interference" with the right (*Morris*), an "unnecessar[y] infringement" of the interests protected by the right (*Sparrow*, and Justice Huddart in *Halfway*), a "detrimental effect" on the exercise of a right (*Ahousaht*), a "limitation on the method, timing and extent" of a right under a treaty except to the extent the treaty has limited that right (*Badger* modified in *Marshall*), an "ero[sion] [of] an important aspect of" the right (*Badger*), a "substantial" impairment of the right (Justice Southin in *Halfway River*), or even (potentially) making the rights "illusory" (Justice Southin in *Halfway River*). Although these cases precede *Mikisew*, notably, these articulations of the standard for finding infringement arise in cases where courts have had to apply the law and determine whether there is an infringement, which did not occur in *Mikisew.*

[529] While different language is used to describe this 'middle ground,' in my view all of the phrases above are trying to get at the idea of rights being diminished in a meaningful or significant way. I find it appropriate to consider whether there has been an infringement of Blueberry's treaty rights by considering if there has been a significant or meaningful diminishment of the rights. I will say more on this below.

e) Looking at Meaningfulness in Context

[530] *Sparrow* and *Gladstone* anticipated that the contours of the standards for infringement and justification would be defined in the "specific factual context of each case." This is the first case to look at infringements from cumulative effects arising from a variety of provincially authorized projects, developments and decisions as well as the regulatory regimes themselves, as opposed to an infringement resulting from a specific restriction contained in legislation or regulations or from one specific project or authorization.

[531] This is also a case that must consider infringement in the context of Treaty 8 which, as noted, contains rights for the Indigenous signatories and adherents that might be in conflict with the rights and powers of governments to take up lands and pass regulation. Blueberry's rights under the Treaty are not absolute, and neither are the Crown's. There is, as Justice Binnie observed in *Mikisew*, an "uneasy tension" (at para. 25).

[532] It cannot be that the Crown's right to take up lands can eclipse Blueberry's meaningful rights to hunt, fish and trap as part of its way of life. As Chief Justice Finch recognized in *West Moberly 2011*, the rights of Indigenous people under Treaty 8 are not "subject to, or inferior to" the Crown's right to take up land (at para. 150).

[533] No case has yet had to determine on evidence of cumulative impacts, where the limit on the Crown's power to take up land under Treaty 8 falls in relation to its encroachment on Indigenous peoples' ways of life. The test for infringement must take this context into account. Unless this is done, the development of the jurisprudence in a singular context may result in an artificial construct that does not fit with the reality of cumulative impacts resulting from industrial or other types of development today.

[534] I agree with the Province that the Treaty reflects some balance. However, I do not agree that the balance is struck by allowing the Province, in essence, an infinite power to take up lands, since (as the Province argues) the intention of the Treaty was

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that the area be "thrown open to development." As I have already concluded, that is not an accurate reflection of the intent of the Treaty. An assessment of infringement that seeks to ensure Blueberry's exercise of rights remains meaningful in the face of the Province's ability to take up lands, is the way of striking the balance. This ensures Blueberry is not left with "an empty shell of a treaty promise."

[535] The focus of infringement analyses to date has been on the reasonableness (or unreasonableness) of various aspects of the Crown's regulatory regimes. Indeed, many of the questions, factors or criteria articulated in *Sparrow* and the cases that have followed are, in essence, ways to look at the reasonableness of a government regime in light of the significance of its impact on Indigenous people. For example: Is the First Nation facing undue hardship, or being denied the very means (or preferred means) of exercising its right? Other factors focus on the level of guidance provided within the regime to decision-makers in exercising their discretion. For example: Is there a direction to guide how to exercise discretionary authority in a manner that would respect treaty rights? In my view, considering the significance of the alleged infringement requires greater emphasis on the Indigenous perspective, especially as it relates to understanding what it means to still have a "meaningful" right.

[536] The Province points out that the *Oxford English Dictionary* defines meaningful as "having a recognizable purpose or function." Using this definition, the Province argues that the purpose of the exercise of treaty rights to hunt has changed over time. In the 1960s and 1970s, hunting was a serious pursuit, purpose-driven and necessary for survival. Today, argues the Province, treaty rights are exercised for cultural survival, not physical survival, and only as time permits.

[537] In pointing out these differences, the Province seems to be suggesting that it may be more acceptable to infringe a right that is being exercised for cultural, as opposed to physical, survival. This way of looking at rights appears to be formulated from the perspective of one party (i.e., the Crown). It fails to take into account, as Blueberry's witnesses and expert anthropologists testified, that these rights are exercised as part of a way of life.

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[538] The dictionary definition of meaningful, which refers to the purpose or function of an activity, suggests looking at the infringement of rights in a broader way – not just at whether and how specific rights may have been limited or diminished, but at how this has affected their purpose or function within a culture.

[539] Blueberry notes that its rights are exercised as part of and "in service of a way of life." For the exercise of rights to be meaningful, Blueberry says, its members must be able to exercise their rights "as part of a mode of life that has not been significantly diminished."

[540] As I noted earlier, I agree with Blueberry that, in this case, the focus of the infringement analysis – and consideration of whether "no meaningful right remains" – should be on whether the treaty rights can be *meaningfully* exercised, not on whether the rights can be exercised *at all*. I also agree that the Court should consider the question of infringement by looking not only at the impacts on the exercise of rights to hunt, trap and fish, but also at impacts on the way of life, since these activities are grounded in a way of life.

[541] I conclude that the appropriate standard through which to consider the question of infringement in this case is: whether Blueberry's treaty rights (in particular their ability to hunt, fish and trap within their territories) have been significantly or meaningfully diminished when viewed within the way of life from which they arise and are grounded. In other words, can Blueberry members hunt, fish and trap as part of a way of life that has not been meaningfully diminished? This is consistent with how infringement was viewed in *Badger*, where the Court looked and whether an important element of the right had been eroded.

[542] As noted earlier, Blueberry alleges that it is the Province's express actions as well as its nonfeasance that has caused this infringement. Specifically, Blueberry says it is the cumulative impact of forestry, oil and gas, hydro-electric infrastructure and agricultural development authorized (and at times promoted) by the Province,

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while failing to prioritize or respect treaty rights, that Blueberry says has caused the infringement.

[543] In the context of this claim, the infringement analysis also requires inquiries into:

a) whether the provincial regimes for managing natural resources and taking up lands in northeastern BC, and in particular in the Blueberry Claim Area, give decision-makers unstructured discretion that risks significantly or meaningfully diminishing and therefore infringing treaty rights;

b) whether the regulatory regimes operate in such a way that they significantly diminishes the Plaintiffs' treaty rights. As noted in *Ahousaht* at para. 757, this question incorporates the three *Sparrow* questions: is the limitation unreasonable; does it impose undue hardship; and does it deny the holders their preferred means of exercising their rights;

c) whether existing policies and decision-making frameworks for managing natural resources and taking up lands in the Blueberry Claim Area recognize and seek to implement the rights contained in Treaty 8 and guide the exercise of discretion; and,

d) whether the regulatory regimes for managing natural resources and taking up lands in the Blueberry Claim Area, have mechanisms to assess cumulative impacts, take into account cumulative impacts on the exercise of Treaty 8 rights, and manage in a way to avoid infringements resulting from cumulative impacts that could significantly diminish rights to hunt, trap and fish within a way of life protected by Treaty 8.

C. Blueberry's Traditional Territories

[544] Treaty rights are not ascertained on a treaty-wide basis, but in relation to the territories over which a First Nation traditionally hunted, fished and trapped, and continues to do so today (*Mikisew* at paras. 47-48). To assess whether Blueberry can meaningfully exercise treaty rights as this Court has been called on to do, the Court

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must delineate Blueberry's traditional territory and the areas that it continues to use today.

[545] Attached as Schedule 1 to Blueberry's Notice of Civil Claim is a map of its "Traditional Territory." The term "Traditional Territory" is defined as (and the map at Schedule 1 shows) a "portion" of the area in which Blueberry traditionally hunted, trapped, fished and gathered. Paragraph 24 of the Notice of Civil Claim states:

> 24. The portion of their traditional territory within which the Plaintiffs traditionally exercised their Treaty Rights, including the rights to hunt, trap, fish and gather, is outlined on the map attached as Schedule 1 to this claim. This area is hereinafter referred to as the "Traditional Territory".

[546] As previously noted, I am referring in these reasons to the area outlined on Schedule 1 of the Notice of Civil Claim as the "Blueberry Claim Area." The Blueberry Claim Area constitutes approximately 38,000 square kilometres (i.e., 3.8 million hectares) (For reference, a map of the Blueberry Claim Area is included in the "Background" section of these reasons.)

[547] At para. 35 of the Notice of Civil Claim, Blueberry alleges that the cumulative effects of industrial development have, *inter alia*, significantly curtailed their ability to exercise their treaty rights, such that they have been left with "no meaningful right to exercise some or all of their Treaty Rights within their Traditional Territory" (i.e., within the Blueberry Claim Area).

1. Parties' Positions

a) Blueberry

[548] Blueberry makes a number of points with regard to the area that can be considered its traditional territory or traditional territories. First, it is candid that the Blueberry Claim Area does not represent the entire area its ancestors traditionally used or where its members exercise their treaty rights today. Blueberry relies on and uses a larger area, and has sought to be consulted about potential impacts to areas that extend beyond the Blueberry Claim Area. Blueberry says that as development

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encroaches on key hunting, trapping, fishing and gathering areas, families have been forced to go further and further from their homes to exercise their rights, and now try to exercise their rights in other areas beyond the Blueberry Claim Area.

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[549] Second, Blueberry says that the evidence, and in particular that from Dr. Ridington and Mr. Brody, supports the notion that the Blueberry Claim Area reflects Blueberry's traditional patterns of land use. Those patterns of land use, says Blueberry, reflect a shift from a semi-nomadic way of life to in effect a semi-settled one.

[550] Blueberry uses what it refers to as the "core" of its traditional territory north of the Peace River, with seasonal activities (hunting, trapping, fishing and gathering) radiating out from that core. What, *exactly*, constitutes the "core" is not set out with precision. At times Blueberry refers to the Blueberry Landscape Unit as constituting the core of its territory and including the areas used by community members today and by their ancestors in times before. That Landscape Unit, Blueberry says has been subject to intensive development, both forestry and oil and gas. Blueberry has also referred to the Fort St. John Land and Resource Management Plan as zoning the "core" of its territory as an "enhanced resource development" zone available for high intensity development. The enhanced resource development zone covers much, but not all of the Blueberry Landscape Unit, as well as the southern portion of the Tommy Lakes Landscape Unit, and the northern portion of the Kobes Landscape Unit.

[551] Blueberry's experts and witnesses have also referred to the "core" of the territory. As discussed below, Dr. Ridington expressed a view that the core of the territory used by Blueberry's ancestors at the time of the Treaty and thereafter was north of the Peace, and centred around Charlie Lake and the Beatton River watershed. This characterization roughly accords with the Blueberry, Kobes and Tommy Lakes Landscape Units. Norma Pyle also testified about the core of the territory, at times aligning it with what the Province has demarcated as consultation

Area A, and at times situating it more generally, as the area in the middle of the Blueberry Claim Area, and within close proximity to where members live.

[552] Blueberry emphasizes that their way of life is focused on their core territory. The fact that they have been pushed out of the areas of most concentrated use and cultural importance, to the margins of the areas they traditionally used in order to find areas that remain relatively intact, Blueberry says, represents a meaningful diminution of their way of life and a breach of the Treaty promise that they would be "just as free to hunt and fish all over as they are now." Blueberry says it ought to be able to rely on areas outside the Blueberry Claim Area, but should not be relegated to those areas.

[553] Third, Blueberry notes that the Blueberry Claim Area is largely consistent with the Province's consultation Area A, which the Province has accepted demonstrates the strongest evidence of historical use by Blueberry's ancestors based on traditional patterns of activity. I will discuss this in some detail below. Blueberry says it is hypocritical for the Province, for the purposes of consultation, to only recognize Area A as the area over which Blueberry traditionally exercised treaty rights and then, in this case, say that Blueberry exercises its rights over a larger territory, in order to argue that an infringement has not been made out. The portion of the Blueberry Claim Area outside consultation Area A is also an area of use as established by the evidence.

b) Province

[554] The Province's primary position is that the Court does not need to determine the location and extent of Blueberry's traditional territory, because it says Blueberry members still have a meaningful ability to exercise their rights in the Blueberry Claim Area.

[555] Alternatively, the Province argues that even if Blueberry members can no longer exercise their treaty rights within the Blueberry Claim Area, they maintain the ability to meaningful exercise treaty rights in a broader asserted traditional territory.

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[556] The Province points out that the Blueberry Claim Area is approximately 38,000 square kilometres, and it notes that the traditional territory of the Beaver Indians at the time Treaty 8 was entered into was approximately 194,000 square kilometres. This, in addition to the evidence that establishes Blueberry members hunt outside the Blueberry Claim Area, the Province says, would establish there are sufficient lands within Blueberry's "traditional territory" for members to meaningfully exercise their treaty rights.

[557] The Province says the precise extent of Blueberry's traditional territory is not clear on the evidence, and that over the years Blueberry has shifted its territorial boundaries. The Province notes the Blueberry Claim Area is smaller than the area Blueberry has asserted is its traditional territory at other times and in other settings. The Province says that, at best, the Blueberry Claim Area is an "arbitrarily defined portion of a larger historic traditional territory." It says the Blueberry Claim Area is more akin to Blueberry's "core or preferred areas," and that this is not what was contemplated in *Mikisew*.

2. Jurisprudence

[558] The text of Treaty 8 provides that the Indigenous people with whom the Crown treated "shall have right to pursue their usual vocations of hunting, trapping and fishing throughout the tract surrendered as heretofore described…"

[559] The issue of Treaty 8 and where the "usual vocations" are to be pursued came up in *Mikisew*. As previously noted, in that case, the governments of Canada and Alberta were arguing that Mikisew's rights were not infringed as the road at issue took up only a small area of land, and the Mikisew could still exercise their rights at other places within the larger Treaty 8 territory. Justice Binnie considered these arguments and, as noted earlier, at para. 48 stated:

> [48]…The "meaningful right to hunt" is not ascertained on a treaty-wide basis (all 840,000 square kilometres of it) but in relation to the territories over which a First Nation traditionally hunted, fished and trapped, and continues to do so today…

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[560] Justice Binnie's reasoning in *Mikisew* has recognized, on the one hand, that signatories and adherents "may have rights under Treaty 8 to hunt, fish and trap throughout the Treaty 8 area" (at para. 47). On the other hand, it shows an appreciation that, from a practical point of view, location, "home turf" or traditional territory matters. In essence, Justice Binnie has reasoned that understanding the locations and territories traditionally used by an Indigenous group, and those that continue to be used today, matters when courts are considering whether the rights protected by Treaty 8 have been infringed.

[561] Knowing the areas used for the exercise of rights is also important in a consultation setting, since the Crown's right to take up lands under Treaty 8 is subject to its duty to consult and, if appropriate, accommodate. The Crown must consult before reducing the area over which a First Nation's members may continue to pursue their hunting, trapping and fishing rights (*Mikisew* at para. 56). This consultation is premised on knowing the area used.

[562] Several cases have discussed how one part of advancing an infringement claim is determining the nature and extent of the First Nation's traditional territory. In *Prophet River v. British Columbia (Environment)*, 2015 BCSC 1682, the Prophet River and West Moberly First Nations brought a petition for judicial review challenging the Province's issuance of an environmental assessment certificate to allow for the construction of the Site C dam.

[563] One of the issues raised was whether the provincial ministers were obligated to determine whether the dam project infringed Treaty 8 rights. Justice Sewell held that the ministers' responsibility in considering an application for an environmental assessment certificate were set out in s. 10 of the *Environmental Assessment Act*, S.B.C. 2002, c. 43, and did not include the power to determine rights. The question of infringement would require, *inter alia*, a determination of the extent of each nation's traditional territory and a "rights-based resolution." The Court reasoned as follows at paras. 130-131:

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> [130] …The [*Environmental Assessment Act*] *EAA* does not provide the Ministers with the powers necessary to determine the rights of the parties interested in the project under consideration. The Ministers have no power to compel testimony, hear legal submissions from the parties or require production of documents. The procedures set out in in the *EAA* are simply inadequate to permit determination of the issues framed by the petitioners in this proceeding. In addition, it is obvious that the Ministers have no particular expertise with respect to those issues.
>
> [131] The infringement issue as raised by the petitioners requires the resolution of the proper construction of Treaty 8, a determination of the nature and extent of each petitioner's traditional territory and a decision as to the effect of the jurisprudence to date on these issues. It is in every respect a rights-based issue and requires a rights-based resolution.

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[564] The First Nations also argued that the Court could decide the question of infringement in the context of the judicial review. The Court disagreed, reasoning the proper route for the determination of the infringement issue was to file a notice of civil claim and hold a trial to resolve the factually complex issues. At para. 143, Justice Sewell added:

> [143] …The petitioners' claims of infringement would involve the petitioners establishing the boundaries of their traditional territory, the extent to which specific species were exploited within their traditional territory and the relative impact of the Project on the traditional rights of the petitioners. These matters would have to be proven by admissible evidence accepted by the court. They cannot appropriately be resolved on a summary hearing pursuant to the *Judicial Review Procedure Act*.

[565] The Court of Appeal in *Prophet River First Nation v. British Columbia (Environment)*, 2017 BCCA 58, upheld this decision.

[566] The Prophet River First Nation and West Moberly First Nation also launched an application for judicial review in the Federal Court regarding the decision of the Governor in Council that the adverse environmental effects that would likely result from the construction of the Site C dam were justified in the circumstances. One of the issues was whether the Governor in Council had the jurisdiction under the *Canadian Environmental Assessment Act, 2012*, S.C. 2012, c. 19, s. 52 to decide whether the project would infringe Treaty 8 rights. The Federal Court held that judicial review was not the appropriate course of action to determine whether treaty rights

had been infringed (*Prophet River First Nation v. Canada (Attorney General)*, 2015 FC 1030 at paras. 49-52).

[567] The Federal Court of Appeal in *Prophet River (FCA)* dismissed the Treaty 8 First Nations' appeal. On the issue of the territorial scope of the rights guaranteed by Treaty 8, the Federal Court of Appeal noted at para. 36 that "[a]lthough treaty rights can be defined as established rights as opposed to claimed rights, and Aboriginal groups are entitled to what was confirmed in Treaty 8…, the scope of their use on Aboriginal peoples' traditional territories still needs to be delineated (*Mikisew* at para. 32)."

[568] At paras. 50-51, the Federal Court of Appeal added that when a First Nation alleges a project will infringe their treaty rights, as part of the consultation process the First Nation must provide specificity regarding where the rights were historically exercised and where they are exercised today:

> [50] Although it is uncontested that the appellants, as signatories of Treaty 8, have treaty rights in the area covered by Treaty 8, there is no evidence that their rights cover the entire area of 840,000 square kilometres, an area that exceeds the size of the province of Manitoba (*Mikisew* at paras. 2 and 48). Unless a treaty enumerates specific locations for hunting, treaty rights ascertained on a treaty wide-basis have to be specified as part of the consultation process. As such, it is insufficient for the appellants to assert treaty rights by merely alleging preferred areas without any specification with respect to the traditional land use area in which the rights were historically and are currently exercised.
>
> [51] As part of the consultation process, the appellants therefore not only had the opportunity but the obligation to carry their end of the consultation process and provide information in support of their allegation that the Site C Project would infringe their specified treaty rights. Particularly, the appellants had the duty to provide information for the determination of their traditional territories and the scope of their treaty rights in order to demonstrate that the potential impact of the Site C Project was so severe so as to constitute infringement (*Haida Nation* at para. 48). …

[569] The question of the territorial scope of treaty rights also arose, but was not decided, in *West Moberly 2020*. In that case, a number of First Nations who had adhered to Treaty 8 brought an action seeking a declaration that the western boundary of the tract of land covered by Treaty 8 was the height of land along the

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continental divide between the Arctic and Pacific watersheds. The First Nation plaintiffs were successful, the declaration was granted, and the Province appealed.

[570] In the appeal, the Treaty 8 First Nations argued that the trial judge's declaration allowed their members to "step outside and know with certainty where they can exercise their Treaty rights" (at paras. 76 and 95). Both Chief Justice Bauman (for the majority) and Justice Smith (dissenting) dismissed the idea that by virtue of the declaration of the western boundary there was clarity on the geographic scope of the rights.

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[571] Justice Smith noted, at paras. 86-87, that there had been "no judicial finding as to the relationship between the tract boundary and the substantive rights under the Treaty" and that it was not clear from the record whether the rights were intended to be exercised on all the land encompassed by the metes and bounds clause.

[572] Considering the language of Treaty 8 and the confirmation of First Nations' rights to pursue their usual vocations throughout the tract surrendered, Chief Justice Bauman reasoned as follows at paras. 422-423:

> [422] The question begged is whether this purports to grant a particular adhering nation harvesting rights throughout the entire area covered by Treaty 8. It raises the spectre of the Cree of Vermilion asserting rights over the Sekani's traditional lands in British Columbia.
>
> [423] On the contrary, in future proceedings the Treaty may be interpreted as only affirming a particular adhering nation's rights that its members traditionally enjoyed within their traditional lands, their "usual vocations" throughout "the tract hereinbefore described" that is the tract that that nation surrendered…
>
> (emphasis in original)

3. Analysis

[573] The location and extent of Blueberry's traditional territories is important both for purposes of consultation and for purposes of adjudication. While the Province says Blueberry can still exercise its rights and continues to do so today, the Court must know the areas used by Blueberry for the exercise of its rights for the purposes "of the infringement analysis in this case, namely:" Have the Plaintiffs established a

treaty infringement in that they are no longer able to ‘meaningfully exercise’ their Treaty 8 rights in their ‘traditional territories,’ having regard to the extent of industrial development?” (which is how the issue is framed in the parties’ trial briefs).

[574] In determining traditional territories, the court must consider the nature of a First Nation’s society. Delineating the traditional territories of a semi-nomadic society and assessing whether treaty rights have been infringed may well require different considerations than for non-nomadic groups. Looking at patterns of use may be more important than focussing on boundaries. That rights can no longer be meaningfully exercised within specified areas of a First Nation’s traditional territories (for example, in areas of particular ecological, cultural or spiritual significance to the First Nation historically and today) might also be sufficient for finding an infringement. The areas may be insufficient in area and character to provide for the meaningful exercise of Treaty rights.

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a) Consultation Areas, Traditional Territories and the Problem with Boundaries

[575] Before reviewing the evidence regarding the territories used by Blueberry historically and today, I will discuss “consultation areas,” and review the correspondence between the parties regarding Blueberry’s traditional territories and the area that should be used for consultation purposes. As part of this, I will consider the problem with demarcating boundaries.

[576] The Province’s Ministry of Indigenous Relations and Reconciliation (previously known as the Ministry of Aboriginal Relations and Reconciliation) develops procedures, guidelines and tools to assist government officials and industry proponents in meeting consultation obligations with First Nations. One such tool is the Consultative Areas Database which geographically identifies consultation areas for each First Nation based on information provided to the Province by the First Nation about the areas over which it has or asserts treaty or Aboriginal rights or title, or based on an area set out in an agreement.

[577] Geoff Recknell, the Ministry of Indigenous Relations and Reconciliation's Regional Director for the North Region from 2010 to 2019 testified at trial and described the idea behind consultation areas as follows:

> Q: …What is meant by a "consultation area"?
>
> A: Yeah, consultation area is an area – a geographic area, so a map area, in which it is understood that a First Nation has Aboriginal rights or interests or treaty rights depending on the circumstance of the situation, and the consultation area is the area within which the Province's duty to consult is triggered.
>
> Q: You described the consultation area database earlier in your evidence. Who determines what consultation areas get placed in the consultation area database?
>
> A: There are a number of different ways that information may be brought forward into the consultation areas database…The consultative areas may be provided by the First Nation to the Province. In some instances the consultation areas are the outcome from a negotiation such as the consultative areas that were described earlier and included with each of the resource management agreements that we went through.
>
> So the processes may be different and they are changed – the maps may change over time as new information comes forward. The First Nation or BC may conclude or undertake ethnohistoric research or studies to establish or refine where the traditional territories which determine a consultative area lie, and that information from time to time is used to update the information in the consultative areas database.

[578] On October 17, 2012, Blueberry wrote to the Province regarding its traditional territory and the area to be used for consultation purposes. Blueberry attached a map, which it said more accurately reflected its documented historical land use and occupancy, and which it said was generated as a result of a study prepared by Dr. Dorothy Kennedy and Randy Bouchard ("Kennedy and Bouchard Report"), which it also enclosed. The map attached to this letter (which I will refer to as the "2012 Map") showed Blueberry's traditional territory outlined in blue. Blueberry asked that the 2012 Map be recognized as the area where the Province is required to consult with Blueberry.

[579] On May 26, 2014, Mr. Recknell responded to Blueberry's October 17, 2012 letter. He noted the Province would implement a three-zoned consultation area approach that was based on Blueberry's asserted traditional territory shown on the

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2012 Map, and that its approach would divide the consultation area into “Area A,” “Area B” and “Area C.”

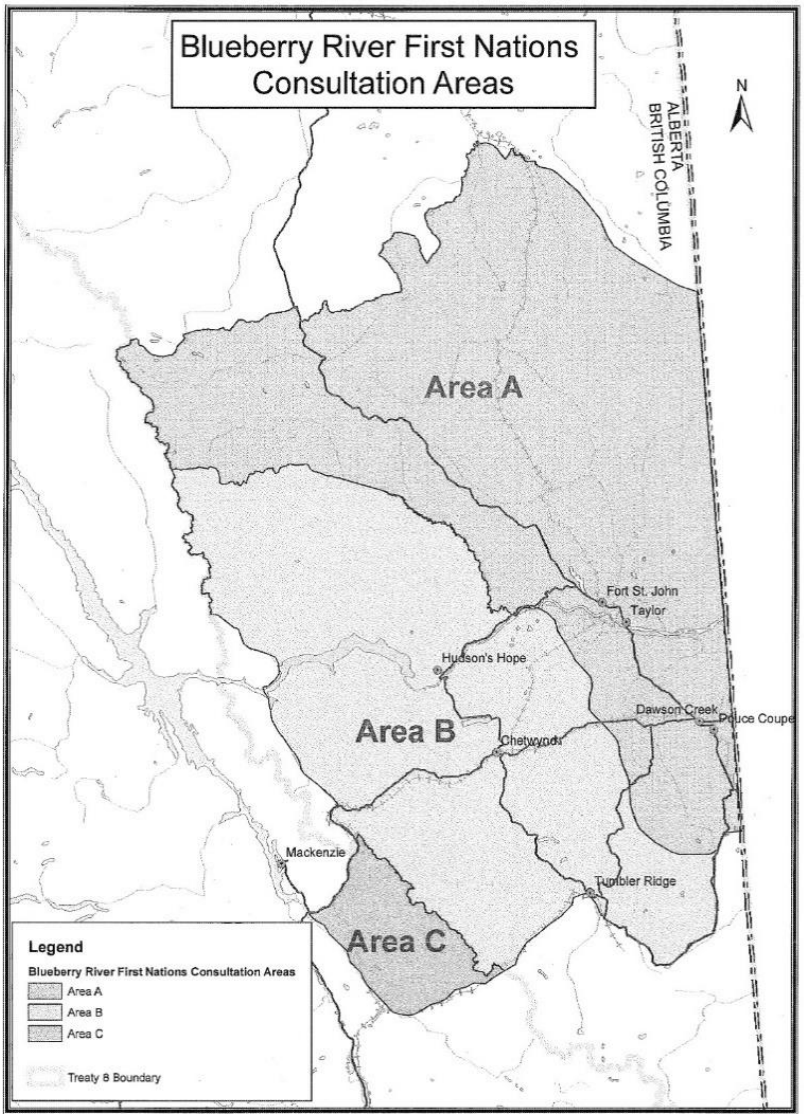

Exhibit 103, Tab 8: May 26, 2014 letter from Geoff Recknell to Chief Marvin Yahey with enclosed map titled “Blueberry River First Nations Consultation Areas.”

[580] He noted the Province had reviewed and considered the Kennedy and Bouchard Report, and that the Province agreed it provided “a credible analysis of known historical sources.” He noted that consultation Area A “largely corresponds with the boundary in the Report delineating the approximate overall area that was

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reported to have been used by the ancestral family groups associated with the contemporary BRFN peoples." Mr. Recknell noted: "The Province agrees with the Report findings that the sources of historical documented use by BRFN are strong in some areas and weaker in others, and is of the view that Area A represents the area historically used by BRFN ancestors, as described in the Report."

[581] I note that Area A covers much, but not all, of the area that would come to be represented on Schedule 1 of the Notice of Civil Claim, and which I have referred to here as the Blueberry Claim Area. In particular, Area A includes the Beatton River Watershed, Pink Mountain, and Tommy Lakes areas, but excludes the area around the lower Halfway River, Farrell Creek and Butler Ridge.

[582] The Province noted that the scope of consultation in Area A will vary according to the proposed activity and the assessed nature and scope of the treaty rights that may be impacted. It noted it would consider information regarding traditional patterns of activity within Area A (i.e., where Blueberry's ancestors undertook their hunting, fishing, and trapping around the time of entering into Treaty 8) as relevant to considering the appropriate scope of consultation. Information about current use, including frequency of use, and whether there are any unique or special characteristics of the area, would also inform the Province's scope of the duty to consult in Area A.

[583] The Province went on to note that historical and current use of Areas B and C was not substantiated by the Kennedy and Bouchard Report or by any other information it has been provided, and it would therefore consult with Blueberry on a notification basis for those areas, pending the provision of further information.

[584] On March 3, 2015, Blueberry filed its Notice of Civil Claim, which attached Schedule 1 showing the Blueberry Claim Area, representing a "portion" of its traditional territory.

[585] On November 19, 2015, the Province wrote to Blueberry noting the territory asserted in the Notice of Civil Claim was reduced in scope compared to the territory

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asserted in the October 17, 2012 letter and 2012 Map. The Province proposed implementing a new consultation area based on the Blueberry Claim Area reflected in the pleadings filed in court.

[586] On December 18, 2015, Blueberry responded to the Province objecting to its proposal to reduce the consultation area. In a follow up letter on March 21, 2016, referring to its pleadings, Blueberry noted that the Blueberry Claim Area was not its "entire traditional territory," but rather the portion of its territory within which Blueberry traditionally exercised their treaty rights. Blueberry noted that due to ongoing development in its territory, members had been forced to travel further from parts of the territory they traditionally used to try to exercise their rights in other areas.

[587] On May 2, 2016, the Province confirmed it would not amend the existing consultation area map boundaries, and would continue to follow the three-zoned approach outlined in Mr. Recknell's May 26, 2014 letter. The Province noted it remained interested in receiving additional information regarding the areas Blueberry members traditionally or currently practiced their treaty rights.

[588] Consultation between the Province and Blueberry has generally proceeded on the basis of the May 26, 2014 letter. The Province has in correspondence to Chief Yahey admitted that Area A is the area Blueberry's ancestors historically used.

[589] In these proceedings, Blueberry has focused its attention on the Blueberry Claim Area, which, as noted earlier, outlines a portion or specific parts of the territory their ancestors used and relied on. The map of the Blueberry Claim Area (i.e., Schedule 1) is appended to the Notice of Civil Claim because at the time the claim is filed, the parties and the court need a clear outline of the claim.

[590] While the Treaty 8 jurisprudence notes the importance of having reference to a particular nation's traditional territories (i.e., "*its* traditional territories") when considering whether an action for treaty infringement has been made out, there is little guidance on how to approach the task of identifying and delineating a nation's traditional territories in the treaty context, as opposed to the Aboriginal title context.

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What is clear is that the court is to consider the nation's "traditional patterns of activity and occupation," and when looking at lands taken up and considering the question of infringement, is to consider whether the nation can meaningfully exercise its rights in relation to the "territories over which [it] traditionally hunted, fished and trapped, and continues to do so today" (*Mikisew*, paras. 47-48).

[591] *Mikisew* does not set the scale at which an infringement claim can be pursued. I do not interpret *Mikisew* and the cases that have followed as requiring a First Nation, when bringing an infringement claim, to do so in relation to the whole of the territories it traditionally used and continues to use today. A First Nation may be entitled to bring a claim in relation to one or more significant portions (whether culturally, spiritually or ecologically) of its traditional territories, including its "core" areas.

[592] It may be that an area within its traditional territory (for example a particular watershed) is an important location for the exercise of certain rights, and that development activities planned for that location risk infringing those rights. The First Nation would be entitled to bring an infringement claim, in relation to that portion of its traditional territories. Nothing in para. 48 of *Mikisew* precludes a First Nation from bringing a claim in relation to a specific area within the territories over which it traditionally hunted, fished and trapped, and continues to do so today. Moreover, in my view, this approach gives meaning to the Supreme Court of Canada's insistence that patterns of activity and occupation matter, as it recognizes the importance to First Nations of specific locations.

[593] In this case, the Court heard specifically how particular locations are important. Wayne Yahey testified about how certain places where Blueberry members exercise their rights to harvest are not easily replaced.

> I asked my uncle is there another area that you think they [pine marten] moved to. He told me, you know, before, how long did it take our ancestors to find that area. He said it's going to – it's going to take just as long for us to find another area to find a pine marten… He said when they are clearcutting that area, marten, their safety net is climb a tree. He said when that feller buncher

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> grabs that tree the marten climbs it, what do you think is going to happen to that marten.
>
> So that's – that's his way of explaining to me about – because I told him could you just find another area. He kind of – he told me no. And he explained to me about that assessment, his – about his history, what his dad told him.
>
> So this area in particular when – it used to be a prime area where we get our necessities, food. It provided – we call it midnitsu. It's a certain wood that we gather for tanning a moose hide. Only – it only exists in big timber. Where my mother used to learn from her mother to harvest this wood, it's all logged. Nothing. I asked my mother let's go back to that place and she said no, it's logged.
>
> And I asked her could we find another place? She told me well, you know, I'm getting old. I can't walk. She said when I was a little girl my grandma showed me that place.
>
> So the thing that people outside our culture don't understand, they say okay, why don't you just look somewhere else. That's what I asked my mother. That's what I asked my uncle. It's not like that. It's not the case what we do. Because it's a simple answer. I say well, can't you just look somewhere else. It took 100 years in evolution just for us to find it, and then another place, it's – it wouldn't happen. Not going to happen.
>
> So just to give you a sense of how they explain it to me, how they conveyed their teachings to me, and when I asked them those questions, could we just find another place, it's not as easy as it sound. All these areas have a significant value.

[594] I therefore do not accept the Province's argument that, in accordance with *Mikisew*, a First Nation cannot bring a claim to a core or preferred area of its territory. Specific areas have significant value.

[595] When faced with allegations that important or core areas within a nation's traditional territory are being impacted or destroyed, it is no answer to say: go elsewhere, you have a large territory. The Supreme Court of Canada recognized this, noting it did not make sense from a practical point of view to suggest to the Mikisew that while their own hunting and trapping territories were compromised, they could effectively move into or invade the territories of other distant First Nations.

[596] The same reasoning applies when considering infringement claims involving specific areas of a First Nation's territory. It is no answer to Blueberry to recognize that its core territory in and around the Beatton River is being compromised, but to

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deny any infringement because members can still exercise their rights in other outlying areas, which may or may not be shared with other First Nations, and which may or may not hold the same cultural, ecological or spiritual values. This approach disregards the nation's attachment to specific places, its patterns of use and occupation, its way of life, and the Indigenous laws and protocols that govern use of shared or neighbouring areas.

[597] Nor do I accept that the Blueberry Claim Area is an "arbitrary" portion of Blueberry's larger traditional territory. As is discussed in greater detail below, I find that the Blueberry Claim Area generally accords with the area Blueberry used at the time its ancestors adhered to the Treaty, and that members continue to use today. For greater clarity, I find that the area delineated as Area A is the area Blueberry historically used at the time of the Treaty. The Province accepted this in its correspondence to Blueberry. In so finding, I also recognize there is evidence that Blueberry's ancestors knew and travelled through a larger area extending from the Rocky Mountains into Alberta. The remaining Blueberry Claim Area (consisting of an area just north of the Peace River and west of Halfway River), as will become evident, is part of Area B and consistent with evidence of use given by Blueberry members at trial.

[598] In so ruling, the Court is mindful that the process of delineating boundaries on a map can be fraught. It must be recognized, especially in the case of nomadic and semi-nomadic societies, that boundaries may be difficult to draw. I note, as Justice Vickers said in *Tsilhqot'in Nation v. British Columbia*, 2007 BCSC 1700 (a case dealing with Aboriginal title, not treaty rights), territorial boundaries can be artificial – members do not stop their harvesting activities based on lines on a map, and there may be a difference of opinion about such boundaries even amongst the people who live in the territory (at paras. 641 and 642).

[599] Yet there is a societal (and in this case legal) demand for boundaries, or at least for a way of knowing the locations of territories. The Province must know where Blueberry exercises its rights in order to consult in a meaningful way, and the Court

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must know where Blueberry exercises its rights in order to ascertain whether they can still be meaningfully exercised within their traditional territories in the context of its infringement claim.

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[600] Although I have used the term boundaries, I recognize this idea could be considered inconsistent with the way in which Blueberry knows and uses its territories. The Court heard evidence from Mr. Brody about how in the 1970s and 1980s when resources were still abundant, Blueberry members were not overly concerned about precise boundaries between the territory of one group of Dane-zaa people and another, and there was an openness towards the members of other nations using parts of the territory. At the same time, however, the members of one nation did not tend to go "deep" into the territories of other nations to harvest. Mr. Brody suspected this was because at the time of his research in the late 1970s to early 1980s, there was considerable abundance of resources, and individuals did not need to travel large distances from their homes to harvest.

[601] Norma Pyle's testimony on this point is especially instructive. At several points during cross-examination Ms. Pyle emphasized that, for Blueberry, there were no boundaries, and that boundaries were made at the insistence of government. On August 30, 2019 she testified as follows:

> …I mean, boundaries – you know, boundaries are only as a result of government. There were no boundaries. I mean, even, you know, when my mom and her family are travelling back and forth from Horse Track to Halfway there are no boundaries. The travel is free.
>
> By the time the Alaska Highway come, Beatton Airport River Road, provincial government getting involved, then there's boundaries. As soon as provincial government determine there's resources, lucrative resource in the area, then they start putting these boundaries.

[602] Again on September 3, 2019 she testified:

> …There were no boundaries, even, you know, in the 70s. That's not that long ago. Boundaries happened because of your clients [the Province] put boundaries on us. Make us have boundaries. That's where the boundaries come from.
>
> …

> So talk about a boundary. We never used to have a boundary. This boundary business is by your clients, both your oil and gas clients and your government client. That's who makes boundary. And they play one nation against the other because now there's a boundary.

[603] Other witnesses, including Sherri Dominic, Wayne Yahey and Jerry Davis, referred to certain areas on what I will call the edges of the Blueberry Claim Area as being the areas or territories of other First Nations, and of the need to show respect when using those areas. For example, Doig River First Nation's territory is at the east side of the Blueberry Claim Area, and Halfway River First Nation's is on the west side.

[604] Ms. Dominic testified that Blueberry members "respect other First Nations and their areas. And if we are given permission or if we go with some of the members then we actually go to those areas and go hunt, but it's just being respectful of other First Nations, their areas." As to boundaries, she testified as follows:

> Q: So is there something of a boundary on here that you would think of as – to the east of it as Doig and Doig territory?
>
> A: No boundary.
>
> Q: No. Just this general area?
>
> A: Just a general area.

[605] Mr. Yahey testified that Blueberry elders had told him there is no "line" that separates Blueberry from the Halfway River First Nation. Part of their culture, practice and tradition is to await an invitation to hunt in a neighbouring nation's "backyard."

[606] Maps of the asserted traditional territories of other Treaty 8 First Nations, as reflected in the Province's Consultative Areas Database, have been entered into evidence in these proceedings. It is clear that the Blueberry Claim Area overlaps, to varying degrees, with the information the Province has about the asserted territories of several other First Nations, including Doig River (who together with Blueberry were once the Fort St. John Indian Band), Halfway River, Prophet River, West Moberly and Saulteau First Nations, and the McLeod Lake Indian Band.

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[607] These First Nations were not parties to these proceedings, and they did not speak to those maps. Nor is there evidence about the Indigenous laws and protocols in place to deal with issues of shared or overlapping territories, though as noted above some witnesses spoke of the importance of respecting the territories of other First Nations and obtaining their invitation or permission before hunting or fishing in those areas.

[608] The Court's findings set out below deal with the territories traditionally used by Blueberry's ancestors and currently used by members today, and are made in the context of this claim that alleges breach of the Treaty and infringement of Blueberry's treaty rights. It is evident there is overlapping use by First Nations in some of these areas. The Court makes no findings as to whether those territories were exclusively used by Blueberry, or whether other Indigenous people also used and accessed these lands and what laws and customs governed such use.

[609] In addition, it must be recalled that Blueberry is not, in this action, seeking to prove Aboriginal title to its traditional territories. It need not meet the test for proof of title set out in *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010 [*Delgamuukw*] and *Tsilhqot'in*, based on occupation prior to the assertion of European sovereignty, nor need it show sufficiency, continuity and exclusivity of occupation over the whole of its territory. Its task here is to bring forward evidence of the areas its ancestors traditionally used, including information about the specific activities undertaken and relevant patterns of use, for the purpose of their infringement claim.

[610] Some of the approaches used in the Aboriginal title context, however, have some relevance here. In the Aboriginal title context, the Supreme Court of Canada has stated that the concept of occupation must be approached from both the common law perspective and the Aboriginal perspective (*Delgamuukw* at para. 147 and *Tsilhqot'in* at para. 34). The Aboriginal perspective focuses on the laws, practices, customs and traditions of the specific Indigenous group, and the court must take into account the group's size, manner of life, material resources, technological abilities, and the character of the lands claimed (*Tsilhqot'in* at para. 35). It is a

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context-specific inquiry, and the nature of the use of the land (including intensity and frequency of use) will vary based on the characteristics of the Indigenous group asserting title and the character of the lands (*Tsilhqot'in* at para. 37). The approach is to be "culturally sensitive" (*Tsilhqot'in* at para. 42). In *Tsilhqot'in*, the Supreme Court of Canada confirmed that nomadic and semi-nomadic groups can establish Aboriginal title to lands (at para. 44). The Court noted that regular use of territories for hunting, fishing, trapping and harvesting is sufficient use to ground title (at para. 42).

[611] The idea of approaching the question of territory from both the common law and Indigenous perspective is reminiscent of one of the principles of treaty interpretation, which aims to find the interpretation that reconciles the interests of both parties at the time the treaty was signed. Looking at what areas of the territory were used for hunting, fishing, trapping and gathering necessarily requires greater emphasis on the Indigenous perspective. It is the members of the nation themselves who know the places they rely on and that are important to them.

[612] The evidence showed that at the time the Treaty was entered into, the Crown did not have any special knowledge of the territories Blueberry's ancestors used and relied on. The Treaty Commissioners did not survey the traditional territories of each signatory and adhering nation, setting out the proper metes and bounds before making the solemn promises reflected in the Treaty. Nor did they seek further information from the Indigenous people regarding how their mode of life was practiced within those territories. Similarly, in the modern context, when the Province is seeking to consult with Blueberry about certain decisions or projects that have the potential to impact the exercise of their treaty rights, it turns to the nation itself to provide information about the specific areas where they hunt, fish, trap and gather and that are important to them.

[613] Specificity is needed and can only come from the Indigenous people. They can tell the Province and the courts which are their preferred or core areas and why. They can provide insight into the important features that allow for the meaningful exercise of rights in these locations. They can explain the values the lands and waters contain.

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Here, in bringing a claim focused on the Blueberry Claim Area, as opposed to the area on the 2012 Map or some other larger asserted area, I take this to represent the significant portions of Blueberry's traditional territories for the exercise of their rights.

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b) Findings Regarding Traditional Territories

[614] The evidence in this case regarding the territories Blueberry used in the past for hunting, fishing, trapping and gathering purposes can be grouped into three time periods: (1) prior to and at the time Blueberry's ancestors entered into Treaty 8 in 1900; (2) early 1900s to early 1970s; and (3) 1970s to 1980s. Evidence regarding areas of current use came from Blueberry members who testified at trial. As noted by Blueberry, the names members use in talking about areas they know and rely on derive from various sources: mile markers, roads or highways, streams and rivers, and Dane-zaa names. The Court will also refer the locations referred to in the evidence using the terms used by the witnesses.

i. Territories Used Prior to and at the Time of the Treaty

[615] The evidence about the territories used by Blueberry's ancestors from the time of contact in the late 1700s through to the 1930s is included in the Kennedy and Bouchard Report). The Kennedy and Bouchard Report is dense. It is based on a review and analysis of the known and available ethnographic, ethnohistoric and linguistic materials. The authors refer to a voluminous amount of historical records, including trading post, fur traders' and explorers' journals; the work of anthropologists and ethnographers (including Dr. Ridington and Mr. Brody), as well as historians and scholars. The Kennedy and Bouchard Report is based exclusively on archival and library research and does not include contemporary Blueberry oral history.

[616] Both parties referenced the Kennedy and Bouchard Report as part of their respective arguments. The report is one of only a few pieces of evidence in these proceedings that provides insight into the territories used by Blueberry's ancestors prior to entering into treaty.

[617] The Kennedy and Bouchard Report shows that, with regard to the period from contact to 1870, there is a wide range of views about which Indigenous peoples used and occupied the lands in and around the Peace River towards the Rocky Mountains, and the relationships between them.

[618] There is more agreement regarding the territory used by Blueberry's ancestors from 1870 onward. The historical evidence from the late 1800s and early 1900s reviewed in the Kennedy and Bouchard report shows that family groups who comprised Blueberry's ancestors often hunted in and around the Peace River and the Beatton River, northwest to the Sikanni Chief River, as well as west to the foothills of the Rocky Mountains, east into Clear Hills, Alberta, and southeast to Grand Prairie.

[619] For example, journals kept at Fort St. John in the late 1800s and early 1900s provide evidence of Blueberry's ancestors living in the Fort St. John region, particularly the Beatton River area, and hunting and trapping over an expansive area both north and south of the Peace River and east into Alberta (p. 15). The journals also provide information about the composition of hunting groups and the range of territories they were reported to have used prior to and after Treaty 8. The Kennedy and Bouchard Report notes at 57: "[i]t is obvious from the journals that the Beatton River watershed was highly significant to the *Dane-zaa* people of the late 19th century." The area on, around and across from the Beatton River was noted as being a favoured hunting ground of the Dane-zaa or Beaver Indians.

[620] Dr. Ridington also identified many of the hunting groups as members or ancestors of the Beaton (North Pine) River Band, later the Fort St. John Band, and later still the Blueberry River and Doig River First Nations. The journals record these groups, while not being fixed territorial or political units, travelling farther in range than the studies of the 1960s and 1970s show.

[621] These journals refer to Blueberry's ancestors hunting and camping in and around Montney Prairie, Blueberry River, Aitken Creek, Halfway River, Nig Creek, and Charlie Lake, north and south of the Peace River including as far south as the

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Kiskatinaw River, and as far east as Clear Hills, Grand Prairie and Clearwater River in Alberta.

[622] Similarly, in his expert report, Dr. Ridington noted there were relationships between people living over territories that extended from the Rocky Mountains to east of the Alberta border, and from the Prophet River area to south of the Peace River. Dr. Ridington concluded at pages 11-12: “At the time of treaty, people identified as the Fort St. John Band knew and used this extensive territorial range through their seasonal rounds and the scheduling of resources.”

[623] At page 14 of his report, Dr. Ridington provided more specificity regarding what he called the “core territories” used and relied on by Blueberry’s ancestors in and around 1900. He stated:

> The Dane-zaa fished in rivers including the Peace, Beatton (earlier called the Pine) and various tributaries like the Doig and Blueberry, as well as a variety of lakes. Charlie Lake together with Stoddart Creek and Fish Creek which flow in and out flow Fish Creek [sic] provided large numbers of suckers during their spring spawning run. East of the Beatton is an area of small lakes known in the Beaver language as *Megawontlonde*, Many Lakes. A little farther to the east are the Beatton River, Cecil Lake, and Boundary Lake. The upper Beatton watershed including the Blueberry River provided important hunting and trapping opportunities. The Dane-zaa name for the people whose core territories were Charlie Lake and northern areas to the east as well as west into the foothills of the mountains, is Lhuuge Lẹa (*Tluge La* or sucker fish there people). They shared these territories with relatives known as Ts’ibii Dané? (Tsipidanne, Muskeg People). These names are still used to identify the Blueberry River and Doig River First Nations respectively. Hunting and trapping were important within the taiga zone beyond the edge zone habitats of their core territories, but could not sustain larger gatherings of people.

[624] The Kennedy and Bouchard Report includes a map that delineates the approximate area used by Blueberry’s ancestral family groups from the 1850s to the 1930s, based on the documentary sources reviewed. The dotted line indicating the area used spans from Clear Hills, Alberta in the east, to Grand Prairie, Alberta in the southeast, roughly follows the Halfway River to Pink Mountain in the northwest, and stretches nearly as far north as Prophet River. At the centre of the territory is the Beatton River watershed. This dotted line is placed over a larger shaded territory that Dr. Ridington had described in the section entitled “Beaver” included in the *Handbook*

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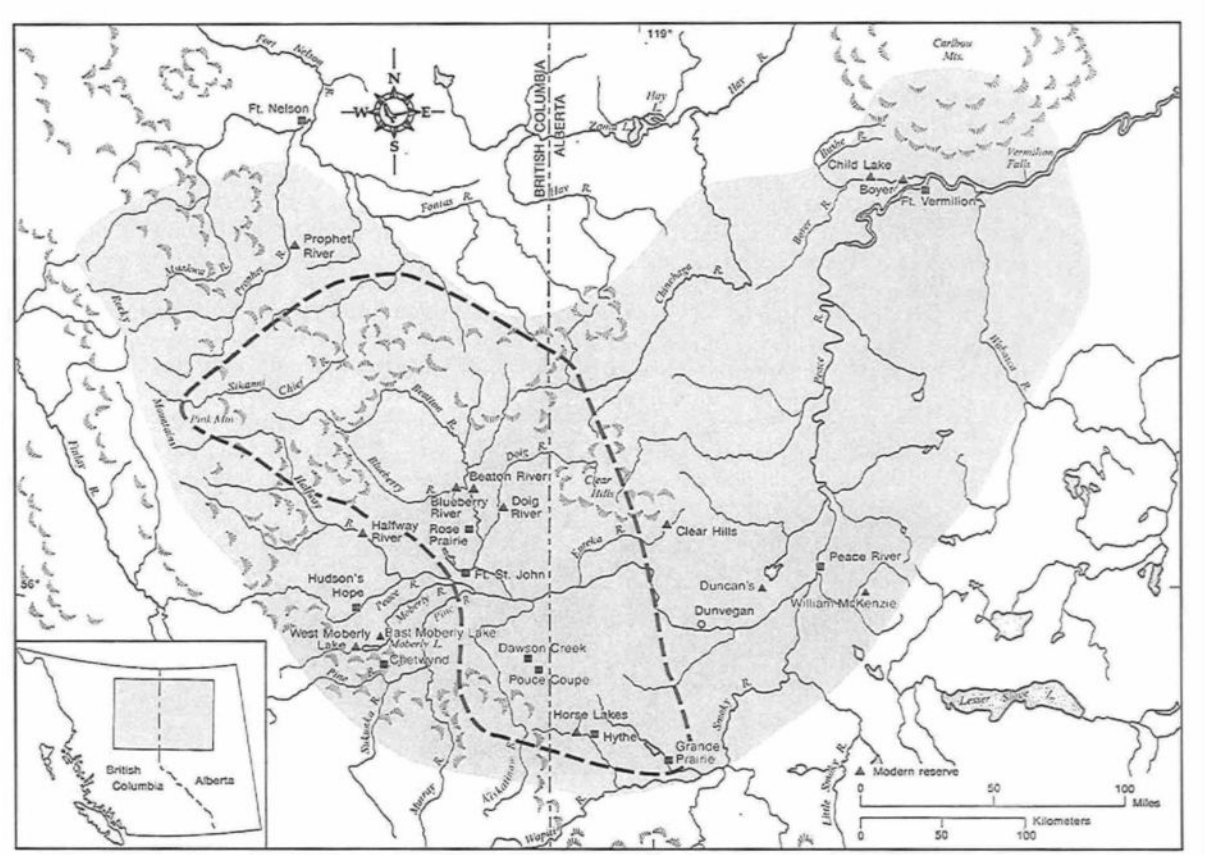
of North American Indians, *Vol. 6, Subarctic* (Washington D.C.: Smithsonian Institution, 1981) at 351.



The added line delineates the approximate overall area used 1850s-1930s by the ancestral family groups comprising the contemporary Blueberry River First Nations, based on documentary sources. Overall map of Beaver Territory adapted from Ridington (1981:351).

Exhibit 103, Tab 4: October 12, 2012 Letter from Chief Joe Apsassin to Minister Ida Chong, enclosing Bouchard and Kennedy Report dated August 31, 2011. This map is found on the last page of the Bouchard and Kennedy Report.

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[625] While recognizing that Blueberry's ancestors had relationships with people living across an expansive area from the Rocky Mountains into Alberta, and that Blueberry's ancestors likely knew and used this wide area, the Court finds that the territory most consistently used and relied upon by Blueberry's ancestors around the time they adhered to Treaty 8 in 1900 roughly accords with the area demarked by the dotted line on the map attached to the Kennedy and Bouchard Report.

[626] As noted earlier, the Province accepted this information contained in the Kennedy and Bouchard Report, as reflected in Mr. Recknell's May 26, 2014 letter to Chief Yahey. In that letter, Mr. Recknell noted: "The Province agrees that the Report provides a credible analysis of known historical sources…."

ii. Territories Used from 1900s to Early 1970s

[627] Evidence of the territories used and relied on by Blueberry from the early 1900s through to the early 1970s was provided, primarily, by Dr. Ridington. He described their mode of life using the concepts of seasonality, scheduling of resources, and adaptation to edge zone environments. These concepts were discussed earlier in these reasons.

[628] Dr. Ridington noted that during the time he lived with various Dane-zaa communities in the 1960s and early 1970s, few people had drivers' licences or vehicles; as such, hunting and trapping was done by foot or on horseback within close proximity to their home reserve community or summer camp. He noted there was sufficient habitat within a day's travel from the community to sustain a regular supply of moose, fish, grouse, beaver, rabbits, and suckers. In particular, he described the lands and waters adjacent to Charlie Lake and in the lower Beatton River watershed as being a "base" for Blueberry's hunting, trapping and gathering activities.

[629] In a few places in his report and in his testimony, Dr. Ridington also referred to the "core" territory or territories used by Blueberry. He identified the core of the territories used by Blueberry's ancestors at the time of the Treaty and thereafter as

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being north of the Peace, and centred around Charlie Lake and the Beatton River watershed.

[630] Dr. Ridington referred to the Montney area, known to Blueberry as *Suu Na chii K'chi ge* (which translates to The Place Where Happiness Dwells) as being where the Dane-zaa historically held their summer gatherings. After these gatherings, the Dane-zaa people would disperse into smaller groups to hunt and trap over an extensive area within the boreal forest taiga biome. While Dr. Ridington referred to these "extensive territories" he did not, in his report, provide further details on specific locations used through to the early 1970s.

[631] The Court finds that in the mid 20th century, Blueberry's patterns of use and occupation shifted somewhat, such that they were using and relying on territories closer to where they were then living, which centred in an area stretching roughly from Charlie Lake to the Beatton River. This became their "base" or "core" area. This shift has been referred to as a transition from a semi-nomadic way of life to a semi-sedentary one. They did, however, continue to hunt and trap in the boreal forests beyond this area.

iii. Territories Used from 1970s to 1980s

[632] Mr. Brody also described Blueberry's activities in the 1970s to early 1980s as radiating out from a core area, and following a seasonal round. The maps and figures included in and appended to his expert report – in particular those showing Blueberry's berry picking areas (Map 2), trapping areas (Map 4), and hunting areas (Map 5), as well as the Dane-zaa year, some of which were also included in his book *Maps and Dreams*, which is also an exhibit in these proceedings – illustrate this radiating notion. These maps were compiled by asking as many individuals as possible to make a map to show where they had hunted, trapped, fished, and picked berries. Mr. Brody and his research team then combined these individual maps to show a community's collective use of the land, and reliance on different resources on the land. Maps were created for each of the seven Dane-zaa communities, as

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well as a combined map showing the overall Dane-zaa hunting, trapping, fishing and gathering areas.

[633] The lines on Blueberry's hunting areas map are concentrated in and around the Beatton area, with the majority of the lines extending from approximately Montney in the south, to the Beatton River on the east and north, and to Wonowon on the west. Some lines extend north beyond the Beatton River to Black Creek and the southern part of Conroy Creek, west to Pink Mountain, and east towards the Alberta border.

[634] The lines on the trapping areas map are also concentrated in and around the Beatton area, and a bit further east in the vicinity of the Doig reserve. While this map does not show the traplines in and around the Tommy Lakes area, the evidence provided by Blueberry members confirms that trapping north of the Beatton River and into the Tommy Lakes area (in the northern part of the Blueberry Claim Area) was part of the pattern of activity in the 1970s and 1980s.

[635] Mr. Brody described the mapped areas as representing Blueberry's "heartlands," noting these were the areas interviewees identified as the places they relied on. The maps do not necessarily reflect boundaries, and individuals may have travelled, hunted, trapped and gathered beyond those areas:

> Q: When you say "extent," does it also mean that that was the outer limit of where people went? Could any members of any of the communities [have] gone beyond the lines that are drawn on those maps?
>
> A: Those were the lines they drew for me. And when I was hunting with people – I should say drew for us – when I went hunting with people, I didn't go beyond those lines.
>
> And so my evidence is that's where they went, that's where they were going at that time. Those were the areas they established as their heartlands, as the places they relied on, and the extent of the area they relied on. I wouldn't – it's quite possible people did go beyond there but they didn't tell me

[636] Mr. Brody also testified that Blueberry's seasonal round showed a planned and patterned movement on their territory. He testified as follows:

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> …I think I should begin by saying that one of the ways in which hunting peoples have often been misunderstood, and certainly you can see the Dane-zaa being misunderstood in the correspondence that we referred to earlier, in 1925 to '33, a misunderstanding that centres on the idea that they roam freely over a huge territory without – in a fully nomadic manner, and that they just go here or there where the spirit or mood takes them.
>
> In fact, their movements in their territories are very patterned and there's a set of areas that they like to go to at particular times of year. And if you look at the times of year, you can see a seasonal round with a dry meat hunting camp – set of camps, dry meat being the central activity in the autumn. So there are camps and areas of land use that pertain to that activity at that time of year.
>
> And then we move into winter, the tendency to shift to trapping for fine furs and hunting areas that are good in winter, the second phase of the year, in the middle of which there would usually be trading.
>
> And then a spring hunt centred on beaver, the third phase of the year. And again there will be ideal locations, and that's cabins that pertain to the spring hunt.
>
> And then a summer area which tends to be relatively slow in activity and often includes areas where people gather to meet in larger numbers on the gathering grounds.
>
> So you can understand this as a seasonal round and a typical pattern of activities in which different parts of the territory are being used at different times.

[637] Mr. Brody's research regarding the Dane-zaa seasonal round shows the growing importance of the reserve, over time. In particular, in the 1960s and 1970s, the Dane-zaa people spent more time away from the reserve engaging in different land-based activities. In the late 1970s, while the Dane-zaa still engaged in land-based activities, they returned to the reserve in between activities in higher frequency.

[638] I accept this evidence regarding Blueberry's patterns of use in the 1970s and early 1980s. During this time period, Blueberry was using and relying on territories north of the Peace River in the vicinity of the Beatton River with the most frequency and intensity, with some hunting and trapping activities extending northwest towards Pink Mountain and north to the Tommy Lakes area.

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iv. Territories Used from 1980s to Present

[639] Seven Blueberry members, ranging in age from teenage to mid-70s, provided evidence about the territories Blueberry currently uses, and areas used within the last approximately 40 years. Most of this evidence was focussed on the time period from the 1980s through to the time they testified in 2019, but some of it, especially from elders Raymond Appaw and Jerry Davis, went back to the 1960s and 1970s and also included recollections of the areas used by older generations.

[640] These witnesses recalled the period from the 1960s through to the 1980s being a time when members hunted, trapped and gathered berries and other resources close to the reserve community of IR 205, or within a day's trip from the reserve.

[641] Many of these witnesses referred to important places up and down the Beatton River, along the Blueberry River, and around Aitken Creek where they camped, hunted for moose, and trapped. Additional harvesting places in this general area that were frequently mentioned by these witnesses include: Beatton River Road, Beatton Airport Road, Mile 43, Buick, Mile 27, Attick Creek, Snyder Creek, Prespatou, Mile 98, Wonowon, Mile 38, Mile 132, Mile 115, Mile 34, Mile 28, Mile 21, and the Dancing Grounds. These locations are all in the central or core part of the Blueberry Claim Area.

[642] Witnesses noted a theme of movement – that families would move around and not always camp or harvest in the same spots, so as to allow for regeneration and regrowth.

[643] The Court heard repeatedly how areas within this core, including Mile 98 and Aitken Creek in particular where members had cabins and trapping areas, are now logged, access is restricted, and hunting is prohibited.

[644] Witnesses also spoke of longer trips to the west and north to Pink Mountain, Lily Lake, Sikanni Chief River, and the Tommy Lakes area. Witnesses referred to

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Pink Mountain and the surrounding area (in the northwest part of the Blueberry Claim Area), as being an important place and where many members hunted for moose, and in the past for caribou. Witnesses spoke about elders encouraging them to travel to Pink Mountain and areas further west into the mountains to find “clean” water and therefore “clean” moose. In or around 1999, Blueberry purchased land at Pink Mountain and it has since become the location of their annual summer culture camp.

[645] Witnesses also referred to other locations further from the core, including fishing places along the Halfway River and Cypress Creek. Mr. Appaw noted that the area in and around Fort St. John (in the southern part of the Blueberry Claim Area) had been an important area for previous generations, but that due to development that was less true for his generation. In particular, witnesses referred to Charlie Lake and Inga Lake – places that older generations had fished for suckers – but noted these places were now surrounded by too much development and were too polluted to be suitable fishing places.

[646] Blueberry members spoke about the Dancing Grounds near Mile 115 Road, and its cultural significance as the place where Dane-zaa would camp and gather in the summer, share stories, sing, dance and hear from their prophets or dreamers. They also noted that access to the Dancing Grounds was impeded, and that it is now surrounded by private land and clearing.

[647] While the Province said evidence other than that of Ms. Pyle makes clear this is not so, I do not agree. The reality is that access to the Dancing Grounds is difficult as reflected by the testimony of Ms. Pyle, Wayne Yahey and others who referred to following the river and regularly re-cutting the trail in order to access this important place. While not all members may have specifically noted it was now surrounded by private land and clearing, they were not asked whether that was the case.

[648] A predominant theme from the evidence given by the seven Blueberry members was that many of the places within the core of their territory centred on the

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Beatton River are now developed to such a degree that hunting, trapping and camping is difficult. Instead, members are moving further and further to get game and practice their cultural and sustenance activities. Wayne Yahey noted this shift had been "life-changing" and that many of the more remote locations his father had shown him in his youth were gaining importance now.

[649] There was some evidence of Blueberry members, over the last approximately five to ten years, using the area around Hudson's Hope, Farrell Creek and Butler Ridge and even further south to Chetwynd. For example, Mr. Davis and his nephew hunted with members of Halfway River First Nation in and around Butler Ridge; and Wayne Yahey and Sherri Dominic fished up and down the Peace River around Hudson's Hope. These places were referred to with less frequency and were most often mentioned in the context of studies done over the last several years in relation to projects south of the Peace River or passing through the southern portion of the Blueberry Claim Area. In addition, Blueberry members noted the need to show respect and obtain permission from the neighbouring First Nations in some of these areas.

v. Summary Regarding Territories Used

[650] The way that Blueberry used its territories historically and today is for families to travel to different areas for hunting, trapping, fishing and gathering purposes on a seasonal basis, moving throughout the territories so as to access a variety of environments (prairies, mountains, muskeg, boreal forests) and to allow habitat and wildlife to rejuvenate and replenish.

[651] Several witnesses and experts spoke about how, especially in the second half of the 20th century, activities radiated out from the core of the territory. In particular, when resources were abundant, Blueberry members could hunt in and around the Beatton watershed, within a day's trip from their homes. However, as development increased in the Beatton area, Blueberry members found themselves needing to travel further from their core area to places they had traditionally visited on a less

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frequent basis. One such place, is the Butler Ridge and Farrell Creek area. The Court heard little evidence about Blueberry using this area in the early to mid part of the 20th century; however, several Blueberry members spoke about hunting and fishing in this area within the last ten years or so.

[652] I find that from the time they entered into Treaty 8 in 1900 to today, there has been a shift in the pattern of Blueberry's use of its territories. At the time they entered into Treaty 8, Blueberry's ancestors consistently used and relied on an area that stretched east to Alberta, south to the Kiskatinaw River, roughly followed the Halfway River northwest to Pink Mountain, and stretched nearly as far north as Prophet River. This area roughly accords with the area demarcated by the dotted line on the map attached to the Kennedy and Bouchard report and with the Province's consultation Area A. At the centre of this territory is the Beatton River watershed – which was a favoured hunting ground. In so finding, I am mindful that Blueberry's ancestors knew and travelled throughout a more expansive area.

[653] During the second half of the 20th century, there was a growing importance on the reserve. During this time hunting and gathering activities, in particular, tended to be undertaken within closer proximity to where Blueberry members were living. This meant that Blueberry began to rely more on its "core" territory north of the Peace River, in and around the Beatton River, with the most frequency and intensity, though members still made longer trips to hunt and trap at areas in the west and north such as Pink Mountain, Lily Lake and the Tommy Lakes areas.

[654] Based on the evidence provided by the Blueberry members who testified in these proceedings, I find there has been yet another shift in frequency in Blueberry's pattern of use of its territories. As development has encroached on the core of Blueberry's territory – fragmenting and affecting wildlife habitat, and impeding access – Blueberry members are travelling more often to areas beyond the core, to places like Pink Mountain and further north and west, which have now gained greater importance. While previously used by Blueberry members, the area around Pink Mountain is seen by community members as a place to find peace and

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tranquility, and with that, healthy and clean animals. Other places, in the southwest portion of the Blueberry Claim Area are now being accessed with greater frequency. Areas such as Butler Ridge and Farrell Creek were referred to by several witnesses as places they are now going to exercise their rights.

[655] The Province, relying in part on Blueberry's 2014 "Knowledge and Use Study Final Report for the Coastal GasLink Pipeline Project," has pointed to the areas around Chetwynd and the Sukunka River Valley as reflecting areas where Blueberry members continue to maintain the ability to meaningfully exercise their treaty rights outside the Blueberry Claim Area. The Province also notes that these areas are in relatively close proximity to the Blueberry Reserve. It is clear, however, as noted at page iii of that study that "this is an area they now prefer to use due to disturbance and contamination caused by industry closer to the Blueberry River reserve."

[656] As noted earlier, Blueberry has been candid that the Blueberry Claim Area does not represent all the territories its ancestors traditionally used or all the places its members exercise their treaty rights today. There are areas outside the Blueberry Claim Area where Blueberry members are exercising rights, such as in the Sukunka area. However, in my view, even if Blueberry members are exercising their rights in these limited areas, this does not mean they can still meaningfully exercise their treaty rights. This will become evident further in my analysis.

[657] In conclusion, on this point, the Court does not accept the Province's argument that there is no infringement because Blueberry members can continue to exercise their treaty rights within a broader traditional territory, outside the bounds of the Blueberry Claim Area. This approach disregards Blueberry's perspective and the evidence relating to Blueberry's patterns of use and occupation. It also disregards traditional cultural and spiritual areas of significance; in essence telling Blueberry to use the further edges of its territory. While traditional territory is relevant in both consultation and legal proceedings, if the Province truly believed that Blueberry can exercise its treaty rights within a larger area, it would also be consulting with

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Blueberry about projects and developments in Areas B and C beyond a notification level. It cannot have it both ways.

[658] I reiterate that I find that the Blueberry Claim Area generally accords with the area Blueberry used at the time they adhered to the Treaty, and that they continue to use today. For greater clarity, I find that the area delineated as consultation Area A is the area Blueberry historically used at the time of the Treaty. The Province accepted this in its correspondence to Blueberry. The remaining Blueberry Claim Area (which includes the area west of the Halfway River in and around Farrell Creek and Butler Ridge), which appears to correspond with part of consultation Area B has, as discussed above, been established as an area of more frequent recent use on the basis of evidence given by Blueberry members.

[659] Accordingly, I conclude that the Blueberry Claim Area represents the significant portions of the territory Blueberry used historically and which it seeks to continue to use today. It is the area I will refer to when considering if Blueberry's treaty rights have been infringed.

[660] I will now discuss the status of various wildlife populations in the Blueberry Claim Area which have been identified as being important to Blueberry, and will then move to consider the data regarding disturbance in the Blueberry Claim Area.

D. Status of Wildlife in the Blueberry Claim Area

1. Lay Witness Evidence and Expert Opinion Evidence

[661] Given the number of lay and expert witnesses who testified at trial, I will briefly comment on the use of lay witness evidence versus expert opinion evidence as relevant to this and other sections of this judgment.

[662] In *Yahey v. British Columbia*, 2019 BCSC 1934, I noted that "[e]xpert opinion evidence has been characterized as an expert interpreting a set of facts and providing the finder of fact with a readymade inference": at para. 10, citing *R. v. Abbey*, [1982] 2 S.C.R. 24 at para. 44. Expert opinion evidence is an exception to

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the generally-held rule that witnesses should testify only to facts. As stated in *White Burgess Langille Inman v. Abbott and Haliburton Co.*, 2015 SCC 23 [*White Burgess*]:

> [14] To the modern general rule that all relevant evidence is admissible there are many qualifications. One of them relates to opinion evidence, which is the subject of a complicated exclusionary rule. Witnesses are to testify as to the facts which they perceived, not as to the inferences — that is, the opinions — that they drew from them. As one great evidence scholar put it long ago, it is "for the jury to form opinions, and draw inferences and conclusions, and not for the witness": J. B. Thayer, *A Preliminary Treatise on Evidence at the Common Law* (1898; reprinted 1969), at p. 524; see also C. Tapper, *Cross and Tapper on Evidence* (12th ed. 2010), at p. 530. While various rationales have been offered for this exclusionary rule, the most convincing is probably that these ready-formed inferences are not helpful to the trier of fact and might even be misleading: see, e.g., *Graat v. The Queen*, [1982] 2 S.C.R. 819, at p. 836; *Halsbury's Laws of Canada: Evidence* (2014 Reissue), at para. HEV-137 "General rule against opinion evidence".
>
> [15] Not all opinion evidence is excluded, however. Most relevant for this case is the exception for expert opinion evidence on matters requiring specialized knowledge. As Prof. Tapper put it, "the law recognizes that, so far as matters calling for special knowledge or skill are concerned, judges and jurors are not necessarily equipped to draw true inferences from facts stated by witnesses. A witness is therefore allowed to state his opinion about such matters, provided he is expert in them": p. 530; see also *R. v. Abbey*, [1982] 2 S.C.R. 24, at p. 42.

[663] In this case, for example, Dr. Christopher Johnson, Dr. Scott McNay, and Mr. Keith Simpson appeared as expert witnesses with specialized knowledge of certain wildlife species. They testified to their opinions regarding the state of various species in the Blueberry Claim Area, and drew inferences on the cause of population changes. Because of their qualification as experts, I am entitled to admit their opinions and to use them when making my findings on causation with respect to wildlife populations.

[664] The Province objected to the admission of some lay evidence as impermissible opinion evidence. The Province voiced particular concerns regarding Dr. Holt, who testified as a lay witness, though she has been retained as an expert consultant in the past by both Blueberry and the Province. Certain documents were admitted through her testimony that contain inferences and opinions which are inadmissible from a lay witness, for most purposes.

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[665] At trial, counsel for Blueberry noted that similar issues – about lay witnesses who are professionally trained giving evidence that may cross the line from fact into opinion – arose in both the *Ahousaht*, 2009 BCSC 1494, and *Lax Kw'alaams* proceedings. Counsel provided the Court with transcripts from the *Ahousaht* proceedings where such objections were made, and where Justice Garson ruled to allow the evidence, with directions to the parties to be careful that the testimony is grounded in fact. Justice Garson noted "there is no such thing as expert evidence. It's expert opinion evidence" (emphasis added). Where a witness is simply recounting facts or their understanding of facts, such evidence should be admitted (subject to general evidentiary rules).

[666] With respect to Dr. Holt, she appeared only as a lay witness, or fact-based witness, in her capacity as one of Blueberry's consultants and as a prior consultant of the Province. To the extent that Dr. Holt's evidence includes her opinion on, for example, the efficacy of the Province's regulatory tools, that evidence is inadmissible except to show that Dr. Holt presented such an opinion to the Province in the course of her work. I have not relied upon the opinions or inferences contained in any of her evidence. However, I agree with counsel for both sides that, subject to other evidentiary rules, I may use the facts to which she testified. For example, when she was retained by the Province in 2017 to critique their regulatory tools, Dr. Holt found that the Province had authorized some degree of development inside every type of designated/protected area. As another example, in her work for Blueberry, she calculated the amount of the Blueberry Claim Area that fell within a protected/designated area and conveyed that information to the Province. This is not opinion evidence, and the Province did not dispute its accuracy.

[667] In each case, including Dr. Holt's, I have reviewed and used the evidence with this distinction carefully in mind.

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2. Overview

[668] I now turn to the evidence dealing with the status of wildlife in the Blueberry Claim Area.

[669] Although Blueberry members harvest a wide variety of species, only a few are principally at issue in this case.

[670] The Plaintiffs submit that a number of key species are in decline within the Claim Area, most notably caribou, moose, and furbearers, including marten and fisher. They submit that industrial development within the Blueberry Claim Area has either caused or contributed to these declines.

[671] They rely on their own direct evidence, the evidence of two expert witnesses – Dr. Johnson and Dr. McNay – and various publicly available reports and data accepted as authoritative by one or more of the expert witnesses.

[672] The Province denies some of the subject species are actually in decline in the Blueberry Claim Area. The Province contends that, where species are in decline, causation cannot be made out. The Province points to non-industrial factors, which vary between species, but that broadly include increased predation, natural forest fires, climate change, and more.

[673] With respect to moose and caribou, the Province highlights increased predation by wolves in particular. The Province notes that active "predator management" has fallen out of favour, and the practice has largely ended in northeastern BC. Predator management essentially consists of culling predators (by hunting, poisoning or trapping) to control their population. In the Province's view, the uncontrolled increase in the wolf population has put pressure on caribou populations, and, to some extent, moose populations as well.

[674] The Province relies on the evidence of Mr. Keith Simpson, detailed below, and to some degree on contrary interpretations of the evidence provided by the plaintiffs.

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3. Causation and Standards of Proof

[675] Before delving into the evidence on impacts, it is also useful to review the standard of proof the Plaintiffs must meet, and what, exactly, they are trying to prove.

[676] As part of its case, Blueberry seeks to establish that the decline of various species within the Blueberry Claim Area, chiefly moose and caribou, are the result of industrial development. The Province argues that while wildlife decline in the Plaintiffs' territory may be *correlated* with industrial development, the evidence does not show a *causal* relationship, i.e., that wildlife decline is actually the result of extensive industrial development.

[677] Blueberry has tendered a substantial volume of evidence in support of a causal connection and/or correlation between industrial development and species decline in the Blueberry Claim Area. Much of that evidence is scientific – it comes either via expert witnesses or authoritative provincial documents authored by non-witness scientists. At various times, the Province sought to refute this evidence by attempting to undermine the absolute certainty of the expert witnesses on their theories of causation.

[678] Scientists, however, work to a different standard of proof than the court. The court does not require proof to a standard of scientific precision or certainty (*Snell v. Farrell*, [1990] 2 S.C.R. 311 [*Snell*]; *Clements v. Clements*, 2012 SCC 32; *Ediger v. Johnston*, 2013 SCC 18 at para. 36 [*Ediger*]). As this is a civil case, neither does the court require proof to the criminal law standard of beyond a reasonable doubt. The civil standard of proof requires the plaintiff to prove causation only on a balance of probabilities.

[679] Causation in the context of a cumulative effects claim is something of a novel or currently developing issue at law, and one which was not fully litigated at trial. It is not necessary for me to fully explore it here. For now, it is enough to note that I am not tasked with determining whether industrial development is the *only* cause of

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wildlife decline, nor with resolving debates amongst the scientific community. I am tasked only with determining whether, based on the evidence before me and on a balance of probabilities, the Province's actions have caused, contributed to or resulted in an infringement of the Plaintiffs' rights which include the Province's actions in permitting the industrial development.

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[680] In the context of treaty litigation and s. 35, it is open to the court to take a robust common sense approach to cause and contribution. In Sopinka J.'s unanimous decision in *Snell v. Farrell*, [1990] 2 S.C.R. 311, he noted at 327:

> If I were convinced that defendants who have a substantial connection to the injury were escaping liability because plaintiffs cannot prove causation under currently applied principles, I would not hesitate to adopt one of these alternatives.

[681] Given the specialized nature of the subject matter, I am entitled to rely on expert testimony for inferences and opinions on causation: *White Burgess* at para. 15. That said, the presence or absence of evidence from an expert positing or refuting a causal link is not determinative of causation: *British Columbia (Workers' Compensation Appeal Tribunal) v. Fraser Health Authority*, 2016 SCC 25 at para. 38 [*Fraser Health*]. Causation can be inferred – even in the face of inconclusive or contrary expert evidence – from other evidence, including merely circumstantial evidence: *Fraser Health* at para. 38.

[682] Finally, I note from *Ediger* that the trier of fact may, upon weighing the evidence, draw an inference against a defendant who does not introduce sufficient evidence contrary to that which supports the plaintiff's theory of causation (at para. 36). In this case, the Province has significant informational power differential as it holds much of the data distinctly applicable to the issues in this case.

4. Wildlife Management Units

[683] Much of the available evidence, including the expert testimony tendered at trial, refers to units of land called Wildlife Management Units (sometimes referred to in the evidence as "WMUs"). The witnesses referred to these units in assessing the

health and number of wildlife in certain areas. These units are provincially defined management areas, on which much of the caribou and moose survey data is based. A number of maps overlaying the Blueberry Claim Area with Wildlife Management Units and various other datasets were presented at trial. A basic map of the Blueberry Claim Area and associated Wildlife Management Units can be found at Exhibit 92, Tab 22.

[684] As outlined by Blueberry, the main Wildlife Management Units overlapping the Blueberry Claim Area can generally be placed into three categories:

a) The Central Wildlife Management Units: 7-45, 7-34, and 7-44 (and perhaps the northern part of 7-33). These are located in the core of the Blueberry Claim Area, and overlap with many of Blueberry's primary hunting and trapping territories.

b) The Outer Wildlife Management Units: 7-46, 7-47, 7-57, and 7-58. These include the mountains in the west, while the eastern areas are mostly scrub bog forest (black spruce). These are primarily caribou territory.

c) The Southern Wildlife Management Units: 7-32 and 7-20 (and perhaps the southern portion of 7-33). These encompass the southern agricultural and urban areas, which are heavily settled.

[685] Wildlife Management Unit 7-35, in the west of the Blueberry Claim Area, has portions that overlap each of these categories, and cannot be placed easily as a whole primarily in any one of them; the western portion is primarily mountain or remote less-developed forests, while the eastern portion is more developed and has a different habitat.

5. Expert Witnesses

a) Dr. Johnson

[686] Dr. Christopher Johnson was qualified as an expert in wildlife ecology, with a specialty in cumulative impacts from resource development. He produced one

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report, dated July 2017 (“Johnson Report”), and two addendums, dated February 2018 (“Johnson Addendum 1”) and May 2019 (“Johnson Addendum 2”). He used publicly available reports and data to opine on health, population trends, and the cumulative effects of industrial development in the Blueberry Claim Area on caribou, moose, marten, fisher, beaver, and porcupine.

[687] Generally, Dr. Johnson stated that there is “considerable evidence demonstrating that the cumulative effects of large scale and rapid industrial development result in a decrease in natural levels of biodiversity.” He noted that industrial development does not affect all species negatively, but what species it does help, it helps at the expense of others. He acknowledged at trial that predator control measures would likely increase ungulate populations.

b) Dr. McNay

[688] Dr. Scott McNay was also qualified as an expert in wildlife ecology, with a focus on caribou and other ungulate populations in BC. His evidence focused on the status of caribou herds within the Blueberry Claim Area. He produced one report, dated July 17, 2017 (“McNay Report”), in which he estimated population trends and assessed the habitat condition of the three caribou herds whose ranges overlap with the Blueberry Claim Area. He then used two previously-developed models to predict herd population growth based on the calculated habitat disturbances.

c) Mr. Simpson

[689] Mr. Keith Simpson was qualified as an expert in wildlife ecology, with a focus on the effects of development on wildlife. He produced one report, dated September 2017 (“Simpson Report”). He gave evidence on habitat requirements, population trends, and the effects of various types of development on a variety of species in the Blueberry Claim Area, including caribou, moose, and furbearers.

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d) Expert Credibility

[690] I found Dr. Johnson and Dr. McNay to be competent, credible expert witnesses. Their testimony was measured and thoughtful. In cross-examination, each was candid as to what they could or could not agree with and where applicable noted any errors and made corrections. While the Province at one point said Dr. McNay resiled from his opinion, I find his comments were no more than a correction when a mathematical and labelling error was identified. Dr. McNay's correction added to his credibility.

[691] I note the Province's characterization of Dr. Johnson's evidence as being "inextricably linked to the Atlas" – referring to the *Atlas of Cumulative Landscape Disturbance in the Traditional Territory of Blueberry River First Nations, 2016* ("2016 Atlas") – is not accurate. Dr. Johnson referred throughout to other surveys and reports, including Environment Canada reports and scholarly literature. I have no trouble relying on Dr. Johnson's and Dr. McNay's opinions in making my findings regarding the state of key species in the Blueberry Claim Area.

[692] I do, however, have some reservations about Mr. Simpson's evidence. Compared to Dr. Johnson and Dr. McNay, Mr. Simpson is less experienced in the areas on which he was asked to opine. Further, his testimony was inconsistent and, at times, somewhat argumentative. On several issues, his opinion varied between his expert report, direct examination, and cross-examination. In one instance, he changed his opinion mid-trial on the relationship between wolf predation and linear disturbances based on a single study he read. In another, he did not include certain pertinent moose survey information he received that was contrary to his opinion. He was unable to adequately explain this omission. Overall, I did not have the same confidence in Mr. Simpson's testimony as that of Dr. Johnson and Dr. McNay. Accordingly, where there are differences between these experts, I assign Mr. Simpson's evidence less weight.

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6. Caribou

a) Overview on Caribou and their Habitat

[693] There are three woodland caribou herds whose ranges overlap with the Blueberry Claim Area: the Chinchaga, Graham, and Pink Mountain herds. The Chinchaga are part of the Boreal Caribou subspecies, while the Graham and Pink Mountain herds are classified as Northern Mountain Caribou. A map of the Blueberry Claim Area, overlaid with each herd's territory and the corresponding Wildlife Management Units, can be found in the Johnson Report:

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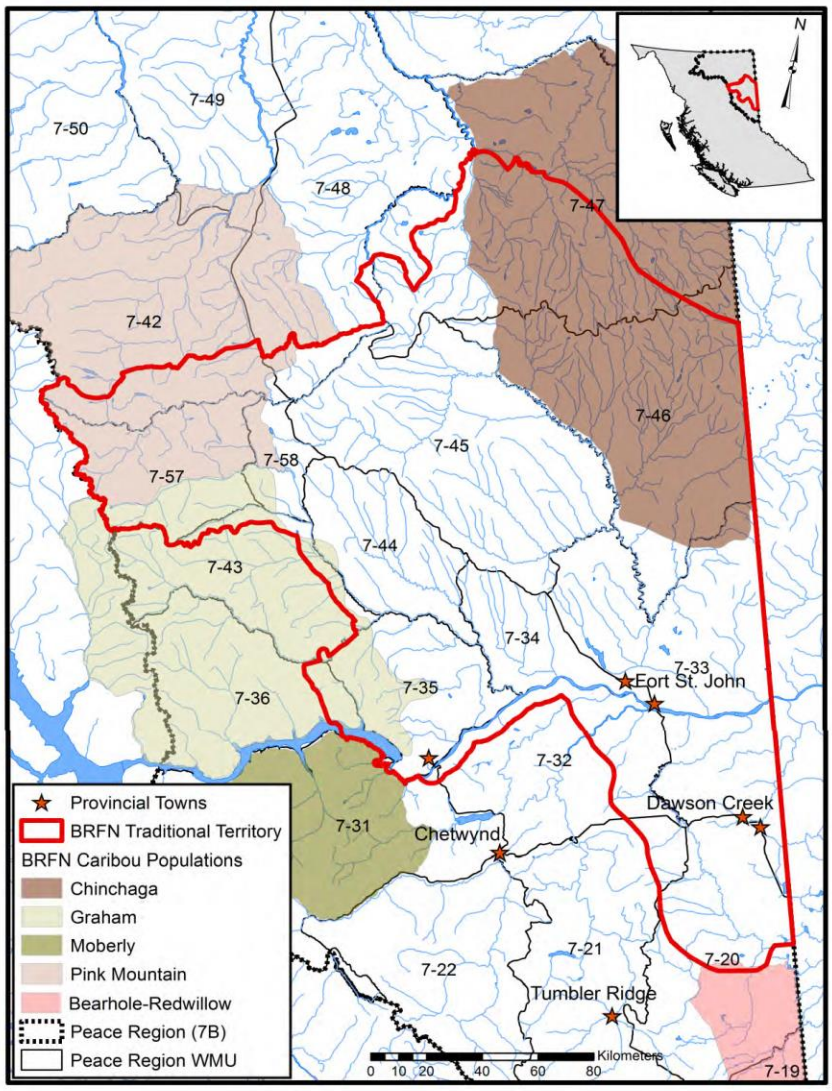

Johnson Report (Exhibit 15, p. 5): Location of caribou populations and corresponding Wildlife Management Units (WMU) within the traditional territory of the BRFN (referred to in these reasons as the Blueberry Claim Area).

[694] Although there are differences between the Northern Mountain and Boreal Caribou ecotypes, Dr. McNay summarized a variety of general conclusions applicable to both types:

a) both types require large areas of contiguous habitat with minimal anthropogenic disturbances;

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b) they have a naturally low reproductive rate;

c) they require undisturbed habitat for calving (birthing and nursing their calves), where they can separate themselves from predators;

d) high calf mortality rates across BC suggest cows do not have access to sufficient undisturbed calving grounds;

e) historically, herds with insufficient access to high-elevation rutting and calving grounds have become extirpated; and,

f) both rely on terrestrial and arboreal lichens, which occur in old-growth subalpine forests and some low-elevation forests (arboreal lichens) and alpine areas (terrestrial lichens).

[695] Dr. McNay noted that Boreal Caribou occur in relatively flatter boreal forests in northeastern BC. They live in smaller groups and are mostly sedentary, as opposed to migratory. He noted that year-round, they select for areas abundant in terrestrial lichens; he explained that they generally avoid deciduous swamps and upland habitat, which tend to be home to predators and alternate prey, such as moose.

[696] Dr. McNay noted that Northern Mountain Caribou seasonally vary their habitat. They spend much of their time at high elevations, where predation risk is low; when they do descend into lower elevations, they are generally found in old stands of lodgepole pine or mixed stands of white spruce and lodgepole pine. He noted: they require year-round contiguous mature forests for secure cover and foraging; that lichen forage is associated with mature to old forests; and, that predation rates are lowest in areas with low anthropogenic disturbance.

[697] Mr. Simpson gave evidence that caribou require large areas of contiguous, undisturbed habitat. His report detailed a need for habitat that is rich in mature to old-growth coniferous forests, lichens, muskegs, peat lands, and upland or hilly areas. He noted caribou require large areas of quality habitat to allow them to disperse in the face of predators and other disturbances, whether natural or

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anthropogenic. He also noted they require access to high-quality, undisturbed calving areas.

b) Status of Caribou in the Blueberry Claim Area

[698] All three wildlife experts (Dr. Johnson, Dr. McNay, and Mr. Simpson) opined on the status of caribou within the Claim Area and the cause of their decline. Direct evidence was also provided by Blueberry members.

i. Dr. Johnson

[699] Dr. Johnson noted that all populations of Boreal Caribou in BC, including the Chinchaga, are unlikely to maintain a self-sustaining population over time. They are provincially red-listed as "imperiled." Dr. Johnson noted there is no strong scientific link between Boreal Caribou decline and diseases or parasites.

[700] In his report, Dr. Johnson noted at page 4:

> … The populations in BC are located in the northeastern portion of the province and are found across landscapes that have been degraded by decades of forestry and oil and gas development. Although the total footprint of disturbance varies across that area, these caribou are some of the most threatened populations in Canada. Environment Canada (2011) has assessed all populations of boreal Caribou in BC as unlikely or very unlikely to maintain a self-sustaining population over time.

[701] Dr. Johnson also cited a science review for Boreal Caribou by Culling and Cichowski (2017), which he said reported a decline in the number of caribou found across the Chinchaga Range. In 2004, there were an estimated 483 caribou in that range, which declined to 250 in 2010. A minimum count survey (only those caribou observed, not estimated) located 194 Caribou in 2016.

[702] Regarding Northern Mountain Caribou, which includes the Graham and Pink Mountain herds, Dr. Johnson noted they are provincially listed as imperiled/special concern. He found no available data on the health of these herds (as opposed to simply their abundance or population size). Dr. Johnson noted that low calf

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recruitment (meaning that few calves survive to adulthood) has been cited as a cause of the Graham herd decline.

[703] Dr. Johnson noted that Environment Canada has set a 35% habitat disturbance threshold for caribou management, which has been formally incorporated into their Boreal Caribou recovery plan. A disturbance management threshold is the point below which range conditions are likely to meet a recovery goal. If the level of disturbance is above that – i.e., if more than 35% of the habitat is disturbed – the outcome is highly uncertain or unacceptable. Based on Environment Canada studies, this threshold or limit of 35% of habitat being disturbed is thought to result in a 60% probability of a caribou population being self-sustaining.

[704] Dr. Johnson stated that the effect of industrialization on caribou is a very well-documented area of research. He cited evidence that:

a) depending on location, caribou decline can be attributed to a number of factors including direct habitat loss, displacement caused by anthropogenic disturbances, and unsustainable predation resulting from human-caused alteration in the distribution and abundance of predators;

b) 70% or more of the variation in Boreal Caribou recruitment across Canada was attributable to range condition/habitat, most of which was the result of anthropogenic activities;

c) there has been a demonstrated loss of habitat for the Graham herd (he found no estimates for habitat disturbance for the Pink Mountain herd); and,

d) studies have estimated the anthropogenic habitat disturbance for the Chinchaga herd to be between 74–78.8%.

[705] Dr. Johnson also cited evidence from Doig River First Nation that their knowledge holders have observed a negative link between oil and gas activities and

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caribou, which they attributed to poor health from ingesting oil and gas–related contaminants.

ii. Dr. McNay

[706] Dr. McNay noted in his expert report at pages 12–13:

> The relationship between anthropogenic disturbance and caribou population declines has been well documented (Wittmer et al. 2007, Environment Canada 2008, 2011*a*, Sorensen et al. 2008, Bowman et al. 2010, Johnson et al. 2015). Adult female caribou have a greater chance of surviving with greater amounts of old, undisturbed forests within their home ranges (Wittmer et al. 2007). Johnson et al. (2015) found that caribou population declines were highly correlated with habitat disturbance, particularly disturbance in caribou calving – summer ranges…

[707] He went on to note:

> The negative relationship between habitat disturbance and caribou declines is likely related to the multiple adverse effects of habitat disturbance and caribou: increase predation, habitat alteration, habitat fragmentation, loss of habitat and forage, and displacement of individual caribou from their preferred habitats (British Columbia Ministry of Environment 2014). Of these effects increased predation has the largest negative effect on caribou. While habitat disturbance is the ultimate reason for caribou population declines, increases in predation is often considered the proximate cause…

[708] Overall, Dr. McNay found that all three herds within the Blueberry Claim Area – Chinchaga, Graham, and Pink Mountain – were in decline, with populations unlikely to become self-sustaining. He specifically noted that "[d]eclines in the Chinchaga and Graham herds are most likely due to habitat disturbance." He opined that the primary proximate cause is wolf predation, the ultimate cause of which is anthropogenic habitat disturbances.

[709] Habitat disturbance in this context refers to a place where the habitat has been disturbed or altered, causing changes to the natural landscape. Anthropogenic (human-caused) disturbances include seismic lines, roads, forestry cutblocks, oil well pads, and farms – essentially any area where humans have interfered with the landscape. Natural disturbances include forest fires and landslides.

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[710] Dr. McNay cited two proposed mechanisms for the increase in wolf predation:

a) an increase in the predator population brought on by increases in seral-associated prey (like moose and deer), which are drawn to the increase in early seral vegetation for forage caused by industrial disturbances; and,

b) ease of predator access to caribou habitat because of anthropogenic disturbances, like linear corridors (e.g., roads and seismic lines).

[711] "Early seral" habitat is essentially young forest, characterized by a greater amount of low-level vegetation, which may provide forage for various animals like moose and deer. This can be contrasted with more mature forest, which has less underbrush and denser canopy cover.

[712] Dr. McNay noted the relationship between anthropogenic disturbance and caribou population declines is "well documented," and is likely related to multiple adverse effects from disturbance, including increased predation, change or loss of habitat and forage, fragmentation, and displacement of individual caribou from their preferred habitats. For example, Dr. McNay noted that linear features (roads, seismic lines, etc.) fragment caribou habitat, cause direct habitat loss along the feature line, and facilitate vehicle collisions.

[713] Dr. McNay also cited evidence that caribou tend to avoid the area surrounding development features, which creates habitat loss greater than the footprint of the feature itself. For example, they may avoid cutblocks by up to 5.5 kilometres, and seismic lines or pipelines by up to 2.5 kilometres. Further, forest harvesting decreases the availability of arboreal lichen for winter forage.

[714] Dr. McNay, citing a BC Ministry of Environment report from 2014, opined that industrial disturbances from the forestry and energy sector are the biggest threat to Northern Mountain and Boreal Caribou in BC. He noted that natural disturbances, including fire and pine beetle outbreaks, may contribute to habitat loss, however, their overall impact seems to be less than that of anthropogenic disturbance. Dr.

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McNay also noted that the impact is “additive,” as several studies have found caribou population growth and recruitment are best explained by the percent area disturbed by anthropogenic disturbance and fire, versus either individually. For example, across 24 Canadian boreal caribou ranges, percent area disturbed by anthropogenic disturbances and fire explained 61% of the variation in caribou recruitment.

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Boreal Caribou: The Chinchaga Herd

[715] Dr. McNay testified that, based on his own modelling, the cause of the Chinchaga herd decline is likely habitat disturbance, which is largely anthropogenic. He found that the Chinchaga range demonstrates a level of habitat disturbance that clearly exceeds any recommended limit. His model (which uses a 250 metre anthropogenic disturbance buffer) showed an 87.25% anthropogenic disturbance in this range.

[716] Further, he noted the level of habitat disturbance in the Blueberry Claim Area was disproportionately higher compared to elsewhere in the Chinchaga range – 92.62% within the Blueberry Claim Area versus 79.14% outside of it. He concluded this would limit their growth in the Blueberry Claim Area and was likely causing the Chinchaga herd to be displaced to other portions of their range.

[717] Dr. McNay opined that habitat disturbance levels are too high for a self-sustaining Chinchaga population; he stated that the herd was likely to continue declining unless multiple management actions are taken.

Northern Mountain Caribou: The Graham and Pink Mountain Herds

[718] Over their entire range, Dr. McNay found that the disturbance levels for both Northern Mountain herd ranges were only slightly above recommended disturbance limits. His calculations showed a 38.28% disturbance for the Graham herd range, and a 36.77% disturbance for the Pink Mountain herd range (compared to the 35%

management threshold specified by Environment Canada). These calculations were done using a 500 metre anthropogenic disturbance buffer.

[719] However, for the portion of the Graham range that exists within the Blueberry Claim Area, he found that disturbance levels were higher than for the total range. Like the Chinchaga herd, he opined that the Graham herd was probably experiencing greater pressure within the Blueberry Claim Area and that their distribution was likely displaced from there.

[720] Dr. McNay noted that the models he used tended to overestimate population growth when compared to demographic data for the Northern Mountain herds. Given the models he used did not align as closely with the observed population trends, Dr. McNay noted that results were less clear for the Northern Mountain Caribou populations. He opined that disturbances within these herd areas were "likely to be more detrimental than the preliminary model results suggest," but that further refinement of the model was necessary to draw clearer conclusions.

iii. Mr. Simpson

[721] On cross-examination, Mr. Simpson acknowledged that all three herds in the Blueberry Claim Area are declining, and are unlikely to reach sustainable populations.

[722] Mr. Simpson's evidence on the cause of that decline was somewhat conflicted. In his report, Mr. Simpson wrote, without qualification, that "[h]abitat fragmentation, increases in seral associated prey (deer, elk and moose) and corresponding increases in predators, particularly wolves, is generally accepted as the main cause of declines in many caribou populations," citing Committee on the Status of Endangered Wildlife in Canada, "Assessment and Status Report on the Caribou Rangifer tarandus; Northern Mountain Population, Central Mountain Population, Southern Mountain Population in Canada" (2014, Ottawa): *Species at Risk Public Registry* [COSEWIC 2014 Report]. At one point in cross-examination, he agreed with this statement; at another, he cited the cause simply as "wolf predation,"

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but noted that “there’s some confusion over how that occurs,” and stated that he had trouble making the linkage between habitat disturbances and increases in wolf predation.

[723] Regarding specific disturbance types, Mr. Simpson opined that road density and linear disturbances negatively impact caribou. He noted there is a strong negative correlation between linear disturbance density and a caribou population’s success in a given area. In his report, he noted that standard forest management is “not compatible” with the needs of woodland caribou. Further, he noted agricultural land was not generally suitable caribou habitat.

[724] However, Mr. Simpson also stressed that other possible causes of decline should also be considered, including climate change, forest fires, pine beetles, and other natural disturbances, particularly since declines have occurred in areas where caribou enjoy relatively undisturbed habitat.

[725] Mr. Simpson noted that habitat protection measures alone have been insufficient to support herd recovery, and that consideration should be given to prey reduction and captive rearing strategies.

iv. Blueberry Members’ Evidence

[726] Both Raymond Appaw and Jerald Davis testified to caribou declines beginning in the 1980s and 1990s. These Blueberry witnesses noted that caribou are almost never seen anymore, though rare sightings do occur. Blueberry members have stopped hunting caribou due to their declining populations.

[727] Some Blueberry witnesses testified that, in recent times, caribou had been seen in some of their former habitat. In its written submissions and appendices, the Province highlighted a number of specific sightings.

[728] Further, a 2018/19 Wildlife Sighting Survey conducted by the Blueberry River Lands Department recorded seven sightings of between one and nine caribou.

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[729] The Province submits that the Plaintiffs' own specific evidence on this subject rebuts an assertion that caribou are "almost never seen anymore." However, this argument does not consider how frequently caribou were seen *before* the reported decline. The Blueberry members testified to diminishing numbers and increasingly infrequent sightings. That they still occasionally see *some* caribou does not negate their more general testimony on declining populations. Further, the overwhelming scientific evidence is in line with the witnesses' testimony: that caribou populations are in decline and are unsustainably low.

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v. Province's Theory on Caribou Decline

[730] The Province submitted that increased predation – particularly by wolves – is the cause of caribou decline. The Province primarily cited the opinions of Dr. McNay and Mr. Simpson (detailed above), although they also pointed to comments made by Blueberry members at trial; for example, at one point, Raymond Appaw testified that wolves had kept ungulate populations down. The Province also referenced predator control measures a number of times, either directly or obliquely, including by asking each expert whether or not predator control measures would be likely to increase ungulate populations.

[731] Wolf control in the province dates back to the late 19th century, and at various times has included the use of bounties, poison, hired hunters, and shooting wolves from planes. However, such measures have become increasingly unpopular with the public, and the Province pointed out that predator control measures had largely ceased by the 1980s.

[732] The Province submits that, in the wake of this cessation, predator populations have increased and caused a corresponding decline in caribou populations. The Province notes it is implementing wolf control measures to protect the Chinchaga and Pink Mountain herds.

[733] The Province also suggested that increases in seral-associated ungulates (including moose and deer) may have allowed for an increase in the wolf population,

with corresponding declines in caribou. The theory is that moose and deer populations have increased, and as they move into caribou territory, they bring their main predator (wolves) with them. Despite the fact that caribou are not their traditional prey, wolves will opportunistically or incidentally hunt caribou when they move into caribou territory. In sum, the Province suggests that increased moose and deer have led to increased wolves, which has caused a decline in caribou.

[734] As the Plaintiffs pointed out, the difficulty with the Defendant's argument here is that it stops at the immediate cause of death of various individual caribou. In Dr. McNay's evidence, he pointed out that increased predation is ultimately believed to be the result of human disturbance. Dr. Johnson's evidence was largely the same. I note that even Mr. Simpson, who originally declined to draw any conclusions on the relationship between industrial disturbance and wolf predation, changed his opinion at trial, and eventually agreed that linear disturbances could cause increased predation for caribou.

[735] The proposed mechanism is that anthropogenic disturbances cause an increase in moose- and deer-friendly early seral habitat. As such, moose and deer have moved into caribou territory, bringing wolves with them. Thus, human-caused habitat disturbance is widely theorized to be the ultimate cause of caribou decline.

c) Conclusions on Caribou

[736] There was clear consensus among the experts and witnesses that the caribou populations in the Blueberry Claim Area are in serious decline, and are unlikely to reach self-sustaining levels.

[737] I accept the evidence of Dr. Johnson and Dr. McNay – and even Mr. Simpson to a certain extent, as explained above – that anthropogenic disturbance, including industrial disturbance, has largely caused or contributed to that decline. This is further consistent with the direct evidence provided by Blueberry members, which has indicated limited to no sightings of caribou, unlike in times past.

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7. Moose

a) Overview on Moose and Their Habitat

[738] Dr. Johnson described suitable moose habitat as containing a mix of forest ages and classes in close proximity, to provide a combination of cover (older forest) and forage (younger forest and shrubland).

[739] Mr. Simpson's evidence on moose habitat requirements largely aligned with Dr. Johnson's: moose require a "mosaic" of shrubland and young to mature forest within both their summer and winter ranges, which provides a mix of forage and cover. Mr. Simpson noted that the availability of suitable winter habitat is generally considered the most important factor for moose populations. He noted that high snow depths are bad for moose, and that in areas with greater snowfall, the best habitat is old forest (for cover) situated near seral shrubland (for forage).

[740] In his testimony, Mr. Simpson agreed that effective winter habitat is another critical factor for moose. He emphasized the importance of winter habitat that provides shelter and thermal cover close to forage in his report, at p. 7:

> The availability of winter habitat is generally considered the most important factor required to sustain moose populations… Moose require a mix of forest age classes in close proximity to provide feeding habitat (<20 years old), thermal and snow interception cover (>60 years) as well as hiding cover (20-60 years)…

b) Moose Populations in the Blueberry Claim Area

[741] Dr. Johnson and Mr. Simpson opined on moose populations within the Claim Area. Direct evidence was provided by Blueberry members. A variety of provincial studies, reports, and other documents were also adduced at trial.

i. Dr. Johnson

[742] Dr. Johnson reviewed population data for moose in the Peace Region, which significantly overlaps with the Blueberry Claim Area. He noted that population trends are not available for all Wildlife Management Units within the Blueberry Claim Area.

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At the time of the Johnson Report, for Wildlife Management Units with available data, Dr. Johnson found that surveys indicated moose populations had:

a) likely increased in Wildlife Management Unit 7-35;

b) likely decreased in Wildlife Management Units 7-32, 7-42 and 7-44 (though more recent data for 7-32 suggests an increase, as will be discussed below; furthermore, the data for 7-44 was out of date at the time of the Johnson Report, and numbers may have increased compared to earlier survey data from the 1980s); and,

c) possibly increased in Wildlife Management Units 7-45 and 7-46, though the data on 7-45 was flawed and out of date, and there was only a single survey for 7-46. (As will be discussed below, more recent government data suggests moose are actually declining in Wildlife Management Unit 7-45.)

[743] The Johnson Report contains a map of the Blueberry Claim Area, overlaid with the Wildlife Management Units including data on areas of likely moose increase or decrease at p. 11.

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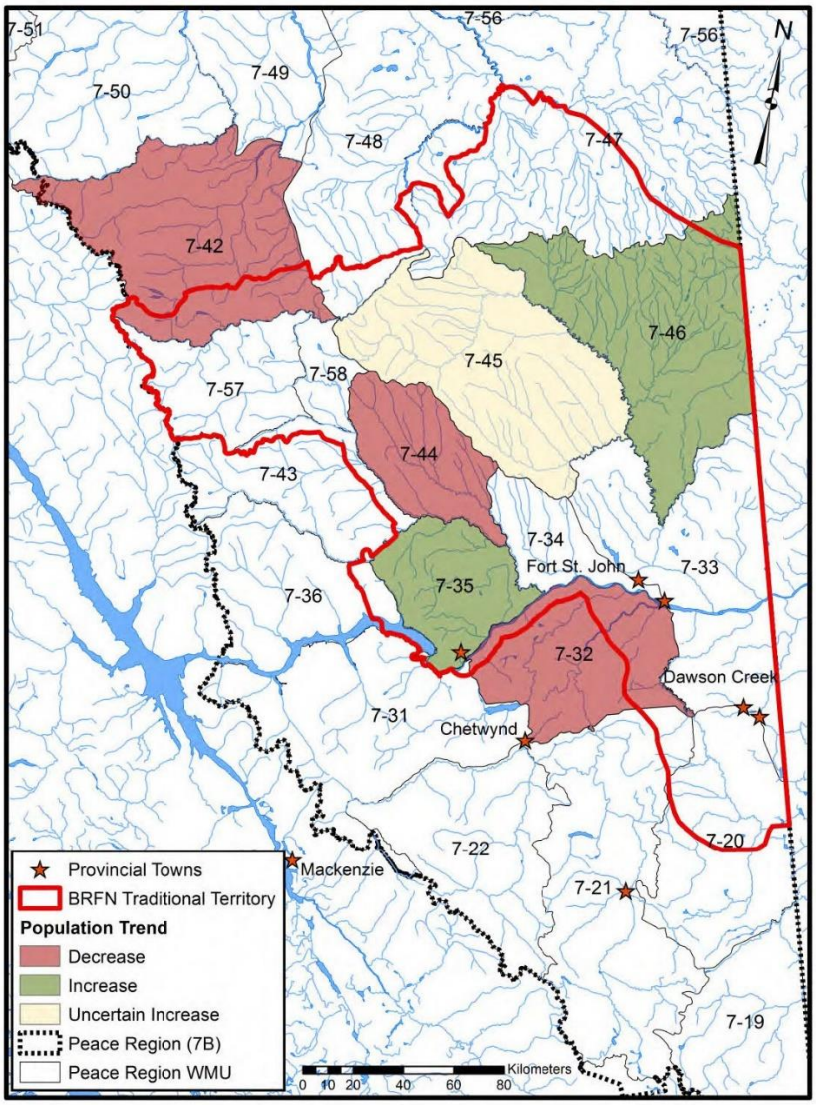

Johnson Report (Exhibit 15, p. 11): Location of Wildlife Management Units within the traditional territory of the BRFN (referred to in these reasons as the Blueberry Claim Area) with corresponding trend in population change of moose, where available.

[744] In his report, Dr. Johnson noted that between the various regional segments, there was evidence of moose declining in some areas and increasing in others, though he was unclear on how some of the reports he reviewed had obtained population data. At the time, he found that "[i]ncomplete data…prevent a full description and evaluation of the population dynamics of moose across the traditional territory." However, in Johnson Addendum 2, he points to data from a

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2018 study by Kuzyk et al. (“Kuzyk 2018”) that concluded moose populations within an area that includes the Blueberry Claim Area had actually declined between 5-12% annually from 2011 through 2015. He felt this new study was better than an older study by the same author (which had found moose populations to be stable), as it reflected improvements in data and study methods.

[745] Dr. Johnson noted it is often thought that landscape disturbance actually results in increased quality/size of habitat for moose, as it creates a convergence of early seral forage areas with older forest cover. However, he also noted that many populations have declined in the last decade despite increases in these disturbances. He stated that the causes of these regional declines are unclear, and are currently being studied. That said, he did summarize a number of empirical findings on the effects of industrialization on moose:

a) there is evidence that moose frequently use cutblocks, however, preliminary results from one study showed that moose density in northeastern BC was positively correlated with wildfire-caused disturbances, but not with anthropogenic ones (like cutblocks, roads, and seismic lines);

b) some evidence suggests moose avoid or are hesitant to cross roads or road-dense areas, although this appears to vary by season, gender, and scale of analysis;

c) broad-scale use of herbicides reduces forage for moose, although moose may eventually return to or even favour previously-treated areas;

d) studies suggest moose will strongly avoid very recent habitat disturbances; and,

e) generally, large-scale forest change can have negative repercussions for moose populations.

[746] He noted that we cannot assume a continuous positive relationship between areas of successional plant communities (i.e., forage areas) and moose habitat

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quality, as moose require a range of stand ages to thrive. He could not find any guidance on the composition of foraging and cover habitats moose require to indicate at what threshold a lack of mature forest might start to limit moose. However, the Provincial Cumulative Effects Framework, which will be discussed later, considers moose habitat "disturbed" if it is within one kilometre of a road or major industrial development. Dr. Johnson noted that, based on only a 500 metre buffer (i.e., half of the provincial disturbance buffer for moose), the 2016 Atlas found an 84% territory disturbance in the Blueberry Claim Area. Further, the BC Cumulative Effects Maps he considered in Johnson Addendum 1 showed that road disturbance was "very high" and mitigation was "very low" for moose across much of the Blueberry Claim Area.

[747] Dr. Johnson also noted that traditional knowledge-holders from some First Nations reported that moose, like caribou, are negatively affected by oil and gas developments via ingestion of contaminants.

ii. Mr. Simpson

[748] Mr. Simpson noted that moose are provincially listed as a "secure" species; the province considers them widespread and abundant. In his opinion, based on the available data, moose populations in the Peace Region and the Peace River Corridor are stable. However, in the Northeast Rockies portion of the Blueberry Claim Area, he found that moose appear to be declining.

[749] Mr. Simpson also opined on the effects of various industrial development types with respect to moose.

[750] Regarding forestry, he noted that moose habitat shows less of a decline in the face of forestry activities than some other species, including caribou, fisher, and marten. That decline is generally based on the availability of winter habitat, i.e., old coniferous forests for cover. He also noted that agricultural land represents a "permanent loss of habitat" for moose.

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[751] Mr. Simpson further noted that roads may have a negative effect on moose, by increasing access to moose by hunters and other predators. In his report, he cited studies concluding that linear corridors facilitate wolf predation on moose (as well as other ungulates). He noted other experts have indicated that, as a point of management, road networks in forestry areas should be minimized or deactivated for up to 10 years following cutblock harvesting, until the vegetation has grown high enough to obscure moose from road traffic.

[752] Mr. Simpson also noted that in the Peace River Corridor – an area with extensive development and also subject to extensive study – moose populations appear stable. Further, he opined that based on his "limited review" of the literature and his own experience, predators may be less tolerant of human presence than some ungulates, including moose, which might account for his observations that moose are stable or increasing in parts of the Blueberry Claim Area subject to the most development.

iii. Blueberry Members' Evidence

[753] All Blueberry witnesses testified that they have experienced a decline in moose in the Blueberry Claim Area. They find moose hard to hunt, and their availability does not meet the community's needs. Several members noted that moose are no longer found in areas they were once plentiful. They noted that moose generally avoid areas of industrial activity or clearcutting.

[754] Although various witnesses noticed a decline in moose at different times in different areas, they have all noticed a significant decline in the last 10 to 15 years.

[755] The Province has conceded that moose are a key species for Blueberry, although it does not concede there is any proven decline in moose population within the Blueberry Claim Area. The Province contrasts the general evidence provided by Blueberry community members (i.e., that moose are declining) with those members' more specific evidence, which includes testimony from multiple members that they

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still see and are able to hunt moose in the Blueberry Claim Area. I will not review all of that specific evidence here, but it includes that:

a) between the Blueberry witnesses, for example, 12 moose were harvested in a recent year;

b) Norma Pyle testified to shooting six moose on five trips between 2009 and 2015;

c) Jerald Davis testified that, although it was more difficult to hunt, he was still able to get enough to allow him to "eat [moose] every day," and that he has heard from members of Blueberry and other nations that they see moose daily (although he did not necessarily believe them); and,

d) Raymond Appaw testified to a number of active moose licks in close proximity to the Reserve.

[756] The Province also says evidence provided by Blueberry suggests that those members who do actively hunt or trap may spend less time on the land than before as a result of competing commitments. For example:

a) Chief Yahey noted that he does not hunt on a daily basis because of his job, and noted that in 2012 specifically he was only able to hunt a small handful of times;

b) Norma Pyle likewise testified she had limited time to hunt or fish due to her job; and,

c) Georgina Yahey explained that it was harder for her family to travel long distances or take longer trips while she was in school.

[757] The Province contrasted this evidence with historical evidence of the effort and time spent hunting by Blueberry members, including testimony by Chief Yahey that, at the time of Treaty 8, the Fort St. John Beaver Band was semi-nomadic and had to travel long distances in pursuit of food resources. They also pointed to

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evidence from Dr. Ridington that even as far back as the 1970s, only one in four hunts was successful.

iv. Province's Theory on Moose Populations

[758] To the extent that any decline has occurred, the Province submits that such a decline "likely reflect[s] a return to a more natural level, prior to the extensive predator control measures in the mid-century." The Defendant argues that Blueberry members may have a distorted sense of the historical abundance of moose, based on a period of artificially high moose populations in the mid-20th century, which are now simply returning to more normal historical levels.

[759] In particular, they rely on a statement from the Plaintiffs' expert, Dr. McNay, who commented at trial that "with the amount of habitat disturbance that's happened in the last 50 years, the moose population has grown basically from 0 to 170,000 animals." The Province argued that a combination of intensive predator control between the 1950s to 1990s, increased forest harvesting (resulting in an increase in forage habitat), tighter hunting restrictions, and a greater history of prescribed burning increased moose populations beyond their natural equilibrium.

[760] As the Plaintiffs pointed out, however, Dr. McNay opined on caribou populations. His expert report and his testimony at trial focused on caribou. He was not asked to study moose generally, nor to opine on moose in the Blueberry Claim Area, except to the extent that moose populations have some relationship to or interaction with caribou populations. The comment quoted above was made rhetorically, in direct examination, while discussing increased predation on caribou *in caribou habitat*, i.e. that there has been an increase in moose in areas traditionally associated with caribou. It was not a general comment on moose populations within the Blueberry Claim Area, and, further, Dr. McNay cited no time period for this increase in moose.

[761] Blueberry highlighted several additional issues with the Province's theory that declining moose populations are simply returning to "natural" or historical levels.

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They pointed out the Province failed to adduce much, if any, evidence to support the theory. Where evidence was proffered, Blueberry argued it had been misinterpreted, and did not actually support the Province's propositions.

[762] Blueberry made compelling rebuttal arguments with respect to each of the factors cited by the Province as having increased moose populations from the 1950s to the 1990s (predator control, increased forestry, hunting restrictions, and prescribed burning). I am inclined to agree with Blueberry on the following points.

[763] Regarding predator control measures, which the Defendant implies would have decreased the wolf population and thus increased the moose population over the relevant period:

a) the Defendant provided no evidence of the magnitude or effects of historical predator control measures within the relevant Wildlife Management Units in the Blueberry Claim Area;

b) predator control was in decline, and ultimately ceased, well before the Plaintiffs began noticing a decline in moose. The Plaintiffs specifically pointed to evidence given by Mr. Simpson that populations "quickly recover" after the cessation of predator control measures; however, these measures were gradually discontinued beginning in the 1950s and had stopped altogether at least 10 years (in the mid-1990s) before the Plaintiffs began noticing a decline in moose (in the mid-2000s);

c) much of the expert evidence relied upon by the Defendant in support of this point was given in relation to caribou habitat, not moose habitat; and,

d) the Defendant mischaracterized some of the expert testimony on this point. For example, the Defendant relied on a quote by Dr. Johnson to support the proposition that wolves were the cause of moose decline in the territory. However, this was not Dr. Johnson's evidence, and in fact he specifically declined to draw this inference. Dr. Johnson simply agreed

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that, if all else were equal, wolves *could* cause a decline in moose populations.

[764] Regarding the effects of increased forestry, which the Defendant submits would have increased forage habitat for moose, resulting in an increased population:

a) three of the Wildlife Management Units within the Claim Area (7-45, 7-44 and 7-34) have declining moose populations despite a high forestry harvest; and,

b) forestry has not stalled or declined in these Wildlife Management Units since the 1990s, which calls into question the causal relationship between increasing forestry and increasing moose populations.

[765] Regarding hunting restrictions as a cause of increased moose population, the restrictions cited by the Defendant did not come into effect until 1996. This is notably *after* the 1950s to 1990s period proposed by the Defendant, and theoretically should have *increased* rather than decreased the moose population from the mid-1990s to present. The Plaintiffs pointed to a credible study which did show a 6% increase in provincial moose populations from 1996 (the year the restrictions were implemented) to 2005. However, the same study showed a subsequent decline in moose of 32%, resulting in a cumulative decline of 29% from 1996 to 2015.

[766] Regarding prescribed burning, which the Province submits would have increased moose forage habitat in a similar manner to forestry activities, the defendants adduced no evidence to suggest a change in prescribed burning over the proposed period that would account for the current decline in moose.

[767] Finally, this theory about artificially high moose populations followed by a return to “natural” levels was newly introduced during the Province’s closing argument. It was not introduced by, nor was it put to, any of the experts or Blueberry witnesses testifying in this case.

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v. Inconsistent Survey Data for Moose

[768] The Province further highlighted the available Wildlife Management Unit survey data for moose. Surveys indicate that while moose may be declining in some areas, they are increasing in others, independent of the level of disturbance in each Wildlife Management Unit. For example, there is evidence that moose populations are stable to increasing in the Southern Wildlife Management Units (7-32 and 7-20) and Wildlife Management Unit 7-35. These Wildlife Management Units have a high level of disturbance. Conversely, declines have been recorded in Wildlife Management Unit 7-42, where there has been little industrial disturbance. The Province argues this variability – increasing moose populations in some Wildlife Management Units with high disturbance levels, and decline in others with relatively low disturbance levels – should prevent the inference that habitat disturbance is the cause of the alleged declines in Wildlife Management Units 7-45 and 7-34, which are at the core of Blueberry's territory and thus at the core of their claim. I note that locations are detailed at the outset of this segment and the map is included earlier.

[769] The Plaintiffs provided compelling evidence to rebut this argument. The Southern Wildlife Management Units are largely disturbed by agriculture and urban settlements; evidence suggests this type of disturbance leads to lower predation and higher moose populations. A 2018 provincial survey for Wildlife Management Unit 7-32 concluded:

> Given the close proximity of portions of [Wildlife Management Unit] 7-32 to urban, industrial, and agricultural areas, predation from species like wolves, grizzly bear, and black bear is likely much lower compared to more remote areas within the Peace Region [citations omitted].

[770] Increases were also found in Wildlife Management Unit 7-20 in a 2016-2017 survey, although there was insufficient information to opine on the cause. The Plaintiffs note that these Wildlife Management Units, in particular Wildlife Management Unit 7-20, where moose populations have increased, are far from their core territory and largely comprised of private land, where they are unable to hunt.

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[771] The Plaintiffs point out that the Outer Wildlife Management Units (7-46, 7-47, 7-57, and 7-58) are substantially different habitat than those in the core territory. Although they are less developed, they are also mountainous and primarily consist of caribou territory. They submit, and I accept, that they present a poor comparison to the "core" or Central Wildlife Management Units. I agree that moose population-to-disturbance trends in these Wildlife Management Units do not necessarily have any bearing on a finding of causation for the Central Wildlife Management Units.

[772] The Province also pointed to declines in Wildlife Management Unit 7-42 – a mountainous region, lying mostly outside of the Claim Area – as an example of an area where moose populations are declining despite very low disturbance levels. The Plaintiffs note that, like the Outer Wildlife Management Units, Wildlife Management Unit 7-42 is ecologically dissimilar to the Central Wildlife Management Units. Further, a provincial study conducted in Wildlife Management Unit 7-42 found the cause of moose decline was increased natural predation based on the cessation of active predator control programs.

[773] The Plaintiffs further note that they have not suggested moose had entirely disappeared from the Blueberry Claim Area, but rather that populations have meaningfully declined such that they are seen and harvested less frequently than before. The Plaintiffs highlighted evidence that Wildlife Management Unit 7-45 – a core management unit and historical moose habitat – is estimated as being able to support about 5,300 moose, but currently contains only 1,400 moose. A provincial government study, "Peace Region Technical Report-2019 Winter Moose Survey: WMU 7-45" ("2019 Winter Moose Survey") cites habitat decline as the limiting factor for moose in that area, noting: "[c]hanges to the habitat have likely been the main factor explaining the decline in the moose population over the past 20 years."

[774] Significantly, Blueberry points to a May 15, 2020 Moose Working Group Progress Report prepared in the context of the Regional Strategic Environmental Assessment project, which concludes that "linear disturbance and a lack of mature and old forests for winter shelter" are the "primary factors thought to influence habitat

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effectiveness [for moose].” The Regional Strategic Environmental Assessment Moose Working Group contains both provincial experts and Blueberry members. The Moose Working Group, including provincial representatives, accepted the modelling this conclusion was based on.

[775] Further, the document included information that, with respect to moose populations, “based on available provincial data…[Wildlife Management Units] 7-45 and 7-34 both have significant decline (down 65% and 51% respectively…),” and that these Wildlife Management Units “overlap with a significant industrial footprint” which has resulted in “little effective shelter and effective forage where forestry and the disturbance footprint affect habitat use by moose, and predation and hunting pressures.”

[776] Although the Province argued these documents were in draft format, the plaintiff gave compelling evidence that they were, in fact, relatively final and that the conclusions contained therein had been accepted by the Moose Working Group, including its provincial representatives.

c) Conclusions on Moose

[777] As a final note, the Province argued that it was unnecessary for me to make any conclusions as to the cause of any decline in moose. Blueberry submitted that it was critical I make such a finding, particularly for the core Wildlife Management Units 7-45 and 7-34. It points out that if I do not rule on causation for moose, the Crown will not be precluded from continuing to issue forestry cutting permits because, in the Province’s belief, harvesting is solely beneficial for the moose population. I agree with Blueberry.

[778] The evidence to make such a determination is already before me and the issue has been engaged between the parties in this case.

[779] As outlined above, there was some disagreement among the experts on the subject of moose populations. Given I place more weight on the evidence of Dr.

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Johnson and Dr. McNay, and further given the direct testimony of Blueberry members, I find that, on the whole, moose populations have declined within the Blueberry Claim Area, with the exception of the Southern Wildlife Management Units 7-32 and 7-20, as well as 7-35. The evidence suggests these have stable or increasing populations.

[780] Importantly, the Wildlife Management Units most central to the Blueberry Claim Area, and which Blueberry primarily uses for hunting – being units 7-45, 7-34 and likely 7-44 – have shown moose population declines. The results for 7-44 were less clear; they showed declines from the 1990s but possibly an increasing or stable population from the 1980s. As noted, the latest provincial government Moose Survey for unit 7-45 (i.e., the 2019 Winter Moose Survey) indicated a 65% decline in moose density since 2006. While some caution was expressed in the report as the 2006 survey used a mix of surveying methods, the Regional Wildlife Biologist who undertook the survey also noted that "[c]hanges to the habitat have likely been the main factor explaining the decline in the moose population over the past 20 years." When compared to 1998 survey results, which the report noted used similar methods to the recent surveys, the moose population appeared to have declined by 35% in unit 7-45.

[781] Over the course of the trial, much evidence was presented on the complex relationship between industrial activity and moose populations. Though some industrial activity may help moose, the positive effects are not universal. There is evidence that agricultural development may allow for increased moose populations (as in Wildlife Management Units 7-32 and 7-20) by reducing the amount of predation. There is also evidence that limited forestry- and oil and gas-related disturbances may increase moose populations – particularly in areas where they otherwise may not find forage, such as caribou habitat. Conversely, large-scale, intensive development may harm the moose population. While the Province relies on the "early seral forage" created after logging to say that such disturbances benefit moose, they do not acknowledge the limiting factor created by a lack of effective

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winter habitat/old forest. The result is that moose populations may increase in some areas with high industrial activity (like the Southern Wildlife Management Units) while declining in other areas, which are disturbed by activities like forestry and oil and gas.

[782] I conclude the evidence establishes that the moose declines are the result of anthropogenic disturbances, including industrial development impacts upon habitat. Evidence points to the importance of old-growth coniferous forests to provide effective winter habit for moose survival. Mr. Simpson agreed to this in cross-examination when he noted middle age forest provides habitat for hiding and security, but moose rely on the larger, contiguous canopy found in old forest for thermal and snow interception protection. In his report (at p. 36), he also cited evidence that "[m]oose showed a small decline based on the proportion of old coniferous forest available for winter habitat."

[783] More specific evidence was provided by Dr. Johnson, referencing the recent study from Mumma and Gillingham (2019), as follows:

a) "Mortality of monitored moose was best explained by a series of variables related to human activity and landscape disturbance (i.e., road density and the proportion of new cutblocks of 1-8 years post-harvest)";

b) "They [Mumma and Gillingham] concluded that relative to snow conditions '…moose that used areas in winter with high proportions of new cutblocks, new burns, and pine were more likely to die from apparent starvation'";

c) "moose appear to be sensitive to rapid and broad-scale landscape change";

d) "…moose are quite sensitive to very early successional, very early seral cuts" and that "moose avoided clear cuts that were somewhere between the age of one to eight years old";

e) "…and what they [Mumma and Gillingham] found is that moose mortality was related to the amount of roads, so road density, as well as the amount

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of early seral forest. And that applied to harvest of moose. So if moose were in landscapes with early seral, lots of clear cuts and lots of roads, they were more likely to be harvested"; and,

f) "…those moose that die from apparent starvation were more likely to be found in landscapes with a high density of roads and a large number of early, young clear cuts."

[784] In Johnson Addendum 2, Dr. Johnson also referenced the Kuzyk 2018 report titled "Moose population dynamics during 20 years of declining harvest in British Columbia," prepared for the Ministry of Forests. As Dr. Johnson noted, this report was a provincial effort by the "brain trust" of provincial experts and represents the most current, comprehensive, and best available evaluation of the population trends for moose across British Columbia. He said this is clear evidence by provincial specialists who reported that "…the provincial moose population increased 6% from 1996-2005, subsequently declined 32% from 2006-2015, and declined 29% overall during the 20-year study period." Dr. Johnson also stated: "Of importance to my report…moose populations declined within all [Game Management Zones] found within the traditional territory of the Blueberry River First Nations."

[785] I note it is not necessary to determine the exact mechanism of declines in moose populations, which are a combination of factors resulting from industrial disturbance. The evidence discloses the following direct and indirect causes of loss of habitat consequent on industrial development, including forestry and oil and gas development:

a) avoidance (movement to other areas);

b) increased predation;

c) loss of winter habitat, forage, starvation, increased stress; and,

d) increased access by human hunters.

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[786] Dr. Johnson testified in respect of Table 4 of the Mumma and Gillingham report, which shows that road disturbance, new cutblocks, and herbicide-sprayed cutblocks are associated with increased mortality to moose.

[787] In the Johnson Report, Dr. Johnson indicates that the density of moose can benefit from early successional vegetation resulting from wildfire, but not anthropogenic disturbance (cutblocks, density of roads, density of seismic lines). He refers to evidence that the application of herbicide reduced the forage availability for moose by 60% and 96% in summer and winter, respectively, four years after treatment. Dr. Johnson supports the use of a one-kilometre distance from road disturbance as an appropriate measure.

[788] Ultimately, the experts and the documentary evidence were in agreement that the availability of effective winter habitat is the most important limiting factor to sustain moose populations. As noted in the "Regional Strategic Environmental Assessment Moose Working Group: Habitat Effectiveness Model" (July 2019), prepared by Tania Tripp of Madrone Environmental Services Ltd. and Tony Button – who has been referred to by witnesses in this trial as the most knowledgeable person in the Province on moose and who is presently working in the Ministry of Environment – at p. 11:

> Winter forage, security, and shelter are the key life requisites of focus because they are considered the important limiting habitats for moose populations.

[789] Based on the evidence before me, including the experts, authoritative provincial documents, and testimony of Blueberry members, I accept there have been significant declines in the moose population in Wildlife Management Units 7-45 and 7-34, and likely some decline in Wildlife Management Unit 7-44. I accept the evidence that moose populations have declined on the whole across the Blueberry Claim Area, despite increases in some individual Wildlife Management Units. I further accept that the likely cause of this decline is anthropogenic habitat disturbance including substantial industrial development. These disturbances have

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created a loss of effective habitat for moose which, along with other factors, has led to the decline of moose in the Blueberry Claim Area.

8. Marten and Fisher

a) Overview on Marten and Fisher and Their Habitat

[790] Dr. Johnson noted that there are few studies available on the habitat ecology or population dynamics of marten and fisher in BC.

[791] Research suggests that marten are dependent on old coniferous forests with coarse, woody debris on the forest floor. Dr. Johnson noted there are a large number of studies supporting the conclusion that marten respond negatively to early successional plant communities and landscape fragmentation associated with large-scale forest harvesting. He did note there is some conflicting evidence on whether marten actually require a particular stand age or whether the structure was more important than age or type, i.e., that younger forest might also be suitable for them. In any event, the thrust of the Johnson Report was that logging, fragmentation, and clear-cuts have a negative impact on marten; they will avoid open areas; and, that they require tall, mature trees to thrive. He noted marten appear to be vulnerable to even a small loss of habitat.

[792] Dr. Johnson noted evidence that fisher have a larger prey base and will use a wider range of forest types than marten, but that they also require an old forest structure for habitat. Habitat management strategies for fisher focus on retention of large natal trees, like cottonwood and spruce, near riparian areas. Dr. Johnson noted that landscape connectivity may be a limiting factor for fisher populations.

[793] Dr. Johnson noted that although marten have long been considered old-growth dependent, new research suggests that it may be a forest's "structure" rather than its age which is important. Mr. Simpson's evidence in this regard is consistent with Dr. Johnson's. Mr. Simpson cited research noting marten require coarse, woody debris, with sufficient overhead vegetation, including shrubs, saplings and trees to provide a mixture of cover and forage for both marten and their prey. This research

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noted marten are not normally found in open habitats, including clearcuts, and avoid non-forested types of cover.

[794] Mr. Simpson summarized quality fisher habitat as including riparian and associated habitats, with large trees for resting and denning and “natural” levels of coarse, woody debris to provide adequate rest areas and prey habitat. He noted they require areas with at least 30-45% mature or old forest with a productive understory; adequate shrub and canopy cover; and, landscape corridors between mature and old forests, ideally along riparian areas. He cited a study noting that tree patches should be at least two hectares in size.

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b) Status of Marten and Fisher in the Blueberry Claim Area

i. Dr. Johnson

[795] Dr. Johnson noted that population and health data for these species is not widely tracked, and he found no reliable evidence on this subject.

[796] Regarding the effects of development, Dr. Johnson noted that most studies on marten and fisher have only considered the specific effects of forestry; there is little data available on cumulative effects. However, he cited evidence of the following:

a) marten in northeastern BC may be disturbed by large or open seismic lines, but not by smaller ones (i.e., less than two metres in width) or those with recovering vegetation;

b) an increased proportion of disturbance and cuts was an important predictor in harvest declines for one study in western Alberta (although harvest data is confounded by other variables, including trapper behaviour). This negative correlation between anthropogenic habitat disturbance and trapping success was supported by a newer study considered in his Addendum 2;

c) logging causes a decrease in quality marten and fisher habitat; and,

d) one can expect a considerable reduction (more than 50%) in the probability of marten occupying areas with a seismic line density exceeding 10 kilometres per kilometre square.

[797] At trial, Dr. Johnson opined that there is "strong evidence" to suggest that a loss of canopy cover is detrimental to marten, and that this loss is mainly related to forest harvesting.

[798] Dr. Johnson noted that, per the Atlas, there is very little intact forest (~14%) remaining in the Blueberry Claim Area. However, he found that because of the limited data on fisher, it was hard to say exactly what this meant for them. He did note that because of evidence suggesting they require large tracts of contiguous habitat, fisher are probably not doing well within the Blueberry Claim Area.

ii. Mr. Simpson

[799] Mr. Simpson noted that marten are provincially listed as a "secure" species.

[800] Mr. Simpson noted the Province considers fisher a species of "special concern." He opined that fisher populations within the Blueberry Claim Area are stable, though little is known about population trends and most information comes from harvest statistics, which contain many confounding variables (including the number of trappers in a given year and their skill level).

[801] On the effect of industrial development, Mr. Simpson noted a study showing "substantial" declines in modelled habitat for both fisher and marten in areas where forestry was the greatest change. He noted that agricultural land clearing is destructive of fisher and marten habitat.

[802] At trial, Mr. Simpson stated that he viewed his conclusions on fisher to be "based on the other … information that's contained in the report and from my experience in the area," though admitted it was "not well documented."

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iii. Blueberry Members' Evidence

[803] Some Blueberry witnesses testified that they had observed declines in marten and fisher in harvested areas, and reported decreased trapping success.

[804] Wayne Yahey testified that his family's trapline used to be "premier" marten habitat, which has now been destroyed by logging. Norma Pyle testified that although forestry proponents leave brush piles for marten and fisher after a clear cut, Blueberry does not support this strategy. Ms. Pyle had "little confidence" that such brush piles were equivalent to standing timber for marten and fisher.

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c) Conclusions on Marten and Fisher

[805] Based on the limited evidence, it is difficult to make substantive conclusions on the populations of marten and fisher in the Blueberry Claim Area. However, Dr. Johnson concluded that – irrespective of the actual populations of marten – the evidence shows a negative relationship between human-caused habitat change and trapping success, and that forestry activities result in fewer marten. In addition, Blueberry member evidence has corroborated this state of affairs.

[806] I find accordingly that it is likely industrial activity has a negative impact on populations of marten and fisher due to loss of canopy cover, therefore interfering with the exercise of Blueberry's trapping rights.

9. Conclusions on Wildlife

[807] I have reviewed the evidence in detail, including that of the expert witnesses. Dr. McNay and Dr. Johnson, whose testimony I accept, testified to their opinion that industrial development has caused the decline of certain species within the Blueberry Claim Area, as summarized below. In developing their opinions and in testimony, they relied in part on government documents, which espouse the same opinion, including Kuzyk 2018, and the Regional Strategic Environmental Assessment Moose Working Group reports.

[808] With respect to caribou, I find that caribou have declined in the Blueberry Claim Area, and that anthropogenic disturbance has largely caused or contributed to that decline.

[809] With respect to moose, I find that moose have declined on average across the Blueberry Claim Area, and particularly in the core Wildlife Management Units 7-45 and 7-34. I also find there was likely some decline in Wildlife Management Unit 7-44. I find that anthropogenic disturbance is the likely cause of that decline.

[810] With respect to marten and fisher, I find it likely that industrial activities, which lead to loss of canopy cover, have had negative impacts on marten and fisher in the Blueberry Claim Area.

[811] Overall, it is clear that wildlife populations that are important to Blueberry are in a reduced state that is likely to interfere with Blueberry's hunting and trapping rights. The evidence establishes that the declines are the result of anthropogenic disturbance, including industrial development impacts upon habitat.

E. Disturbance and Scale of Development in the Blueberry Claim Area

1. Introduction

[812] Evidence that industrial development is transforming the landscape, and that those transformations are affecting the exercise of rights, is important in this case. The evidence of disturbance and impact is, however, in dispute.

[813] Three major industries are conducted in northeastern BC: forestry, oil and gas, and agriculture. Forestry operations over the years have left cutblocks, and resulted in little intact forest remaining. Oil and gas development has left well sites, pipelines, cut lines or seismic lines, and other facilities. Agricultural activities have resulted in much of the land being fenced and cleared for crops. There is hydro-electricity development and infrastructure in the form of dams, such as Site C, and

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various mining operations. In addition, a growing network of roads, both paved and unpaved, have been built in order to provide access for these industries.

[814] The term disturbance, which is used a lot in this case, refers to anthropogenic developments (such as those noted above) that, together with natural impacts like forest fires, landslides and pests, have changed the landscape: Caslys Consulting, Ltd., "Regional Strategic Environmental Assessment Disturbance Methodology" (September 2018). By combining and mapping the anthropogenic disturbance and the natural disturbance footprints, it is possible to see the comprehensive disturbance footprint.

[815] One of the reports in evidence in this case – entitled *Blueberry Cumulative Effects Case Study*, prepared for the Oil and Gas Commission by Salmo Consulting in January 2003 – defines disturbance as "a natural or human action that affects physical, chemical or biological conditions." A disturbance feature is defined as "a corridor or patch created by natural random events (e.g., burn or flood) or human action (e.g., cutblock, facility, community, road)." These definitions are possible descriptions of what might be considered a disturbance.

[816] Blueberry has brought forward evidence – in the form of atlases, maps, and data – to show the disturbance footprint or scale of development in its territory. This includes: a document prepared by Ecotrust Canada entitled *Atlas of Cumulative Landscape Disturbance in the Traditional Territory of Blueberry River Fist Nations, 2016* ("2016 Atlas"); a review of the 2016 Atlas done by Dr. Brian Klinkenberg; and, disturbance data and a comprehensive disturbance layer prepared as part of the Regional Strategic Environmental Assessment process (also referred to occasionally in these reasons as "RSEA"), which are discussed in further detail below. It has also presented *viva voce* testimony from its members about the impact of changes to the landscape and environment, such as smells and sounds, on the exercise of their rights. Blueberry says this evidence, taken together (and considered alongside the evidence regarding the various regulatory regimes and their lack of enforceable

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mechanisms to take into account cumulative impacts), is proof the Treaty has been breached and its rights infringed.

[817] The Province challenges the reliability of the disturbance evidence relied upon by Blueberry. More fundamentally, the Province says the disturbance data and evidence presented by Blueberry does not establish that the lands have been "taken up" such that Blueberry members are unable to exercise their treaty rights in or around these places. The Province says that evidence showing proximity to a disturbance is not a proxy for lands that are not available for harvesting activities.

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2. Admissibility of and Weight to be Given to Certain Documents

[818] On the question of disturbance and other environmental issues, the Province has also objected during these proceedings to a number of documents. It reiterated its objection in its final written argument, in a footnote. In that footnote, the Province noted it had made objections to the admissibility of "many documents tendered by the Plaintiffs." Without specifying the exhibits to which it objected, the Province referred to requirements for adoption of opinion by qualified experts, for putting documents to a witness, to the limits of lay opinion evidence, to witnesses not being called to speak to draft documents, to citing portions of documents for the truth of their contents, and it questioned whether certain documents were indeed "public documents."

[819] The Province maintained the objections and observations it made at trial, and noted it would comment on specific documents in oral argument if necessary. Unfortunately, it did not do so.

[820] The Court will nevertheless deal with the points raised in the footnote and previously mentioned at trial at the time certain documents were admitted.

[821] The documents the Province has objected to are numerous; however, they share common characteristics. As such, I will deal with them as a group when I consider the purpose for which they were admitted and the reliance that may be

placed on them. Where the Province has raised specific issues with individual documents, I will deal with them at the end of this section or as part of my analysis, as necessary.

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[822] First, the Province says Blueberry cites portions of many such documents for the truth of their contents, purportedly under the "public documents" exception to hearsay evidence. The Province notes this exception is not intended to admit detailed opinions, or reports of public inquiries that have led to recommendations, and argues that the documents relied on by Blueberry do not meet the test for "public documents" (relying, in part, on *Rumley v. British Columbia*, 2003 BCSC 234 at para. 51 and *Radke v. M.S.*, 2005 BCSC 1355 at paras. 51-53). Examples include:

a) a report by the Forest Practices Board, entitled *Cumulative Effects Assessment: A Case Study for the Kiskatinaw River Watershed Special Report* (March 2011);

b) reports by British Columbia's Auditor General, including:

   i. *An Audit of Biodiversity in B.C.: Assessing the Effectiveness of Key Tools* (February 2013);

   ii. *Managing the Cumulative Effects of Natural Resource Development in B.C.* (May 2015);

c) a report by Biodiversity BC's Technical Subcommittee, entitled *Taking Nature's Pulse: The Status of Biodiversity in British Columbia* (Victoria, BC: 2008);

d) a report commissioned by the Oil and Gas Comission, Steven F. Wilson, "Managing zone-of-influence impacts of oil and gas activities on terrestrial wildlife populations and habitats in British Columbia" (Sean Curry and James O'Hanley, who testified at trial, reviewed the report and provided commentary on it prior to its completion); and,

e) other documents produced as a result of collaboration in the Regional Strategic Environmental Assessment process, including but not limited to:

   i. R.F. Holt and Dave Myers, *Old Forest Current Condition: A Cumulative Effects Analysis for the Northeast RSEA Study Area – Final Report* (June 2019);

   ii. Tania Tripp, *Methods Documentation: Regional Strategic Environmental Assessment (RSEA) – Moose Working Group: Habitat Effectiveness Model* (16 July 2019); and,

   iii. Three Regional Strategic Environmental Assessment Moose Working Group reports, all dated September 24, 2019, entitled "Potential Habitat Conditions for Moose in WMU 7-45," "Potential Habitat Conditions for Moose in WMU 7-31," and "Potential Habitat Conditions for Moose in WMU 7-28."

[823] The Province says the RSEA materials should not be admitted for the truth of their contents. The Province says the only admissible opinion evidence on the issue of moose habitat is the testimony of Dr. Johnson and Mr. Simpson. The Province notes that work done through the RSEA Moose Working Group, on which Blueberry relies, is taking a conservative approach, assuming worst-case scenarios and making favourable assumptions for the protection of wildlife. Further, the Province also says certain reports were never put to Dr. Johnson to be commented on or adopted at trial.

a) Analysis

[824] As noted by Blueberry, out-of-court statements are admissible for the truth of their contents when they fall within the recognized exceptions to the hearsay rule or where they meet the criteria of necessity and reliability under the "principled approach": *R. v. Youvarajah*, 2013 SCC 41 at paras. 20-21. "Public documents" are a recognized categorical exception to the rule against hearsay: *R. v. A.P.,* [1996] O.J. No. 2986 (C.A.) at paras. 14-15 [*A.P.*].

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[825] The authenticity of these disputed documents was not at issue, nor was their relevance.

i. Public Documents Exception

[826] The "public documents" exception allows evidence that would otherwise be considered inadmissible hearsay to be tendered for the truth of its contents. A public document is a document which is "made for the purpose of the public making use of it, and being able to refer to it": *Sturla v. Freccia,* (1880) 5 A.C. 623 (U.K. H.L.) at 643. Public documents are admissible without proof because of their inherent reliability or trustworthiness, and because of the inconvenience of requiring public officials to be present in the court to prove them: *A.P.* at para. 14, citing *R. v. Finestone*, [1953] 2 S.C.R. 107.

[827] The test for admissibility under the "public documents" exception is laid out in *A.P* at para. 15. To fall within this exception, it must be established that:

i. the document must have been made by a public official, that is a person on whom a duty has been imposed by the public;

ii. the public official must have made the document in the discharge of a public duty or function;

iii. the document must have been made with the intention that it serve as a permanent record; and,

iv. the document must be available for public inspection.

[828] The fourth criteria may not be strictly required, particularly if there are other guarantees of reliability besides full public scrutiny; see *A.P.* at para. 17.

[829] As noted by Blueberry, documents admissible under this exception include "governmental reports and surveys prepared by an official whose duty it was to investigate and record his or her findings," public registers and records, official certificates, statutes, parliamentary journals and gazettes: see Sopinka, Lederman &

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Bryant, *The Law of Evidence in Canada,* 5th ed. (Markham, ON: LexisNexis Canada, 2018) at s. 6.312. However, documents need not fall into a certain category of public document to meet the test; the focus should be on the reliability of the document: *A.P. v. L.K.*, 2021 ONSC 150 at paras. 153-154.

[830] Essentially, as described by Blueberry, the Province relies on cases where the results of commissions of inquiry have been held to not fall within the public documents exception. These cases rely on a different test for the admission of public documents as set out in *R. v. Kaipiainen,* [1954] O.R. 43 (C.A.), which required the inquiry to be "judicial or semi-judicial" for such documents to be admissible. None of the documents that Blueberry relies upon, however, are the result of a judicial or semi-judicial inquiry. Concerns relating to evidence being given in a confidential or untested environment, then summarized in a report without identifying the individual complainants or evidence relied upon, do not arise here.

[831] I conclude that the documents meet the four criteria set out in *A.P.*. The documents that Blueberry seeks to rely on are public documents and fit within the established exception to the rule against hearsay.

[832] The documents were either produced or commissioned by government officials in furtherance of their public duties. As such, and as Blueberry says, the circumstances surrounding the creation of the documents provide guarantees of inherent reliability or trustworthiness. The records and reports of public officials are admissible for the truth of their contents because of their inherent reliability and because of the inconvenience of requiring public officials to testify in court regarding these reports.

[833] Many of these documents were produced to guide the Province's decision-making with respect to industrial development and wildlife management. Much like the documents in *P.I.P.S.C. v. Canada (Attorney General)*, [2005] O.J. No. 5775 (S.C.J.) [*P.I.P.S.C.*], they were created "for the purpose of conveying information to Ministers and senior government officials or other departments of government,"

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which means it is reasonable to expect that “a high premium would be placed on their accuracy” (at para. 70). Many have been reviewed and vetted by multiple contributors. I find they have significant circumstantial guarantees of trustworthiness.

[834] Moreover, as reflected in the evidence, the Province purports to rely on these documents, or will soon rely on them, when making management decisions in Blueberry’s territory. This is particularly so with respect to the Regional Strategic Environmental Assessment documents, which the evidence demonstrates were subject to both collaboration and authentication as part of the production process, and which the Province has indicated will assist with management decisions.

[835] With respect to necessity, it was open to the Province to call the authors of the reports or other officials to explain the statements made in the documents, but they largely chose not to do so. When relying on documents produced by the government in a claim against the government, courts have recognized it is “unfair” to place the burden on the plaintiffs to call the authors of the documents, who may be adverse in interest: *P.I.P.S.C.* at para. 75.

[836] Further, although I have already found the documents admissible under the public documents exception, I would, in the alternative, find them admissible under the principled approach as documents that are both necessary and reliable: *R. v. Khelawon*, 2006 SCC 57 at para. 49.

[837] Overall, I agree as argued by Blueberry that the Province is seeking to exclude relevant evidence whose reliability rests on the integrity of the provincial government’s own processes. The Province called no evidence to refute the reliability of these reports. Their objections are primarily technical, on the grounds that they fall outside the public documents exception to hearsay, rather than on the substantive grounds that they are irrelevant, unreliable or unnecessary.

[838] The purpose of the hearsay rule is not served by excluding the evidence: “As with the proper application of all rules of evidence, it is wise to always keep in mind the purpose of the rule…the basis of the hearsay rule-the adversary’s inability to

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cross examine the person with knowledge of the event": Sopinka at s. 6.39, citing Ron Delisle, Don Stuart & David Tanovich, *Evidence: Principles and Problems*, 10th ed. (Toronto: Carswell, 2012) at 691. Here, many of the documents were actually produced by the adversary (i.e., the Province).

[839] Moreover, in some cases, documents were even adopted as authoritative works by one of the Defendant's own expert witnesses. For example, Mr. Simpson cited as authoritative, and adopted, portions of the COSEWIC 2014 Report.

[840] I note that while Blueberry does not heavily rely on all of these reports, including the Auditor General reports, Blueberry would suffer significant prejudice if the Province's argument concerning these reports were acceded to. The reports are part of the overall evidence. They do not necessarily stand alone, but are corroborative of various points made by Blueberry in this matter.

[841] In these circumstances, the probative value of the documents outweighs any prejudicial effect. The documents therefore pass the threshold for admissibility, and are admitted for the truth of their contents.

b) "Examples" of Objections

[842] While the Province was not specific with respect to the objected to documents, in the footnote it did set out "examples" of the kinds of documents at issue, which I will deal with now.

[843] I note first, Auditor Generals' reports have been recognized as public documents that fall within the exception to the rule against hearsay: *Authorson v. Canada (Attorney General)*, 53 O.R. (3d) 221 (S.C.J.) at para. 50, rev'd on other grounds 2003 SCC 39. These reports are the product of "an official whose duty it was to investigate and record his or her findings": Sopinka at s. 6.312.

[844] The government is able to review and does respond to the Auditor Generals' reports – with the response being incorporated into the reports – adding to the trustworthiness of the document. The Province in this case did respond to both

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reports, setting out steps it would undertake to fulfill its duties; see BC Auditor General, *Managing the Cumulative Effects of Natural Resource Development in B.C.* (May 2015) at p. 9-14, and *An Audit of Biodiversity in B.C.: Assessing the Effectiveness of Key Tools* (February 2013) at pages 4-8. These reports must be released to the public and reports are available online, establishing them as a public record. These documents have also been included in the evidence.

[845] The Forest Practices Board is the Province's independent watchdog for sound forest practices, appointed under the *Forest and Range Practices Act*, S.B.C. 2002, c. 69. The *Forest and Range Practices Act* requires that the "Board members must faithfully, honestly and impartially perform their duties" (s. 136(7)). It conducts independent audits and investigates complaints relating to compliance and enforcement of forestry legislation.

[846] In the "Cumulative Effects Assessment: A Case Study for the Kiskatinaw River Watershed Special Report" (March 2011), the Forest Practices Board investigated and reported on "how activities regulated under the *Forest and Range Practices Act* (FRPA) and other natural resource developments interact to affect FRPA values" (at p. i). This report is a public document available as a permanent record online.

[847] Two other provincial reports referred to and apparently at issue deal with Biodiversity in BC. The first is *Taking Nature's Pulse: The Status of Biodiversity in British Columbia*, (Victoria: 2008), a report prepared by provincial officials, in partnership with conservation groups, as part of their "mandate to produce a biodiversity strategy for British Columbia" (at p. xiii). This report is a "companion document" of *The Biodiversity Atlas of British Columbia*. The public purpose of the report is to "assist British Columbians in making informed choices regarding biodiversity." The report is available online as a permanent, public record.

[848] A common author and editor of both reports is Matt Austin, a Ministry of Environment member of the Technical Subcommittee that prepared the document.

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Mr. Austin is presently an assistant deputy minister of the Ministry of Forests. The Province could have called Mr. Austin to testify, but did not. In view of the circumstances in which these documents were produced, and the inconvenience of requiring Blueberry to call the public official to prove the documents, I agree that the requirements of necessity and reliability are met.

[849] There are a number of other reports developed through the Regional Strategic Environmental Assessment process, including in relation to Old Forest, Moose Habitat, Water, and Peaceful Enjoyment that support conclusions with respect to the disturbance in the Blueberry Claim Area. The Province has objected to these as well.

[850] These documents have been jointly commissioned and reviewed by provincial representatives and First Nations as part of the Regional Strategic Environmental Assessment process, and are based on the Regional Strategic Environmental Assessment disturbance data. Dr. Holt spoke about the Regional Strategic Environmental Assessment process, the documents, and their origins in her testimony.

[851] In addition, the evidence demonstrates the vetting process through the various project working groups provides assurances of reliability. The data gathered through the Regional Strategic Environmental Assessment process has been agreed by all witnesses, including provincial government witnesses, to be the best available data. The evidence demonstrates it is presently being used, or close to being used, and relied upon by the Province. I will deal with the specifics of the Province's objection to the Regional Strategic Environmental Assessment disturbance data later, as part of my analysis on disturbances.

[852] Another example of a report, the admissibility of which the Province apparently objects to, was commissioned by the Oil and Gas Commission and authored by Steven F. Wilson of Ecologic Research. Entitled "Managing zone-of-influence impacts of oil and gas activities on terrestrial wildlife populations and

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habitats in British Columbia," the Oil and Gas Commission described it as an assessment of the science and management literature surrounding the use of zone-of-influence buffers. This has been identified throughout this trial, as an issue in the management of disturbance and cumulative effects.

[853] The Oil and Gas Commission both commissioned and relied upon this report. This included in discussions and consultation with Blueberry, and in the Area Based Analysis tool used by the Commission. Both Sean Curry and James O'Hanley of the Oil and Gas Commission commented on this report.

[854] The Province could have called Mr. Wilson to testify about the report, but it did not. Its own witnesses testified they had used and referred to this report. In these circumstances, it is not entirely clear why the Province would object to the contents of this report or require Mr. Wilson to testify.

[855] I will deal with objections to other documents as necessary throughout the remainder of the judgment.

3. 2016 Atlas and Dr. Klinkenberg's Review

[856] The 2016 Atlas is an assembly of maps and data tables that sets out the scale and nature of industrial development in Blueberry's traditional territory. Dr. Brian Klinkenberg, who provided an expert report reviewing the soundness of the 2016 Atlas, described it as an "inventory" of industrial developments in Blueberry's territory. The 2016 Atlas reports this information as of approximately 2016 and contextualizes the increase of development up to that date.

[857] The 2016 Atlas does not define what constitutes an industrial development, but under the broad heading "Industrial and Infrastructure Land Uses" includes data and maps relating to agriculture and private lands; roads; transmission lines; oil and gas projects including wells, facilities, pipelines, tenures and fields, geophysical exploration, unconventional natural gas fields and Montney basin, and water withdrawals and stream crossings; forestry; mining; hydropower; and, wind power

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tenure and towers. These types of industrial developments generally accord with how industrial developments are defined in the pleadings. Paragraph 30 of Blueberry's Notice of Civil Claim states:

> 30. The Defendant has authorized activities, projects and developments within, and adjacent to, the Plaintiffs' Traditional Territory, including but not limited to the following types of activities, projects and developments:
>
> a) oil and gas;
>
> b) forestry;
>
> c) mining;
>
> d) hydroelectric infrastructure;
>
> e) roads and other infrastructure;
>
> f) agricultural land clearing;
>
> g) land alienation and encumbrance; and
>
> h) other industrial development (collectively the "Industrial Developments").

[858] My use of the term industrial development in these reasons reflects the types of activities, projects, and developments Blueberry refers to at para. 30 of its Notice of Civil Claim.

[859] The 2016 Atlas follows from the 2012 Atlas produced by Peter G. Lee and Matt Hanneman for Global Forest Watch Canada and the David Suzuki Foundation, entitled *Atlas of Land Cover, Industrial Land Uses and Industrial-Caused Land Changes in the Peace Region of British Columbia*, which is also referred to as the Lee and Hanneman Report.

[860] The authors of the 2016 Atlas describes it as a "necessary starting point," noting that numbers and maps are tools that can assist in gaining an understanding of the nature and scale of cumulative effects in Blueberry's territory, but that examining cumulative effects on a landscape is a "multi-layered endeavour and no single snapshot can tell the whole truth at once." As is discussed later, Dr. Klinkenberg, who provided an expert report on the soundness of the 2016 Atlas, noted in cross-examination that he agreed with this description.

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[861] Blueberry first tendered the 2016 Atlas in its August 9, 2016 injunction application that sought to enjoin the Province from allowing further industrial development in segments of its traditional territory pending trial of this action. One of the disputes before the Court in the injunction application was whether the 2016 Atlas contained expert evidence and opinion (as the Province argued) or whether it was simply a summary of publicly available data which was then assembled in the report (as Blueberry argued).

[862] In *Yahey* 2017, I reasoned that the selection and analysis of the data contained in the 2016 Atlas showed that expertise and opinion was involved in its preparation. I noted that doubts had been raised about the accuracy, objectivity and therefore reliability of the 2016 Atlas' cartographic presentation (at para. 80), and that it had not benefited from proper qualification, *viva voce* testimony in direct- or cross-examination, or countering opinion (at para. 81). The same deficiencies were present in the evidence relied upon by the Province in that application to establish the existence of healthy and sustainable wildlife populations (at para. 84). I concluded there was a conflict in the evidence that needed to be tested at trial.

[863] As a result of this ruling, Blueberry retained Dr. Klinkenberg to comment on the soundness of the 2016 Atlas. Dr. Klinkenberg provided his expert report on the 2016 Atlas, entitled "Expert Report on the Atlas of Cumulative Landscape Disturbance in the Traditional Territory of Blueberry River First Nations (2016)" (20 July 2017) ("Report on the Atlas").

[864] In *Yahey v. British Columbia*, 2018 BCSC 829, I held that Dr. Klinkenberg had provided a detailed review of the data in question (the vast majority of which derives from government sources) and its validity (at para. 58). I concluded there was a "circumstantial guarantee of trustworthiness" such that those parts of the 2016 Atlas report that Dr. Klinkenberg had adopted within his area of expertise could be considered part of his opinion, as per *R. v. Marquard*, [1993] 4 S.C.R. 223.

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[865] Those parts of the 2016 Atlas adopted by Dr. Klinkenberg, and Dr. Klinkenberg's own Report on the Atlas, were therefore deemed admissible. Commentary in the 2016 Atlas that was beyond Dr. Klinkenberg's area of expertise, did not form part of his opinion evidence. Blueberry was directed to identify those parts that fell into that category and provide that information to the Province. It did so by shading the portions of the 2016 Atlas that Dr. Klinkenberg considered beyond his expertise.

[866] Dr. Klinkenberg testified at trial, and his Report on the Atlas was admitted as Exhibit 9. The shaded version of the 2016 Atlas is Exhibit 12 in these proceedings.

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4. RSEA Disturbance Data and Disturbance Layer

[867] In addition to the 2016 Atlas and data associated with that document, Blueberry introduced into evidence and relies on a number of products from the Regional Strategic Environmental Assessment process, namely a disturbance layer and disturbance datasets. As is set out in greater detail below, the purpose of developing the disturbance datasets and disturbance layer was to create one layer that could be relied on to be a reasonable interpretation of what is actually on the ground, and that could be usable as the actual disturbance footprint. The best available provincial data regarding where and how the landscape has been modified would be collected in one place, and, through the Regional Strategic Environmental Assessment process, that data would be made accessible to others to use in spatial analysis and to inform decision making.

a) Background to the RSEA Process

[868] This Regional Strategic Environmental Assessment process is a broad collaborative planning process involving seven Treaty 8 First Nations and the Province, and also includes representatives from industry (primarily from the forestry and oil and gas sectors) as observers. Blueberry joined the Regional Strategic Environmental Assessment process in 2016.

[869] Dr. Rachel Holt is Blueberry's technical representative for the Regional Strategic Environmental Assessment process and testified about it. Dr. Holt has extensive professional knowledge and experience with respect to forestry and management of lands and ecosystems and has worked for 20 years for the government of British Columbia.

[870] While in more recent years Dr. Holt has undertaken work for First Nations, Dr. Holt has also: done old forest analysis for the provincial government for land use planning, including work spanning 15 years on the Great Bear Rainforest Joint Solutions Project; was appointed to the Old Growth Technical Group in the development of the provincial Cumulative Effects Framework; served as a board member for the Forest Practices Board between 2008 and 2014; helped develop a Conservation Framework for the Province; and, advised on developing monitoring protocols used by the Forest and Range Evaluation Program.

[871] While the Province sought to characterize Dr. Holt as an advocate of Blueberry, her history includes working extensively for the government over many years, as well as working for First Nations. I found her evidence reliable and probative of a number of matters, including the Regional Strategic Environmental Assessment process.

[872] In 2015, Dr. Holt undertook work for the Fort Nelson First Nation with respect to forestry analysis; she also worked for Blueberry to develop a report on the state of old forest in the northeast of BC. In 2016, she drafted Blueberry's Land Stewardship Framework. In 2017, she assisted Blueberry in providing comments on the Fort St. John Sustainable Forest Management Plan to the Province, and she also provided a review of the statutory tools available to protect southern mountain caribou, which was provided to the Province.

[873] As previously noted, Dr. Holt is a fact witness. She explained the regulatory context and the nature of processes undertaken with respect to the Regional Strategic Environmental Assessment and other matters. I consider Dr. Holt's

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testimony with respect to all these matters, and others, to be of assistance in resolving questions of fact. I have not considered her evidence as expert opinion evidence because, as the Province points out, she was not proffered as an expert in this case. I have therefore considered her evidence to ascertain certain factual aspects of this case.

[874] Dr. Holt recommended that Blueberry join the Regional Strategic Environmental Assessment process as the area under consideration included a core part of the Montney shale basin, which is part of the Blueberry Claim Area.

[875] Dr. Holt described the Regional Strategic Environmental Assessment process as being a collaborative environmental assessment and land management process that involves a series of Project Table meetings held approximately every six weeks. Participants come together and decide upon key pieces of work to undertake through the process. Dr. Holt emphasized the Regional Strategic Environmental Assessment process is one that continues to evolve over time.

[876] In 2019, the Regional Strategic Environmental Assessment initiative developed a sub-project focused on the Fort St. John Timber Supply Area, which covers an area similar to the Blueberry Claim Area. Dr. Holt testified this was done because the RSEA Project Table concluded this is the central area of development: it has extensive forestry and oil and gas development as it sits upon the Montney shale basin. It also has a large agricultural area.

[877] The Regional Strategic Environmental Assessment initiative is presently undertaking a cumulative effects analysis of this area, and that work is referred to as the Methods Pilot. The Methods Pilot has had some setbacks. Chris Pasztor of the Ministry of Energy and Mines, who was the provincial co-lead for the RSEA initiative, testified it was anticipated the Methods Pilot analysis and modelling work would be finalized by March 2021, but the pandemic and other issues have affected that timing. The Province's written submissions, which were submitted in the fall of 2020, refer to this work as "ongoing."

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[878] As part of the Regional Strategic Environmental Assessment process, the Project Table (after consulting with their respective principals and communities) identified four indicators representing core values in Northeastern BC: old forest, moose, water, and peaceful enjoyment. The Project Table then established working groups to look into and report back on these core values.

b) RSEA Data Working Group, Methodology and Disturbance Layer

[879] It was recognized that, in order to progress the work of RSEA, all parties would need one source of data they could use and trust. A data working group was constituted with representatives from both the Province and participating Treaty 8 First Nations.

[880] The data working group was cognizant that disturbance data associated with certain activities such as oil and gas development and forestry are held in separate government departments. The data are stored and updated differently, and departments do not reference each other's data in a comprehensive way. For example, if someone wanted to know how many roads there were in northeast BC, they would have to access and review all the datasets, but they would not necessarily know if they had retrieved all the available datasets, or whether they overlapped such that they were double counting.

[881] One of the primary tasks of the data working group was to establish a layer of disturbance information that gathered into one place all the relevant datasets stored and utilized by the Province. Therefore, it was decided that other RSEA work should be put on hold until this reliable disturbance data was generated.

[882] As a result, around 2017, the provincial government contracted Caslys Consulting Ltd. ("Caslys") to undertake this project and prepare the disturbance layer and disturbance datasets. The disturbance layer was prepared through a year-long process and presented on a number of occasions to the RSEA data working group. Caslys and the provincial representatives undertook quality assurance of the data

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and process. Ultimately, the data was distributed to all the participants at the RSEA Project Table and entered as Exhibit 52 in these proceedings.

[883] Dr. Holt indicated the results of the project are a practical and consolidated dataset that combines best available data in a manner that is flexible enough to support a wide array of Geographic Information System ("GIS") modelling and decision-support tasks. Through this approach, landscape and regional implications can be quantified and monitored into the future.

[884] The executive summary of Caslys' "Regional Strategic Environmental Assessment (RSEA)-Disturbance Methodology Version 2.0" (September 2018) ("Methodology Document"), describes this work as follows at p. 2-3:

> The RSEA Disturbance Methodology is a framework that brings together the best available landscape disturbance data into a consistent format for use in land and environmental management decisions. … The procedures and derived [Geographic Information System] GIS datasets produced through this project have been developed through collaboration with stakeholders from both the RSEA Data Management Working Group and broader participation by the RSEA table, which includes representatives from the province, Treaty 8 First Nations and industry proponents. Together these groups have a diverse set of decision support requirements that benefit from the best available spatial data that characterizes where the landscape has been modified through development activities or selected natural factors. Having a comprehensive dataset to support all of these decisions will build continuity and improve validity into our on-going management tasks. The RSEA Disturbance Methodology provides a framework for periodic data updates, while also giving those that use spatial information a flexible and comprehensive product that has been designed to support all forms of spatial analysis and mapping initiatives that depict land disturbance impacts.
>
> […]
>
> A conservative approach was followed throughout the development of the mapping product. …

[885] The purpose of preparing the disturbance dataset and disturbance layer is succinctly set out in the Methodology Document, which states at p. 1 that "the objective of this project was to develop and test a documented, transparent disturbance methodology that is replicable by third parties and understandable to a wide ranging audience." As noted by Dr. Holt, the dataset was prepared for use by

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those at the RSEA table. The data was intended for use by a GIS practitioner who would utilize the data to spatially represent the disturbances.

[886] The Methodology Document states at p. 77: “The consolidated dataset is a polygonal map layer that incorporates all human disturbance footprints into a single file.” This combined anthropogenic disturbance layer was referred to in the evidence as “Level C.” Levels A and B contained data relating to specific “themes” (i.e., files that delineate all disturbance footprint areas by theme i.e. individual layer files such as road, oil and gas development, mining seismic communities, agriculture). Level D is the comprehensive disturbance footprint that includes both anthropogenic and natural disturbance.

[887] The disturbance layer was available by September 2018 at which time the disturbance data itself was distributed for download to RSEA participants.

[888] Dr. Holt requested that Gregory Khem, a GIS technician, calculate the overall disturbance in Blueberry’s territory. In other words, take the shape file from the RSEA disturbance layer, “clip” the data from the 25 million hectare dataset included in the RSEA study area to focus on the approximately 4 million hectares that make up the Blueberry Claim Area, and run the calculations (i.e., map the disturbances) applying first a 250-metre, and then a 500-metre, buffer.

[889] The buffering process was described as simple math: the computer draws either a 250-metre line or a 500-metre line around everything in the data layer, and then it adds up how much area is within those areas and uses the total Blueberry Claim Area as the denominator. This shows how much of the Blueberry Claim Area is affected by disturbance. The results of these calculations indicated that 85% of the Blueberry Claim Area is within 250 metres of a disturbance, and 91% of the Blueberry Claim Area is within 500 metres of a disturbance.

[890] The inclusion of this information and the use of certain maps derived from the disturbance layer and datasets developed as part of the RSEA process became an issue at trial. The Province argued that the maps and summary calculation table

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derived from the RSEA disturbance layer and datasets were not admissible. The Province said the maps and table were expert evidence, lacked probative value in determining the issues in the case, and were unreliable.

[891] I dealt with these arguments in *Yahey v. British Columbia*, 2019 BCSC 1934, where I concluded the objected to documents were admissible, and that the Province would be free to raise issues about weight in final argument. Some portions of that judgment bear repeating.

[892] I noted at para. 10 that while the RSEA disturbance layer and disturbance data is technical in nature and may require a specialist with knowledge to explain, this evidence does not constitute expert opinion, as it does not offer any interpretation or express any view or conclusion. At para. 20, I noted that the disturbance layer and disturbance data contained indicia of reliability: they were produced collaboratively at the RSEA table using provincial data, they were developed using an open and standardized methodology, they were shared by the Province with all members of the Regional Strategic Environmental Assessment process and were intended to be used by third parties, and the parties agreed these were the best available data for the purpose of determining landscape scale disturbance.

[893] In final argument, the Province reiterated its arguments that the maps and data tables derived from the RSEA disturbance layer and disturbance datasets lacked probative value and were unreliable. I will deal with these issues as part of my analysis on the disturbance data and the scale of development in the Blueberry Claim Area.

[894] A number of witnesses in addition to Dr. Holt testified about both the RSEA disturbance methodology and the use of the data. They included: Chris Pasztor of the Ministry of Energy and Mines, who was the provincial co-lead for the Regional Strategic Environmental Assessment initiative; Greg Van Dolah a representative for the Ministry of Forests; Dr. Jennifer Psyllakis, the provincial representative in charge

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of developing the Province's Cumulative Effects Framework; and, Sean Curry from the BC Oil and Gas Commission.

[895] While Dr. Holt agreed in cross-examination that Caslys took a conservative approach to developing the disturbance layer and disturbance data, erring on the side of being overly inclusive of potential disturbance, she also testified to it being "one of the, if not the, best compiled disturbance datasets in the province." She noted it has had more time and money put into it than any other project of this kind, and that she had never seen such a concerted effort by a team of experts on a data layer in a project of this scale.

[896] The Province's witnesses also attested to the reliability of the data. Mr. Van Dolah noted that one of the initial concerns of all participants in the RSEA process was that there was a need for "trusted data." He referred to the collaboration that has been occurring through the RSEA process. He testified that the products of the RSEA work, such as the disturbance layer information, were "what all parties within RSEA are agreeing to be as that trusted data." He went on to note that this data is the "best data that is currently available."

[897] Mr. Pasztor agreed that the data was built collaboratively and used an approach that "clearly applies methodologies and procedures how one would go about articulating disturbance on the land base." Mr. Curry of the Oil and Gas Commission confirmed that the 2016 Atlas used the right datasets and the data used was "reasonable."

[898] Dr. Psyllakis noted that to understand impacts on treaty rights one should look at both the RSEA disturbance data and information from Blueberry members.

[899] All of this demonstrates that the disturbance layer uses appropriate methodologies, is trusted by the parties to the Regional Strategic Environmental Assessment process, and can be relied upon and given weight by the Court. I therefore do not accept the Province's arguments that the disturbance layer and datasets are unreliable or lack probative value.

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5. Analysis of Disturbance Data and Scale of Development in the Blueberry Claim Area

a) Findings of Fact on the Level of Disturbance and Scale of Development in the Blueberry Claim Area

[900] I note at the outset that the Province does not deny there has been extensive development since 1900 throughout BC, including in the northeast. It could not realistically say otherwise when considering the industrial development that has occurred in the northeast, in particular.

[901] That said, and as Blueberry has pointed out, the Province consistently seeks to raise doubt regarding the nature or quality of its own data concerning resource use and industrial development in this part of the province.

[902] The provincial natural resource ministries and agencies, including the provincial Chief Forester, rely on provincial data when undertaking the Timber Supply Review and Annual Allowable Cut determination; the Ministry of Forests in tracking forest inventory; the Ministry of Energy and Mines in tenuring; and, the Oil and Gas Commission in regulating oil and gas activities.

[903] Much of the data accessed and relied on in the 2016 Atlas and the RSEA disturbance layer and datasets is, by professional consensus, the best available data, and data that is to be trusted. Moreover, with respect to the RSEA disturbance layer and disturbance data, the provincial representatives have conceded this is the best available data. This is also data upon which the Province purports to manage the landscape and wildlife. It relies upon it to show the state of the landscape.

[904] Accordingly, with respect to the overall disturbance in Blueberry's territory, I accept the conclusions set out in the data relied upon by Blueberry, as reflected in the 2016 Atlas and the RSEA disturbance layer and datasets.

[905] I conclude, as the 2016 Atlas demonstrates, that based upon the data available as of January 2016:

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a) 73% of the Blueberry Claim Area is within 250 metres of an industrial disturbance; and,

b) 84% of the Blueberry Claim Area is within 500 metres of an industrial disturbance.

[906] I also conclude, as the Regional Strategic Environmental Assessment's 2018 disturbance datasets demonstrate, that, by September 2018, the level of disturbance in the Blueberry Claim Area was as follows:

a) 85% of the Blueberry Claim Area is disturbed when a 250-metre buffer is applied; and,

b) 91% of the Blueberry Claim Area is disturbed when a 500-metre buffer is applied.

[907] The extent of any further disturbance in the Blueberry Claim Area since the close of evidence in the summer of 2020 is not known.

[908] These conclusions reflect the state of the landscape over which Blueberry is trying to exercise its rights. This is important contextual information that is further bolstered by the members' evidence regarding their attempts to continue to exercise their rights in a territory that is significantly impacted by development.

[909] As noted by Blueberry, further corroboration of the percentages relating to disturbance in the Blueberry Claim Area is provided by the fact that the RSEA Project Table ran the data for the Fort St. John Timber Supply Area (which makes up a substantial portion of the Blueberry Claim Area) and found as well that 85% was within 250 metres of a disturbance. In cross-examination on October 24, 2019, Dr. Holt testified "we just ran this in the RSEA pilot and got the exact same numbers…[a]n entirely other set of people did that work."

[910] Furthermore, other studies and reports corroborate the data and conclusions set out both in the 2016 Atlas and the RSEA disturbance layer.

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[911] For example, the overall level of disturbance in the Blueberry Claim Area is further corroborated by the disturbance calculations in scientific reports on caribou habitat. As discussed in greater detail earlier, government reports from 2009 and 2010 suggest the area within the Blueberry Claim Area used by the Chinchaga herd is approximately 79% to 93% disturbed, when applying a 250-metre buffer. This information is found in Conrad Thiessen's 2009 report for the BC Ministry of Environment, "Peace Region Boreal Caribou Monitoring: Annual Report 2008-09" (May 2009) ("Thiessen 2009 Report") and the Chris Pasztor and Steven F. Wilson Report entitled "Projected Boreal Caribou Habitat Conditions and Range Populations for Future Management Options in British Columbia" (22 April 2010) ("Pasztor and Wilson Report"), the latter report being one for the Ministry of Environment and the Ministry of Energy and Mines.

[912] Furthermore, Environment Canada identifies the disturbance management threshold for Boreal Caribou as being 65% undisturbed habitat in a caribou range (i.e., not greater than 35% disturbance): Environment Canada, "Recovery Strategy for the Woodland Caribou (*Rangifer tarandus caribou*), Boreal Population in Canada" (2012). If this 65% intactness threshold is met it provides a 60% chance of a local population being self-sustaining.

[913] Finally on this point, while the Province continues to point to a variety of issues that it says renders the data "unreliable," it is uncontroverted that the RSEA disturbance data has been developed jointly between these parties, along with other participants at the RSEA table. While the Province says management recommendations based on this data still need to be approved before it can be directly implemented in decision making processes, this does not affect the validity of the data, which through great effort has been developed and approved by the parties to this litigation, along with other Treaty 8 First Nations. The evidence is also clear that the parties are using some of this data in collaborative processes presently underway. As noted earlier, I find this data reliable and give it weight in my analysis regarding disturbance within the Blueberry Claim Area.

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b) Province's Points of Contention Regarding the Disturbance Data

[914] In coming to my conclusions set out above, I have considered the Province's points of contention regarding the disturbance data and other data placed before the Court. I will now set out my analysis with respect to the Province's specific points of contention.

[915] The Province essentially argues, first, that Blueberry relies on data which is known to overestimate the actual disturbance. Second, it maintains the data does not allow for any differentiation or determination of the effect of a particular disturbance. This, the Province argues, goes to its consistent point that this Court cannot rely on either the 2016 Atlas or the RSEA disturbance data as presented, as it does not reflect whether or not Blueberry members can exercise their treaty rights.

[916] In particular, the Province argues that the disturbance data does not establish that Blueberry members are unable to exercise their treaty rights. It emphasizes that not all disturbances impact wildlife or wildlife habitat, and not all are permanent. The Province says, for example, that Blueberry can still hunt in a clearcut or on lands under which there is subsurface development. It says despite development in the Blueberry Claim Area and surrounding areas, Blueberry members are able to exercise their treaty rights to hunt, fish, and trap.

[917] The Province also argues that not every disturbance is a "taking up" under the Treaty. The Province says instead of canvassing the community for evidence of the collective exercise of treaty rights, Blueberry emphasized evidence of the proximity of areas within their territory to disturbances, appearing to assume that all forms of landscape disturbance amount to "taking up." The Province maintains this assumption is contrary to both the legal definition of taking up, and the expert evidence given by Blueberry's wildlife ecologists.

[918] The Province therefore takes issue with Blueberry's argument that the data regarding industrial development, and the presentation of that data via the 2016

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Atlas and RSEA disturbance layer, presents an accurate reflection of the disturbance on the ground, or an accurate measurement of the cumulative effects of development in the Plaintiffs' territory.

[919] I will deal with the specific points raised by the Province with respect to the disturbance data and what it illustrates about the scale of development and level of disturbance in the Blueberry Claim Area. In doing so, I will further comment on the 2016 Atlas, the RSEA disturbance data, and other points made by the Province.

[920] As part of my analysis, I will deal later with the question of whether a disturbance is a "taking up" and the resultant effect on Blueberry's ability to exercise its treaty rights.

[921] Prior to dealing with the 2016 Atlas, I will briefly deal with the Province's point that, in addition to the same limitations identified in the RSEA data, the disturbance layer Level C (which is the combined anthropogenic layer relied upon by Mr. Khem) includes additional types of disturbance not captured in the 2016 Atlas calculations, including recreational sites, trails, and communities. As such, the calculations are not comparable.

[922] In considering that point, however, I conclude that this may have led to the slightly larger conclusion of disturbance in the RSEA disturbance data of 85% disturbed based on a 250-metre buffer, and 91% disturbance based on a 500-metre buffer. This is contrasted with the corresponding numbers of 73% and 84% disturbance set out in the 2016 Atlas. In addition, this difference may well be attributed to additional development in the territory in the intervening two years. Suffice it to say, either set of numbers is significant, and choosing one over the other does not fundamentally affect the conclusions in this case.

c) 2016 Atlas and Dr. Klinkenberg's Review

[923] Both the 2016 Atlas and Dr. Klinkenberg's Report on the Atlas refer to disturbances within Blueberry's "traditional territory." In the 2016 Atlas, the area

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demarcated as being Blueberry's "traditional territory" is that outlined in the Notice of Civil Claim that initiated these proceedings. For ease of reference, I will therefore refer to the area to which the 2016 Atlas pertains as the "Blueberry Claim Area."

[924] The 2016 Atlas was prepared almost entirely from provincial data. The data used reflects the scale and nature of industrial development in the Blueberry Claim Area up to mid-January 2016. As noted earlier, Blueberry provided the 2016 Atlas to the Province as a means of objectively demonstrating their concerns regarding impacts to the lands on which they rely for the exercise of their treaty rights. The Province did not respond to this document, other than to acknowledge its receipt and note the amount of work it must have involved.

[925] While the Province says it has responded to the 2016 Atlas in the context of this litigation, that is not consistent with the honour of the Crown. The Crown cannot ignore a legitimate request by a First Nation to address information and concerns relating to cumulative impacts by pointing to litigation which may take years to complete. There is an obligation on the Crown to deal with matters outside litigation. The honour of the Crown requires more than just an adversarial response in the context of this litigation. The courtroom is not an alternative to the negotiating table, and true reconciliation is rarely, if ever, achieved in courtrooms: *R. v. Desautel*, 2021 SCC 17 at paras. 87, 91.

[926] Furthermore, while the Province says, in any event, that it has established the Regional Strategic Environmental Assessment process to address the cumulative impacts on treaty rights which the 2016 Atlas does not address, it then raises doubts about the products coming out of that process. As the evidence demonstrates however, it established the RSEA process for the express goal of collecting and coordinating trustworthy information about natural- and human-induced disturbance on the landbase in northeastern BC to inform decision-making on cumulative impacts. It cannot now cast doubt or denigrate the soundness of the data assembled through the RSEA process in the context of this litigation.

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[927] I now turn to Dr. Klinkenberg's assessment of the 2016 Atlas.

[928] Dr. Klinkenberg's testimony concerned the verification and validation of the data used in the 2016 Atlas.

[929] At p. 16 of his Report on the Atlas, Dr. Klinkenberg situated the Blueberry Claim Area (which he, like the authors of the 2016 Atlas, referred to as "Blueberry Traditional Territory") within a larger study area. He noted:

> More than 99% of the Blueberry Traditional Territory is within the Peace River Regional District (RD). To the North, the Peace River RD shares a border with the Northern Rockies RD. Together they form the North East Development Region. Active oil and gas exploration and extraction has taken place in this region extensively. In order to look at a broader context and include a comparable (e.g. vegetation, resources, climate) area, this larger region will be used (the 'study area'). The study area is bounded by Alberta (East), the Fraser-Fort George RDs (South), the Buckley-Nechako and Stikine RDs (West) and the Northwest [T]erritories (North). The area is more than 200,000 Km^2 and represents approximately 21% of the BC territory. The study area and the BRFN traditional territory are represented in Figure 2.

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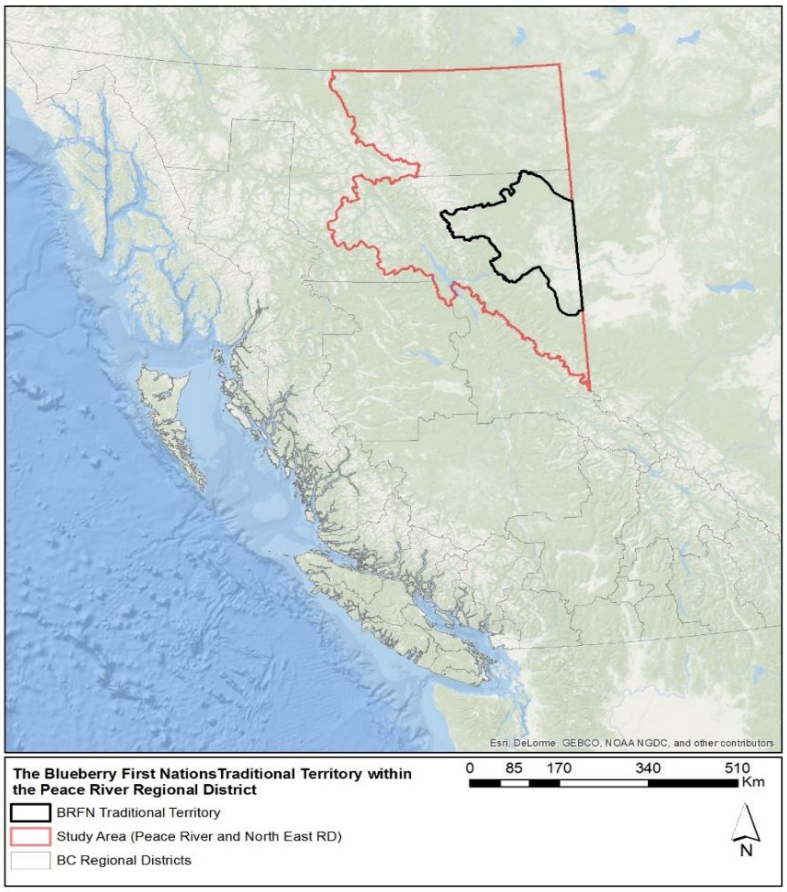

Exhibit 9: Expert Report on the Atlas of Cumulative Landscape Disturbance in the Traditional Territory of Blueberry River First Nations (2016) by Dr. Klinkenberg, page 16, Figure 2 showing the Blueberry Claim Area in relation to the Study Area.

[930] The Court heard evidence of Dr. Klinkenberg's detailed review of the data contained in the 2016 Atlas and its validity, noting the vast majority of it came from provincial government sources. This included, as noted by Blueberry:

a) examination of the maps, tables and data sources used;

b) examination of the forestry data, including an analysis in Appendix 4 and 5 of the Ministry of Forests' cutblock dataset and comparison to the forest change dataset 1985-2011 (regional level and local level);

c) analysis of the temporal change in the coal and mineral tenures data (Appendix 6);

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d) annotation and review of the 36 maps presented in the 2016 Atlas (Appendix 7); and,

e) reproductions of Maps 32 and 34 to highlight scale-related issues (Appendix 9).

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[931] Dr. Klinkenberg agreed that the scale chosen for the maps in the 2016 Atlas gave the impression the marked feature was larger than it actually was, and created a "cluttered" impression. He noted one could not distinguish individual features on a map when it is displayed at a scale of 1:1.8 million (meaning 1 millimetre on the map represents 1.8 kilometres on the ground), but the purpose of the density maps was to provide an overview perspective of what is going on.

[932] With respect to the cartographic representation in Maps 31-34 of cumulative effects in the Blueberry Claim Area, at page 48, Dr. Klinkenberg said the density of the features as displayed on these maps appear to be a cartographically-correct presentation, given the small scale of the maps. He noted the question of the appropriate size of the buffer around the disturbance i.e., 250 or 500 meters was not, however, a matter he could attest to.

[933] Dr. Klinkenberg noted the field of cartography has changed over the last 40 years. Maps are now more inherently a subjective account of the natural world. However, when it was put to Dr. Klinkenberg that one cannot rely on the maps in the 2016 Atlas for the "truth," he disagreed. He noted that while all maps are a distortion of the earth, the fact that there are certain features in certain places, such as, for example, seismic lines, is not subjective criteria. This is an objective fact that the map now presents.

[934] Dr. Klinkenberg's comments regarding subjectivity do not extend to the data underlying the maps in the 2016 Atlas and his Report on the Atlas, most of which were obtained from government sources. Those Dr. Klinkenberg downloaded and verified were the same datasets and sources, with a few minor exceptions. In Appendix 7 of his Report on the Atlas, Dr. Klinkenberg undertook an annotated and

helpful review of the 36 maps presented in the Atlas that deal with any notable subjective features.

[935] With respect specifically to the completeness and accuracy of the 2016 Atlas data sources, at page 17 of his report, Dr. Klinkenberg noted:

> Most of the data portrayed and analyzed in the Atlas is public data available through different open data portals from the BC government. It is evident that oil and gas exploration and extraction as well as forest harvesting are the main potential sources of environmental impact in our study area. As a second step in the analysis, the focus was on evaluating the completeness and accuracy of the datasets used in the Atlas to portray disturbances associated with these two extractive industries.

[936] Dr. Klinkenberg noted that three main datasets were used in the 2016 Atlas for the visualization of disturbances associated with oil and gas exploration: one containing locations of oil and gas wells, one for pipelines, and one for exploration lines (seismic lines) from 1996 to 2015.

[937] In addition, the 2016 Atlas made use of two main datasets to portray environmental impacts associated with the forestry industry: one developed by Global Forest Watch, and one of consolidated forest cutblocks from the Ministry of Forests. While he was unable to validate the Global Forest Watch data, he noted as per pages 20-21 of the 2016 Atlas, 60% of B.C. has intact forest landscape, while only 13.78% of the Blueberry Claim Area had intact forest landscape.

[938] At page 41 of his Report on the Atlas, Dr. Klinkenberg noted that as the government continuously updates its online data he cannot say with 100% confidence that the data presented in the 2016 Atlas is a complete and accurate representation of the data the authors downloaded at the time, because, as he wrote, he is unable to “turn back time.” He noted, however, for some datasets, including those related to seismic lines and oil and gas wells, one can make an independent assessment of the accuracy and completeness of the dataset by overlaying the data on recent satellite imagery and doing visual comparisons. He can also assess the cutblock records by comparing the government records to an

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independently produced assessment of logging activity by year (citing White et al 2017, *A nationwide annual characterization of 25 years of forest disturbance and recovery for Canada using Landsat time series*).

[939] Dr. Klinkenberg noted he undertook a qualitative analysis – a rigorous quantitative statistical analysis would require considerable more time and effort – but the results nonetheless provide useful insight into the data completeness issue.

[940] The data itself is the more helpful evidence for the Court – especially in view of the changes in cartography over the last 40 years attested to by Dr. Klinkenberg. Maps, however, are tools that can assist in presenting this data spatially and visually.

[941] Dr. Klinkenberg ultimately provided his expert opinion on the question posed: "Whether the Atlas, as an inventory of human induced and accumulated disturbance in BRFN traditional territory, is a sound document?" At page 28 of his report, he concluded it was sound:

> **Yes**. Based upon reviewing all of the publicly-available downloadable datasets, performing validation on several of the maps either by reproducing the map or by conducting qualitative tests using independently-derived data, as well as by reviewing every map from a professional cartographer's perspective, and reviewing other documents related to cumulative impact assessment in British Columbia, in my opinion the Atlas is a sound document. There are some minor faults, but nothing that would cast doubt on the accuracy, objectivity and therefore the reliability of the Atlas' cartographic presentation.
>
> (emphasis in original)

[942] Those "minor faults" related to some duplication and updates in the datasets between 2016 and his 2017 Report on the Atlas, but, as indicated, did not cast doubt on the accuracy, objectivity, and reliability of the maps in the Atlas. One area of duplication, for example, was with respect to some of the seismic lines in Map 22.

[943] The Province extensively cross-examined Dr. Klinkenberg. The Province pointed out that Dr. Klinkenberg agreed that the tables and maps in the 2016 Atlas

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"are not, nor should they be interpreted as an accurate reflection of the actual disturbance on the ground." Rather he agreed they represent "a plotting of the data." The Province says, as a result, it is clear that the 2016 Atlas over-represents the scale of disturbance and represents a "worst case scenario."

[944] The Province also says Dr. Klinkenberg agreed that much of the data used by the authors of the 2016 Atlas reflects permitted or authorized activity or tenure, as opposed to actual development.

[945] In addition, the Province says given that Dr. Klinkenberg, in cross-examination, distanced himself from some of the commentary in the 2016 Atlas, it became impossible to determine what Dr. Klinkenberg accepted as accurate and reliable in the 2016 Atlas.

[946] While Dr. Klinkenberg was not able to agree with a variety of written conclusions in the 2016 Atlas as being either subjective opinion, outside his expertise or knowledge, or referring to the 2012 Atlas which he did not review, he did verify the accuracy of the data, including and specifically the statistical information in Table 22 on page 73 of the 2016 Atlas with respect to the extent of cumulative effects in the Blueberry Claim Area.

[947] That table notes the industrial footprint in the Blueberry Claim Area (taking into account roads, transmission lines, seismic lines, pipeline tenures, consolidated cutblocks, and agricultural areas) affected 13% of the area; when buffered by 250 metres it was 73%; and, when buffered by 500 metres, 84% of the Blueberry Claim Area was affected by an industrial disturbance.

[948] Dr. Klinkenberg agreed with the essential portions of the 2016 Atlas, being the maps and tables from verified government data sources, that establish industrial disturbance in the Blueberry Claim Area.

[949] In addition, in cross-examination, Dr. Klinkenberg said that he agreed with the final conclusion in the 2016 Atlas, which he said was based on the data. This

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part of the 2016 Atlas should therefore not have been shaded as an area he could not verify. That conclusion, at page 85 reads as follows:

> Examining cumulative effects upon a landscape is inherently a multi-layered endeavour and no single snapshot can tell the whole truth at once. Numbers and maps are only two of the tools that can assist in gaining an understanding of the nature and scale of cumulative effects upon the traditional territory of Blueberry River First Nations. This understanding can only be crude, but it is a necessary starting point. The analysis in this Atlas which is based upon government of British Columbia data, reveals that approximately 73% of the area inside Blueberry River First Nations traditional territory is within 250 metres of an industrial disturbance, and approximately 84% is within 500 metres of an industrial disturbance.

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d) Dr. Klinkenberg's Analysis of Oil and Gas Disturbances

[950] At page 20 of his Report on the Atlas, Dr. Klinkenberg indicated that to verify the accuracy of the oil and gas disturbances noted in the 2016 Atlas he had randomly selected a number of sites to visually inspect using aerial imagery. He concluded at page 20 that the Blueberry Claim Area had nearly twice as much disturbance associated with oil and gas development as the surrounding regional districts that made up the study area:

> Although this in-depth analysis was not intended to specifically document the differences in the intensity of development between study region (i.e., Prince George RD and the Northern Rockies RD) and the Blueberry River FNTT [i.e., the Blueberry Claim Area], the differences in the number of 5 km x 5 km cells that intersected with at least one linear or point disturbance are dramatic. While almost 91% of the 5 km x 5 km cells that fall within the Blueberry River FNTT intersect with some form of disturbance, only 52% of the total study area cells do. If we exclude the Blueberry River FNTT cells from the overall study area and recalculate the percentage of cells affected (i.e., (4456-1523) / (8600-1677)), the number of affected cells drops to 42%. So, using a relatively crude measure of disturbance, it appears as if the spatial extent of the disturbance associated with oil and gas developments is more than double (90.8% of the cells) in the Blueberry River FNTT than that in the surrounding regional districts (42% of the cells).

Table 2. Surveyed Areas

Feature	Count
Number of 5 X 5 Km Cells in Study Area	8,600

Number of Cells Intersecting Oil and Gas Features (wells, seismic lines, or pipelines)	4,456 (51.8%)
Number of 5 X 5 Km cells within the Blueberry River FNTT	1,677
Number of cells intersecting Oil and Gas Features within the BRFNTT	1,523 (90.8%)

[951] The Province retained Ann Blyth to prepare an expert report responding to this aspect of Dr. Klinkenberg's work, namely the accuracy of his analysis of the oil and gas datasets used in the 2016 Atlas.

[952] Ms. Blyth provided an expert report dated February 2018. Ms. Blyth was qualified as an expert in GIS and remote sensing, including the accuracy of spatial data and interpreting aerial photographs and satellite imagery.

[953] Ms. Blyth was asked to re-create the disturbance analysis undertaken by Dr. Klinkenberg at page 20 of his report. In doing so she redefined the study area to be, in the Province's view, more representative of the Blueberry Claim Area, decreased the size of the cells analysed to improve the spatial position, and increased the number of cells analysed to increase the confidence level.

[954] Ms. Blyth said her results indicated that 37.5% of the cells in the study area overlapped with oil and gas disturbances compared to 51.8% for Dr. Klinkenberg, and 56.4% of the cells within the Blueberry Claim Area overlapped with oil and gas disturbances compared to 90.8% for Dr. Klinkenberg. Ms. Blyth attributed the differences in outcome to the cell size, and the differences in the boundaries of the study areas.

[955] While conducting an accuracy assessment of her results by reviewing the imagery, Ms. Blyth indicated she erred on the side of determining a feature was present in a cell, rather than not. Ms. Blyth testified that in the 96 cells she sampled there was a tendency by Dr. Klinkenberg to over-represent the amount of oil and gas disturbance. She noted 41.7% of the cells over-represented disturbances, and 24% under-represented.

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[956] Significantly, however, in cross-examination Ms. Blyth confirmed that if one of a number of features was not visible in the imagery associated with that cell (i.e., was missing in the cell) it would be marked as having been over-represented. As an example, if Dr. Klinkenberg had mapped 5 features in a cell, but only 4 were accounted for in the imagery, Ms. Blyth would have characterized this as having been an over-representation of the disturbance data. Notably, Ms. Blyth agreed, however, that a cell in the over-represented category did not mean that a disturbance or activity was not present in the cell.

[957] Ms. Blyth agreed that while her overall study area was different from Dr. Klinkenberg's, the Blueberry Claim Area was the same, and therefore comparable. She also agreed that both Dr. Klinkenberg's result (i.e., 90.8% of the cells in the Blueberry Claim Area intersecting oil and gas features) and her results (i.e., 56% of the cells in the Blueberry Claim Area intersecting oil and gas features) were correct. Her study still found a larger level of disturbance in the Blueberry Claim Area than in the study area.

[958] Regardless, as Blueberry points out, ultimately Ms. Blyth's report is of limited utility to the Court. Ms. Blyth did not review the 2016 Atlas, but only five pages of Dr. Klinkenberg's Report on the Atlas (pages 18-22), which dealt with the analysis of oil and gas datasets, and she did not contradict his evidence. Her study still found a large level of disturbance in the Blueberry Claim Area and her concept of "over-representation of disturbance" did not assist as it did not reflect that an area was not disturbed. Rather, it may have only been "less disturbed" based on the criteria Ms. Blyth used to reach this conclusion.

[959] The evidence established that Blueberry, as part of its efforts to have the Province address what it described as devastating cumulative impacts in the Blueberry Claim Area, went to considerable efforts to commission and assemble the data and maps in the 2016 Atlas and present them to government. The 2016 Atlas provides a helpful visual of the area where Blueberry members are trying to exercise

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their treaty rights. Again, it is most striking that the Province never addressed this report – and has never presented any different data to counter this information.

[960] As indicated earlier, I agree with Blueberry that if the Province had different information, it was bound as a matter of honourable dealing to provide this information to Blueberry. It did not do so.

e) Does the Data Over-represent Disturbance in the Blueberry Claim Area?

[961] The Province made many of the same arguments with respect to the accuracy of the disturbance data in the 2016 Atlas that ultimately developed through the Regional Strategic Environmental Assessment process. I will therefore deal with these issues together.

[962] There are essentially three alleged categories of deficiencies in the data identified by the Province. The first is the over-representation of disturbance; the second is lack of differentiation of the effect of disturbances; and, the third is that Blueberry members can still exercise their rights to hunt, fish, and trap notwithstanding a disturbance, since particular disturbances such as cutblocks allow for early regrowth and can still support wildlife.

[963] The Province argues that the data in both the RSEA disturbance layer and the 2016 Atlas over-represent disturbance in the Blueberry Claim Area. This is largely because the data includes activities that are authorized or permitted, but not yet built. Some of the specific issues identified by the Province are:

a) the pipeline data may reflect tenured or authorized pipelines, as opposed to constructed pipelines;

b) the well data includes both authorized wells that may not have been drilled, and cancelled wells; and,

c) the forestry consolidated cutblocks data may reflect authorized as opposed to harvested cutblocks.

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[964] Much of this argument covers the oil and gas industry, although some reflects forestry practices and authorization. I will deal first with the oil and gas disturbance data.

i. Oil and Gas

[965] The 2016 Atlas shows the number of well authorizations by year since 1918. Between 1918 and 1990, the number of authorizations held relatively steady, other than a spike in the 1960s and 1970s. The authorizations, however, significantly increased in the late 1990s, with a significant spike starting in 2003, and truly spiking from 2004 to 2006, and again in 2014. Figure 1 at page 38 of the 2016 Atlas notes that (as of January 2016) there were 19,974 oil and gas wells in the Blueberry Claim Area, 36% of which were active. Of those active wells, 74% were solely gas.

[966] The figure at page 38 of the 2016 Atlas demonstrates, whether or not all these wells have been built, both an accumulation of well authorizations, and an increased rate of development from the 1990s, with a significant increase since the early 2000s.

[967] At page 64, the 2016 Atlas notes that well sites in the Blueberry Claim Area encompass an area of 10,482 hectares.

[968] Table 13 on page 41 of the 2016 Atlas shows that within the Blueberry Claim Area there were 9,435 oil and gas facilities, the majority of which (65.82%) were test facilities, and just over 10% of which were battery sites, which means a gas or oil facility with product separation and multiphase delivery point measurement for one or more wells. Maps 14, 15, 16 and 20 of the 2016 Atlas show the spatial distribution of these sites across the Blueberry Claim Area. Map 17 shows the density of new well authorizations in the Blueberry Claim Area, comparing the periods from 1950-1970, 1970-1990, 1990-2010 and 2006-2016. The 1990-2010 period shows the highest density of new well authorizations. All of this is corroborated by the evidence given by Blueberry members.

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[969] Importantly, the Oil and Gas Commission's Comprehensive Liability Management Plan, published in May 2019, provides additional context. That plan indicates that, three years after the 2016 Atlas was published, there were 25,451 oil and gas wells in British Columbia, of which 40% were active.

[970] The area impacted by oil and gas is also set out in the Forest Operations Schedule 2017. This shows that the Total Crown Forest area impacted by oil and gas in the Fort St. John Timber Supply Area (which overlaps with much of the Blueberry Claim Area) is approximately 102,000 hectares. The 2019 RSEA Forestry Data Package shows an oil and gas imprint of 138,955 hectares within the Fort St. John Timber Supply Area.

[971] While the Province points out that wildfires since 1950 have accounted for almost three times as much disturbance as wells since 1918, this does not remove the reality that anthropogenic disturbances (and specifically those from oil and gas) have a significant and a different effect on the landscape. Furthermore, the lack of restoration of wells (until recently), and the nature of that restoration is fundamentally different from the natural restoration that occurs after wildfires. Unlike restoration techniques used in the past, natural restoration after a wildfire promotes the growth of natural forage and habitat for wildlife.

[972] The Province says that for both the 2016 Atlas and the RSEA disturbance layer, restored wells are included in the disturbance category and should not be. The evidence demonstrates, however, that a "restored" well does not mean the natural habitat is restored. While more recent efforts are underway by Petronas and others to restore a well to its natural habitat by using natural vegetation and engaging First Nations in these efforts, these efforts are new and restorations to date have not done so. Photos of a restored well that are in evidence in these proceedings show an area resembling a field rather than restored habitat. A restored well likely therefore maintains a disturbance footprint on the ground.

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[973] In addition, with respect to oil and gas tenures granted, the 2016 Atlas sets out the extent of oil and gas tenuring in the Blueberry Claim Area as follows:

a) of the total area of BC reserved for pipelines via tenures, 46% falls within the Blueberry Claim Area; and,

b) active petroleum and natural gas tenures cover 69% of the Blueberry Claim Area.

[974] Chris Pasztor, the decision maker for issuance of tenure in the Ministry of Energy and Mines, confirmed that over the past ten years, most of the oil and gas industry within British Columbia has been targeting the Montney shale basin (also referred to as the Montney Play Trend). The Montney shale basin is part of the Western Canadian Sedimentary Basin that stretches across most of northeast British Columbia and into Alberta. The Western Canadian Sedimentary Basin is also made up of three other geological formations: the Cordova Embayment, the Horn River Basin, and the Liard Basin. Part of the Montney Play Trend, referred to as the North Montney (or the North Montney Field), overlaps with the Blueberry Claim Area.

[975] While the Province notes that tenures have a limited term and can be cancelled or withdrawn, as Blueberry points out, these areas can then be re-tenured. Furthermore, tenure is granted in multiple layers, so a withdrawal or cancellation of a tenure does not necessarily mean the area is free from development.

[976] In addition, the amount of existing (‘active’) tenures in the Blueberry Claim Area is extensive, as shown in a number of exhibits.

[977] Chris Pasztor also testified about a table titled “Oil and Gas Rights Sales” from 1978 to February 19, 2020, which shows the amount of hectares of tenures disposed (i.e., sold and re-sold) from 1978 to February 19, 2020. It notes that in this timeframe, 18,170,215 hectares have been disposed.

[978] A March 20, 2015 map prepared by the Ministry of Natural Gas Development, Upstream Development Division, Tenure and Geoscience Branch which is in

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evidence in these proceedings shows that “if all currently deferred parcels were disposed the increase in the BRFN Consultation Area A and current active tenure would be 1%.” I take this to mean that, notwithstanding that some of the parcels within the Blueberry Claim Area have been deferred (meaning the tenure request has been held back from potential disposition for an indefinite period of time), this constitutes only a minute portion of the land base that is not already covered by active tenure.

[979] The “RSEA Interim Measures Agreement Related to Petroleum and Natural Gas Development” (15 June 2018), appends a map that helpfully illustrates in grey shading the amount of active tenure in three areas within the Blueberry Claim Area that Blueberry had previously identified as being “critical” areas. Area 2 and 3 are extensively tenured, while Area 1 is less so.

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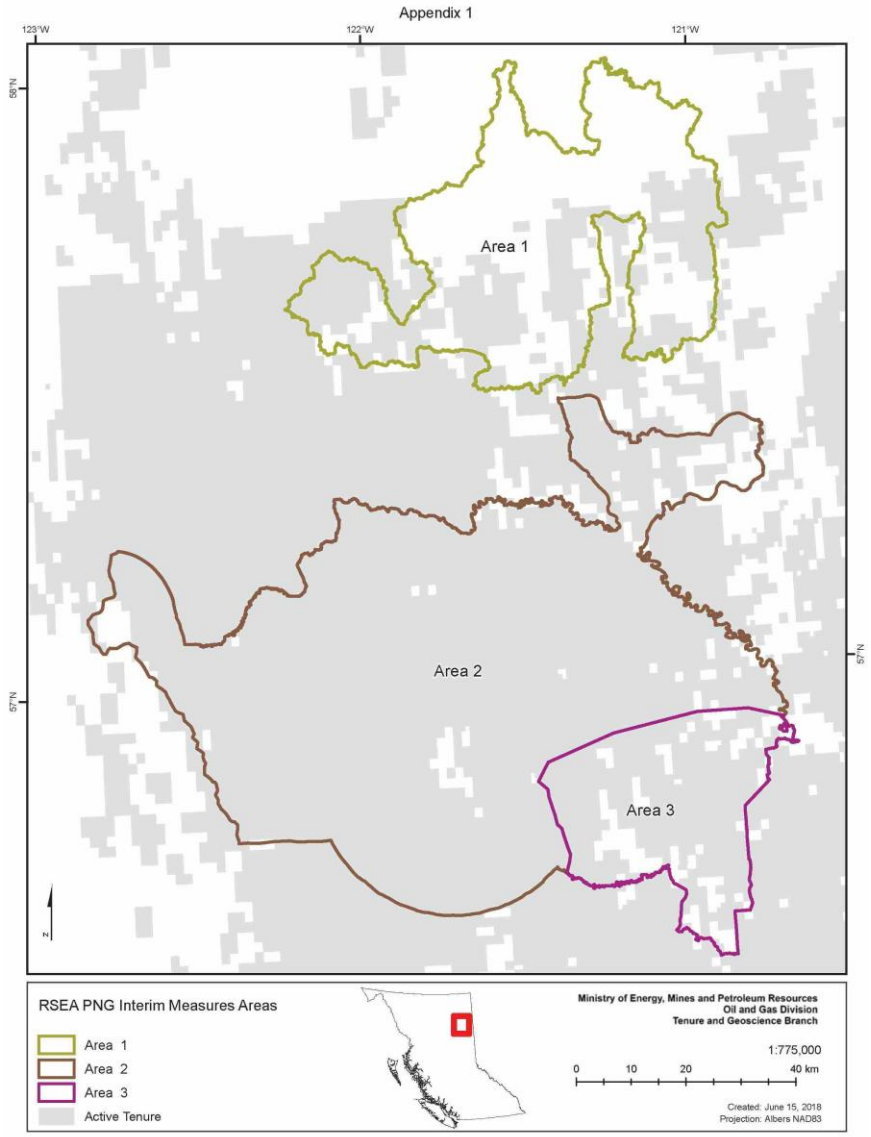

Exhibit 108, Tab 28: Appendix 1 to RSEA Interim Measures Agreement Related to Petroleum and Natural Gas Development, showing the outlines of Areas 1, 2 and 3, and active tenure in grey.

[980] I agree with Blueberry that the location of the active tenures on the maps illustrates how closely oil and gas activity overlays with the Blueberry Claim Area. While oil and gas tenures are not, as the Province points out, a direct measure of surface disturbance, the overwhelming scale of tenure sales is an indication of the extent and amount of potential activity.

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[981] The Province maintains that even when an application is made to the Oil and Gas Commission for a permit associated with a tenure, this does not necessarily mean there will be surface disturbance or any corresponding impact on rights. This point was emphasized repeatedly by Mr. Pasztor.

[982] During his testimony on July 27, 2020, Mr. Pasztor stated several times that the decision to dispose tenure is "purely subsurface-related," "doesn't result in any immediate physical impacts to the land base," and, as such, the Ministry takes the position that the disposition of tenures does not infringe treaty rights since the tenures will not authorize any activities. Mr. O'Hanley, from the Oil and Gas Commission testified, however, that the grant of tenure is a clear indication or "signal" from government that an area may be developed, and/or is a candidate for development.

[983] The difference between Mr. Pasztor's and Mr. O'Hanley's understandings of the implications of decisions to dispose tenure clearly illustrate that, as Blueberry says, government agencies operate in "silos," and are like "two ships passing in the night." One agency is of the view that the other will consider treaty rights and the other is of the view that treaty rights have already been considered, or that they need not be as the area is designated for development.

[984] Mr. Pasztor referred to "caveats" on the grant of tenure that protect treaty rights, but these are not given much, if any, significance in the Oil and Gas Commission's application management system. The existence of the caveat appears to be to avoid potential claims for compensation from proponents as reflected in the *Risk Assessment to Support the Disposition of Petroleum and Natural Gas Parcels* (November 13, 2019). The introduction to that document states:

> The decision to dispose petroleum and natural gas (PNG) tenure, i.e., subsurface rights, does not authorize any physical impact to the land (i.e., surface). Rather it is considered strategic in nature and is the first step to an administrative process to support future activities to explore for and develop PNG resources. Exploring for and developing PNG resources is considered the second step and is a separate decision that can have physical impacts to stakeholders and First Nations [sic] rights and interests, as well as values,

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> features and objectives that government has identified as requiring special management and protection (i.e., values, features and objectives identified in the *Environmental Protection and Management Regulation* under the *Oil and Gas Activities Act*.) Because these two administrative decisions are separate and tenure is issued without any exploration or development planning, there may be situations where compensation is triggered if the tenure cannot be accessed due to legal requirements and obligations.

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[985] Furthermore, with respect to authorized but not yet built pipelines – such as the Prince Rupert Gas Transmission Project, the West Coast Transmission Project, and the northern portion of the North Montney Transmission line – the Province led no evidence to demonstrate to what extent this alleged "over-estimation" existed in the disturbance data. As noted by the Province, the total pipeline tenure is only 0.73% of the Blueberry Claim Area, so any over-estimation of disturbance based on authorized, but not yet built, pipelines affects less than 1% of the Blueberry Claim Area, in any event.

[986] Furthermore, pipelines that have been authorized but not yet built, may still be built. There is nothing to prevent that, and while it may not reflect an actual physical disturbance on the land, the reality is that it may yet occur without further input from Blueberry.

[987] I note, in addition, the RSEA disturbance layer also removed overlapping features like pipelines so that they only count once.

ii. Linear Features

[988] The Province also argues the data over-estimates disturbance from linear features because it:

a) includes old seismic lines, including Terrain Resource Information Management ("TRIM") data which is primarily seismic lines from before 1992;

b) assigns set widths for various linear features where no data was available (e.g., between 4 and 7 metres for seismic lines, 50 metres for all power lines, and 32 metres for all pipeline rights of way); and,

c) includes authorized but not constructed developments.

[989] The Province also points out that in the overall RSEA disturbance data and in the 2016 Atlas, roads are not distinguished in terms of being decommissioned forest roads or active roads and the same buffers are applied. The point being that an active road has more disturbance than one not used, which may have recovering habitat. This distinction is acknowledged in the 2016 Atlas, which references "decommissioned/overgrown/unknown" roads as being 1,221 kilometres of the total 50,238 kilometres. Furthermore, a decommissioned road cannot simply be ignored as a disturbance. While it may have a lesser impact than an active industrial road or an urban road, it will still have an impact.

[990] Linear features such as roads, seismic lines, transmission lines, and pipelines are inherently disruptive disturbances on the landscape, as the government's specialists recognize. I note the evidence establishes, and the Oil and Gas Commission's own specialists acknowledge, that old seismic lines (such as those that were initially cleared using bulldozers prior to the 1990s) are very long term disturbances. Many old seismic lines can still be seen on satellite imagery.

[991] Furthermore, in their 2017 report on Boreal Caribou in British Columbia, Diane Culling and Deborah Cichowski noted that while industry has made important improvements in operational practices and methods with respect to seismic lines over the past few decades, this has been offset by a corresponding increase in the level and intensity of development.

[992] While the Province says it doesn't accept the Culling and Cichowski report, this is a 2017 report directed by the provincial Ministry of Forests, with review comments provided by provincial representatives such as Mr. Pasztor and referenced by the three wildlife experts who testified in this case, including Mr. Simpson, the Province's expert. In addition, the Province's "Boreal Caribou Recovery Implementation Plan" (draft 30 March 2017) indicates provincial policy on the rates of recovery for linear features extends from 35 to 100 years:

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> The Province considers linear features in upland habitats restored ≥ 35 years from disturbance, while linear features in lowland habitats take at least 100 years to restore naturally (Appendix H).

[993] Mr. Pasztor agreed with this specific statement on cross-examination.

[994] I note that, in recognition that seismic features have an impact that varies, the Regional Strategic Environmental Assessment report entitled "Old Forest Current Condition: A Cumulative Effects Analysis for the Northeast RSEA Area" and the report produced by Madrone Environmental Service Ltd. on moose habitat did not include this data in calculating the disturbances. As Dr. Holt testified, in those areas it did not make much difference as there were so many disturbances everywhere.

[995] The effect of linear features with respect to predators is demonstrated in the same Boreal Caribou Recovery Implementation Plan, which states:

> Dickie (2015) reported that vegetation taller than 1 m on linear features reduced wolf movement by 23% in summer, while vegetation needed to be taller than 5 m in winter to decrease wolf travelling speed (Dickie 2015).

[996] In addition, the Province's *Taking Nature's Pulse: The Status of Biodiversity in British Columbia* outlines how linear features and utility corridors (including roads, railways, seismic lines, transmission lines and pipelines) represent key pressures or threats to biodiversity and have impacts that extend far beyond their corridors.

[997] The Province produced *Taking Nature's Pulse,* along with whom it referred to as "partners," who are set out in the acknowledgements. These "partners" include Dr. Holt, who was noted as having peer reviewed the draft report, and having participated in a workshop associated with the draft report. Dr. Holt testified that the lead author of this report was Matt Austin, who was then with the Ministry of Environment and is now with the Ministry of Forests.

[998] *Taking Nature's Pulse* states at pages 199-200:

> …Even relatively narrow roads through forest can produce marked edge effects that may have negative consequences for the function and diversity of these ecosystems. There is also significant ecosystem degradation in the

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> area beyond the actual feature. The construction of linear features alters hydrology in water courses and increases sedimentation, and can disconnect streams from floodplains and block aquatic species movement.
>
> Roads and other linear features impede the movement of native species, facilitate invasion by alien species and alter predator-prey relationships. Specifically, roads can fragment ranges, populations, habitats and ecosystems, and reduce gene flow, resulting in loss of genetic diversity. Roads can increase access to previously inaccessible areas, resulting in increased road kill of wildlife and increased access for legal and illegal fishing and hunting. Both on-road traffic and off-road vehicles create disturbance, which can alter species behaviour. Roads also facilitate ecosystem conversion, ecosystem degradation, and alien species invasion and environmental contamination.
>
> The ecological impacts of roads can affect approximately 20 times the land area that the roads actually cover. Hence roads and other linear features are a useful index for the cumulative impact on biodiversity…

[999] As noted by certain maps in *Taking Nature's Pulse:*

a) there is high and pervasive road density in northeast British Columbia, with what is essentially the core of the Blueberry Claim Area seeing some of the highest levels of density (Map 20, p. 202);

b) the highest oil and gas site density in the province lies within the core of the Blueberry Claim Area, with up to 14.73 oil and gas sites per squared kilometre (Map 22, p. 208); and,

c) the largest area and highest levels of terrestrial ecosystem conversion in the province lie at the core of the Blueberry Claim Area (Map 12, p. 161). Ecosystem conversion refers to the direct and complete conversion of natural ecosystems to landscapes for human uses.

[1000] Dr. Holt noted the RSEA table is using road indicators in their work on linear disturbances to understand the landscape condition. With reference to the map prepared by Caslys and included at p. 202 of *Taking Nature's Pulse* (which is also included in the Land Stewardship Framework that Dr. Holt prepared for Blueberry), Dr. Holt testified that in the area around Fort St. John, and indeed throughout the Blueberry Claim Area, there is very high and pervasive road density.

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[1001] The 2016 Atlas indicates that more than 1,884 kilometres of petroleum access and permanent roads were authorized between 2013 and 2016. The Province points out that the 2013 Oil and Gas Regulation required a permit for any pre-existing roads used for oil and gas development, such as forest service roads. Regardless, roads exist, whether permitted or not, whether old or new.

[1002] The evidence of Dr. Klinkenberg shows that within the Blueberry Claim Area, there is an average of 4.79 kilometres of linear disturbance per square kilometre (this includes roads, transmission lines, seismic lines, and pipelines) and that significant portions of the Blueberry Claim Area have a linear disturbance density that is much higher, ranging up to 15.8 kilometres per square kilometre.

iii. Forest Harvest

[1003] The 2016 Atlas, relying on Ministry of Forests' 2015 consolidated cutblock dataset, states that 195,091 hectares of the Blueberry Claim Area has been logged since 1950.

[1004] Dr. Klinkenberg conducted an independent review of the cutblock dataset, validating its completeness by comparing it to a dataset recently published by the Canadian Forest Service and the University of British Columbia demonstrating the year of forest change and type of change (e.g., harvest or wildfire). He concluded there was a "reasonable areal match" between the two datasets.

[1005] While the Province says this is an overestimation, as the consolidated cutblock data may reflect authorized as opposed to harvested cutblocks, the RSEA disturbance layer, like the 2016 Atlas, relies on the provincial consolidated cutblock dataset. The Methodology Document states that this dataset is "...the best representation of cutblocks on the landscape..." with a "[h]igh" level of confidence due to the "quality of the input datasets."

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[1006] In addition, while Mr. Van Tassel of the Ministry of Forests had not personally verified these 2016 Atlas numbers, he noted “looking at the results dataset, I would say that could very well be an accurate number of total area harvested.”

[1007] The Province also says the 2016 Atlas does not put the landscape disturbances in the Blueberry Claim Area in context, and presents a one sided picture. It maintains that forest harvesting in the Blueberry Claim Area was less than in the province as a whole, in every year. The Province, relying on Dr. Klinkenberg’s report, notes the total accumulated percentage of forest change in the Blueberry Claim Area was less than half what it was in the province as a whole – 3.63% for the Blueberry Claim Area, as opposed to 8.71% for the entire province – and that the 2016 Atlas failed to mention this.

[1008] In cross-examination in answer to this question, Dr. Klinkenberg noted, however, that the 2016 Atlas looked at intact forest landscape, and used this as the denominator for assessing forest change, whereas he used the total land base as the denominator. If he too had used intact forest as the denominator that would have changed the percentages considerably in figures 4 and 5 of his Report on the Atlas, making them much higher.

[1009] As a more accurate comparison, Dr. Klinkenberg noted, as per the Global Forest Watch dataset, approximately 60% of BC is intact forest landscape, while the Blueberry Claim Area has less than 14% intact forest landscape (i.e., a quarter as much as within BC as a whole). As the land base of intact forest is far smaller within the Blueberry Claim Area than within the province as a whole, any logging that occurs within the Blueberry Claim Area would therefore have a relatively larger impact.

[1010] The rate of forest harvest is also useful to consider in assessing disturbance in the Blueberry Claim Area. The Blueberry Claim Area is in the Fort St. John Timber Supply Area. As set out in the Ministry of Forests’ 2016 Timber Supply Analysis Discussion Paper for the Fort St. John Timber Supply Area, in Figures 10 and 11,

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the annual area harvested in the Fort St. John Timber Supply Area is approximately 7-8,000 hectares, and on average a volume of 300 cubic metres is harvested per hectare. The concentration of the harvest is set out in the Chief Forester's May 10, 2018 Rationale for Allowable Annual Cut Determination ("Chief Forester's Rationale") and the Fort St. John Timber Supply Area Timber Supply Review Data Package. I discuss this in further detail below when considering the regulatory regime for forestry management.

[1011] I note briefly here that 55.3% of the actual harvest in the Fort St. John Timber Supply Area has occurred in the Blueberry Landscape Unit (which is at the heart of the Blueberry Claim Area) – even though only 28.7% of all of the timber harvesting land base in the Fort St. John Timber Supply Area occurs in that landscape unit.

[1012] The Chief Forester's Rationale also corroborated the forestry-related disturbance data in the Blueberry Claim Area. At page 21 of that document, the Chief Forester says:

> Input was received from BRFN and the public regarding concerns that the level of harvest is concentrated in the southern and central part of the TSA (the 'core'), with little likelihood of harvesting more remote parts of the TSA (the 'periphery'). They have commented that the concentrated harvest activity in the core is not sustainable and it may have negative environmental and economic impacts while also impacting their treaty rights. *A supplementary analysis was conducted, verifying the concentration of harvesting in the core of the TSA.*
>
> *The core encompasses approximately 56 percent of the THLB [timber harvesting land base] and accounts for approximately 87 percent of the historic harvesting. The periphery encompasses approximately 44 percent of the THLB and accounts for approximately 13 percent of the historic harvesting*. Appendix 4 shows a map of the Fort St. John TSA outlining the landscape units comprising the core and the periphery.
>
> In recent years Ministry staff has made requests of the forest licensees to increase their level of harvest in the periphery, but these requests have not been followed. Forest licensees commented that they are meeting the objectives and requirements of the FSJPPR [*Fort St. John Pilot Project Regulations*] and will direct harvesting to the periphery as harvest opportunities in the core decline.
>
> (emphasis added)

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[1013] The Chief Forester's Rationale specifically noted the supplementary analysis was conducted verifying the concentration of harvest in the southern and central part of the Timber Supply Area, which is largely within the core of the Blueberry Claim Area. Of further note was that Ministry staff had made requests of forest licensees to increase harvest in the 'periphery' area and this request was not followed. The 'core' encompasses 56% of the timber harvesting land base, but accounted for 87% of the historic harvest. This once again is the Province's own information and further corroborates the data that reflects the high level of disturbance within the Blueberry Claim Area.

[1014] To understand the impact of this it is helpful to place this information in the context of the maps entered into evidence.

[1015] Appendix 4 of the Chief Forester's Rationale shows the Landscape Units, and indicates that the Blueberry, Lower Beatton, Kobes, Halfway and Tommy Lakes South Landscape Units (coloured in green on the map below) constitute the "core" of the Fort St. John Timber Supply Area.

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Exhibit 42, Tab 2: Fort St. John Timber Supply Area Rationale for Allowable Annual Cut Determination, May 10 2018, Appendix 4. Map of the Fort St. John TSA showing the Landscape Units comprising the core and the periphery areas.

[1016] The “enhanced resource development” zone, which was set in the Fort St. John Land and Resource Management Plan, is identified in pink on a map included in the Sustainable Forest Management Plan and set out below. The Fort St. John Land and Resource Management Plan notes that the “enhanced resource development” land use category includes lands:

- with existing or with future potential suitability, for intensive resource development with due consideration to the management of other resource values.
- where a high priority has been designated for a special or combined resource management emphasis (such as high intensity forest management regime or range management emphasis).
- where investments in resource development and enhancement are encouraged in full compliance with the existing regulatory regime.

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[1017] This enhanced resource development zone takes up more than half of the Blueberry Landscape Unit, the northern half of the Kobes Landscape Unit, and the southern half of the Tommy Lakes Landscape Unit, and other areas.

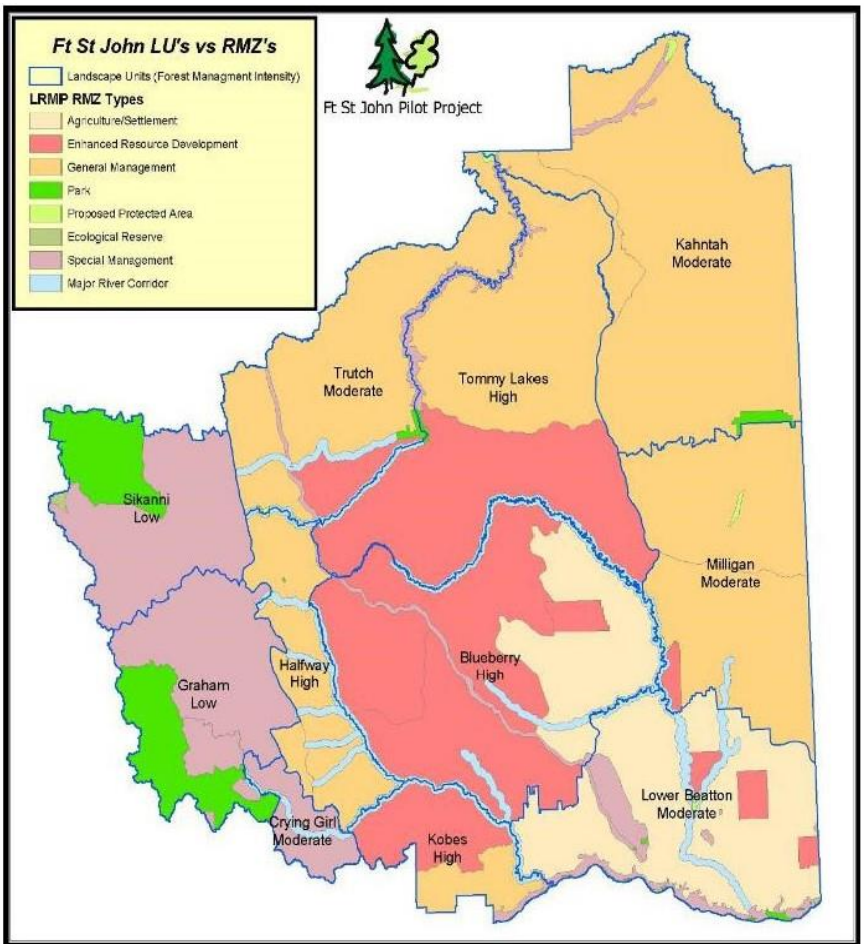

Exhibit 43: Fort St. John Pilot Project Sustainable Forest Management Plan #3, Figure 2 at page 23, showing Landscape Units and Resource Management Zones.

[1018] The Sustainable Forest Management Plan at page 31 says the following with respect to "High Intensity Forest Management LU's [Landscape Units]":

> The Blueberry, Halfway, Kobes and Tommy Lakes LU's are included in this zone. The LRMP's [Land and Resource Management Plan's] predominant timber objective in the RMZ's [Resource Management Zones] that make up the majority of these landscape units is to establish forest production targets consistent with high intensity forest management regimes. Similarly, the predominant biological diversity emphasis identified in the LRMP for these zones is low. To meet other non-timber objectives identified in the LRMP,

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> some unique areas within these LU's will receive special management attention.

[1019] The Province maintains that over the last 40 years, only 11% of Blueberry's "core" area (i.e., the Blueberry, Kobes, Halfway, and Tommy Lakes South Landscape Units) has been harvested. This percentage is based on approximately 200,000 hectares, of a total 1.8 million hectares, having been harvested from the "core" area.

[1020] As pointed out by counsel for Blueberry, however, much of the land within the 1.8 million hectares relied on by the Province as constituting the total core area cannot be harvested, as it consists of lakes, rivers, wetlands, alpine, non-Crown land and the like. Blueberry says the correct way of determining the percentage of harvest from the "core" area (or, more specifically, from the Blueberry Landscape Unit) over time can be ascertained from figures contained in an August 23, 2016 letter from Mr. Atmo Prasad, a manager in the Forest Analysis and Inventory Branch of the Ministry of Forests.

[1021] Mr. Prasad notes that the Blueberry Landscape Unit contains 28.7% of the timber harvesting land base, which (according to Table 2 of the Ministry of Forests' 2016 Timber Supply Analysis Discussion Paper for the Fort St. John Timber Supply Area) is approximately 1,000,000 hectares. In other words, the Blueberry Landscape Unit contains 280,000 hectares of harvestable timber. Mr. Prasad then notes that approximately 55% of the total timber harvesting land base harvested in the Timber Supply Area has been harvested from the Blueberry Landscape Unit.

[1022] Blueberry therefore submits the amount harvested from the Blueberry Landscape Unit is 110,000 hectares (i.e., 55% of 200,000 hectares) divided by 280,000 hectares, which equals 39%.

[1023] In addition, relying on Table 2 in the 2016 Timber Supply Analysis Discussion Paper for the Fort St. John Timber Supply Area, Blueberry notes that within the Timber Supply Area approximately 102,000 hectares are recognized as having an

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"oil and gas imprint." If land available for forest harvesting is reduced by the oil and gas activity in the Timber Supply Area (which is largely within the Blueberry Landscape Unit, but Blueberry's calculations assumed that only 50% of that oil and gas imprint (i.e., 50,000 hectares) was within that Landscape Unit) the amount of disturbance can reach 75% of the "core" of the territory.

[1024] Blueberry's main point, and I agree, is that the Province's estimate of 11% of the "core" of the territory being harvested or affected is a gross under-estimation. That figure is based on a landbase that included not only forested areas, but also lakes, rivers and mountain tops. I conclude therefore that the lands within the "core" or the Blueberry Landscape Unit that have been harvested or otherwise imprinted with roads or oil and gas development is a much higher percentage, and likely between 50% and 75% of that area. The disproportionate harvest in this area is corroborated by the evidence of Blueberry members as to the impacts on their territory.

[1025] While Blueberry mainly pointed to the level of harvest to illustrate disturbance in the Blueberry Claim Area, this should be placed in context of the impact of a harvested cutblock. As noted by Blueberry, when a cutblock is harvested, the habitat is likely taken from a high habitat value (including winter habitat) to no winter habitat with perhaps some value as early seral forage for moose. While the Province characterized this as a positive effect of a disturbance, as new forage will grow, the negative impact of the loss of winter habitat is significant therefore precluding an overall characterization of a cutblock as being an example of a positive effect on wildlife.

[1026] Almost all of the cutblocks in the Blueberry Claim Area are 40 or 50 years old. "High or effective habitat" does not exist until trees are, at a minimum, 60 years old. Mr. Simpson suggested that a deciduous tree at 60 years might fulfill some of the high habitat criteria. Dr. Johnson's evidence, however, was that trees needed to be 100 to 140 years to fulfill this habitat function, and Mr. DeLong's work suggested 140 years. This is relevant to the existence and effectiveness of wildlife habitat, including

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for moose and caribou. The level of the harvest put into the context of its impact, is important to consider when evaluating disturbance.

iv. Old Growth Forest

[1027] With respect to disturbance on the Blueberry landscape and Old Growth Forest, Dr. Holt also referred to and testified about the Regional Strategic Environmental Assessment report entitled "Old Forest Current Condition: A Cumulative Effects Analysis for the Northeast RSEA Study Area" ("RSEA Old Forest Report"), which Dr. Holt and Dave Myers of Ecora Consulting Ltd. completed in June 2019.

[1028] Dr. Holt testified as follows:

> And I will say that it [a robust cumulative effects analysis of current condition for old growth] was identified as a priority action item because all the nations at the table [referring to the Regional Strategic Environmental Assessment process] identified old forest as being very important to them also because the Province also uses old forest as their primary management tool to maintain diversity.

[1029] As noted by all three expert witnesses who testified about the status of wildlife populations in the Blueberry Claim Area, old growth forests provide habitat for a diversity of species, including unique species such as caribou and moose. They also contain cultural values important to Indigenous peoples. Old growth is an important indicator used to assess the conditions of forested ecosystems, and to evaluate the status of resource stewardship. The measurement of old growth forest is therefore a very relevant indicator of biodiversity and impacts on treaty rights.

[1030] The Chief Forester confirms this at page 15 in the Allowable Annual Cut Rationale:

> I agree that in addition to contributing to conservation biodiversity at the landscape level, mature and old growth forests are also an important component of accommodating First Nations interests in wildlife for food and ceremonial purposes. The maintenance of landscape level biodiversity is an important component that supports First Nations in sustaining their traditional ways of life.

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[1031] The Regional Strategic Environmental Assessment Old Forest Working Group, which has government representatives, including Mr. Van Tassel, and receives advice from the former regional ecologist from the northeast, Mr. Delong, was tasked with gathering the appropriate data and undertaking the cumulative effects analysis of old forest as a priority action item for the RSEA initiative.

[1032] Dr. Holt said the Regional Strategic Environmental Assessment project wanted to focus in and look at the landscape unit level to understand the status of old forest in the whole northeast RSEA area.

[1033] Fieldwork for the RSEA Old Forest Report was done in the summer of 2017. The drafting and completion of this report had to wait for the completion of the RSEA disturbance layer so that information, recognized as the best available information on disturbance for the study area, could be used. Using that data, the authors undertook a "functional forest analysis."

[1034] This analysis was predicated on the Province's 1995 *Biodiversity Guidebook*. The *Biodiversity Guidebook* was the first attempt in BC to present guidance for forest management based on natural disturbance dynamics. The *Biodiversity Guidebook* provides specific guidance for seral stage distribution, patch size, wildlife tree patch amount, and spatial arrangement, and more general guidance on species composition and stand structure.

[1035] The RSEA Old Forest Report seeks to answer two key questions: (1) How much old forest is there? and (2) How much of it is in good condition, or can be considered "functional forest"?

[1036] Dr. Holt described the approach used in the RSEA Old Forest Report as assessing how much actual old forest there is in the northeast today, and comparing it with what there would have been under natural conditions.

[1037] The RSEA Old Forest Report analyzed the condition of old forest in the study area by buffering the RSEA disturbance layer by 20 metres, 50 metres, 100 metres,

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and 250 metres to compare results (see Ex. 47, Tab 7, p. 13). During her testimony, Dr. Holt provided the following explanation for the use of buffers of various distances, noting the effect of particular types of disturbances varies:

> …we know that the effects of disturbances, be they roads or well sites or railways or pipelines, they have different types of effects on the surrounding forest. That's not of dispute at all in the science literature. And what is discussed is how far those effects go into the forest.
>
> And we know that they go different distances and that the distance – the importance of the distance really changes with respect to different values. So, for instance, dust landing on berries may go 30 metres. Noise, disturbance noise may go 50 metres. Temperature change may go 50 to 100 metres. Sedimentation into creeks and other kinds of disturbances like predators, for instance, being able to get into the middle of patches, those have very large distances.

[1038] The RSEA Old Forest Report provides analysis for two categories of old forests: forests greater than 140 years in age, and those greater than 250 years in age. The results show the Blueberry Landscape Unit has only 9% of old growth forest greater than 140 years, when 17-33% would be expected; and, it has no forest older than 250 years, when between 6-12% would be expected.

[1039] With respect to how much of the old growth forest may be in good condition or "functional," after factoring in the disturbances (i.e., overlaying all the roads, well sites, transmission lines, pipelines etc.), the RSEA Old Forest Report notes at pages 37 and 40 that there is almost no old forest greater than 140 years in the Blueberry Landscape Unit further than 250 metres from a disturbance.

[1040] While the Province quarrels with the estimate of old forest; particularly in the Blueberry Landscape Unit and has provided mathematical calculations to say it is "double" the amount referenced by the Plaintiffs, I prefer the above analysis which places the old forest within the context of effective functional forest, which is critical for wildlife habitat.

[1041] Dr. Holt indicated the RSEA Old Forest Report has been submitted to the Regional Strategic Environmental Assessment table and the indicators of old forest

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and functional forest are now being used in ongoing work referred to as the Methods Pilot.

f) Do the Effects of Disturbance Vary?

[1042] Despite the evidence on the amount of disturbance, the Province argues that another defect of the disturbance data which Blueberry relies upon is that it does not take into account the unequal effect of disturbances. The Province maintains that the impact of development varies depending on the type of development, its intensity, and its duration. It also says that the impact of industrial development on wildlife varies depending in the species, and even among populations of the same species. The Province adds that even when the effects are negative, they do not necessarily reduce or displace the species.

[1043] The Province pointed out Dr. Holt agreed and noted that the potential effects of a disturbance will vary based on:

a) the type of disturbance (e.g., single lane road, highway, pipeline);

b) the frequency of use (e.g., number of vehicles, speed);

c) the type of impact (e.g., noise, light);

d) the species of interest (e.g., moose, caribou, beetles); and,

e) the nature of the surrounding area (e.g., cleared/treed, upslope/downslope).

[1044] The Province points out with respect to the level of disturbance associated with a specific activity, Dr. Johnson confirmed that while there would be a variance over any set distance it would decrease the further one moves away. This is referred to as the “decay function” – where an animal’s response to a disturbance decreases as the distance from a feature increases. For example, the disturbance associated with a road would be greater closer to the traffic and lesser further away.

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[1045] As a result, the Province says that the impacts of development vary in their nature and timing and not all disturbances are “taking up” such that the land cannot be used for the exercise of treaty rights.

[1046] Blueberry does not disagree with this proposition. Blueberry says, however, that the law recognizes that, regardless of these variations, impacts *can* accumulate and converge so as to cause a breach of the substantive promise of Treaty 8. It points out the Province has led no evidence to refute the evidence before the Court that this accumulation and convergence *has* now occurred in the Blueberry Claim Area.

[1047] Much of what the Province says on this point relates to the use of zones of influence or buffers in the various reports, datasets, and disturbance layers that are in evidence. It says that for some disturbances, there will potentially be no effect immediately outside of the actual disturbance, and that in those situations, there would be no basis for applying any buffer. The Province criticizes the disturbance evidence relied on by Blueberry as it includes zones of influence (i.e., applies buffers) of varying distances.

[1048] The Province says that the use of zones of influence in measuring the impact from the immediate footprint of industrial development is not an established or well accepted method.

[1049] This position, however, is not supported on the evidence. The concept of and measurement of zones of influence objected to by the Province are now routinely used by government and other experts in measuring and analysing the impacts of anthropogenic disturbance beyond their immediate footprints.

[1050] For example, Environment Canada’s “Scientific Assessment to Inform the Identification of Critical Habitat for the Woodland Caribou (*Rangifer tarandus caribou*), Boreal Population, in Canada” (2011 update) applied a 500 metre zone of influence for anthropogenic disturbance, as did Environment Canada’s “Recovery

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Strategy for the Woodland Caribou (*Rangifer tarandus caribou*), Boreal Population in Canada" (2012).

[1051] Similarly, the Province's Boreal Caribou Recovery Implementation Plan of 2017 adopted a 500 metre zone of influence and applied it to all forestry cutblocks and anthropogenic disturbances.

[1052] Further, reports applying a 250 metre zone of influence for a variety of types of industrial disturbance (cutblocks, roads, seismic lines, etc.) include Sorensen at al.'s 2008 Boreal Caribou study in the Journal of Wildlife Management entitled "Determining sustainable levels of cumulative effects for boreal caribou"; the Thiessen 2009 Report; and the Pasztor and Wilson Report.

[1053] Dr. Johnson noted in his expert report that the Environment Canada Boreal Caribou work has used a 500 metre buffer instead of the 250 metre buffer used by Sorensen et al.

[1054] The 2003 Salmo report entitled *Blueberry Cumulative Effects Case Study*, commissioned by the Oil and Gas Commission as part of a cumulative effects assessment and management framework for northeast British Columbia, used a 500 metre zone of influence for all potentially high use features such as roads, pipelines, railway lines, well sites, communities and clearings to represent the area were reduced habitat effectiveness to occur. Salmo noted that the use of a 500 metre zone of influence is considered conservative because avoidance is generally related to the level of activity rather than the features themselves.

[1055] In addition, the provincial Cumulative Effects Framework noted that high suitability habitat for moose is considered to be disturbed if it is within one kilometre of gravel or paved roads, or the footprint of a major industrial development. Numerous other reports say the same thing.

[1056] While I will not review all the scientific reports that supported use of buffer zones, I do conclude that use of 250- to 500-metre zones of influence with respect to disturbance features is a reasonable approach when assessing disturbance impact

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and is not an over-representation, as argued by the Province. It is the zone of influence that illustrates the level of potential disturbance.

[1057] While there is no doubt that applying different buffers will produce different results, and that maps applying 500 metre buffers around disturbances will show a more drastic effect than those with no buffers, the data and its spatial representation along with satellite photos, aerial photos, and on the ground photos, must be considered within the context of the evidence as a whole.

[1058] The disturbance datasets and disturbance layer have been created as part of a collaboration between the Province and Treaty 8 Nations, along with stakeholders. The data was intended to be accessed and used for the management of the land. It has been subject to quality assurance and cannot be so easily dismissed. The Province, which is the custodian of this data, has not shown any great magnitude to their criticisms. The evidence therefore must be given significant weight with awareness of the limitations expressed.

F. Do the Disturbances Constitute Lands Taken Up?

1. Province's Position

[1059] I will now deal with the Province's argument that not all disturbances constitute lands "taken up" as, despite the disturbances evident by the data, Blueberry members can still exercise their treaty rights. This has largely been dealt with in the section outlining the members' evidence on this point, but I reiterate a few points here.

[1060] It must be recalled that the text of Treaty 8 provides that the signatories and adherents to the Treaty have the right to hunt, trap and fish through the tract surrendered "saving and excepting such tracts as may be *required or taken up* from time to time for settlement, mining, lumbering, trading or other purposes." This has been described by the Supreme Court of Canada in *Badger*, as the "geographic limitation" on the exercise of treaty rights (at para. 40).

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[1061] In *Badger*, Justice Cory reasoned that the Indigenous signatories to Treaty 8 would have understood that land had been "required or taken up" when it was visibly being put to a use that was incompatible with the exercise of their rights (at paras. 53-54). This has become known as the "visible incompatible use" test. Whether or not land has been "taken up" or remains "unoccupied" (which is the language used in the NRTA, which does not apply in this case) is a question of fact to be resolved on a case-by-case basis (at paras. 57-58).

[1062] The Province says that certain disturbances such as clearcuts and subsurface development do not constitute lands that have been taken up, since Blueberry members can continue to exercise their rights in these places. The Province's position seems to be contrary to the plain language of Treaty 8 which, on its face, suggests lands are "taken up" when required for, among other things, mining and lumbering purposes. I will, however, go on to consider whether lands that have been clearcut, or are the site of subsurface exploration or development, are being put to a use which is a "visible, incompatible use" with the exercise of treaty rights. This analysis will show that, in my view, there are sufficient indicia to suggest these lands, and the roads used to access them, are being put to a use which is incompatible with the exercise of treaty rights and thereby "taken up."

2. Analysis and Conclusions

[1063] In *Badger*, the Court referred to the following indicia that lands had been taken up: buildings or fences having been erected on the lands, the lands being put into crops, the presence of farms or domestic animals, and physical signs manifesting exclusionary land use (at paras. 23, 53, 67, 68). The presence of abandoned buildings, however, would not necessarily signify to Indigenous people that land was taken up in a way that precluded hunting (at para. 53).

[1064] Blueberry members including Jerry Davis, Georgina Yahey and Wayne Yahey testified that logging roads by their nature serve to exclude Blueberry members from accessing areas they used to hunt and trap. These roads were described as being

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heavily trafficked and very dangerous, as they are frequented by large logging trucks and other industrial vehicles. These tend to be radio-controlled and monitored roads, meaning those travelling on them are required to tune into particular radio channels and periodically report their locations. This poses a barrier and a risk for a lot of Blueberry members. Georgia Yahey testified as follows:

> **…** it's radio controlled, so these radios cost from up – I don't know, $500 dollars to $1,000. So … even when we go hunting I have to have a radio. And there is a lot of families that can't afford these radios and they just take a chance. And it's so scary out on those roads. Even I had a radio I almost got – this huge logging truck almost ran me over. It ran me literally off the road. If I didn't do that he probably would have hit me.

[1065] Wayne Yahey testified that the presence of road monitors deters members from accessing the places they used to harvest, and is understood as an exclusionary sign – that the lands are being used by others.

> … the traffic will only increase… as there's more development there the traffic obviously increased a lot. … where they had road monitors on these roads.
>
> Road monitors are people from the industry that stop you if you're on that road, and they ask you if you have … a truck radio and what are you doing on that road.
>
> And based on those factors, a lot of people from my community, especially the elders that go back into their trapline, when the road monitors – they call them road cops from industry – stop them, and then they will have no radio and then they will tell them that they have to leave that area. And most of these elders don't understand that, that they have to call the kilometres because the road is so busy. So every 2 kilometres you would have to call on the radio, saying your whereabouts on that road.
>
> So when they tell the elders that, and the elders, they come back to us and they are pretty frustrated and obviously mad and discouraged, they said that's my trapline area. That's where I grew up. That's where I was born. And these people tell me I can't go back there.
>
> But we have to explain to them that's industry, they have their road monitors, and then they kind of monitor. But from there they don't go back. They say I'm not going back there.
>
> That discourages them from going back because they get stopped and they told them you can't be on this road. So they kind of – they kind of get frustrated. And they said this is where I grew up, this is – this is my birthplace.
>
> … when it's busy on the road that's what they have, they have road monitors. Every vehicle that comes in, wherever it be. And if they are a hunter without a

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> road – without a radio, they would stop you and they said you have to leave because you don't have a radio.

[1066] Georgina Yahey also testified about the signs she has encountered throughout the Blueberry Claim Area, photographs of which were entered into evidence. These signs note: no shooting areas, poisonous gas areas, high vehicle traffic areas, that people are working in the area, hard hat areas, that use of radios is required and that drivers are advised to drive defensively. These kinds of signs indicate that these areas have been taken up and are not available for harvesting, and, moreover, that it would be dangerous to do so. Ms. Yahey's evidence was that when she sees such signs at areas where she used to hunt, she does not continue to hunt there anymore. For her, the signs are warnings of how dangerous and busy these areas are.

[1067] While there may not be "no trespassing" signs or fences in a clearcut, it goes without saying that, when forests have been clearcut, the land is fundamentally altered – the forests are gone. This is the central sign to Blueberry that the land has been put to a use that is visibly incompatible with the exercise of its rights.

[1068] The habitat that supported wildlife is gone, and may take decades to return in terms of supporting the biodiversity it once did. Under the Province's current approach to forestry management and allowing for the harvesting of adjacent clearcuts, all that is left are "wildlife tree patches" or "little islands" of forests, surrounded by vast cleared areas of consecutive clearcuts. Moreover, as noted by Blueberry, with a focus on converting natural forests to managed plantations, forestry companies may actively suppress regrowth by applying herbicide treatments, undertaking manual thinning, replacing the natural mixed forests with limited species crop plantations, and engaging in other silviculture practices.

[1069] Quite aside from whether a disturbance such as a clearcut legally or factually constitute lands taken up, the Court is to consider whether these are places within Blueberry's territory where members can meaningfully exercise their rights. The Province's arguments overlook this point.

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[1070] Blueberry members repeatedly referred to the “damage” done by clearcutting. They testified that clearcuts left to regenerate are, for many years, virtually impassable for moose, because the deciduous trees grow in so thick. As a result, moose are largely gone from clearcuts.

[1071] The members’ evidence summarized in these reasons indicates that Blueberry members do not hunt in clearcuts. With both the forests and wildlife largely gone, this is not surprising. While a member may opportunistically shoot a moose by the side of the road, this was not part of their traditional way of life.

[1072] On this point, I do not agree that Blueberry did not canvass the community for evidence of the collective exercise of treaty rights. The Province appears to seek to draw an inference or imply that if Blueberry had done so, evidence of the regular exercise of treaty rights would have been present. This inference or implication is without foundation.

[1073] The Province did not pose the question of why more Blueberry members did not testify to any of the witnesses; several of the witnesses, on account of their leadership positions, could have answered that question. Members of Blueberry testified about their ability to exercise treaty rights in previous times and in the current context. Those members included skilled hunters and generally appeared to represent a broad section of the membership.

[1074] When members have returned to important hunting or trapping places only to find them clearcut, they experience a sense of loss. These are not places where they then continue to exercise their rights. As Wayne Yahey testified:

> …Other areas were being developed heavy. So it’s kind of like these other areas were being – there was major development in terms of logging. So that kind of – when there’s areas like that to the Dane-zaa people, when there’s heavy development in an area like that, we don’t frequent those – we don’t go there. It’s like I said, it makes them angry, it makes them hurt.
>
> They don’t want to go see a place where they remember it was a special place at one time and when they go back there, it just bothers them. They don’t want to go back there when there’s that development.

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[1075] From Blueberry's perspective these disturbances are areas where they cannot exercise their rights in a meaningful way. On closer examination, it is clear that overall while a minor disturbance may not have an impact and therefore be a taking up, it must be recalled that this is a cumulative impacts case, and the combination of these disturbances has created the adverse impact on treaty rights argued by Blueberry. The Province's argument that not all disturbances constitute a taking up as Blueberry members can still exercise their treaty rights in places such as clearcuts is without merit.

[1076] In view of all of this, I have concluded that, the landscape over which Blueberry is seeking to exercise its treaty rights has been significantly impacted by industrial development. As reflected in the 2016 Atlas and the Regional Strategic Environmental Assessment disturbance data from 2018, 73% to 85% of the Blueberry Claim Area is within 250 metres of a disturbance, and between 84% to 91% of the Blueberry Claim area is within 500 metres of a disturbance.

[1077] That scale, even give or take a percent or more, is fundamentally not what was agreed to at Treaty. The promise was not to interfere with the exercise of treaty rights. As Blueberry has argued, that is both a freedom "from" and a freedom "to" and it requires a certain level of proactive protection. Blueberry needs places to exercise its rights and an opportunity to harvest healthy wildlife. These conditions are not being met in this landscape where, according to 2018 data, over 90% of the Blueberry Claim Area is within 500 metres of a disturbance.

G. Blueberry Members' Ability to Exercise Treaty Rights

1. Introduction

[1078] As I have noted, this is a novel case. Aboriginal and treaty rights, and the infringement of these rights, have often been considered in the context of regulatory prosecutions (*Sparrow*; *Van der Peet*; *Badger*). The applicable tests have been developed in that setting. To date, the cases in which Indigenous people have

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alleged infringements of their Aboriginal and treaty rights have focussed on single authorizations or specific provisions in statutes and regulations.

[1079] In this case, Blueberry alleges that the cumulative impacts from a range of provincially authorized activities, projects and developments associated with oil and gas, forestry, mining, hydroelectric infrastructure, agricultural clearing and other activities (which I refer to here as industrial development), within and adjacent to their traditional territory have resulted in significant adverse impacts on the meaningful exercise of their treaty rights.

[1080] Despite these disturbances in their territory, the Province has argued that there is no infringement or breach of the Treaty because Blueberry members continue to exercise their treaty rights in a meaningful way both inside and outside the Blueberry Claim Area. In support of this proposition, the Province draws the Court's attention to specific evidence given by Chief Marvin Yahey in examination for discovery and by Blueberry members in direct and cross-examination. This evidence, it says, confirms the members' ability to continue to meaningfully hunt, trap, fish, and gather and to pass these skills and knowledge on to younger generations. The Province argues strongly that this specific evidence counters Blueberry's overly broad statements that members are unable to hunt, trap and fish and that their rights have been infringed.

[1081] In addition, the Province points out that Blueberry decided not to call some of its most successful hunters and trappers as witnesses at trial. The Province says the Court, therefore, has only selective and individualistic evidence from seven members about the exercise of treaty rights. Nor did Blueberry survey its members or update the study done by Mr. Brody in the early 1980s to provide the Court with evidence of where and how treaty rights are being exercised today. The Province also argues that Blueberry has focussed on difficulties in hunting moose and caribou, while overlooking other species on which Blueberry continues to rely such as deer, elk, buffalo, sheep, lynx and beaver.

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[1082] The Province also suggests that if Blueberry members are hunting, trapping or fishing less frequently or successfully than they used to, this is because of community dynamics and personal decisions or is a matter of perception, and is not an infringement. The Province suggests that many of Blueberry's most successful hunters are now too old to hunt or have died, that members don't have time to hunt, and that the younger generation is more interested in other activities. As for trapping, the Province suggests that members are trapping less as the market for furs has dropped.

[1083] The Province recognizes that hunting, trapping and fishing may be more difficult today, but it emphasizes that the Treaty does not guarantee that Blueberry members will have success in hunting, fishing or trapping. In any event, the Province says that members are still able to carry out what is important to them, and that their success rates (for example, an estimated 25% success rate in moose hunting) are the same as they were in the 1960s.

2. Province's Appendices 1 and 2

[1084] The specific evidence relied on by the Province, which it says rebuts Blueberry's broad arguments about infringement and the inability to exercise treaty rights, is summarized in Appendices 1 and 2 of the Province's final written argument.

[1085] Appendix 1 is a compendium of some of the evidence given by Blueberry members in direct and cross-examination regarding their activities on the land. The Province's cross-examination of the Blueberry members who testified at trial was largely focussed on interviews that five of the witnesses had done for knowledge and use studies (also sometimes referred to as traditional use studies) relating to particular projects. In *Yahey v. British Columbia*, 2018 BCSC 123, I ruled that transcripts of these interviews should be disclosed, as they were pertinent and probative. Appendix 1 also includes information from the examination for discovery of Chief Marvin Yahey, who did not testify at trial. Certain portions of that examination of discovery were, however, read into the record.

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[1086] The information included in Appendix 1 is organized on a year-by-year basis and indicates that Blueberry members participated in the following activities:

a) 2019: picking berries; attending cultural events including culture camps; fishing at Billy's Hole at Pink Mountain and along the Peace River; hunting for moose in and around the Graham River, Sikanni River, Pink Mountain, Alaska Highway, Lily Lake, Carbon Lake, and Butler Ridge; hunting elk at Pink Mountain; eating moose every day; observing caribou near Marion Lake Pass; and, teaching skills to younger generations;

b) 2018: picking berries around the Tommy Lakes and Fort St. John areas; observing moose at Inga Lake; hunting sheep; fishing at Billy's Fishing Hole; and, trapping at the Yahey family trapline;

c) 2017: hunting moose and sheep, and trapping lynx and fisher at Pink Mountain; berry picking, hunting and trapping at Tommy Lakes; berry picking at Lily Lake and in and around Fort St. John; attending culture camp; and, carrying out spiritual practices at the Dancing Grounds;

d) 2016: visiting popular fishing locations near Sikanni River falls; observing beaver dams on the Beatton River; noticing signs of moose, elk and buffalo at Pink Mountain; hunting deer at Pink Mountain and Farrell Creek; hunting deer and elk around Lily Lake and the Beatton River; hunting sheep at Rocky Creek Pass (west of Pink Mountain); collecting medicinal plants along the Beatton River; camping near the Graham River, Carbon Lake and Mile 5 of the Beatton Airport Road; cutting a trail near Mile 5; drinking from a spring at the Dancing Grounds; attending culture camps; and, teaching skills to younger generations;

e) 2015: camping and hunting moose in the Beatton area; hunting elk and deer along the Beatton River Road near Mile 73, Butler Ridge, Beryl Prairie, and Farrell Creek; hunting moose northeast of Chetwynd, west of Hudson's Hope, north of the Williston Reservoir, Addick Creek Road, and

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Umbach; hunting sheep and elk west of Pink Mountain; noticing mineral licks in the Umbach area; and, teaching skills to younger generations;

f) 2014: hunting buffalo, elk, moose and sheep in the Pink Mountain area; observing caribou west of Pink Mountain Ranch; hunting deer southwest of Fort St John; hunting moose near Inga Lake, north of Fort St. John, towards the Beatton River, and south of Lily Lake; hunting deer near the Reserve; hunting sheep and moose at Butler Ridge; visiting the Dancing Grounds for spiritual sustenance and camping; fishing along Pink Mountain Road, the Halfway River, McQue Flats, and Dunlevy Inlet.

g) 2013: camping and fishing at the Chowade River and Graham River; and, noticing good habitat for moose and other wildlife west of Chetwynd, around Beattie Peaks and Carbon Creek;

h) 2012: picking berries near Carbon Lake and near Pink Mountain; camping in the Sukunka River area; fishing southeast of Chetwynd; hunting moose north of Lily Lake; hunting in the Halfway River Valley; hunting moose along a pipeline right of way of the Beaton River Road;

i) 2011: hunting moose and elk in the Hudson's Hope and Halfway River areas up to Pink Mountain; hunting sheep and elk in the Sikanni River area; hunting elk near the Reserve; hunting elk at Pink Mountain; hunting moose at Tommy Lakes; teaching skills to younger generations; attending culture camp at Pink Mountain; and,

j) 2008-2010: camping in the Addick Creek area and observing signs of moose and mineral licks; hunting moose in the Wolfe/Davis trapline area; fishing near Hudson's Hope and on the Halfway River; hunting and berry picking in cutblocks; camping, fishing and berry picking in the Monkman Park area; camping on the Sikanni River area and observing mineral licks in this area.

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[1087] In addition, the Province has prepared Appendix 2, which it describes as a summary of the evidence given by members about their ongoing and continued use of areas inside and outside the Blueberry Claim Area. Appendix 2 is more detailed than Appendix 1. It categorizes the evidence regarding hunting, trapping, fishing, camping, gathering, and spiritual activities into the areas where these activities took place both within and outside the Blueberry Claim Area, and appends a map. Appendix 2 points to evidence of Blueberry members exercising their treaty rights in the following places:

a) Central or core areas, including the Dancing Grounds, Beatton River, Aitken Creek, Inga Lake, Prespatou, Wonowon, Mile 5;

b) Northwest areas, including Pink Mountain, Lily Lake, Sikanni Chief River, Upper Halfway River, McQue Flats;

c) Northeast areas, including the Tommy Lakes area and various traplines;

d) Southeast areas, including Fort St. John and Charlie Lake;

e) Southwest areas, including the Peace River, Butler Ridge, Dunlevy Creek, Farrell Creek, and Cameron Lake; and,

f) Areas outside the Blueberry Claim Area, mostly south and west of the Blueberry Claim Area.

[1088] Much of what is included in these appendices is information that was provided by Blueberry members for the purposes of preparing traditional use studies relating to various proposed pipeline projects. These studies are often completed as part of the consultation process, as a means of providing further information about a First Nation's use of an area within a project's footprint, including how frequently an area is used, and the importance of the area to the First Nation.

[1089] When consulting with Blueberry about projects that are proposed for a location within or adjacent to its traditional territory, the Province will often solicit such information and use it to inform the scope of the duty to consult. See, for

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example, Mr. Recknell's May 26, 2014 (discussed earlier in these reasons) regarding consultation area boundaries, where he noted that "[i]nformation about current use, including how frequently an area is used and whether there are any unique or special characteristics of the area, will also inform the Province's scope of the duty to consult in Area A."

[1090] The purpose of putting forward evidence of First Nation's knowledge and use is to show the decision-maker the importance of the area to the First Nation, to attract a deeper level of consultation, to have meaningful discussions about the project and how to avoid impacts on the exercise of rights, and to potentially reach agreement or accommodation in relation to the proposed project.

[1091] It is therefore not surprising that Appendices 1 and 2 read as an inventory of activities undertaken by certain Blueberry members inside and outside the Blueberry Claim Area over the last approximately 10 years. The witnesses were responding to questions about when and where they had hunted, trapped, fished, camped and undertaken other cultural activities over the years.

[1092] Notably, neither Appendix 1 nor Appendix 2 refers to the multitude of evidence given by Blueberry members about the difficulties they have experienced in trying to exercise their rights to hunt, trap or fish; the observations they have made about impacts or changes to the landscape and wildlife; the significance of any of these changes on their way of life; their concerns about potential future impacts; and, their general sense of loss.

3. Analysis and Conclusions

[1093] Blueberry has the burden of proving, on a balance of probabilities, the nature of its treaty rights, and that they have been infringed.

[1094] The civil standard of balance of probabilities has been described as proof by a preponderance of probability. The application of the standard will depend on the nature of the case. In *Mitchell*, Chief Justice McLachlin stated that "…[C]laims must

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be proven on the basis of cogent evidence establishing their validity on the balance of probabilities. Sparse, doubtful and equivocal evidence cannot serve as the foundation for a successful claim" (at para. 51). Chief Justice McLachlin went on to note that indisputable evidence is not required to establish an Aboriginal right, but neither should the claim be established on the basis of evidence that is inevitably scarce (at para. 52).

[1095] The Supreme Court of Canada has also recognized that, in Aboriginal and treaty rights cases, a sensitive application of evidentiary principles is needed, in order to take into account the difficulties of proof of historical facts (*Simon* at para 41). In *Sparrow*, the Court reasoned it was "crucial to be sensitive to the aboriginal perspective itself on the meaning of the rights at stake" (at 1078). In *Delgamuukw*, Chief Justice Lamer emphasized that Aboriginal rights are *sui generis* and "demand a unique approach to the treatment of evidence which accords due weight to the perspective of aboriginal peoples" (at paras. 82, 84).

[1096] These statements about evidence, perspective, and weight relate primarily to the determination of the right, but are also relevant to the court's determination of infringement. Giving appropriate weight to the evidence given by Blueberry members about the impacts to the exercise of their rights is part of being sensitive to Blueberry's perspective on the "meaning of the rights at stake."

[1097] I am cognizant that Blueberry members have provided evidence that they continue to hunt, fish and trap, and have spoken about where, when and how they do these activities. As dots on a map, these specific instances of Blueberry members hunting moose, trapping lynx, fishing or picking berries may seem to paint a picture that treaty rights can and are being exercised, and that by virtue of this, their exercise must be meaningful. But it is not the whole picture.

[1098] The Province has highlighted only one aspect of the evidence given by Blueberry members about the exercise of their rights. What it has chosen not to

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highlight is the evidence provided by those same members about the impacts and loss they are already experiencing.

[1099] I am mindful of the consistent themes echoing through each of the witnesses' testimony. They are not able to exercise their rights as they used to. They cannot access the preferred hunting, trapping and fishing places within the core of their territory, and have to travel further from their homes and even to areas outside of the Blueberry Claim Area to find signs of wildlife. The habitat has been fragmented, polluted, and in some cases has disappeared. The wildlife are not as healthy or abundant. They do not have peaceful enjoyment on their traplines or in their hunting areas, as they smell the sour gas and hear the drones of oil and gas infrastructure. They do not feel safe or welcome in their territory. I am also cognizant that the evidence given by Blueberry members is supported by and reflected in scientific and technical data and maps which indicates the level of disturbance within the Blueberry Claim Area.

[1100] The evidence on these points is not just of a general nature, as the Province argues. Witnesses, including Georgina Yahey and Wayne Yahey, provided specific examples of finding that areas where they used to collect medicinal or other plants had been cleared, and needing to look for other places where they could harvest these important items. They and other witnesses testified about difficulties in accessing hunting and trapping places in several areas, including near the Reserve, Aitken Creek, Mile 98 and the Beatton Airport Road, because of development, forestry, oil and gas infrastructure, and fenced private lands. Wayne Yahey spoke about returning to the Yahey trapline to find it almost entirely clearcut, and being able to see from one end of the trapline to the other, with no forests around it. Raymond Appaw spoke about not being able to fish for suckers in Charlie Lake, as it has essentially been turned into a sewer.

[1101] Kayden Pyle and Mr. Yahey testified about how they and Blueberry elders felt unwelcome in their territory. Witnesses testified about having difficulty finding safe

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places to hunt, and being concerned about the potential of hitting oil and gas infrastructure.

[1102] Jerry Davis and Ms. Yahey testified about no longer being able to drink the water from the creeks, or which they used to dig from muskeg. Witnesses, including Norma Pyle and Kayden Pyle, testified about seeing fewer moose tracks and more clearcuts. They spoke about the smell of sour gas and the drone of compressors and other oil and gas infrastructure which affects and their peaceful enjoyment. They spoke about moose licks being destroyed by vehicles or development, or drying up. While the Province maintains that one of the moose licks at issue is now restored, and brought evidence and photos to reflect that, its destruction had both an emotional and a direct and significant effect on hunting rights for some time.

[1103] All these specific incidences of impacts add depth to what Blueberry members are experiencing – it qualifies their loss – and supports Blueberry's allegations that their rights have been infringed.

[1104] Moreover, the inventory included in the Province's Appendices 1 and 2 also supports Blueberry's allegations of infringement, as it is clear that much of the hunting and fishing is occurring outside of the core territory, in and around Pink Mountain, and also beyond the Blueberry Claim Area.

[1105] Blueberry has not alleged that members no longer hunt, trap, fish or gather within their traditional territories; nor do they need to show that they have ceased exercising their treaty rights in order to make out their infringement claim. The allegation is that their treaty rights have been infringed because they can no longer meaningfully exercise their treaty rights as their way of life has been significantly diminished.

[1106] The evidence is that it is harder to hunt, trap, fish and gather as there are fewer places to do so, fewer animals, and more disturbances; and, yet Blueberry members do still hunt, trap, fish and gather. This does not mean that the impacts are not real or have not been proven. Rather, this shows that Blueberry members are

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trying, as best they can, to continue their way of life – to help elders get moose meat, to use the traplines that have been in their families for generations, and to show their children and grandchildren how to camp, hunt, trap and fish, even if they cannot do so at the same places where they were first taught.

[1107] The law does not require that Indigenous people stop trying to exercise their treaty rights. Rather, Blueberry members' ongoing efforts to exercise treaty rights shows just how important these rights are to them. Even though there are fewer opportunities to engage in these activities in the core of their territory, they continue to try to do so and are willing to go further afield to hunt and to search out the areas for peaceful enjoyment.

[1108] I do not accept the Province's argument that Blueberry's lack of success is due to personal circumstances, the fact that people are working as part of the wage economy and have less opportunities to hunt and trap, or that the younger generation is not interested in continuing this way of life. Mr. Brody's study in the late 1970s and 1980s indicated that members were participating in the wage economy then too, and were hunting on evenings, weekends and during breaks. The same is true now.

[1109] As for youth being less interested in these pursuits, Kayden Pyle, the youngest Blueberry member who testified, spoke eloquently about how he truly feels like himself when he is on the land, and about the importance to him of continuing to hunt and fish as his parents and grandparents did. If other youth are not inclined to take up these pursuits it is likely, as Jerry Davis testified, because the state of the landscape and wildlife is dissuading them. They watch their family members scout for wildlife and not find any, and are losing hope and interest.

[1110] While, as noted by the Province, Kayden Pyle and Jerry Davis each shot their first moose at around the same age and in the same approximate area, the similarities in their experiences on the land as young people – over 55 years apart – end there. Mr. Davis, in particular, testified at length about how the land he once

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knew has been “destroyed” and how he worries about the opportunities that will exist for younger generations.

[1111] It is not simply a quantitative analysis of the number of times members hunt, fish or trap, but about the quality and meaning of Blueberry’s experience on the lands. The Province’s arguments overlook this. For example, the Province points to Chief Yahey’s evidence in examination for discovery where he stated that there was no longer peaceful enjoyment on 80% of the Yahey trapline area because of forestry and oil and gas activities. The Province says this means that 20% of the Yahey trapline retains peaceful enjoyment.

[1112] Assessing and weighing the evidence to make a determination of whether there is a *prima facie* infringement is not a mathematical exercise. As Blueberry said in oral argument, it is not about starting at zero (i.e., no exercise of treaty rights) and counting up to find instances of the rights being exercised.

[1113] I must consider the evidence as a whole, and consider the Indigenous perspective. I do not accept that the only conclusion to be drawn from the specific instances of the exercise of rights referred to by the Province is that the rights have not been infringed. The members’ evidence of loss, together with the disturbance data and evidence about the status of wildlife populations in the Blueberry Claim Area, supports a finding that there has been a significant and meaningful diminishment in the Plaintiffs’ way of life, and that their treaty rights to hunt, trap and fish have been infringed.

[1114] The eloquent and persuasive evidence of the Blueberry members called in this case considered alongside the scientific and technical evidence, has provided more than a sufficient base from which the Court can rule on the scope of the rights and impacts to them.

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H. Conclusions in Brief

[1115] An important part of my task is to consider whether "the time [has come]" – that is, whether, for Blueberry, no meaningful rights to hunt, fish or trap remain over its traditional territories (*Mikisew* at para. 48).

[1116] On the basis of all this evidence and my findings, I conclude that the time has come, the tipping point has been reached, and that Blueberry's treaty rights (in particular their rights to meaningfully hunt, fish and trap within the Blueberry Claim Area) have been significantly and meaningfully diminished when viewed within the way of life in which these rights are grounded.

[1117] I will not repeat my findings, which have been set out in detail earlier, but I have assessed meaningfulness, along with my findings in this context and with respect, particularly, to Blueberry's way of life. In view of my findings with respect to the state of disturbance in the Blueberry Claim Area, the status of the wildlife, Blueberry members' testimony and other evidence about their ability to exercise their treaty rights within a meaningful mode of life, I conclude that the Treaty's promise has been infringed. I note in brief as follows:

1. Way of Life

[1118] Blueberry's Dane-zaa way of life is connected to and dependent on the land and wildlife. Blueberry members have, for centuries, moved throughout the territory on a seasonal basis to take advantage of the available resources. They continue this practice today. Blueberry members plan and schedule hunting, trapping, fishing and gathering activities to ensure a steady supply of game, fish and plant resources, and to allow areas to rejuvenate. Members have intimate knowledge of the areas within the territory and their resource potential.

[1119] While some change may be expected, this way of life depends on the existence of healthy mature forests, a variety of wildlife habitats, fresh clean water, and access to these places. It requires a relatively stable environment, so that the

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knowledge held by Blueberry members about the places to hunt, fish and trap stays relevant and applicable.

2. Disturbance

[1120] Over the last decade or more, Blueberry members have had to exercise their rights over a landscape that is becoming increasingly disturbed from a range of industrial development, including forestry, oil and gas, mining, hydro-electric infrastructure, land clearing, roads and other impacts.

[1121] The “core” of the Blueberry Claim Area has, since the late 1990s, been zoned as an enhanced resource development zone, available for high intensity development. The Province has, accordingly, been encouraging investments and enhancements in resource development in this area. Both forestry and oil and gas development has focussed on this core area.

[1122] By 2016, 73% of the Blueberry Claim Area was within 250 metres of an industrial disturbance. By 2018, disturbance had increased such that 85% of the Blueberry Claim Area was within 250 metres of an industrial disturbance. Disturbance has a direct impact on the sustainability of wildlife and quality of life for Blueberry members. This includes both the loss of habitat and the increasing anthropogenic presence which impacts on Blueberry’s ability to hunt, fish and trap.

[1123] As but one striking example, there is less than 14% intact forest landscape within the Blueberry Claim Area.

3. Wildlife

[1124] The wildlife Blueberry hunts and traps including moose, caribou, and smaller furbearing species, depend on a mix of habitat – contiguous forested areas, old-growth forests as well as younger forests and shrublands. The wildlife are all affected by disturbances to the land.

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[1125] Moose populations in the central part of the Blueberry Claim Area have declined, and habitat disturbance in the form of anthropogenic disturbance, including industrial development, is the likely cause of that decline.

[1126] Caribou populations in the Blueberry Claim Area have also declined with certain populations at risk of extirpation. Anthropogenic disturbance is a significant cause of that decline.

[1127] Populations of smaller fur bearing species such as marten and fisher have declined in the Blueberry Claim Area, likely due to forestry activities.

[1128] As members of Blueberry testified, the state of these wildlife populations, along with the state of the land, is significantly diminishing Blueberry's ability to exercise its hunting and trapping rights in its territory in a manner consistent with its way of life.

4. Infringement

[1129] The evidence from Blueberry members about the loss of their ability to exercise their rights as part of their way of life, together with the evidence about the disturbance of the land and the status of wildlife populations in the Blueberry Claim Area, leads me to conclude that the time has come that Blueberry can no longer meaningfully exercise its treaty rights in the Blueberry Claim Area. Their rights to hunt, fish and trap within the Blueberry Claim Area have been significantly and meaningfully diminished when viewed within the context of the way of life in which these rights are grounded.

[1130] Their way of life which is dependant on healthy mature forests, a variety of wildlife habitats, fresh clean water and access to these places are threatened by the level of disturbance from industrial development in the Blueberry Claim Area. Their ability to hunt, fish and trap in this context is also threatened.

[1131] I conclude due to the level of "taking up" caused by Provincially authorized activities, including resulting disturbance, the impact on the wildlife, and the

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evidence of Blueberry members that there are not sufficient and appropriate lands in Blueberry's traditional territories to permit the meaningful exercise of their Treaty rights.

[1132] I conclude therefore that Blueberry members' rights to hunt, fish and trap as part of their way of life have been significantly and meaningfully diminished. Blueberry's rights under Treaty 8 have therefore been infringed.

[1133] I now turn to the Crown's obligations with respect to Treaty 8, and whether the Province has fulfilled those obligations. I will briefly reiterate the jurisprudence and then deal with the specifics of the allegations concerning the Province's land management and natural resources regulatory framework.

VIII. HAS THE PROVINCE DILIGENTLY IMPLEMENTED THE TREATY?

A. Overview

[1134] In addition to seeking a declaration that the Province has infringed some or all of its treaty rights, Blueberry is seeking declarations that the Province:

a) breached its obligations to Blueberry under the Treaty; and

b) breached its fiduciary obligations to Blueberry.

[1135] In particular, Blueberry argues that the Province breached its obligations under the Treaty by failing to diligently implement the Treaty's promise to protect Blueberry's rights and way of life from the encroaching cumulative impacts of industrial development. These arguments are based on the honour of the Crown and (to a lesser extent) the Crown's fiduciary duty.

[1136] As I discussed earlier, the honour of the Crown is a foundational principle of Aboriginal law and governs the relationship between the Crown and Indigenous peoples (*Mikisew* 2018, at paras. 21-22). The principle of the honour of the Crown is understood as arising from the Crown's assertion of sovereignty and *de facto* control over lands and resources in the face of pre-existing Aboriginal sovereignty. This

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tension of conflicting sovereignties has created a special relationship between the Crown and Indigenous peoples that requires the Crown to act honourably in all its dealings.

[1137] The principle of the honour of the Crown was referred to in jurisprudence dealing with the relationship between the Crown and Indigenous peoples as far back as 1895. In *Province of Ontario v. The Dominion of Canada and Province of Quebec*, [1895] 25 S.C.R. 434 – a case concerning the Robinson Huron Treaty and the Robinson Superior Treaty – Justice Gwynne of the Supreme Court of Canada (writing in dissent) evoked the concept of the honour of the Crown to explain the Crown's approach to treaty making and interpretation. He noted that when entering into treaties with Indigenous peoples dealing with the surrender of their lands, the terms to be performed by the Crown "have always been regarded as involving a trust graciously assumed by the Crown to the fulfillment of which with the Indians the faith and honour of the Crown is pledged, and which trust has always been most faithfully fulfilled as a treaty obligation of the Crown." The idea that the honour of the Crown is pledged to the fulfilment of its obligations to Indigenous peoples has been repeated and accepted by the Supreme Court of Canada, including in *Mikisew*.

[1138] The principle of the honour of the Crown underpins and is relevant to all aspects of the Crown's relationship with Indigenous peoples including: the discharge of its fiduciary duty when the Crown assumes discretionary control over specific or cognizable Aboriginal interests; the negotiation, interpretation and implementation of treaties; the duty to consult and accommodate; and the justification of infringements of Aboriginal and treaty rights and title.

1. Review of Jurisprudence

[1139] In the paragraphs below, I review some of the key jurisprudence on both the honour of the Crown and the Crown's fiduciary obligations. This is important backdrop for Blueberry's arguments that evoke these concepts.

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[1140] In *Guerin v. The Queen*, [1984] 2 S.C.R. 335 [*Guerin*], the Supreme Court of Canada recognized that while the Crown is not normally viewed as a fiduciary, there are ways the Crown can become a fiduciary in its *sui generis* relationship with Indigenous peoples. *Guerin* involved the surrender of a portion of Musqueam's reserve lands. There, the Court found that Musqueam had a pre-existing independent legal interest in its reserve lands, and that s. 18 of the *Indian Act* conferred on the Crown a broad discretion to deal with surrendered reserve lands. Therefore, when the Band surrendered its interest in the reserve to the Crown, this gave rise to fiduciary obligations on the Crown in its dealing with the land on the Band's behalf.

[1141] In the context of a fiduciary duty arising from the Band's pre-existing interest in its land and s. 18 of the *Indian Act*, Justice Wilson, in concurring reasons, wrote: "…the Crown has a responsibility to protect that interest and make sure that any purpose to which reserve land is put will not interfere with it…," and that the Crown held the lands subject to a fiduciary obligation "to protect and preserve the Band's interest from invasion or destruction."

[1142] The fiduciary relationship was subsequently discussed in *Sparrow*, where the Court set out a general guiding principle for s. 35(1) of the *Constitution Act, 1982*, namely, that government has the responsibility to act in a fiduciary capacity with respect to Indigenous peoples. The Court went on to frame the test for the justification of infringements of Aboriginal rights to take into account that "federal power must be reconciled with federal duty." One of the considerations at the justification stage is whether the infringing legislation or action is consistent with the honour of the Crown and the responsibility of the government vis-à-vis Indigenous peoples.

[1143] In *Wewaykum*, the Supreme Court of Canada again considered the fiduciary relationship between the Crown and Indigenous people and when fiduciary duties arise. The interest at issue here was not s. 35 Aboriginal rights (as in *Sparrow*) or an existing reserve to which either Band had pre-existing legal interests (as in *Guerin*),

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but rather lands subject to the reserve creation process in which the Bands did not have pre-existing legal interests (at para. 77).

[1144] Justice Binnie, writing for the Court, reviewed the genesis of the Crown's fiduciary relationship with Indigenous peoples.

> [78] The *Guerin* concept of a *sui generis* fiduciary duty was expanded in *R. v. Sparrow*, [1990] 1 S.C.R. 1075, to include protection of the aboriginal people's pre-existing and still existing aboriginal and treaty rights within s. 35 of the *Constitution Act, 1982*. In that regard, it was said at p. 1108:
>
> > The *sui generis* nature of Indian title, and the *historic powers and responsibility assumed by the Crown* constituted the source of such a fiduciary obligation. In our opinion, *Guerin*, together with *R. v. Taylor and Williams* (1981), 34 O.R. (2d) 360, ground a general guiding principle for s. 35(1). That is, the Government has the responsibility to act in a fiduciary capacity with respect to aboriginal peoples. *The relationship between the Government and aboriginals is trust-like, rather than adversarial, and contemporary recognition and affirmation of aboriginal rights must be defined in light of this historic relationship.* [Emphasis added.]
>
> See also: *Quebec (Attorney General) v. Canada (National Energy Board)*, [1994] 1 S.C.R. 159, at p. 185.
>
> [79] The "historic powers and responsibility assumed by the Crown" in relation to Indian rights, although spoken of in *Sparrow*, at p. 1108, as a "general guiding principle for s. 35(1)", is of broader importance. All members of the Court accepted in *Ross River* that potential relief by way of fiduciary remedies is not limited to the s. 35 rights (*Sparrow*) or existing reserves (*Guerin*). The fiduciary duty, where it exists, is called into existence to facilitate supervision of the high degree of discretionary control gradually assumed by the Crown over the lives of aboriginal peoples. As Professor Slattery commented:
>
> > The sources of the general fiduciary duty do not lie, then, in a paternalistic concern to protect a "weaker" or "primitive" people, as has sometimes been suggested, but rather in the necessity of persuading native peoples, at a time when they still had considerable military capacities, that their rights would be better protected by reliance on the Crown than by self-help.
> >
> > (B. Slattery, "Understanding Aboriginal Rights" (1987), 66 *Can. Bar Rev.* 727, at p. 753)

[1145] Justice Binnie went on to observe that since *Guerin*, there had been a "flood" of fiduciary duty claims, and he clarified that the fiduciary duty imposed on the Crown "does not exist at large but in relation to specific Indian interests" (at paras. 81-83). The focus must be on the particular obligation or interest that is the subject

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matter of the dispute and whether the Crown assumed discretionary control in relation thereto sufficient to ground a fiduciary obligation (at paras. 83 and 85).

[1146] The Court recognized the Crown is no ordinary fiduciary, it "wears many hats and represents many interests, some of which cannot help but be conflicting" (at para. 96).

[1147] The concept of the honour of the Crown as a stand-alone duty was discussed in *Manitoba Metis*. In that case, the Supreme Court of Canada considered whether the federal government owed and breached fiduciary obligations to the Métis, and whether and under what circumstances a court could issue a declaration that the Crown had acted in a manner inconsistent with the honour of the Crown. In 1870, the Canadian government passed the *Manitoba Act, 1870*, S.C. 1870, c. 3. Section 31 of the *Manitoba Act* set aside 1.4 million acres of land that was to be given to Métis children. The land grant was intended to be made to give the Métis children a "head start" over the anticipated wave of settlement. Rather than implement s. 31 swiftly, the federal government's errors and inactions delayed the land distributions for approximately 10 years.

[1148] The Manitoba Metis Federation brought a claim seeking a number of declarations including that in implementing the *Manitoba Act*, the federal Crown breached its fiduciary obligations to the Métis, and failed to implement the *Manitoba Act* in a manner consistent with the honour of the Crown. Chief Justice McLachlin and Justice Karakatsanis (writing for the majority) did not find a breach of fiduciary duty, but did find that Canada failed to implement s. 31 of the *Manitoba Act* in a manner that upheld the honour of the Crown.

[1149] Chief Justice McLachlin outlined two ways for a fiduciary duty to arise. In the Aboriginal context, a fiduciary duty may arise from the Crown assuming or undertaking discretionary control over a specific or cognizable Aboriginal interest (at paras. 49, 51, referring to *Wewaykum*, *Haida* and *Guerin*). In other situations, a fiduciary duty could arise if there was an undertaking by an alleged fiduciary to act in

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the best interests of one or more alleged beneficiaries, the beneficiary was a defined person (or the beneficiaries were a class of people) vulnerable to the fiduciary's control, and the beneficiary or beneficiaries had a legal or substantial practical interest that stood to be affected by the fiduciary's exercise of discretion (at para. 50, referring to *Alberta v. Elder Advocates of Alberta Society*, 2011 SCC 24 at para. 36).

[1150] The Court held that the Crown had undertaken discretionary control of the administration of land grants, but that the Métis did not have a collective Aboriginal interest in the land, since (as found by the trial judge) they used and held the land individually (at paras. 53-59). Chief Justice McLachlin also emphasized at para. 58 that an Aboriginal interest in land giving rise to a fiduciary duty "cannot be established by treaty, or, by extension, legislation. Rather, it is predicated on historic use and occupation."

[1151] Nor did the Court find that the Métis had made out a fiduciary duty based on the second route. While s. 31 of the *Manitoba Act* showed an intention to benefit the Métis children, there was no evidence of an undertaking to act in their best interests in priority to other concerns or forsaking all other interests (at para. 62). To the contrary, the federal government was also concerned with ensuring land was available for the construction of the railway and with opening up the province for settlement.

[1152] Chief Justice McLachlin then turned to the arguments based on the honour of the Crown. At paras. 66-67 she noted the honour of the Crown:

a) arises from the Crown's assertion of sovereignty over an Aboriginal people and *de facto* control of lands and resources that were formerly in their control;

b) goes back to the *Royal Proclamation of 1763* and arises not from a paternalistic desire to protect Aboriginal people but rather from recognition of their strength;

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c) has as its ultimate purpose the reconciliation of pre-existing Aboriginal societies with the assertion of Crown sovereignty; and,

d) characterizes the special relationship between the Crown and Aboriginal peoples.

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[1153] Chief Justice McLachlin held that the honour of the Crown was engaged by an explicit obligation to an Aboriginal group that is enshrined in the Constitution and that an analogy could be drawn between such a constitutional obligation and a treaty promise (at paras. 70-71). In both cases there would be an intention to create obligations, a measure of solemnity, and promises would have been made for the overarching purpose of reconciling Aboriginal interests with Crown sovereignty.

[1154] At para. 75, the Court found that when the issue is the implementation of a constitutional obligation to an Aboriginal people, the honour of the Crown requires that the Crown: (1) takes a broad purposive approach to the interpretation of the promise; and (2) acts diligently to fulfill it. The Court recognized that this duty has arisen largely in the treaty context (at para. 79).

[1155] Because the Crown's honour is pledged to the fulfillment of its obligations, it must endeavour to ensure its obligations are fulfilled (at para. 79). It is expected to carry out the work required with due diligence, as good governance requires decisions be taken in a timely way. Not every mistake in implementation will bring dishonour; however, a persistent pattern of errors and indifference that substantially frustrates the purpose of the promise may betray the duty (at para. 82). Diligent efforts are required, even if circumstances may ultimately prevent the fulfillment of an obligation (at para. 82).

[1156] Chief Justice McLachlin held that the constitutional obligation enshrined in s. 31 of the *Manitoba Act* was a promise made to the Métis people collectively for the purpose of reconciling their interests with the Crown's claim to sovereignty, and it engaged the honour of the Crown (at paras. 91-92). The Court held that, on the facts of this case, the Crown did not act diligently to fulfill this constitutional promise. In the

result, the Court issued a declaration that the federal Crown failed to implement the land grant provision set out in s. 31 of the *Manitoba Act* in accordance with the honour of the Crown.

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[1157] In *Grassy Narrows*, the Supreme Court of Canada considered the powers and obligations on the Province of Ontario with respect to Treaty 3. The central question before the Court was whether Ontario had the power to take up lands in the Keewatin area under Treaty 3 so as to limit the Ojibway's harvesting rights under the treaty, or whether this must be done by or in cooperation with Canada (at para. 28).

[1158] Chief Justice McLachlin held that although Treaty 3 was negotiated by the federal government it was an agreement between the Ojibway and the Crown. The level of government that exercises or performs the rights and obligations under the treaty was to be determined by the division of powers in the Constitution. Accordingly, Ontario, and only Ontario, had the power to take up lands under Treaty 3 (at para. 30).

[1159] The Court went on to note that Ontario's power to take up lands was not unconditional and was subject to both the honour of the Crown and fiduciary duties, and it referred to the duty to consult prior to taking up lands as outlined in *Mikisew*:

> [50]…In exercising its jurisdiction over Treaty 3 lands, the Province of Ontario is bound by the duties attendant on the Crown. It must exercise its powers in conformity with the honour of the Crown, and is subject to the fiduciary duties that lie on the Crown in dealing with Aboriginal interests. These duties bind the *Crown*. When a *government* – be it the federal or a provincial government – exercises Crown power, the exercise of that power is burdened by the Crown obligations toward the Aboriginal people in question.
>
> [51] These duties mean that for land to be taken up under Treaty 3, the harvesting rights of the Ojibway over the land must be respected. Any taking up of the land for forestry or other purposes must meet the conditions set out by this Court in *Mikisew*. As explained by the Ontario Court of Appeal (at paras. 206-12), the Crown's right to take up lands under Treaty 3 is subject to its duty to consult and, if appropriate, accommodate First Nations' interests beforehand (*Mikisew*, at para. 56). This duty is grounded in the honour of the Crown and binds the Province of Ontario in the exercise of the Crown's powers.
>
> (emphasis in original)

[1160] I note that although the Supreme Court of Canada commented that the Crown was subject to both the honour of the Crown and its fiduciary duties, it did not expand on what, specifically, the Crown's fiduciary duties required it to do in relation to treaty rights, other than ensuring such rights were "respected." The Court noted that the Province must consult and if appropriate accommodate the First Nation before exercising the power to take up lands. The Court also recognized that if the taking up amounts to an infringement, the *Sparrow/Badger* analysis will determine if the infringement is justified (at para. 53).

[1161] The Supreme Court of Canada had occasion to consider the Crown's fiduciary obligations owed to Indigenous people again in *Williams Lake*. This case involved the review of a decision made by the Specific Claims Tribunal finding that the colonial Crown breached its fiduciary obligation to the Williams Lake Indian Band when it failed to protect the band's village lands from pre-emption by settlers, and that after 1871, the federal Crown also breached its fiduciary duty in failing to take appropriate measures to address this.

[1162] Justice Wagner (as he then was, writing for the majority) noted the need to focus on and identify with clarity the particular interest that is vulnerable to the fiduciary's discretionary control (at para. 51). He underscored that an Aboriginal interest in land giving rise to a fiduciary duty cannot be established or created by treaty or legislation, but is "predicated on historic use and occupation" (at para. 53). A pre-existing interest in land may, however, be *recognized* by treaty, legislation or policy (at paras. 68 and 81, emphasis by Wagner J.).

[1163] Justice Wagner upheld as reasonable the Tribunal's findings that the Band's substantial and practical interest in its village lands – the land it historically used and occupied – constituted a cognizable interest, and the Crown assumed discretionary control over this interest. In addition it noted as acceptable an approach that looked not only at the form or extent of the Crown's discretionary power, but also at the vulnerability of the interest (at para. 60).

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[1164] In terms of the standard of conduct required of the Crown as a fiduciary, Justice Wagner noted that the circumstances in which a fiduciary obligation arises shapes its content, and that the content varies to take into account the Crown's broader public obligations (at para. 55). This may involve a duty to act with loyalty, good faith, ordinary diligence and full disclosure in respect of the interest at stake (at paras. 46, 55). While the Crown cannot ignore the reality of its conflicting demands, those demands do not absolve it of its fiduciary duty in its efforts to reconcile them fairly (at paras. 55, 88).

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2. Blueberry's Position

[1165] Relying on *Manitoba Metis* (and, to a lesser extent, *Marshall*), Blueberry argues that the honour of the Crown gives rise to a positive obligation on the Province to implement Treaty 8. It must act to accomplish the purpose of the Treaty and of the solemn promise given, and it must do so with diligence. Blueberry argues that implementing the Treaty promise means that before the Province authorizes land uses in the areas Blueberry relies on, it must put in place measures to ensure the essential elements of the Treaty will not be violated. In other words, the Province has a positive duty to protect treaty rights, and its management of the lands and resources should reflect this.

[1166] As its grounding for this "duty to protect," Blueberry relies on Chief Justice Bauman's statement at para. 424 of *West Moberly 2020*, where he notes, *in obiter*: "It is uncontroversial that the Crown has an obligation, constitutionally enshrined, to protect Aboriginal rights both treaty and non-treaty, and to act honourably in doing so." Blueberry also points to the Alberta Court of Appeal's decision in *Fort McKay* at para. 53, where the majority recognized the open ended nature of possible obligations arising from the honour of the Crown.

[1167] Blueberry says the search to see if the Crown has honourably upheld its treaty obligations involves looking for persistent patterns of errors and indifference that frustrate the purpose of the solemn promise. Here, says Blueberry, the Province

has failed to act with diligence, or at all, to address Blueberry's concerns, protect Blueberry's treaty rights or uphold the treaty promise, with the result that the Province has breached its duty to implement the Treaty.

[1168] In particular, Blueberry says the Province has failed to:

a) develop processes to assess whether the ecological conditions in Blueberry's traditional territories are sufficient to support Blueberry's way of life;

b) develop processes to assess or manage cumulative impacts to the ecosystems in Blueberry's traditional territories and/or on their treaty rights;

c) implement a regulatory regime or structure that will take into account and protect treaty rights, and that will guide decision-making for taking up lands or granting interests to lands and resources within Treaty 8; and,

d) put in place interim measures to protect Blueberry's treaty rights while these other processes are developed.

[1169] Blueberry goes on to allege that, since none of the above measures have been developed or implemented, and since development has continued to proceed in the absence of protections for its treaty rights, the Province's approach to forestry, hydro-electric development, land use planning, agriculture, and oil and gas development breaches the Treaty and the Crown's solemn promise that Blueberry would not be interfered with in their way of life. Blueberry's argument and evidence focussed on forestry, land use policy and oil and gas development.

[1170] In addition, Blueberry argues that in certain circumstances, the Province's actions go beyond constituting a breach of its honourable obligations and constitute a breach of its fiduciary obligations, which, at a minimum, require that it act with diligence and prudence. Blueberry provided the example of the core of its territory being zoned as a high intensity forestry zone in the Sustainable Forest Management

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Plan. Blueberry said in such a situation, where the Crown is exercising discretionary control over its interests, and is taking express actions that run contrary to its treaty rights, there is a breach of the Crown's fiduciary duty.

3. Province's Position

[1171] The Province recognizes that the honour of the Crown is engaged in treaty implementation, and that it requires the Crown to act in a way that accomplishes the purposes of such treaties. It is a concept that speaks to *how* the Crown's obligations are to be fulfilled. The Province says the proper approach is to consider the Crown's conduct as a whole, in the context of the case, and ask whether it acted with diligence to pursue the fulfillment of the purposes of the obligation.

[1172] On the facts of this case, the Province says it has met its honourable requirement to manage development in a manner that preserves sufficient habitat, territory and wildlife to allow Blueberry's members to carry on their hunting, trapping and fishing mode of life. The Province denies that the Treaty has been breached, or that its honourable obligations or fiduciary duties have been breached.

[1173] The Province ties the honour of the Crown to the duty to consult, not a fiduciary duty. It argues that Blueberry is conflating the honour of the Crown that is applicable before an infringement, and the fiduciary duty that is applicable after an infringement. The Province recognizes that its right to take up land under the Treaty is not unstructured, but is bounded by the prior duty to consult imposed by the honour of the Crown. The Province says it is trying to and is engaging with Blueberry as part of collaborative processes to address their treaty rights. Many of these processes involve First Nations, local governments, and constituents and are ongoing. It emphasizes that these engagement processes are occurring prior to infringement of any rights and to avoid such infringement from occurring.

[1174] Moreover, it says there is no duty for the Province to implement regulatory policies that place Blueberry's views as the paramount views. It has no duty to implement the kind of "fettered regulatory structure" Blueberry seems to be seeking.

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The Province says that Blueberry's complaint is with the Province's policy decisions regarding the management of wildlife and natural resources.

[1175] As to the fiduciary duty, the Province emphasizes that the Crown's fiduciary duty does not exist at large, but in relation to specific interests, such as reserve lands. The Province notes that in order to attract a fiduciary duty, the First Nation must identify a "specific or cognizable Aboriginal interest" in relation to which the duty is owed. It says the interest must be a communal Aboriginal interest in land that is integral to the nature of the Aboriginal community and their relationship to the land. This interest must be predicated on historical use and occupation, and cannot be established by treaty or legislation.

[1176] The Province seems to be suggesting that in this case, Blueberry has not identified a specific or cognizable interest over which the Province has assumed discretionary control. The Province also points out that the Crown has responsibilities to the public as a whole. It is no ordinary fiduciary; it wears many hats, some of which may be conflicting.

B. Application of the Legal Principles

1. Management of Treaty Rights

[1177] In dealing with these arguments I will outline the various regulatory regimes the Province has put in place to manage oil and gas development, forestry, and wildlife, and the impacts of industrial development in the Blueberry Claim Area.

[1178] As part of that, I will consider whether the Province's regulatory regimes take into account Blueberry's constitutionally protected treaty rights, and whether the Province has acted diligently to address Blueberry's concerns about the impacts of industrial development on the exercise of their treaty rights and to implement the Treaty promise, more generally.

[1179] At the outset, I note the Province says that while Blueberry disagrees with the means by which the Province manages impacts on treaty rights in its territory, this is

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not a commission of inquiry on the Province's policy choices in managing industrial development – it is a case about Blueberry's ability to practice its treaty rights. With respect to managing impacts on treaty rights, the Province argues the Plaintiffs' submissions are technical in nature and not supported by the expert evidence on cumulative effects policy.

[1180] The Province's submission, however, essentially presupposes a finding that despite the impacts of industrial development, Blueberry members can still meaningfully exercise their treaty rights. I have concluded they cannot. There is not sufficient appropriate lands in the Plaintiff's traditional territories, in this case the Blueberry Claim area, to permit the meaningful exercise of their Treaty 8 rights. Sufficient habitat, territory and wildlife has not been preserved to allow Blueberry members to carry out their hunting, trapping, and fishing mode of life.

[1181] The Province led evidence of the primary ways they manage the impact of industrial development on treaty rights, specifically in the forestry and oil and gas sectors. Though they described this evidence as a "summary" rather than a comprehensive record, the evidence was, in fact, extensive. The Province says the evidence establishes that they did and do properly manage for impacts to treaty rights and consider cumulative impacts of development.

[1182] The Court must examine this evidence as part of the question of whether the Crown has diligently implemented the Treaty, ensuring that Blueberry can meaningfully exercise its treaty rights. The jurisprudence clearly establishes the Crown's obligation to do so.

[1183] In undertaking this exercise, the Court is not a commission of inquiry on policy choices. Rather, the Court is examining this evidence in assessing the impacts on treaty rights created by the Province's regulatory choices. Furthermore, Blueberry submits that this evidence shows a pattern of perfunctory conduct throughout the consultation/regulatory process that has contributed to the substantive problems in the Blueberry Claim Area.

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[1184] Fundamentally, Blueberry says the level of development surpasses what the Treaty contemplated, and the Province's authorization of this development has caused or contributed to Blueberry's inability to meaningfully exercise their treaty rights, which constitutes an infringement of their treaty rights.

[1185] The Province's regulatory regime controls development and impacts in the Blueberry Claim Area. Whether and how the regulatory regime considers treaty rights is an essential underpinning question as to whether the Crown has diligently implemented the Treaty. This includes whether or not there is guidance within the regulatory regime for how discretionary decisions should be made. While not every aspect of the various regulatory regimes at issues reflect or constitute a breach of the Treaty, Blueberry argues their cumulative effects do.

[1186] The purpose therefore of reviewing the regulatory regimes for oil and gas, forestry, wildlife management, and the progress towards implementing a cumulative effects framework is to consider whether the Province, through its regulatory regimes, has authorized this level of industrial development and has therefore contributed to Blueberry's inability to meaningfully exercise its treaty rights, and breached the Treaty.

[1187] While I cannot comment on or consider that entire complex network of statutes, regulations, rules and policies, I will deal with the primary components of the regulatory regime and focus on the areas I find to be most significant in this case. I also note while there may be other causes besides the regulating and permitting of industrial development that impact the Blueberry Claim Area, it is sufficient in this case that the Plaintiffs prove that the permitting of these developments and the regulatory regime's lack of enforceable mechanisms to take into account the cumulative impacts on treaty rights has meaningfully diminished the exercise of treaty rights in the Blueberry Claim Area.

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[1188] Finally, I note this is not a static environment, with changes to both the environment and the regulatory regime. The Court's task, however, is to consider the evidence before it in the context of this claim.

[1189] I now turn to the task.

C. Regulatory Regime for Oil and Gas Development

1. Overview

[1190] Oil and gas development in BC is largely concentrated in the northeast of the province. The majority of the province's petroleum resources are gas, rather than oil. There are several shale gas basins, one of which – the Montney Play, which is most active – overlaps the Blueberry Claim Area. As reflected in a Provincial government map overlaying the Oil and Gas Commission North Montney Regional Field with the Wildlife Management Units, the Montney overlies Wildlife Management Units 7-34, 7-44, and 7-45. These units represent the core of the Blueberry Claim Area.

[1191] Historically, most petroleum development was "conventional." Conventional development uses a single vertical well to target a discrete "pool" of oil or gas. Development typically requires numerous well pads separated by 500 to 1,500 metres, with one vertical well per pad.

[1192] Many new gas wells are now "unconventional." Unconventional development targets vast subsurface areas – shale basins – that are less porous than conventional oil and gas pools. Unconventional wells are drilled horizontally; the well pads can be spaced several kilometres apart, and a single pad can accommodate up to 40 wells. Unconventional development theoretically results in less surface disturbance compared to conventional development.

[1193] Before oil and gas development can occur a company must obtain:

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a) an oil and gas tenure from the Tenure and Geoscience Branch ("Tenure Branch") at the Ministry of Energy, Mines and Petroleum Resources ("Ministry of Energy and Mines"); and,

b) a permit from the BC Oil and Gas Commission.

[1194] A tenure conveys the rights to subsurface resources and is granted over a unit of land called a parcel. Permits issued by the BC Oil and Gas Commission allow holders to carry out the surface activities necessary to make use of those subsurface tenure rights – for example, clearing seismic lines for exploration, or surface drilling activities.

[1195] The Province contends that it adequately considers treaty rights at both stages. Conversely, Blueberry argues that the regulatory framework is inadequate. It submits that the scheme is ill-suited to the consideration or accommodation of treaty rights. Further, Blueberry argues that the Province's pattern of conduct and the results of these processes prove that the scheme essentially ignores both treaty rights and cumulative effects.

[1196] For the reasons that follow, I agree with the Plaintiffs.

2. Conclusions in Brief

[1197] Although the Province has identified certain measures that it says take into account treaty rights and/or cumulative effects, a review and consideration of the evidence reflects this is not the case. I find there is a significant disconnect between the tenuring and permitting decision makers, such that each believes the other considers treaty rights and/or cumulative effects to a greater degree than they actually do. This disconnect has created a gap through which Blueberry's rights have fallen.

[1198] What tools the Province does have in place – including tenure caveats, permit conditions and the Area Based Analysis as presently structured and used by the Oil and Gas Commission – are largely ineffective. Other tools, such as Resource

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Review Areas and deferrals, are temporary and essentially have no long-term legal effect. They only prevent disposition of tenures on a temporary basis. The Province has also refused to designate “No [tenure] Disposition Areas” in areas where the demand for tenure is highest, and which are most critical to Blueberry. The Province has made some designations in areas that have little demand for activity, and therefore this designation has little effect.

[1199] Moreover, in reality, the administration and application of these measures, in particular the application process of both agencies, does not take into account the needs and ability of First Nations to respond to what can only be described as being, at times, an avalanche of applications and supporting material.

[1200] In this context, the agencies demonstrate what can only be characterized as a pattern of perfunctory conduct, having constantly responded to Blueberry with identical template letters that either refer Blueberry to different organizations or processes or insist that the tools – and the Oil and Gas Commission’s Area Based Analysis tool in particular – have addressed Blueberry’s concerns. This inadequate, circular response has also contributed to substantive problems in the Blueberry Claim Area, as reflected in the evidence before this Court.

[1201] While the Province accuses Blueberry of the same conduct, it is the Province who is in control of permitting industrial activity. The status quo benefits the Province, and in that context, the Province must be responsive to concerns. The Province cannot merely indulge in identical, repetitive letters insisting that concerns have been met and maintain this satisfies its obligation to properly consider treaty rights.

[1202] Norma Pyle, who acted as Director of Blueberry’s Lands and Resource Department over the pertinent time period, identified and testified to numerous applications and the associated correspondence establishing that the practical reality of the application process is seriously problematic. I will set out some of this correspondence as part of my analysis, but note that these are only examples of

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what Ms. Pyle said – and I agree – was a continuous reality for Blueberry. Permits came in at a staggering rate and with limited response windows, and did not always contain critical information about the size and scope of the project.

[1203] An application may be referred to Blueberry for one segment of a project, when in fact the project scope is much larger. The Oil and Gas Commission conducts “deeper” initial consultations on the project, without adequately disclosing or disclosing at all, that the project is anticipated to expand over the course of the next several years – for example, by adding a processing facility to an area initially cleared for a well pad. Subsequent permit applications to expand the project are then conducted at a lower consultation level, hampering Blueberry’s ability to meaningfully respond on the full scope of the project.

[1204] The Province had the opportunity to respond to this evidence, but did not offer any correspondence that fundamentally differed. Rather, the reliance on other agencies and processes – some of which were and are still in development – was confirmed by the Province’s own evidence.

[1205] The Province did respond with evidence of the regulatory processes in place, maintaining that these did take into account both treaty rights and cumulative impacts. I will examine those processes in my analysis.

[1206] Finally, the Province pointed to more recent initiatives, which I will deal with later. I will say at the outset that while recent initiatives are laudable and are part of the way forward, they cannot erase what has been done and they do not as yet have legally enforceable protections. They rely on present policy initiatives that could change or be abandoned at any time, and do not as yet sufficiently protect Blueberry’s ability to exercise it treaty rights in its traditional territory.

[1207] In this segment, I will provide a brief overview of the oil-and-gas-related agreements between Blueberry and the Province, followed by an examination of the tenuring and permitting processes and the Province’s reclamation and remediation

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efforts. I will then analyze and evaluate the regime, giving regard to the parties' specific arguments and critiques.

[1208] Because the tenuring process appears to proceed on the basis that subsurface grants do not impact treaty rights, this section devotes significant space to examining the processes of the Oil and Gas Commission – the agency that the Tenure Branch of the Ministry of Energy and Mines says considers treaty rights. Most critically, it includes an evaluation of the Area Based Analysis tool, which underpins the Oil and Gas Commission's permitting decisions and is ostensibly used to consider treaty rights. However, as will become clear, this tool does not directly consider treaty rights at all, and measures cumulative effects on far too broad a scale to meaningfully protect the Blueberry Claim Area and Blueberry's exercise of treaty rights therein.

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3. Oil and Gas Agreements between Blueberry and the Province

[1209] I will begin with a review of the various agreements between Blueberry and the Province with respect to oil and gas development.

[1210] In 2006, Blueberry and the Province entered into an Economic Benefits Agreement and a series of Resource Management Agreements. The Province says these agreements provided significant benefits to Blueberry in the context of resource development in its territory. Although Blueberry has since terminated the agreements, some of their provisions are still being used by the Province.

[1211] A useful summary of the Economic Benefits Agreement is set out in a briefing note prepared for Steve Munro, Deputy Minister of what was then known as the Ministry of Aboriginal Relations and Reconciliation, dated March 13, 2013. This briefing note was prepared in the context of Blueberry's written notice of termination on March 5, 2013 of the Economic Benefits Agreement and Resource Management Agreements with the Province. Based on the evidence, it appears Blueberry

terminated the agreements in large part due to a perceived lack of meaningful response from the Province on cumulative effects issues.

[1212] Blueberry and the Province entered into this Economic Benefits Agreement on June 2, 2006. In the subsequent years, seven Resource Management Agreements were negotiated and completed between the Province and Blueberry pursuant to this Economic Benefits Agreement. Among the Resource Management Agreements were the Long-Term Oil and Gas Agreement, which was signed in 2007 and terminated in 2014. The agreements provided activity-based benefit payments and consultation capacity funding. The agreements set out a consultation process, including a consultation area map for proposed authorizations under each of the agreements.

[1213] From 2006 to 2013, Blueberry received funding of over $18 million under these agreements. While this initially appears to be a significant sum, it should be evaluated in light of provincial oil and gas revenues during that time. As Chris Pasztor with the Ministry of Energy and Mines testified, while revenue the Province receives from royalties is sensitive to price and market demand, the Province's annual revenue could range from $100 million to $175 million in a given year. This revenue flows into the Province's consolidated revenue fund and is dispersed to fund public services, such as education and health care.

[1214] The March 2013 briefing note indicates that:

> Since signing [sic] of these agreements, implementation has proceeded relatively smoothly. In the past year, however, [Blueberry] has become increasingly vocal with respect to their concerns about cumulative effects of natural resource development within their territory. Although the Province has directed their concerns towards current initiatives outside of the agreements, such as the Cumulative Effects Pilot project (led by FLNRO [Ministry of Forests, Lands and Natural Resource Operations]) and Area Based Analysis (led by OGC [Oil and Gas Commission]), [Blueberry] has become frustrated at the perceived lack of progress.

[1215] Indeed, the evidence demonstrates that Blueberry had been specifically setting out its concerns in response to permit applications before the Oil and Gas

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Commission since at least early March 2012. As an example, in a letter dated March 19, 2012 with respect to an application by Progress Energy listed as "Project HZ Town d-65-K, 94-B-16, Blueberry specifically noted:

> [Blueberry] has grave concerns that the Applications, in connection with past and planned oil and gas development within its traditional territory, are jeopardizing its "meaningful right to hunt". [Blueberry] elders report that species of deep significance to the traditional "mode of life" of the community are growing increasingly scarce throughout [Blueberry's] traditional territory. Moose are becoming more difficult to access. Furbearers are in rapid decline. Wildlife health is also a widespread concern as moose and other species harvested by [Blueberry] have been observed consuming contaminated fluids in and around unreclaimed well sites (of which there is an unacceptably high number as reported in recent years by the Auditor General of British Columbia).

[1216] With respect to cumulative effects, Blueberry stated:

> The information provided by the [Oil and Gas Commission] in the referral package pertained exclusively to site-specific (as opposed to cumulative) and bio-physical (to the exclusion of social economic and cultural) effects of the Applications. No information was provided to assess impacts within the context of relevant historical or future impacts. In consultation on the Applications, and in previous applications, [Oil and Gas Commission] staff have stubbornly refused [Blueberry's] requests to examine the Applications in connection with associated cumulative effects.

[1217] Blueberry's specific concerns were set out at page 4 of this March 19, 2012 letter:

> *Water Quantity*: the unprecedented and irreversible removal of massive quantities of water from the hydrological cycle for shale gas extraction, a concern shared by organizations such as the Pembina Institute. Consultation respecting water quantity reduction should be undertaken at the watershed level, not merely on a well-by-well basis. [The Oil and Gas Commission] has refused to provide [Blueberry] funding for an external technical review of its plans to monitor water usage of the industry.
>
> *Water Quality*: the seepage of fracking chemicals into the water table and contamination of drinking water. We are aware that some steps have been taken to provide a database of fracking chemicals used in British Columbia, but that the government has refused to require the disclosure of the quantities of each chemical used or that disclosure occur prior to drilling. Without this information, there will be no credible way to draw causal connection in and requisite legal liability in the event of water contamination.
>
> *Habitat Fragmentation*: the cumulative effect of oil and gas access roads, pipelines, seismic, and well sites within [Blueberry's] traditional territory is

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> staggering. Linear disturbance fragments ungulate habitat, cutting off traditional migratory patterns – which in turn interferes with the traditional knowledge and patterns of hunting. Furthermore, this disturbance enhances access for predators such as wolves, which has and continues to throw predator/prey relationships out of balance and cause an incremental diminution of game populations and the traditional harvesting practices they have for generations sustained.
>
> *Access Increasing Non-Aboriginal Hunting*: The cumulative effect of criss-crossing access roads throughout the territory also increases access for non-aboriginal hunters, leading to interpersonal conflicts with [Blueberry] hunters and trappers, as well as further unsustainable reductions in game populations.
>
> *Access Increasing Accidents*: these access roads are also increasing the number of traffic accidents in which moose, deer, and other game hunted by [Blueberry] are unnecessarily injured or killed. The access road planning, and consultation with [Blueberry] respecting the same, should be undertaken a [sic] tenure-wide or multiple tenure-wide scale in order to reduce the cumulative effects of any new access roads on the valuable habitat that does remain in [Blueberry's] territory.
>
> *Safety*: As mentioned above, the current high concentration of wells within [Blueberry's] traditional territory, and sour gas wells in particular, raises serious concerns to [Blueberry's] hunters and trappers who may be out in the bush for extended periods of time without cellular phone or other expedient forms of communication. To date, no meaningful consultation has occurred respecting how safety issues such as these would be addressed in relation to the Applications.

[1218] Numerous letters to the same effect followed in response to specific applications, but also to the Oil and Gas Commissioner and CEO, Paul Jenkins. Blueberry sent similar correspondence to the Minister of Energy and Mines, Rich Coleman, and the Premier at the time, Christy Clark.

[1219] While the Province ultimately invited Blueberry to "discuss a plan of action for moving forward, it continued to maintain its position "that it had been addressing cumulative effects" for "many years" as reflected in a letter Blueberry received from Dale Morgan, the Northeast Regional Manger of the Ministry of Aboriginal Relations and Reconciliation, dated September 2, 2016. After reviewing a number of initiatives, he said in closing:

> The Province acknowledges that you have significant issues with development within your traditional territory. However the province disagrees with the [Blueberry] position that the Province's current approach to

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> identifying, managing and mitigating cumulative effects is inadequate. The Province recognizes the importance of managing cumulative effects and has been employing a number of stewardship tools to address potential cumulative effects of development within [Blueberry] Territory for many years. As outlined above, the Province has a number of initiatives and tools to address [Blueberry's] concerns raised in the [Land Stewardship Framework], Atlas and the several letters from [Blueberry] to the Province over the course of the last year. The Province encourages [Blueberry] to participate in Provincial initiatives because we believe that [Blueberry] participation will, build trust in provincial processes, and result in outcomes that meet [Blueberry] interests.

[1220] This letter was copied to a number of Ministries and individuals including Kristy Ciruna of the Ministry of Forests, Sean Curry of the Oil and Gas Commission, Richard Grieve representing the Ministry of Natural Gas Development (now the Ministry of Energy and Mines), Greg Perrins of the Ministry of Aboriginal Relations and Reconciliation, and Cici Sterritt who was Blueberry's Band Administrator.

[1221] After Blueberry terminated their Economic Benefits Agreement and related agreements, and prior to commencing this litigation, Blueberry wrote to various government agencies and met with the Premier seeking to protect what it considered to be critical areas in its territory. Geoff Recknell testified that in February 2015, Blueberry provided a map of Critical Areas to the Minister of Aboriginal Relations and Reconciliation. Blueberry identified these Critical Areas as places where they continued to practice their treaty rights, and requested that the Province suspend development in these areas.

[1222] Parenthetically, I note that while slightly different versions of critical areas for protection have been defined or provided to the Province since 2015, those differences do not affect any determination in this case with respect to the overall provincial regulatory regime. Some of these critical areas have been negotiated between the parties for different purposes.

[1223] Some time later, in June 2018, the parties negotiated an Interim Measures Agreement dealing with oil and gas development. As a recital noted, the Interim Measures Agreement (found at Exhibit 108, Tab 28) was created as an interim tool

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to “address immediate concerns with respect to [oil and gas] development in [Blueberry’s] critical areas” while Regional Strategic Environmental Assessment is being developed. The parties included Blueberry, the Ministry of Energy and Mines, the Oil and Gas Commission, and the Ministry of Forests. The lack of interim measures to address these concerns was identified as a barrier to the successful implementation of the Regional Strategic Environmental Assessment.

[1224] Further set out in the recitals, “The parties are committed to developing improved management and relationships regarding [petroleum natural gas] development with this agreement on [interim measures] as the first step leading to collaboratively developed recommendations for management responses for longer-term improvements to managing [petroleum natural gas] developments which eliminates the need for [interim measures].” The objective for Area 2 is to restrict new (anthropogenic) surface disturbances, and to prohibit them in Areas 1 and 3.

[1225] Sean Curry of the Oil and Gas Commission described the agreement as identifying mechanisms to reduce the amount of new surface disturbance from oil and gas activities in three different areas, and to create a group identified as the “flex team” that would be involved in reviewing applications to the Oil and Gas Commission. Applications that could result in new surface disturbance that did not meet a specific criteria would be subject to a 4-to-1 restoration offset in Areas 1 and 3. This meant that proponents would be required to restore four times the amount disturbed, i.e., if 10 hectares would be disturbed by an activity, the proponent would be required to restore 40 hectares.

[1226] Once the agreement was signed and implementation was underway, a dispute arose as to whether the 4-to-1 offset also applied in Area 2, which is the area surrounding Blueberry’s reserves. Despite a dispute resolution process, this was not resolved, and in June 2019 the Oil and Gas Commission and the Ministry of Energy and Mines withdrew from the agreement. Sean Curry said, however, that the provisions with respect to offsets in Areas 1 and 3 continue to be implemented and

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"the vast majority of the agreement has been moved to different forms other than the flex team which doesn't exist anymore."

[1227] Chris Pasztor of the Ministry of Energy and Mines confirmed that the Tenure Branch defers all tenure requests within Areas 1 and 3. He said that based on the agreement, "we turned Areas 1 and 3 into No Disposition Areas." However, he also confirmed Area 2 is almost completely encompassed by active tenure, while Areas 1 and 3 have far fewer active tenures.

[1228] I will deal with this later as part of my analysis.

4. Tenures: The Ministry of Energy and Mines

[1229] In most areas of BC, the Provincial Crown owns the subsurface petroleum and natural gas resources. The Province grants oil and gas companies the right to explore, develop and produce oil and gas resources by granting rights to geographically specific areas through subsurface tenures. In exchange for these rights, the Province collects fees and royalties from the tenure holders.

[1230] The Ministry of Energy and Mines is responsible for the management of Crown-owned petroleum and natural gas resources in BC. This Ministry issues sub-surface petroleum and natural gas tenures under the authority of the *Petroleum and Natural Gas Act*, R.S.B.C. 1996, c. 361, and associated regulations.

[1231] In this case, Chris Pasztor provided testimony regarding the Province's management of oil and gas resources. Mr. Pasztor is both the Director of Petroleum Lands and the Executive Director of the Tenure Branch within the Ministry of Energy and Mines' Oil and Gas Division. As the Director of Petroleum Lands, Mr. Pasztor is the statutory decision maker in charge of tenure disposition.

[1232] As Mr. Pasztor testified, "…over the past ten years, most of the oil and gas industry within British Columbia has been targeting the Montney Shale Basin, and so because of that there are less and less Montney Shale rights that are available for sale," from which I conclude most have been tenured.

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[1233] This is confirmed in a Ministry of Forests information note prepared for the Provincial Northeast Strategy Committee, dated May 22, 2014. This note is illuminating, as it sets out the overall context of development in northeastern BC:

> **ISSUE**: Treaty 8 interest in the advancement of regional strategic environmental assessments (RSEAs) in Northeast BC.
>
> **BACKGROUND**:
>
> In 2009, the Ministers of the Canadian Council of Ministers of the Environment (CCME) published a report outlining the principles and guidance for undertaking a Regional Strategic Environmental Assessment (RSEA) process. CCME defines an RSEA as: *A process designed to systematically assess the potential environmental effects, including cumulative effects, of alternate strategic initiatives, policies, plans or programs for a particular region.*
>
> (emphasis in original)

[1234] As part of the discussion portion of that information note, the fact that virtually all Crown land within the proposed northeastern area was fully tenured was set out. At page 2 the information note reads:

> …RSEA can only work if there are alternative options available which suggests that there must be significant crown resources that are not tenured. The rate of development of crown owned resources is controlled through the disposition of resource tenures. Once crown resource tenures have been sold, alternative options are significantly reduced and the market forces of supply and demand tend to dictate the rate of extraction. As such, there are no opportunities in Northeast region that would trigger an RSEA. *Virtually all of the Crown land within the proposed Northeast RSEA study area is fully tenured*. The development of viable alternative options would be extremely limited to what could be achieved through the various regulatory processes.
>
> (emphasis added)

[1235] The perspective of the Ministry of Forests is set out in a response portion of the information note, which said in part:

> In 2011, the Province developed its BC Jobs plan. The plan is focused on creating long term jobs through increased resource extraction particularly in the oil and gas, mining and forest industries. The thrust of the 2014 Throne speech was a reiteration of the Jobs Plan and a commitment to stick to the plan. The export of liquefied natural gas (LNG) is the most significant element of the plan and all aspects of LNG development have the focused attention and priority of the Premier and Cabinet.

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> *A recommendation to implement an RSEA in B.C. particularly in Northeast region would be in direct opposition to the Jobs Plan*. It would also likely be viewed as an attempt to increase investor uncertainty for LNG development, create time delays, and pit communities, First Nations, industries and companies as well as other stakeholder interests against each other. Possible identification of alternatives to resource development would also be extremely limited without reacquiring tenures and rights.
>
> (emphasis added)

[1236] This establishes some context to the oil and gas development in BC during pertinent times which impacted on the Blueberry Claim Area.

a) The Tenuring Process

[1237] The tenuring process involves several steps:

a) First, industry proponents make a request that the Province, via the Crown Sales Team of the Tenure Branch of the Ministry of Energy and Mines, advertise particular tenure rights for sale.

b) The Crown Sales Team determines whether the rights are available for disposition.

c) If rights are available, the Crown Sales Team conducts a "critical information analysis" to identify legal and non-legal land use designations, values and rights that overlap with or are nearby the requested parcel.

d) A pre-tenure referral process then begins, including consultation and engagement with First Nations, local governments, landowners, and other provincial agencies.

e) The Director of Petroleum Lands (a position currently held by Mr. Pasztor) reviews information from the critical information analysis and the pre-tenure referral process, and decides whether to post the requested tenure rights for sale. The Director may defer, reconfigure, deny, or grant the request for sale and/or may apply caveats to the tenures.

f) Tenure rights are then posted for sale and bids are accepted.

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[1238] The Province says it has temporarily paused grants of tenure since March 2020, due to the COVID-19 pandemic.

b) Consideration of Treaty Rights

[1239] Mr. Pasztor testified that in managing subsurface tenures, the Tenure Branch seeks to ensure, *inter alia,* that the Province is meeting its obligations to First Nations and advancing reconciliation.

[1240] The Province alleges that it considers surface values at all stages of the tenure review and referral process: in the availability of the rights for disposition, the critical information analysis, pre-tenure referral and consultation, and the decision-making process. However, when pressed, Mr. Pasztor admitted that the Tenure Branch essentially did not believe a tenure grant could impact treaty rights because it does not authorize surface activities. This is reflected in many communications from the Tenure Branch to Blueberry when Blueberry raised concerns.

[1241] Mr. Pasztor testified to several methods the Tenure Branch uses to manage impacts on wildlife and treaty rights.

i. No Disposition Areas

[1242] No Disposition Areas provide protection for some areas of land; Mr. Pasztor explained that once an area has been declared, no tenure can be disposed of inside it. According to the Province, the establishment of a No Disposition Area is a landscape-level strategic decision.

[1243] Mr. Pasztor gave examples of several No Disposition Areas established in consideration of treaty rights. For example, a total of 364,393 hectares inside the Blueberry Claim Area were designated as No Disposition Areas in connection with the Oil and Gas Interim Measures Agreement, and 35,467 hectares were designated within the Claim Area in relation to a government-to-government agreement with Salteau First Nation. Several hundred thousand hectares of No Disposition Areas were also established inside of Blueberry's Consultation Areas A, B and C in

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connection with a caribou recovery partnership between the Province and two other First Nations.

[1244] As of July 2020, there were approximately 638,159 hectares of No Disposition Areas inside the Blueberry Claim Area. However, as will be discussed below, these areas are temporary, and of little effect given the majority of subsurface tenures in the Blueberry Claim Area have already been granted.

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ii. Deferred Parcels

[1245] Mr. Pasztor also testified that the Province addresses treaty rights by deferring tenure requests. The Ministry of Energy and Mines may defer a tenure parcel for an indefinite period in response to issues raised during the critical information analysis or pre-tenure referral process. Mr. Pasztor testified that the Ministry of Energy and Mines frequently defers tenure requests on a parcel-by-parcel basis in consideration of First Nations' interests and the potential impact of disposition on treaty rights.

[1246] Further, there are some automatic deferral areas – identified by First Nations as critical to the practice of their treaty rights – in which tenure requests are automatically deferred for months or years to support further discussions with First Nations about the exercise of treaty rights in these areas. There are some automatic deferral areas for Blueberry. For example, Mr. Pasztor testified that in 2015, after Blueberry commenced this litigation and identified "Critical Areas," the Ministry of Energy and Mines agreed to defer all requests for new tenures in these areas. As of July 2020, these deferrals covered a total of 126,000 hectares within the Blueberry Claim Area. Mr. Pasztor also noted that the Ministry of Energy and Mines is currently deferring tenures in areas identified by Blueberry as "Protection and Restoration Zones," based on a map Blueberry provided to the Ministry in 2018..

iii. Withdrawn or Reconfigured Tenure Requests

[1247] A requesting party may withdraw their tenure request at any point prior to disposition. Mr. Pasztor testified that proponents regularly withdraw requests for

deferred parcels. He noted that since 2014, proponents had withdrawn 282 tenure requests within the Blueberry Claim Area, including at least one example where he said a proponent withdrew a tenure request because it overlapped with a No Disposition Area established in response to Blueberry's concerns.

[1248] Requests may also be reconfigured, i.e., the number or location of requested parcels may be modified. Both the requesting party and the Ministry of Energy and Mines may reconfigure the tenure request at any time prior to disposition. Mr. Pasztor testified that reconfiguration may occur to avoid or minimize potential impacts to treaty rights or wildlife, and that they are "quite often" reconfigured to avoid First Nations' concerns. Mr. Pasztor provided one example of such a reconfiguration: in 2017, a party requested two parcels, one of which overlapped with a Blueberry Treaty Land Entitlement Resource Review Area; Mr. Pasztor noted that the request for the parcel overlapping the Resource Review Area was withdrawn, leaving only the remaining parcel up for consideration.

iv. Critical Information Analysis

[1249] Mr. Pasztor testified about the steps taken in the critical information analysis. This process involves mapping out the surface location of the requested parcels, and overlaying it with data from provincial databases. The overlays include land designations, prior development in the area, known First Nations' cultural areas, and traplines. Information from this stage is used to determine the scope of pre-tenure referrals. Mr. Pasztor noted that during the referral process, the Tenure Branch would send the overlays to the First Nation, including information on prior development in the area.

[1250] Types of land designations included in the analysis include parks and protected areas, Indian Reserves, and several Nation-specific designations for various First Nations (some of which overlap the Blueberry Claim Area). Several wildlife land designations are included, such as Ungulate Winter Ranges and Wildlife Habitat Areas.

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[1251] As noted earlier, specific to Blueberry, the Ministry of Energy and Mines also has designations for “Critical Areas,” which are automatic deferral areas, and Interim Measures Areas 1, 2 and 3, as established in the Interim Measures Agreement for Petroleum and Natural Gas. While the Agreement is no longer in effect, the Ministry still follows this protocol.

v. Pre-tenure Referral Process

[1252] Mr. Pasztor said provincial consultation with First Nations occurs during the pre-tenure referral process. The information gathered during the critical information analysis is used for an initial impact assessment regarding the impact of any proposed tenure on a First Nation’s treaty rights.

vi. Mitigation of Impacts

[1253] Mr. Pasztor also said the Ministry of Energy and Mines uses information gathered during the consultation process to develop options for mitigating potential impacts on treaty rights.

[1254] The Ministry of Energy and Mines’ says its primary approach to mitigation is to avoid potential impacts from the outset by establishing No Disposition Areas. However, as Mr. Pasztor testified, they may also mitigate in other ways, including by deferring tenure requests, reconfiguring parcel requests, or deciding not to post a parcel for sale.

[1255] The Ministry of Energy and Mines also relies on caveats to mitigate potential impacts on treaty rights. A caveat is a notice placed on a tenure that is intended to provide information to the tenure-holder, guide engagement between the tenure holder and First Nations, and inform applications to the Oil and Gas Commission regarding permit activities.

vii. Tenure Sale Decisions

[1256] Before making a decision regarding the sale of tenure, Mr. Pasztor meets with the Crown Sales Team and the Pre-tenure Referral Team to review and discuss the

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information gathered during the application process. Each parcel is assessed as high, medium or low risk depending on a variety of factors, including First Nations' interests, wildlife values, and cumulative effects assessments. The cumulative effects assessment is based on the Area Based Analysis, which is discussed at length below.

[1257] Mr. Pasztor then decides whether to defer, reconfigure, post or not post the requested parcels for sale.

[1258] Once tenure is granted, the tenure holder is obliged to develop the land in accordance with the *Petroleum and Natural Gas Act*. If they fail to meet these obligations within a defined time frame, the Ministry of Energy and Mines cancels the tenure and the rights revert to the Crown.

[1259] According to Mr. Pasztor, tenure cancellation is fairly common, and from 2014 to 2020, more tenures were cancelled in the Blueberry Claim Area than granted.

[1260] I note, however, as the vast majority of the Blueberry Claim Area is already tenured for oil and gas development, this latter comment is not surprising.

5. Permitting: The BC Oil and Gas Commission

[1261] The BC Oil and Gas Commission is a regulatory agency formed under the *Oil and Gas Activities Act,* S.B.C. 2008, c. 36. The Commission is responsible for regulating oil and gas activities in the Province, including exploration, production, pipeline transportation, and reclamation. The Oil and Gas Commission also holds authority over activities related to petroleum and natural gas development under other specified enactments, such as the *Forest Act*, R.S.B.C. 1996, c. 157; the *Water Sustainability Act*, S.B.C. 2014, c. 15 and the *Heritage Conservation Act*, R.S.B.C. 1996, c. 187. The Oil and Gas Commission is responsible for ensuring that proponents conduct their oil and gas activities in accordance with the terms and conditions of permits and applicable regulations.

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[1262] Land use orders also guide the Oil and Gas Commission via general orders and policy directives from other government agencies.

[1263] In its "Activity Application Manual" (the "Application Manual") the Oil and Gas Commission outlines its role as follows:

> The Commission's core roles include reviewing and assessing applications for industry activity, consulting with First Nations, ensuring industry complies with provincial legislation and cooperating with partner agencies.

[1264] The Application Manual further describes the Oil and Gas Commission as a "consolidated single-window authority" which:

> …provides not only a one-stop place for all oil and gas and associated activity requirements, but a consistent application, decision, regulatory and compliance authority. Stakeholders work with one agency; therefore serving the public interest by having an all-encompassing review process for oil and gas activities.

[1265] Section 4 of the *Oil and Gas Activities Act*, S.B.C. 2008, c. 36 requires that the Oil and Gas Commission manage its permit application process in the public interest, "having regard to the environmental, economic and social effects and in a manner that encourages the participation of First Nations." However, there are significant gaps in the Commission's process, particularly in the use of its much-touted Area Based Analysis tool as a purported way to address cumulative effects.

[1266] With respect to Blueberry, the Oil and Gas Commission has segmented Blueberry's territory into three zones, each of which has a different consultation level. According to Ms. Pyle, Zone A is the area surrounding their reserves and what the Commission believes is the "core" of their territory. Applications that fall within Zone A receive a "normal" level of consultation. Zones B and C, which are further out, attract a lower level of consultation.

[1267] Two representatives from the BC Oil and Gas Commission testified at trial: James O'Hanley (Vice President of Applications), and Sean Curry (Vice President of Operational Policy and Environment).

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a) Oil and Gas Commission Objectives and Values

[1268] Mr. Curry testified that the Oil and Gas Commission is a "policy taker, not a policy maker." In other words, the Oil and Gas Commission takes direction from the government on the values to consider in managing the land base. One of the primary ways government provides this direction is through the *Environmental Protection and Management Regulation*, B.C. Reg. 200/2010.

[1269] The *Environmental Protection and Management Regulation* has four broad parts: definitions; provisions setting out the government's environmental objectives; operator requirements; and a series of provisions allowing various ministers to identify certain features on the land base. The Oil and Gas Commission's Environmental Protection and Management Guideline contains detailed guidance for industry and Oil and Gas Commission staff regarding the requirements found in the *Environmental Protection and Management Regulation*. The Guideline also contains Planning and Operational Measures for various environmental values, including riparian values and Old Growth Management Areas.

[1270] Mr. Curry testified that these Planning and Operational Measures provide applicants with the list of government objectives and guidelines they must address in the application process (detailed further below). The "planning" component gives guidance on how to plan the activities – for example, to avoid certain ecological features where possible. The "operations" component provides guidance on how applicants should actually conduct an activity – for example, timing their operations to minimize environmental impacts. If an applicant proposes something not in line with these Planning and Operational Measures, they must submit a rationale explaining why they are unable to follow the prescribed measures.

[1271] The *Environmental Protection and Management Regulation* also guides permit issuance and post-permit activity through the "material adverse effect" test embedded in the regulation. Under the *Environmental Protection and Management Regulation*, no activity can be located on a riparian feature, or in an Old Growth

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Management Area, Ungulate Winter Range or Wildlife Habitat Area, *unless* it will not have a "material adverse effect." This is a two-part test which considers, first, whether the activity in question will have a "material" impact on the value – in Mr. Curry's words, whether it will be "significant, of consequence"; and, second, whether that impact will be "adverse" – in Mr. Curry's words, "detrimental or harmful" to the value.

[1272] On this basis, however, despite the alleged protections afforded by these designations, oil and gas activity can occur in these protected areas.

[1273] Mr. Curry testified that the Oil and Gas Commission also uses the coarse filter/fine filter management method. In brief, this method uses two categories of regulatory "tools" in conjunction with one another to manage ecosystems and individual species. Coarse filter tools work at a landscape level. Mr. Curry testified that coarse filter management groups together species and habitats that respond similarly to similar management efforts, and then applies management strategies that are expected to assist all of them. Some designated areas, like Old Growth Management Areas and Riparian Reserves, are coarse filter tools. These areas are supposed to provide broad-strokes protection over, for example, an entire riparian area. The Oil and Gas Commission has referred to coarse filter management as a "logical and practical approach to conserve and manage the vast majority of species occurring in BC, because ecosystems are comprised of more species than can reasonably be managed individually."

[1274] Conversely, fine filter tools target individual species and unique landscape features or habitats. Fine filter tools work in conjunction with coarse filter tools; these tools are designed to catch the finer concerns that may fall through the cracks in the coarse filter approach. For example, where a specific ecological feature is disproportionately important to the conservation of a particular species. Fine filter tools include Ungulate Winter Ranges, which target critical habitat for a specific ungulate species like caribou.

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[1275] In short, a coarse filter tool applies one strategy to target multiple species, habitats, or a whole landscape. A fine filter tool uses one strategy to target an individual species, habitat, or ecological feature.

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b) The Application Process

[1276] Mr. O'Hanley testified about the permit application process at the Oil and Gas Commission. Applications go through three broad stages: pre-application, application review, and decision-maker review.

[1277] Applicants are required to take several pre-application steps, including securing tenure and meeting the requirements of the *Consultation and Notification Regulation*, B.C. Reg. 279/2010. Though it is "not required," applicants are "encouraged to engage First Nations prior to submitting an application."

[1278] Under the *Consultation and Notification Regulation*, applicants are required to consult in advance with all fee simple landowners and defined "rights holders" within a prescribed distance of a proposed project (for example, 1,000 to 1,800 metres for an oil or gas well), as well as any First Nation whose reserve is located within the prescribed distance. "Rights holders" includes those with grazing licenses, guide outfitting certificates, and registered traplines. Under s. 13 of the Regulation, applicants are required to provide consultees with detailed information on the proposed activity.

[1279] The application itself must contain a variety of details. Applicants submit a set of maps and plans illustrating the location and extent of planned activities, and, per the Oil and Gas Activity Application Manual, they are required to plan projects to minimize disturbances where possible.

[1280] Upon receipt, the Oil and Gas Commission reviews the application. At this stage, Oil and Gas Commission staff carry out a variety of technical reviews, and consult with First Nations on the proposed activities.

[1281] As part of this assessment, decision makers rely heavily on a tool developed by the Oil and Gas Commission called Area Based Analysis (also referred to as the "ABA"), which the Commission says considers cumulative effects. It has been described as an analytical framework or "decision support tool."

[1282] Mr. Curry testified that the Area Based Analysis contains information on the total footprint of industrial disturbances in northeastern BC. Mr. Curry stated that when a permit application comes in, the Oil and Gas Commission uses its Area Based Analysis to calculate the total area of disturbance, including the incremental disturbance from the proposed application. The Oil and Gas Commission then compares the total disturbance to a series of environmental "values" – for example, the amount of old forest in an area – resulting in a calculation of the proposed activity's impact on these values. Where a threshold is overrun, the Commission may take further action, such as requesting additional information from the applicant.

[1283] Mr. O'Hanley described the Area Based Analysis a decision support tool for addressing cumulative impacts of oil and gas development in northeastern BC. However, as noted above, the Oil and Gas Commission repeatedly referred Blueberry to this tool as the primary lens through which the Commission would address such concerns. In fact, in internal communications regarding the Province's Cumulative Effects Framework Interim Policy, the Director of Regulations of the Oil and Gas Commission expressed the view that the Commission was "ahead of the curve by virtue of the ABA."

[1284] Furthermore, as noted by Sean Curry in an email dated June 29, 2015:

> BFRN may be asking for an alternative, that we have been clear that ABA is the tool we would be using, in conjunction with consultation and ongoing permitting processes…

[1285] The Area Based Analysis was originally intended to consider nine "values":

1. Old Forest
2. Hydro-Riparian Ecosystems

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3. Water Quantity
4. High-Priority Wildlife Habitat
5. Private Land Values
6. Cultural Heritage Values
7. Water Quality
8. Air Quality
9. Groundwater

[1286] As of its launch in 2015, however, the Area Based Analysis only actively considered two factors: Old Forest and Riparian Reserve Zones. The Oil and Gas Commission has slowly phased in additional values over time. At present, four values are included: Old Forest, Riparian Reserve Zones, Designated Wildlife Areas, and Old Growth Management Areas.

[1287] The Area Based Analysis tool however, suffers from significant shortcomings, which will be discussed further below.

[1288] Mr. O'Hanley testified that as part of the application review, a Natural Resource Officer also generally conducts a land and habitat review. This is also meant to provide assessment and management of cumulative effects. The review uses overlays and mapping programs to review various data layers, which include existing and authorized forestry and oil and gas activities. Where impacts to wildlife habitat are expected, the review staff apply the Province's Environmental Mitigation Policy (discussed below) to assess whether those impacts can be avoided, minimized, mitigated, or restored. However, nowhere in the application manual is a question about "wildlife habitat." Rather the "land and habitat" review appears to only rely on legally protected designations.

[1289] Mr. O'Hanley also agreed that the Oil and Gas Commission has never turned down an application on the basis of impact on habitat, and he agreed the Oil and Gas Commission did not have any specific thresholds as to how much development is allowable in moose habitat. He also noted that if treaty rights became an issue in

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an application, he would have to seek legal advice on that point. Further critique on this point will be offered later, in my analysis.

[1290] Mr. Curry testified that where no wildlife habitat features have been officially identified under s. 26 of the *Environmental Protection and Management Regulation,* Oil and Gas Commission policy requires that the Commission consider these features during the application review process. The Province provided at least one example of a mineral lick that was identified during the review process; the proponent accommodated a 100-metre set-back/buffer using an irregularly shaped well pad.

[1291] Throughout the application process, the Oil and Gas Commission says it remains in contact with the applicant, seeking clarification, revisions, and additional information where needed. Where necessary, proponents may revise their applications.

[1292] During the application review stage, Oil and Gas Commission consultation staff provide a referral package to each First Nation identified through their Application Management System, which includes a copy of the entire application. Where there is no consultation agreement in place between the Oil and Gas Commission and a First Nation – like Blueberry – consultation is conducted using the Provincial Interim Consultation Procedure. Consultation "levels" are determined based on what the Oil and Gas Commission predicts the impact will be on each First Nation's rights, with varying response deadlines.

[1293] The possible consultation levels are: information only, notification with opportunity to comment, normal, and deep. A fairly complex set of criteria are applied to determine the consultation level, which depends on the type of development, its size and scope, and which area it falls inside. At the end of the day, these criteria are all ways to quantitatively (as opposed to qualitatively) assess the potential impacts on Blueberry's treaty rights. The higher the consultation level, the longer the initial response window, from zero days for "Information Only" to 30

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business days for “Deep” consultations. While he provided no specifics, Mr. O’Hanley made the general statement that the Commission regularly extends deadlines at the request of First Nations.

[1294] Mr. O’Hanley said the Oil and Gas Commission also makes use of two data layers specifically related to First Nations issues, which include information on known First Nations values, plus confidential consultation and engagement information that the Oil and Gas Commission has collected over time. These data layers are spatial, and identify “areas of sensitivity” and other potentially important locations for First Nations. While “archeological features” are referenced, there is little information on what is actually contained in these data layers. They appear to represent a database of locations, but further details are unclear.

[1295] Finally, as a result of this application review process, Mr. O’Hanley noted mitigation measures dealing with outstanding concerns from the First Nation may be proposed. However, as will become evident, that is essentially the extent of any measures offered to deal with Blueberry concerns. Given the volume of applications and the scale of development in the Blueberry Claim Area, by its very nature “mitigation” alone means cumulative impacts are not being effectively considered. Critically, the Oil and Gas Commission has never turned down an application because of impacts on treaty rights, habitat issues, or cumulative effects.

[1296] Once the Oil and Gas Commission has completed the applicable consultations and reviews, the decision-maker reviews the entire package. They can approve it as is, approve with conditions, refuse it, or defer the decision. Notably however, the Oil and Gas Commission has only turned down one project in its history, in 2009. During the period Blueberry has consistently been raising concerns about cumulative effects in its territory, the Oil and Gas Commission has never refused an application.

[1297] Mr. O’Hanley testified that in practice, approved permits are subject to conditions (in essence mitigation measures), which may include various notification

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obligations, environmental protection measures, archaeological protections, and more.

6. Remediation and Reclamation at the Oil and Gas Commission

[1298] As part of its evidence, the Province also set out the relatively recent remediation and reclamation initiatives of the Oil and Gas Commission, of which I will provide a brief summary.

[1299] In May 2019, the Oil and Gas Commission introduced what it called a Comprehensive Liability Management Plan, comprised of three components: liability management; improving the rate of inactive site restoration, and addressing orphan sites.

[1300] In May 2020, the Province entered into a Memorandum of Understanding ("Restoration Memorandum") with two petroleum industry associations, which provides for expected funding of at least $1 million annually for restoration activities in northeastern BC. Its focus is on "legacy" oil and gas features, like seismic lines not otherwise subject to legal restoration requirements.

[1301] The federal government has also recently pledged significant funds to support restoration and reclamation in BC, of which the Province has allocated:

a) $15 million to the Oil and Gas Commission for use in reclaiming orphan sites, and

b) $5 million to address legacy impacts from old oil and gas developments, to be administered under the Restoration Memorandum.

[1302] As previously noted, in June 2018, Blueberry entered into an Interim Measures Agreement with the Oil and Gas Commission, the Ministry of Forests, and the Ministry of Energy and Mines. The Agreement designated three Critical Areas – Area 1, Area 2 and Area 3. Development in Areas 1 and 3 required a 4-to-1 restoration offset by proponents. However, the Oil and Gas Commission withdrew

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from the agreement in June 2019, when the parties were unable to resolve disputes as to whether Area 2 was also subject to this restoration offset requirement. Per Ms. Pyle's testimony, Area 2 is the area more immediately surrounding Blueberry's reserves, which has already been subject to intensive development.

[1303] The Oil and Gas Commission gives wells an "orphan" designation where the operator is insolvent or cannot be located. Such sites can then be remediated using the industry-funded Orphan Site Reclamation Fund. According to the Oil and Gas Commission's Orphan Site Reclamation Fund Annual Report: 2017/18 and 2018/19, and "[b]arring any unforeseen increases in the orphan population," their current plans and programs will allow the Commission to complete restoration work on orphan sites within 10 years of their designation.

[1304] Mr. Curry testified that in 2016 there was a significant increase in orphan wells as a result of Terra Energy's bankruptcy, from roughly 45 to an estimated 356 orphan wells at the time of his testimony. Mr. Curry noted that once a well is designated as an orphan, it remains on the Province's list of orphan wells indefinitely, even after it has been reclaimed.

[1305] In discussions between Blueberry and the Province, Blueberry has identified 10 orphan sites as priority sites for restoration. Mr. Curry testified that the Oil and Gas Commission and Blueberry had visited nine of the 10 sites together, and noted that they will address these priority sites (as well as those identified by other Treaty 8 First Nations) ahead of other sites.

[1306] In 2019, the new *Dormancy and Shutdown Regulation*, B.C. Reg. 112/2019 was introduced; it sets timelines for the restoration of dormant oil and gas wells.

[1307] "Dormant" wells are those that fall below a certain activity threshold (720 active hours per year) for five consecutive years. Dormant wells are assigned to various categories depending on their current or anticipated dormancy date, and proponents must comply with specific restoration timelines based on a well's

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category. Based on the current inventory of inactive well sites in northeastern BC, the Province anticipates that 10,000-11,000 of these sites will be restored by 2036.

[1308] The *Dormancy and Shutdown Regulation* also allows the Oil and Gas Commission to designate well sites as "priority sites," which requires the company to restore within five years. Mr. Curry noted there are three of these priority sites in the Blueberry Claim Area, all near Pink Mountain.

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7. Issues with the Province's Oil and Gas Regime

[1309] The Plaintiffs laid out a variety of issues with the Province's oil and gas regime; I have addressed these issues in detail below.

[1310] Ultimately, the Plaintiffs submit that neither the Ministry of Energy and Mines nor the Oil and Gas Commission has any mechanism to properly consider cumulative effects or treaty rights. They point to significant shortcomings in the Area Based Analysis, which the Province has arguably presented as the primary tool to assess and address cumulative impacts and treaty rights in oil and gas development.

[1311] The thrust of Blueberry's submissions on this issue is that the Ministry of Energy and Mines and the Oil and Gas Commission are like two ships passing in the night: the Ministry of Energy and Mines believes the Oil and Gas Commission will thoroughly assess and address cumulative impacts in its permitting process, while the Oil and Gas Commission believes that tenuring decisions are already reflective, to some degree, of a strategic approval of development in that area.

a) Tenuring at the Ministry of Energy and Mines

[1312] Blueberry submits that the Ministry of Energy and Mines issues tenures with essentially no assessment of cumulative effects or the impact of any likely surface disturbance on treaty rights.

[1313] Blueberry produced examples of Initial Impact Assessments for several parcels that had been proposed for tenuring. With respect to Blueberry's treaty rights, they simply state that "[Blueberry's] exercise of treaty rights on this parcel includes the potential for wildlife, vegetation and cultural values," a standard phrase which, in Blueberry's submission, does not demonstrate a nuanced or parcel-specific assessment of the impacts on their treaty rights. The Province noted, however, that these initial assessments occur prior to consultation and are not reflective of a final assessment. Further, at least some additional parcel-specific information is provided, including Ungulate Winter Range and Wildlife Habitat Area overlap information.

[1314] As the Province notes, the Oil and Gas Commission gathers more information through the various application stages, which they may use to inform mitigation measures or a deferral decision. However, there was a dearth of evidence on how the Commission actually considers this information with respect to cumulative effects. There were no policy documents detailing acceptable impact thresholds, nor any formalized guidance on how the Commission uses information on cumulative effects in making a mitigation or deferral decision.

[1315] With the exception of No Disposition Areas, the Ministry of Energy and Mines admittedly addresses most treaty rights concerns through the use of caveats (discussed below) or by "deferring" tenure requests rather than simply denying them. Mr. Pasztor testified that although deferred parcels may remain on the deferred list for many years, the expectation is that "deferral" is temporary.

i. No Disposition Areas

[1316] The Province relies on the designation of No Disposition Areas, which prohibit subsurface tenure dispositions, "to support government strategic direction" in response to Blueberry's concerns.

[1317] As noted above, a total of 638,393 hectares of No Disposition Areas currently exist within the Blueberry Claim Area, including 364,393 hectares within the Interim

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Measures Agreement Areas 1 and 3. The Province noted that they continue to prevent disposition in these areas despite the expiration of the Agreement.

[1318] The plaintiffs pointed out however that the No Disposition Areas in Areas 1 and 3 have little effect, as demand for tenure in these areas is low. Despite Blueberry's efforts, the Province has refused to agree to the same protections in Area 2, where the demand for tenure is high.

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ii. Resource Review Areas

[1319] In addition, the Province points out that Resource Review Areas, which prevent the Ministry from disposing of tenure within a particular area, protect 233,839 hectors of land within the Blueberry Claim Area. These have been established for a number of reasons, including to support treaty land entitlement claims, government-to-government agreements with other First Nations, and the caribou management program.

[1320] Resource Review Areas, however, are a policy tool, not a legal designation. They essentially function as interim protection for a number of objectives, including Blueberry's treaty land entitlement claims. Mr. Pasztor stated that he is not aware of the Oil and Gas Commission ever turning down a permit because of a Resource Review Area.

[1321] As noted earlier, deferrals over these areas are temporary, and therefore do not offer any substantive legal protection.

iii. Tenure Branch does not think tenures impact treaty rights

[1322] The Plaintiffs also pointed to evidence that the Tenure Branch does not consider the granting of tenure to be capable of infringing on treaty rights, since such a grant does not authorize any surface activities. For example, at trial, Mr. Pasztor noted that they did not consider "infringement" but only "potential impacts" as "the decision to dispose tenure is purely subsurface-related and doesn't result in any

immediate physical impact to the land base." Mr. Pasztor was unable to clearly articulate how he factored treaty rights into his decisions on whether to grant tenure in a given area, given that the Ministry of Energy and Mines is of the view that it is only disposing of subsurface rights with no guarantee of development.

[1323] As another example, on April 20, 2015, Blueberry wrote to the Tenure Branch to oppose a tenure grant in a number of critical areas, including a Caribou Ungulate Winter Range in Chinchaga herd territory. With respect to the proposed tenures, Blueberry pointed out that:

> Today, Blueberry faces an unprecedented crisis. The cumulative effects of the thousands of wells, roads, pipelines, gas plants, clear cuts, dams, transmission lines, water approvals and other developments authorized by the provincial government are destroying our land and threatening our traditional way of life. There are very few places left for us to exercise our rights under Treaty No. 8, including our rights to hunt, fish, and trap. The disturbance of huge parts of our territory, combined with the displacement of our families from their preferred areas, makes it very difficult to continue our way of life and pass our culture onto younger generations. Indeed, disturbance of our territory is so extensive that we no longer have the ability to meaningfully practice the rights promised to us under Treaty No. 8. This is a grave situation.

[1324] In a May 7, 2015 email to Norma Pyle, Blueberry was told:

> MNGD [the Ministry of Natural Gas Development] has concluded that the disposition of these parcels does not infringe on BRFN's treaty rights since any tenures issued will not authorize any activities.

[1325] Numerous Tenure Branch emails and letters were presented where the Tenure Branch repeatedly stated this after receiving input from Blueberry. In an August 6, 2015 email to Norma Pyle from Bill Adair, a senior advisor in the Tenure Branch, Blueberry was told:

> As you know, any tenures issued by [the Ministry of Natural Gas Development] do not authorize surface activities. Should a permit for oil and gas activities be applied for in the future that has the potential to impact [Blueberry's] Treaty Rights, the Oil and Gas Commission will conduct further consultation with [Blueberry]. As a result [the Ministry] intends to offer the bulleted parcels for disposition.

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[1326] This view was pervasive throughout the Tenure Branch. After outlining how the Province recognizes the importance of assessing and managing the cumulative effects of resource development in northeastern BC, Richard Bader, Senior First Nations Consultant with the Tenure Branch, concluded a June 2015 letter by noting that the disposition of a particular parcel "does not infringe on [Blueberry's] Treaty Rights for the reasons outlined above and because any tenures issued will not authorize oil and gas activities. As you know, [Blueberry] will be consulted on any applications for oil and gas activities with the potential to impact [Blueberry's] treaty rights." The parcel was therefore offered for disposition.

[1327] The same view was reflected in a letter dated November 7, 2016 from Bill Adair, Senior Advisor, Upstream Development Division of the Ministry of Natural Gas and Development (now the Ministry of Energy and Mines). Mr. Adair noted that "numerous topic areas" were "outside the scope and mandate" of the Ministry. He suggested that Blueberry refer to correspondence from others in the government, and listed the Ministry of Environment; the Ministry of Forests; the Oil and Gas Commission; the Ministry of Aboriginal Relations and Reconciliation; and various other individuals associated with these ministries.

[1328] In addition, Mr. Pasztor confirmed that despite the known and acknowledged risk of extirpation of the Chinchaga caribou, the Ministry of Energy and Mines continues to issue tenure in this area.

[1329] As a whole, the evidence demonstrated that the Tenure Branch is of the view that its sale of tenure rights in the Blueberry Claim Area did not affect treaty rights, and that it was up to others to take care of that concern.

[1330] This evidence – particularly the 2015 emails from Tenure Branch – read like the Joseph Heller novel, Catch-22. The *Oxford Dictionary* describes this as "a dilemma or difficult circumstance from which there is no escape because of mutually conflicting or dependent conditions." In this case Blueberry was constantly told by one department or another to take its difficulties or dilemma elsewhere as someone

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else would deal with it. That in fact never happened clearly creating a frustrating Catch-22 situation.

iv. Caveats

[1331] The Plaintiffs contend that at the tenuring stage, the only real mechanism for the consideration and protection of treaty rights are the caveats that might be placed on a tenure. The Ministry of Energy and Mines routinely uses caveats to “address” Blueberry’s concerns before posting parcels for sale. However, any protection derived from these caveats is weak, if not non-existent.

[1332] On the evidence, caveats have no impact on Oil and Gas Commission decision making. Mr. Pasztor agreed that the Ministry of Energy and Mines does not monitor, inquire, or even purport to know whether the Oil and Gas Commission grants development permits, nor whether they consider the caveats on tenure when doing so.

[1333] Moreover, at the Oil and Gas Commission level, evidence suggests that caveats are essentially meaningless. Mr. Pasztor admitted that caveats are not legally binding, and he was unaware of any evidence that the Oil and Gas Commission actually uses them. As the Plaintiffs pointed out, neither of the Oil and Gas Commission witnesses referred to tenure caveats at any point in their testimony.

b) Permitting at the Oil and Gas Commission

[1334] Blueberry notes that the Ministry of Energy and Mines defers the real substance of the treaty rights and cumulative effects analysis to the Oil and Gas Commission, on the assumption that the Oil and Gas Commission will assess and regulate surface development. However, Blueberry argues that the Oil and Gas Commission is failing to discharge this burden in a way that considers cumulative impacts. Further, Blueberry has experienced significant difficulties with the administration of the permitting process, which hampers meaningful dialogue between Blueberry and the Oil and Gas Commission on these issues.

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i. Administration of the Permitting Process

[1335] The regulatory framework around oil and gas at a surface level appears to set out some tools to consider cumulative impacts and treaty rights. The picture the Province has painted however, is not consistent with reality. A review of this framework demonstrates fundamental flaws created by the tools and revealed by the reality of Blueberry's experience with the process.

[1336] In her testimony, Ms. Pyle identified a number of consistent problems with the permitting application process. First, she noted that the application does not reveal the true character, scale or scope of the project. The application may identify a request for one well, with a note that other wells may be built in the same area later. However, the application does not provide information on the number of wells that may be drilled going forward or when they may be drilled. Importantly, the Oil and Gas Commission assesses each of the subsequent wells separately using an "information only" consultation process rather than the deeper consultation for the original application. A project may therefore be divided into multiple subsequent applications with an "information only" process which, as Ms. Pyle noted, frustrates meaningful consultation on the project as a whole.

[1337] In addition, an application may not be described fully. By way of example, Ms. Pyle described an August 28, 2016 application by Painted Pony, which indicated it was an application for a "Wellsite, Access road and Borrow pit." However, it soon became apparent that the applicant planned to build a processing facility on the site and was seeking approval to clear the site for that purpose.

[1338] Ultimately, as Ms. Pyle noted in her letter of October 28, 2016 to Adam Kamp, First Nations Officer of the Oil and Gas Commission:

> Blueberry remains very concerned with the OGC's fragmented approach to consultation on this Application. The OGC is seeking to divide this project into two components: the clearing of the land and the construction and operation of the hydrocarbon processing facility ("the Facility"). In spite of the OGC knowing that the Proponent plans on building the Facility on the cleared site to process the gas produced from the wells on its wellpad and surrounding areas, it is attempting to consult only on the proposed clearing. This approach

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> amounts to project splitting, and it is frustrating meaningful consultation on this Application because we can never discuss with the OGC the full range and scope of potential impacts from the proponent's plan to build this facility. Further, we are concerned that, if the OGC approves the clearing, it will then use those approved impacts to justify construction of the Facility and its incremental impacts to our lands and animals.

[1339] This application also contains a useful demonstration on how the Oil and Gas Commission uses its Area Based Analysis tool (discussed further below) to assess cumulative impacts. As per the Oil and Gas Commission's application process, the proponents hired a consultant – Highmark Environmental Services Ltd. – to run the Area Based Analysis tool for the proposed project. Highmark Environmental produced a report to this end, dated July 4, 2016. The application site was in the Cameron River area.

[1340] The conclusion segment for that report stated there was "no indication in any of the spatial data…that this project would have an adverse effect or contribute to the cumulative effects on the [listed resources]." The listed resources included: existing old forest; Old Growth Management Areas; "the distance to watercourses"; riparian areas; "location of water wells"; community watersheds; and water quality, as well as various wetland features (like swamps and marshes) and land use designations. However, Ms. Pyle noted that the analysis made no mention of the seven tributaries of the Cameron River and Blair Creek that the access road would cross, nor did it make any reference to the low-lying wet areas surrounding the development, which she testified were important for animals and plants that Blueberry members use in exercising their treaty rights. A moose lick was depicted in the appendices, but the Area Based Analysis portion contained no mention of this feature, either.

[1341] Ms. Pyle also noted there are no guidelines in place to address the impacts of industrial noise on wildlife. She testified that some noise is both disruptive and constant, like a pump jack. When Blueberry raised this issue, the Oil and Gas Commission's response was to refer them to a residential noise guideline. As Ms.

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Pyle notes, this guideline only applies to nearby residences – of which there were none – it protects people, not animals.

[1342] When Blueberry has raised the impacts of an application on animal habitat, the Oil and Gas Commission references Section 6 of the *Environmental Protection and Management Regulation*, where protection may be provided for "proposed or established ungulate winter range; wildlife habitat features; core caribou habitat; old growth management areas or wildlife retention areas." However, if none of these designated areas overlap with the application area, the Oil and Gas Commission does not recognize an impact on wildlife habitat – even if Blueberry identifies the area as a critical area of concern – on the basis that it is inconsistent with the government objectives under s. 6 of the Regulation.

[1343] The apparent sole consideration of non-designated wildlife habitat is under the *Environmental Protection and Management Regulation,* s. 6(b), which states that the Oil and Gas Commission is obligated to carry out oil and gas activities "at a time and in a manner that does not result in physical disturbance to high priority wildlife." On cross examination, Mr. Curry confirmed that the Oil and Gas Commission interpreted this obligation as being only with respect to the timing of activities – for example, by avoiding disturbances during sensitive moose calving season. As Ms. Pyle pointed out, once the calving season is over, the disturbance then occurs. The reality is that, going forward, the habitat is destroyed and the sensitive calving area needed for the future is gone.

[1344] Blueberry consistently raised the above concerns in response to individual permit applications. In the face of repeated requests from Blueberry to consider the cumulative impacts of a specific application, Oil and Gas Commission staff eventually responded:

> In addition to direct participation in the development of the ABA, the best opportunity for Blueberry to assist the Commission in assessing and addressing the cumulative impacts question is through discussion of project-specific concerns with respect to proposed oil and gas activity.

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Note that the Commission gave this suggestion as a way of *dismissing* Blueberry's project-specific concerns about cumulative effects. In some examples reviewed at trial, the Commission offered to consider project-specific concerns if Blueberry would provide them, ignoring the fact that Blueberry had already done so, repeatedly, in the immediately preceding correspondence. Ms. Pyle testified that this was a common theme in correspondence around permit applications.

[1345] Ms. Pyle reviewed a number of permit applications provided by the Oil and Gas Commission to Blueberry. In her capacity as Director, she was responsible for supervising Blueberry's Lands and Resource Department and responding to referrals about proposed development in the territory, including oil and gas development. Ms. Pyle testified that Blueberry receives hundreds of these referrals annually, and that she probably sent a response regarding 15 to 20 such referrals each day.

[1346] Mr. Curry indicated that the Commission regularly grants deadline extensions for the responses. In contrast, Ms. Pyle indicated they normally request a response within five working days of receiving the application. I prefer Ms. Pyle's testimony on this point, as she was directly involved in the difficulties of responding to these numerous applications; Mr. Curry was not.

[1347] As an example, Ms. Pyle referred to a weekly status report put together by the Oil and Gas Commission in December 2016. She indicated that Blueberry's Lands and Resource Department was overwhelmed by the number of applications they were required to respond to at this time, with only three staff. The weekly status report listed 45 active Zone A referrals (being those closest to Blueberry's core territory), but Blueberry also had to respond to Zones B and C. Ms. Pyle said this was a sliver of what the department had to consult and respond to at the time. In addition to these referrals, the Blueberry Lands and Resource Department was responding to the Silverberry expansion and dealing with the Environmental Protection Agency; all referrals associated with the Site C dam; and two

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amendments to the six-year Forestry Operating Schedule: one amendment sought by Canfor to log the Beaton burn, and one sought by West Fraser out of Chetwynd.

[1348] In June 2019 the Oil and Gas Commission implemented an Interim Consultation Procedure and timeline protocol that provided a longer timeline for the initial response to applications, but very little evidence was provided on this point. If anything, it confirms the need to address the issue that Ms. Pyle identified in her testimony.

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ii. Area Based Analysis

[1349] It is evident the Area Based Analysis has been heavily relied on by the Oil and Gas Commission in response to Blueberry's concerns. As noted earlier, to assess the impact of a proposed activity, Area Based Analysis calculates the total area of industrial disturbance in northeastern BC, and then adds the *incremental* disturbance expected from the proposed activity. It essentially asks, "What will the total disturbance in this area be, including this new disturbance?" The tool then compares that total disturbance number to a set of thresholds based on various environmental "values" or "indicators." For example, one indicator is "Old Forest." If the total disturbance would decrease the amount of old forest below a certain threshold, the Area Based Analysis tool would sound the proverbial alarm, triggering an assessment by the Oil and Gas Commission. As will be discussed further below, surpassing a threshold does not actually stop development and has no substantive effect.

[1350] Although it has been in development since 2013, and was initially implemented in 2015, Area Based Analysis still only addresses a small grouping of issues. At the time of its inception, the Area Based Analysis only considered two environmental values: Old Forest and Riparian Reserves. The Oil and Gas Commission has slowly added new values; at present, there are only four values in use. In the interim, the Commission continues to issue permits.

[1351] This limited list of values means that the Area Based Analysis does not address what Blueberry – and to some extent, the Province's own scientists – say are key cumulative effects metrics, including:

a) buffers or zones of influence surrounding disturbances, despite an abundance of credible scientific evidence that these buffers are useful in estimating and assessing actual cumulative impacts;

b) the actual impacts of development (as opposed to simply the disturbance footprint);

c) any future planned development;

d) the level of relative importance of tracked features or values (i.e. whether a given stream or forested area is critical habitat);

e) the concentration of development in any given area versus the average level of development across the Natural Disturbance Unit;

f) linear disturbance density, fragmentation, connectivity, or interior forest metrics; or

g) most forestry impacts, including readily-anticipated forestry development in the areas in question.

[1352] Notably, there is no direct measure in the Area Based Analysis to assess or protect treaty rights. At various points, Blueberry suggested linear disturbance density as a possible treaty rights indicator. Mr. Curry was asked about the Oil and Gas Commission's decision to use total disturbance instead of linear disturbance in the face of this request, but provided little or no explanation.

[1353] There are also a number of issues with the chosen indicators or values and with the Area Based Analysis' thresholds or "triggers" for disturbance levels. The Oil and Gas Commission did not consult Blueberry when determining these thresholds.

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[1354] First, and most importantly, there is no real consequence to a threshold being reached. Mr. Curry testified that triggers result only in the proponent and the Oil and Gas Commission collecting more information and conducting additional reviews. There is no “hard stop” if a threshold is reached. There is no bar on further development. There do not appear to be any concrete consequences to an Area Based Analysis threshold being overrun.

[1355] Furthermore, with respect to Old Forest, the thresholds are set based on Natural Disturbance Units: massive tracts of land, which are too coarse and large to be of any help to the plaintiffs in combatting cumulative effects. Nearly the entire Blueberry Claim Area is contained within a single Disturbance Unit – the Boreal Plains Natural Disturbance Unit– which comprises roughly eight million hectares of land. This is more than twice the size of the Claim Area itself, and may be many times the size of an individual watershed. This can be compared to other management units – for example, Wildlife Management Units – which are far smaller and allow for more granular management.

[1356] The following map, which is Exhibit 73, illustrates the size disparity:

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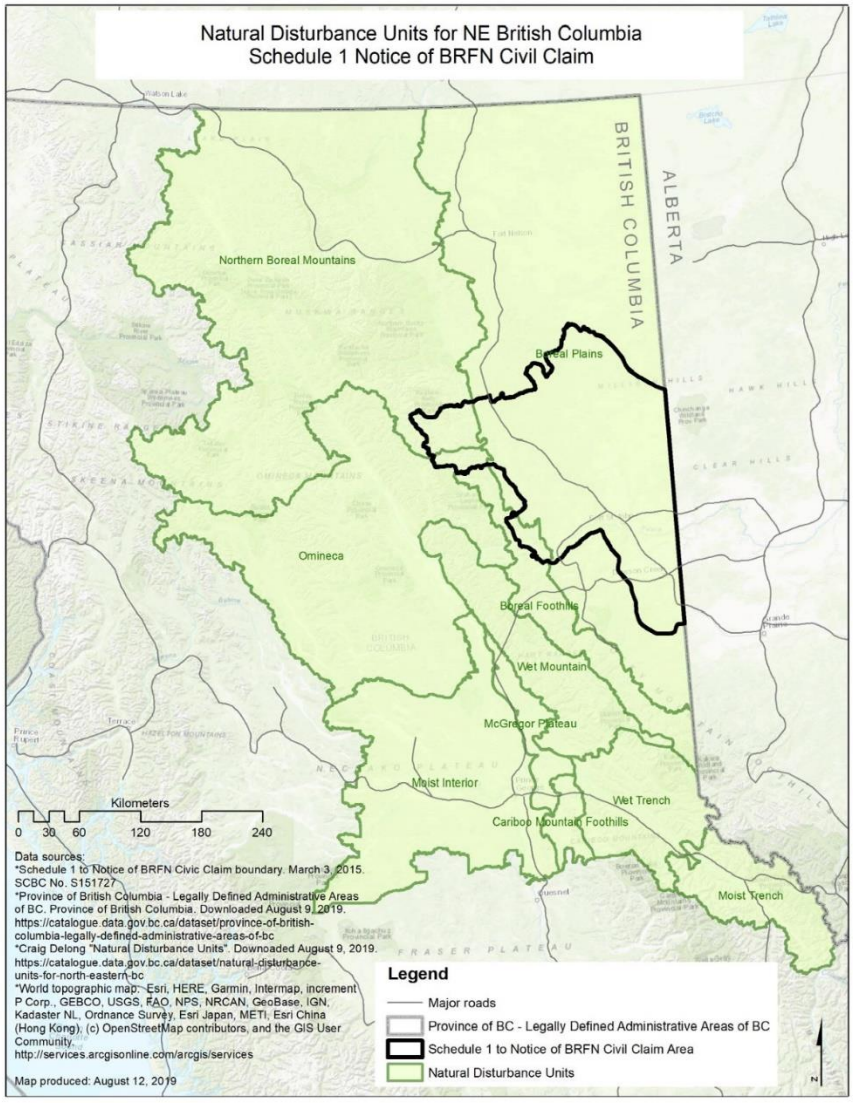

Exhibit 73: Natural Disturbance Units for NE British Columbia, Schedule 1 Notice of BRFN Civil Claim.

[1357] Mr. Curry testified that the Oil and Gas Commission chose the Natural Disturbance Unit based on research by Craig DeLong, the former regional ecologist for northeastern BC. Mr. DeLong originally designed these units to provide forestry harvesting recommendations based on natural disturbance patterns in each unit. For example, Mr. DeLong's management recommendations include maintaining large old forest reserves, or harvesting trees in irregularly-shaped patches to match the shape of natural disturbances, like forest fires, and maintaining a composition of

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forest ages (for example: new growth, old forest) roughly in line with the natural landscape. As part of this research, he determined a guideline natural range for “old forest” inside of each unit.

[1358] Mr. DeLong’s management theory is laid out in a 2011 report for the Ministry of Forests entitled “Land Units and Benchmarks for Developing Natural Disturbance-based Forest Management Guidance for Northeastern British Columbia.” Natural Disturbance Units were not designed to address oil and gas development, nor cumulative effects. Critically, the report sets out a number of recommended strategies to be used in conjunction with each other. The Oil and Gas Commission, like the Ministry of Forests, has selected only one factor (the percentage of old forest) and does not use the combination of strategies or factors recommended in the report.

[1359] Further, the Area Based Analysis threshold for Old Forest (17%) is set as an average across the entire Natural Disturbance Unit. This means it does not account for the intensity of development in any given area, including the Blueberry Claim Area.

[1360] By way of illustration, Plaintiffs’ counsel pointed out that the threshold or “trigger” for the amount of Old Forest – i.e., the point at which the Area Based Analysis would “sound the alarm” on the Old Forest value – would not be triggered even if every single Old Forest tree in the Blueberry Claim Area were cut down.

[1361] That the Oil and Gas Commission chose such a low threshold only compounds the problem: 17% is at the lowest end of the natural range. Mr. DeLong’s research – upon which the threshold is based – specified that a natural level of Old Forest in the Boreal Plains Natural Disturbance Unit was somewhere between 17-33%. In addition, the lack of any consideration of buffers or zones of influence means the Area Based Analysis underestimates actual disturbance levels in the forest. Mr. Curry admitted that when choosing to use Natural Disturbance

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Units for the Old Forest indicator, he did not consider when, if ever, the trigger was likely to be surpassed.

[1362] Moreover, with respect to concentration, much of the planned development in the Montney Play is concentrated in the North Montney area, which overlaps with Wildlife Management Units 7-34, 7-44 and 7-45 – areas that are central to Blueberry. Because the Area Based Analysis measures impacts on Old Forest at the Natural Disturbance Unit scale, significant development could occur in what Blueberry describes as its “core territory” without triggering an assessment, which only measures the average across the Natural Disturbance Unit. Similar concerns are relevant to the Riparian Reserve Zones indicator given the size of water management basins.

[1363] Finally on this point, the Old Forest value does not track the “internal,” “functional” or “effective” forest that is needed for effective wildlife habitat. More will be said about that later in these reasons.

[1364] The Riparian Reserve Zones indicator tracks only a small subset of the Blueberry Claim Area. It tracks only large streams, not small ones, and applies to only a small strip of land surrounding each riparian feature (between 10-50 metres). Riparian Reserve Zones cover only a small percentage of each water management basin, and, much like the Old Forest indicator, the threshold is applied against too coarse of an area. In this case, the threshold measures the entire water management basin rather than against particular streams or waterways. As the plaintiffs pointed out, this means the disturbance for any individual stream could greatly exceed the threshold 5% disturbance rate without triggering the Area Based Analysis indicator.

[1365] In addition, as the Plaintiffs point out, the two more recently implemented values, Designated Wildlife and Old Growth Management Areas, have very little application to the Blueberry Claim Area.

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[1366] The Oil and Gas Commission implemented the “Designated Wildlife” value in 2017. It monitors only those areas which have been designated as wildlife habitat under legal orders (i.e., as Wildlife Habitat Areas and Ungulate Winter Ranges), of which there are almost none in the Blueberry Claim Area. There are very few of these lands in the Blueberry Claim Area, and as moose are not a protected species, their habitat will not be designated as a Wildlife Habitat Area. Provincial policy limits on the use of Ungulate Winter Ranges and Wildlife Habitat Areas make it unlikely the Province will meaningfully expand these designated lands within the Blueberry Claim Area.

[1367] The Oil and Gas Commission is aware there are very little to none of these designations in Blueberry territory. Despite this knowledge, the Oil and Gas Commission has consistently and in rote fashion responded to Blueberry’s concerns by referring it to the Area Based Analysis, which relies in part upon these designations.

[1368] The Plaintiffs engaged Dr. Rachel Holt to review the Area Based Analysis framework. Dr. Holt testified as a fact witness in this trial, including on the factual underpinnings of the Area Based Analysis. She was not tendered as an expert witness and was not asked to provide an expert opinion, and as such I have not considered Dr. Holt’s testimony as that of an expert. Rather, Dr. Holt testified about actions she has taken at Blueberry’s request to address issues Blueberry raised concerning impacts on its territory. Dr. Holt testified about the report she authored at Blueberry’s request detailing a number of issues with the Area Based Analysis framework. Blueberry provided the Oil and Gas Commission with that report in 2016 as part of identifying its concerns.

[1369] At trial, Dr. Holt went through the Area Based Analysis report for the Blueberry River watershed, which appears on the Oil and Gas Commission’s website, to highlight some of the critiques she and Blueberry provided to the Commission. As Mr. Curry acknowledged in his testimony, in communications with the Oil and Gas Commission, Blueberry repeatedly requested that the Commission

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use the watershed scale – or even the scale of their territory – for its old forest indicator.

[1370] Dr. Holt noted the issues with the landscape scale on which the Area Based Analysis' values are measured:

> A: … And I literally was originally very confused by how the status for each watershed could be classified as normal for old forest when I'm looking at an image of the Lower Beatton River, in this case, where most of it is private land, agriculture. There is no forest on most of it. And a very small percentage of the remaining forest is old forest. You can see the very small scattered forest fragments here.
>
> And I – I literally did not understand how – how that was being reported on. So I was puzzled, and then I looked at it in more detail and started to understand that in one part of their information they report on the very large – on the very, very large Natural Disturbance Unit, but they provide an output for every watershed as though that reflected the condition of old forest in that watershed.
>
> And the reason that – so I became familiar with this in this level of detail when I wrote the Land Stewardship Framework for Blueberry. And the reason it concerned me and I wrote in that report was that the [Area Based Analysis]– the [Commission] was telling Blueberry that the [Area Based Analysis] was an effective tool for making sure that permits weren't allowed to just go ahead because this tool would somehow protect the values that the nation was concerned about. And on a human scale or a wildlife scale or an ecosystem scale I pointed out in that technical review that it's not helpful to either people or animals if there is old forest a very long way away. It matters on the scale of watersheds.
>
> And I was confused about it because the [Commission] themselves developed these watershed as their own reporting unit because they are a – and I had heard this from them directly – that because they are an appropriate scale to report on. And yet when I delved into it I realized that they were not reporting at this scale.
>
> …
>
> When I looked into the details, they were not reporting at the scale of the watershed. They are – they are showing a map of the watershed but reporting on the old forest over a very large area…[t]he Natural Disturbance Unit.
>
> So even though there's no – so the [Area Based Analysis] tool has a trigger that suggests concern about old forest less than 17 percent. They have set an old forest target of 17 percent. This watershed has about 1 percent of old forest in it yet the [Area Based Analysis] tool concludes that the old forest status here is normal. Which is why I wrote in the Land Stewardship Framework that I was concerned about the potential effectiveness of that tool for looking at and responding to the value of old forest.

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[1371] This reality was demonstrated by a review of the Oil and Gas Commission's own documentary evidence.

[1372] Dr. Holt also noted that the Area Based Analysis report excludes private land – which may well have been developed or converted to agricultural land – from its calculations. These habitat changes are not factored into the assessment of a watershed's overall disturbance level.

[1373] Parenthetically, I take these comments to be a statement of fact, i.e. that while the Oil and Gas Commission references watersheds in its reports, it uses the much larger Natural Disturbance Unit measure for assessing old forest, and excludes private land from its calculations; and furthermore that Blueberry and Dr. Holt alerted the Oil and Gas Commission to the fact that this was an issue.

[1374] On March 14, 2016, Blueberry forwarded correspondence to the Oil and Gas Commission setting out some of its concerns with respect to the Area Based Analysis. In that correspondence Blueberry expressed that:

a) the values the Area Based Analysis considered at the time (old growth forest and riparian zones) are not acceptable proxies for treaty rights;

b) the disturbance thresholds set by the Oil and Gas Commission have no relationship with Blueberry's interests and practices, nor was Blueberry involved in defining them;

c) the large Natural Disturbance Units employed by the Area Based Analysis, such as the Boreal Plains Unit, have no relationship with the much smaller areas in which Blueberry members try to exercise their rights. This means the Area Based Analysis "dilutes and grossly understates" the concentrated impacts that actually occur on the areas and the values that matter to the treaty rights; and,

d) the Oil and Gas Commission has abdicated its regulatory responsibility for managing and assessing cumulative impacts by trying to make oil and gas industry proponents responsible for applying the Area Based Analysis,

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> notwithstanding its known fundamental defects, the strong incentives these proponents have to understate their impacts, and the Commission's limited ability to oversee and/or evaluate industries assessments.

[1375] The Area Based Analysis is at the heart of the Oil and Gas Commission's cumulative impacts analysis. Although the defendants suggested that cumulative impacts assessment is embedded into the Oil and Gas Commission's permitting process more broadly, internal communications between Oil and Gas Commission staff make it clear that the Area Based Analysis is used as the primary tool in this regard. In fact, Mr. Curry stated in a 2015 email regarding BRFN's ongoing requests that the Oil and Gas Commission more directly assess cumulative effects on treaty rights:

> [Blueberry] may be asking for an alternative, but we have been clear that [Area Based Analysis] is the tool we will be utilizing, in conjunction with consultation and ongoing permitting processes.

[1376] Mr. Curry then asked about meetings to engage with Blueberry on how to improve the Area Based Analysis. Alicia Jung, first Nations Liaison Officer for the Oil and Gas Commission, responded to Mr. Curry by saying:

> During the April 17th and May 5th meetings it was agreed that [Area Based Analysis] would be a separate discussion however there were no commitments from [Blueberry] or [the Oil and Gas Commission] to follow-up and book a separate discussion. As you know, every letter we send includes an offer to meet separately to discuss [Area Based Analysis]. We have not proposed any dates as [Blueberry] has not expressed any interest in taking us up on that offer. *The only interest they have expressed is for an assessment of cumulative impacts on Treaty rights and a plan to restore impacts to Treaty rights*. We have been focused on continuing discussions on the files.
>
> (emphasis added)

[1377] What is notable about this exchange is the Oil and Gas Commission's refusal to consider any of Blueberry's suggestions or propose alternatives to properly address Blueberry's concerns.

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[1378] Further, in response to such requests, the Oil and Gas Commission eventually refused to discuss cumulative effects with Blueberry at all, and by way of response consistently pushed Blueberry's representatives to talk directly to Mr. Curry regarding the Area Based Analysis. Mr. Curry agreed at trial that the Commission did not intend the Area Based Analysis to act as a single, comprehensive cumulative impacts assessment tool. However, he also testified:

> Q: Did you understand that you, on behalf of the [Oil and Gas Commission] and the Crown, had an obligation to develop an effective approach to cumulative impacts, to respect their treaty rights?
>
> A: Well, it's my understanding that our approach to assessing cumulative impacts was with area-based analysis. We hadn't defined what treaty rights were; how they would be measured, we didn't have a value.

[1379] Overall, and despite the regulators' demonstrated reliance on it, Area Based Analysis is deeply flawed as a cumulative effects or treaty rights consideration tool.

iii. Permit Review Outside of the Area Based Analysis

[1380] In addition to the Area Based Analysis, the Oil and Gas Commission considers designated land areas – including Ungulate Winter Ranges, Wildlife Habitat Areas, and Old Growth Management Areas – which are subject to the "material adverse effects" test described above, which stems from the *Environmental Protection and Management Regulation*. However, as Blueberry notes, this implies that development can and will continue in designated areas provided the decision makers believe it to fall below the "material adverse effect" threshold on a permit-by-permit basis. Mr. O'Hanley testified that in terms of Old Growth Management Areas, they have interpreted this to allow up to 5% disturbance in each area.

[1381] Perhaps even more telling, Cultural Heritage Resources – an indicator which the Oil and Gas Commission has not yet implemented – are also a designated value under the *Environmental Protection and Management Regulation*. The Oil and Gas Commission is thus required to consider whether a proposed activity might have a "material adverse effect" on Cultural Heritage Resources when issuing permits. The

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Environmental Protection and Management defines “cultural heritage resources” as including, *inter alia*, sites that are subject to a treaty right (in treaty areas) and those that are “the focus of a traditional use by an aboriginal people…” (in non-treaty areas). When Mr. Curry was taken to relevant sections of the *Environmental Protection and Management Regulation* during cross-examination, he appeared to realize for the first time that unlike Ungulate Winter Ranges, Old Growth Management Areas and Wildlife Habitat Areas, Cultural Heritage Resources do not need to be designated by a minister. This means that protecting Cultural Heritage Resources is an existing and ongoing Oil and Gas Commission obligation. He admitted the Oil and Gas Commission has no process in place to protect Cultural Heritage Resources, which include treaty rights, and have developed no definition for what counts as a Cultural Heritage Resource.

[1382] The Province noted that even beyond the Area Based Analysis and these designated areas, a wide array of information is collected and put before the decision maker, including maps overlaid with various data layers detailing disturbances, other active developments in forestry and oil and gas, and wildlife habitat.

[1383] However, the Oil and Gas Commission’s “consideration” of various maps and data layers means only that the Oil and Gas Commission decision makers may be aware of the extent of development in the area, including forestry activities and cutblocks. There are no disclosed thresholds associated with this information, against which the decision maker may assess cumulative impacts. There was no evidence of a standardized use of these maps, besides that they are put in front of the Oil and Gas Commission decision maker at some point. Recall that the Area Based Analysis assesses disturbances for its limited list of “values” on various disparate scales (e.g., Natural Disturbance Units and watersheds), none of which directly correspond to Blueberry’s territory. As a result, it is clear that there is no formal process as part of the Oil and Gas Commission’s permitting process to

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consider the cumulative footprint of disturbances for the Blueberry Claim Area or how the impacts of those disturbances may interact.

[1384] The Oil and Gas Commission's Policy on Decision-Making Considerations provides specific direction with respect to the application of the Government's Environmental Mitigation Policy:

> Government's Environmental Mitigation Policy (EMP) was established in 2014 and was originally drafted to assist with addressing significant environmental impacts from large projects. It was expanded to include consideration of environmental impact mitigation in all decision making but with a number of important qualifications. The EMP does not convey legal authority and must be applied in accordance with the relevant legislation. It is ultimately up to the decision maker, in accordance with their legislative authority, to decide where and what type / amount of mitigation to apply. The EMP applies a hierarchy in deciding on the type of mitigation to apply and encourages all feasible measures to be considered at one level before moving on to the next. That mitigation hierarchy is as follows:
>
> > a) avoid impacts on environmental values and associated components.
> >
> > b) minimize impacts on environmental values and associated components.
> >
> > c) restore on-site the environmental values and associated components that have been impacted.
> >
> > d) offset impacts on environmental values and associated components.
> >
> > Given the Commission's legal authorities in [the *Oil and Gas Activities Act*] and the requirements in [the *Environmental Protection and Management Regulation*] sections 6 and 7(a), *the mitigation hierarchy cannot be fully applied* for the following reasons:
> >
> > e) [*Environmental Protection and Management Regulation*] sections 6(a), (b), (d) and 7(a) do not provide authority to mandate avoidance of the identified environmental values, instead they state that impacts are acceptable, until a material adverse effect occurs.
> >
> > f) Some on site restoration (or mitigation) can be addressed in decision making through permit conditions (OGAA s25), other key environmental restoration requirements are required under the [*Environmental Protection and Management Regulation*] and [*Oil and Gas Activities Act*], and these aren't part of decision making under sections 25, 31(7) and 32(5) of the [*Oil and Gas Activities Act*].

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> g) The Commission does not have legal authority to require the offsetting in terms in item d above.
>
> (emphasis added)

[1385] As reflected in the above Oil and Gas commission's Policy, the government's environmental policy is modified in effect to *allow* oil and gas development to proceed *despite* its impacts on the environment. It is evident from this policy manual that what might be considered environmental protections in other areas are not applied in the same fashion to areas in which oil and gas development occurs, including Blueberry's traditional territory. Indeed Mr. O'Hanley testified that while the Environmental Mitigation Policy provides for restoration offsets, the oil and gas decision makers don't have the legal authority to order such restoration until the supporting regulations of the amended *Oil and Gas Activities Act* are completed and come into force.

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iv. Disconnect Between the Tenures Branch and the Oil and Gas Commission

[1386] Finally, as mentioned above, there appears to be a significant disconnect between the Ministry of Energy and Mines and the Oil and Gas Commission regarding the Oil and Gas Commission's role in assessing cumulative impacts and protecting treaty rights.

[1387] With respect to the Tenure Branch's tenuring decisions, Mr. O'Hanley (at the Oil and Gas Commission) stated:

> [I]n situations where tenure has been granted, going back to the Commission's decision test which is a public interest and balancing test, *the granting of tenure we would see as at least a signal from government representing the public interest, that the tenured area is a candidate for development*. So we wouldn't then turn around and say that we wouldn't assess development proposals, because it is an area that has been identified as potentially developable.
>
> (emphasis added)

[1388] However, the Tenure Branch decision maker, Mr. Pasztor, did not seem to be aware that the Oil and Gas Commission has taken tenure grants as any kind of

strategic signal regarding potential development. As noted above, the Ministry of Energy and Mines largely defers the obligation to protect treaty rights to the Oil and Gas Commission as the body that actually authorizes surface activities.

[1389] Conversely, the Oil and Gas Commission witnesses testified that they did not have the power to impose limits on development to protect treaty rights from cumulative impacts. There are no written thresholds at the Oil and Gas Commission for cumulative impacts, nor is there any written guidance on how much development or disturbance is too much for a given area. The Oil and Gas Commission has noted in a letter of May 2015 to Blueberry that while it considers potential future increases in development, it would ultimately rely on "other processes being initiated by the Province to address the level of development."

[1390] In addition, Mr. O'Hanley testified that if an Oil and Gas Commission decision-maker wanted to protect treaty rights or wildlife habitat, they could not do so at their own discretion; they would have to elevate the decision to a higher authority. He noted that Oil and Gas Commission decision-makers are required to elevate any "unusual" decisions, which would include the decision to reject a permit due to cumulative impacts or to reject based on the infringement of treaty rights.

[1391] It is telling that the Oil and Gas Commission has never denied a permit due to anticipated impacts on the Plaintiffs' treaty rights, nor based on cumulative impacts to those rights. To reiterate, the Commission considers it "unusual" to reject a permit for treaty rights infringement – so unusual that decision makers believe they have no discretion to reject on this basis without seeking approval from a higher authority.

[1392] This disconnect between the Ministry of Energy and Mines and the Oil and Gas Commission is illustrative: both appear to consider the other as an assessor of cumulative impacts on treaty rights. This issue was further magnified in Mr. Curry's and to some degree Mr. O'Hanley's testimony. Mr. Curry, in particular, frequently responded to direct questions regarding the Oil and Gas Commission's consideration of treaty rights or cumulative effects as being the purview of

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"government," often with an implication that the Oil and Gas Commission was awaiting direction from another source before implementing any protections.

[1393] I note that the Province, both in argument and via their witnesses, had a tendency to point to an ever-expanding pool of decision-making bodies as evidence that cumulative effects and/or treaty rights are being considered, without concretely describing how these issues are being addressed.

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c) Restoration and Reclamation Issues

[1394] As the plaintiffs note, the Province's oil and gas reclamation plans may be judged on their efficacy and timeliness.

[1395] Many of the reclamation measures the Province presented during this case were initiated on the eve of or, in some cases, during trial. There is consequently little evidence of their efficacy. As the Plaintiffs submit, these recent reclamation programs go more to the question of remedy than of prior infringement.

[1396] The evidence shows that significant funds are required to restore the existing oil and gas disturbances in northeastern BC, including in the Blueberry Claim Area. By Oil and Gas Commission's own estimates, restoring existing seismic lines in northeastern BC will cost somewhere in the range of $500 million.

[1397] With respect to the Reclamation Memorandum, the $1 million in annual funds will be split between a number of initiatives and First Nations. The Court received no evidence of how the funds will be allocated, or how much will go to restoration inside the Blueberry Claim Area. At the time of Mr. Curry's testimony, the Province had not yet engaged with any Treaty 8 First Nations regarding the restoration work to be undertaken pursuant to the Restoration Memorandum, although he expressed an intention to do so.

[1398] There is a similar issue, on a larger scale, with the federal funding – it is unclear how much of this will go toward the Blueberry Claim Area or if it will be of benefit to Blueberry's treaty rights. The Defendant did not proffer evidence of how

much damage these funds will restore within the Blueberry Claim Area, nor how long recovery will take after the restoration efforts are complete. Further, as the Plaintiffs pointed out, these federal funds will be used for "dormant" well sites, which proponents are already legally obligated to restore under the *Dormancy and Shutdown Regulation*.

[1399] Critically, contemporary restoration efforts have a long lead time. Even if the Province undertakes aggressive restoration efforts in the present day, the effects may not be seen for many years. Depending on the disturbance type and the ecosystem, complete restoration may take up to a century. For example, with respect to seismic lines and roads, Mr. Pasztor confirmed that linear features are not "restored" by the Province's definition until 35 years post-disturbance for upland habitat, or at least 100 years for lowland habitat.

[1400] The manner in which restoration is carried out presents further problems. Section 19 of the *Environmental Protection and Management Regulation* requires the use of "ecologically suitable species" for the restoration of operating areas of Crown land. However, oil and gas proponents have generally used a non-native seed mix called "timothy clover" to re-plant on seismic lines. Blueberry considers this an invasive species, which negatively impacts biodiversity.

[1401] Mr. Curry did testify that the Oil and Gas Commission is still clarifying what constitute ecologically suitable species. As a result of discussions with First Nations, including Blueberry, they have provided guidance to industry that certain "invasive and persistent" species – including timothy clover – are not suitable for reclamation on Crown land, as they may reduce plant community diversity and hinder the natural revegetation process.

[1402] Mr. Curry also noted that proponents are "encouraged" to engage with local First Nations when developing reclamation plans, including when choosing reclamation plant species. There is some evidence that proponents do engage in this work. For example, Ms. Nicole Deyell, Senior Vice President of Development for

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PETRONAS Energy Canada Ltd. (an oil and gas proponent, and the largest tenure holder in the Blueberry Claim Area), testified that her company has been working with Blueberry on a number of reclamation sites in the Blueberry Claim Area.

[1403] Parenthetically, there does appear to be some positive progress on PETRONAS's part. They committed to collaborating with Blueberry on the planning process for the reclamation program, and reclamation work has already begun. PETRONAS also increased its 2019 reclamation budget in response to concerns from Blueberry about the effects of their proposed developments.

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8. Conclusions with Respect to Oil and Gas Regulation

[1404] In sum, the Province has no substantive measures in place to protect the Blueberry Claim Area against cumulative impacts from oil and gas development. The Province also scarcely considers treaty rights in its oil and gas regime.

[1405] As noted earlier, I find there is a significant disconnect between the tenuring and permitting decision makers, such that each believes the other considers treaty rights and/or cumulative effects to a greater degree than they actually do. This disconnect has created a gap through which Blueberry's rights have fallen.

[1406] Tenure caveats are not legally binding. They have no effect on Oil and Gas Commission decision making and proponents are not bound to follow them. The Ministry of Energy and Mines does not follow up to see if proponents or the Commission are using their caveats in any way. They primarily defer to the Oil and Gas Commission to consider treaty rights and cumulative effects.

[1407] Deferrals and Resource Review Areas are temporary and, as the Plaintiffs noted, there is no indication how long they will remain in place – they may well end the moment this litigation concludes. The Province has also refused to designate tenure "No Disposition Areas" in areas where the demand for tenure is highest and critical to Blueberry.

[1408] The Oil and Gas Commission's permitting process is equally fraught. Permit applications are sent to Blueberry with very little information about planned future development, which means projects may be much larger than originally disclosed, and future permits are pushed through at a lower consultation level. The sheer volume of permits Blueberry receives and the timelines for response stand in the way of meaningful engagement. In addition, the many identical template letters sent to Blueberry in response to their concerns demonstrate perfunctory conduct.

[1409] Further, the permitting process relies on the Area Based Analysis to manage cumulative effects, however, this tool:

a) does not directly consider treaty rights;

b) currently considers only four of the nine intended values; and,

c) sets thresholds that are unlikely to provide any meaningful protection for the Blueberry Claim Area, because:

    i. they measure disturbance on too coarse of a scale;

    ii. they are set too low; and/or

    iii. they are largely inapplicable to the Blueberry Claim Area.

[1410] Moreover, surpassing a trigger results only in further reporting requirements so even if a threshold is reached, development does not have to stop.

[1411] Other avenues for protection against cumulative effects have similar issues. The Oil and Gas Commission has never considered Cultural Heritage Resources in its permitting process. The Province has only recently made steps toward restoration, a process that will take decades to bear fruit. The Province's land use designations provide very limited – and non-binding – protection (further detailed under the Wildlife Management section of this judgment).

[1412] Across the substantial volume of evidence led on the Province's oil and gas regime, the dominant theme was that the Province – via the Oil and Gas

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Commission – had no response to Blueberry's concerns about cumulative effects except to refer them to the Area Based Analysis; or to ask them to wait for more comprehensive forthcoming cumulative effects initiatives. Those initiatives may be years in the making. In the meantime, the Province continues to approve development permits at a substantial rate – hundreds each year, by Ms. Pyle's testimony. While matters may be paused or slowed down during the COVID-19 pandemic, that situation may well return.

[1413] Finally, the evidence shows that the Province has not only been remiss in addressing cumulative effects and the impacts of development on treaty rights, but that it has been actively encouraging the aggressive development of the Blueberry Claim Area through specific royalty programs (including for marginal wells) and Jobs Plan policies.

[1414] As has been set out in the earlier section dealing with disturbance on the land, oil and gas development has contributed significantly to anthropogenic disturbance in the Blueberry Claim Area, with its resultant adverse impacts on habitat and wildlife. The disturbance on the land, which has impacted and resulted in the inability for Blueberry to meaningfully exercise its treaty rights, has been fostered by the Province's regulatory regime.

[1415] Overall, the Province's oil and gas regime provides very little protection against cumulative effects, and barely considers treaty rights. While new initiatives are underway, the analysis of whether the Province has diligently implemented the treaty requires an assessment of whether *existing* processes are adequate to protect treaty rights. That assessment reveals they are not.

[1416] Delay in dealing with these matters and the continuation of the status quo has benefitted the Province. While interim measures can be helpful, they are only so if permanent measures are developed in a timely way. In the end, these processes are at the discretion of the Province and its agencies, with no clear ability for Blueberry to enforce its treaty rights. That has to change. The Province has been on notice for

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years – at least since 2012 – regarding these issues. In the meantime, adverse impacts on Blueberry's territory continue to accumulate, fundamentally eroding the Treaty promise.

[1417] While the Province has made some recent efforts, particularly in the Regional Strategic Environmental Assessment process, these initiatives have no definitive timelines and are ultimately discretionary. The Province continues to have all the power, and ultimately little incentive to change the status quo. There is a clear need for timely, definitive, enforceable legal commitments that recognize and accommodate Blueberry's treaty rights. The delay in implementing such legally enforceable commitments must therefore come to an end.

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D. Forestry Management

[1418] The management of BC's forests falls under the responsibility of the Ministry of Forests, Lands and Natural Resources Operations and Rural Development (previously defined in these reasons as "Ministry of Forests"). The Ministry of Forest's approach to forest management divides the province into three geographic areas: the north, the south, and the coast. These areas are then subdivided into regions, and within that, resource districts. The forest resources in each resource district are further divided into Timber Supply Areas (also referred to as "TSAs") under s. 7 of the *Forest Act*.

[1419] The Blueberry Claim Area falls within the Peace Natural Resource District, which is a subset of the northeast region. The majority of the Blueberry Claim Area is within the Fort St. John Timber Supply Area, which covers approximately 4.6 million hectares. (Recall that the Blueberry Claim Area is approximately 3.8 million hectares.) The Fort St. John Timber Supply Area is bounded by the Peace River on the south, the Alberta border on the east, and the height of the Rocky Mountains on the west. The portion of the Blueberry Claim Area that is south of the Peace River is within the Dawson Creek Timber Supply Area.

The location of the Blueberry Claim Area in relation to these timber supply areas can be seen on Exhibit 99, Tab 1, which is reproduced below.

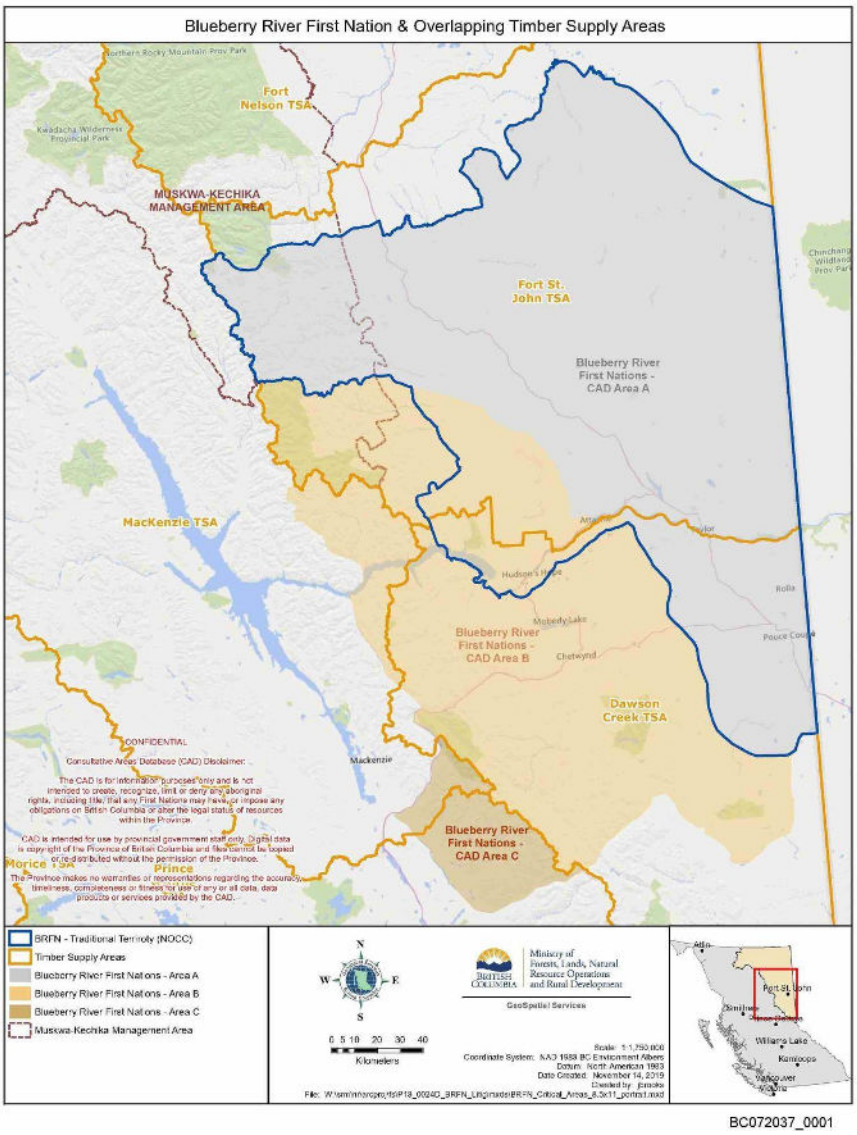

Exhibit 99, Tab 1: Map titled Blueberry River First Nation & Overlapping Timber Supply Areas, dated November 14, 2019.

[1420] Within the Ministry of Forests there are a number of different forestry related decision makers, tasked with making either higher level strategic decisions or operational decisions.

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[1421] The Chief Forester of British Columbia is responsible for setting the Allowable Annual Cut (also referred to as the "AAC"), which is the maximum volume of timber that may be harvested per year within a timber supply area. The Chief Forester's jurisdiction in setting the Allowable Annual Cut is prescribed by legislation.

[1422] Setting the Allowable Annual Cut is one of the primary strategic decisions, and it frames or affects many of the operational decisions that follow it. The other important strategic decision – though not one made by the Chief Forester – is zoning. Zoning is set in the applicable land and resource management plan.

[1423] The Fort St. John Land and Resource Management Plan was approved by Cabinet in 1997. The Land and Resource Management Plan establishes, among other things, resource management zones. Importantly, it establishes an "enhanced resource development" zone that covers approximately a quarter of the Blueberry Claim Area.

[1424] Of note, the Fort St. John Land and Resource Management Plan describes the enhanced resource development provincial land use category at page 30 as including lands:

- with existing or with future potential suitability, for intensive resource development with due consideration to the management of other resource values;
- where a high priority has been designated for a special or combined resource management emphasis (such a high intensity forest management regime or range management emphasis); and,
- where investment in resource development and enhancement are encouraged in full compliance with the existing regulatory regime.

[1425] In most of BC, timber harvest is managed under the *Forest and Range Practices Act*, and the *Forest Planning and Practices Regulation*. However, timber

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harvest in the Fort St. John Timber Supply Area is governed by the *Fort St. John Pilot Project Regulation,* B.C. Reg. 278/2001.

[1426] Under the *Fort St. John Pilot Project Regulation*, unlike in the rest of BC, forestry companies (referred to as “participants”) are responsible for preparing a Sustainable Forest Management Plan (also referred to as an “SFMP”) and associated Forest Operations Schedules (or “FOS”). The Sustainable Forest Management Plan sets out the objectives and targets for forestry activities in the Fort St. John Timber Supply Area. The Forest Operations Schedules (which are in place for six-year periods) set out anticipated harvest and road building activities. The Sustainable Forest Management Plan must be approved by the Ministry of Forests’ Regional Executive Director for the Northeast Region (a position held by Karrilyn Vince) and the Director of Resource Management for the Northeast Region (a position held by Chris Addison in pertinent times), neither of whom testified at trial.

[1427] When a participant wants to start harvesting, it applies to the Ministry of Forests for the appropriate permits. Determining whether or not to grant the requested permits are operational decisions made by the district managers. Greg Van Dolah is the District Manager for the Peace Natural Resource District. Mark Van Tassel is the Resource Manager for that district, and has also acted as District Manager. Both testified at trial.

1. Parties’ Positions

[1428] Blueberry argues that the Province’s forestry regime is built upon the fundamental goal of maximizing harvest and replacing all the natural forests with crop plantations that will create efficiencies for the next harvest cycle.

[1429] It says that the operational decisions district and resource managers are empowered to make, all connect to higher level plans and processes that have already zoned much of the Blueberry Claim Area for high intensity forestry.

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[1430] Blueberry also raises concerns about decision makers lacking authority to manage cumulative effects, or take into account impacts on the exercise of treaty rights. Blueberry points out that, at the end of the day, it is the forestry companies (i.e., "participants" per the *Fort St. John Pilot Project Regulation*) who hold much of the power regarding what cutblocks to harvest, how and when.

[1431] In response, the Province argues that the forestry legislation, regulations and policies in place protect various social, ecological and environmental values, including those associated with the practice of treaty rights. The Province points, in particular, to the Chief Forester's imposition of a geographic partition to limit the amount of harvesting that can take place within the "core" of the Blueberry Claim Area.

[1432] At a surface level, imposing a partition appears to address a number of Blueberry's concerns and specifically those relating to overharvesting in the core of their territory; however, as discussed later, this is not the case.

[1433] The Province also notes that all First Nations whose territories are within the Fort St. John Timber Supply Area have opportunities to provide input on the Sustainable Forest Management Plan and Forest Operations Schedules, and are also consulted about specific permits. The Province is critical of Blueberry's engagement in consultation regarding forestry decisions to date, and alleges Blueberry has not provided the site-specific information the Province and participants need in order to mitigate impacts of forestry activities on the exercise of their rights.

[1434] The Province says that, in essence, Blueberry disagrees with the way in which the Province is managing impacts, and the Province again reminds the Court that this is not a commission of inquiry into the policy choices the Province has made respecting forest management or the management of industrial development more broadly. The Province notes that difficult questions about how to manage cumulative

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effects are best addressed through collaborative, multi-party processes, such as the Regional Strategic Environmental Assessment process.

[1435] In the sections below I will review in greater detail the various tools used to manage forestry in the Blueberry Claim Area, and will consider the parties' arguments about whether these tools, and the forestry management regime more broadly, allow for the effective consideration of cumulative effects and impacts on treaty rights.

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2. Allowable Annual Cut

[1436] Under s. 8 of the *Forest Act*, it is the Chief Forester of British Columbia, a position currently held by Dianne Nichols, who must determine the Allowable Annual Cut for a timber supply area. The process by which the Allowable Annual Cut is determined by the Chief Forester is referred to as the Timber Supply Review process.

[1437] Setting the Allowable Annual Cut is a strategic-level decision that creates the general contours for other forestry management tools. Because the Allowable Annual Cut sets the maximum level of harvest per year in the Fort St. John Timber Supply Area, it forms a "baseline" of sorts for the activities undertaken as part of the Fort St. John Pilot Project, and directly impacts the creation of the Sustainable Forest Management Plan and Forest Operations Schedules.

[1438] Forest tenures are the contractual agreement between the Province and participants to harvest Crown timber and construct roads, among other things, on the land base. Forest licences, and other types of forest tenure documents, identify the participants' Allowable Annual Cut (i.e., the maximum amount they are allowed to harvest under that specific tenure annually). Participants are required to manage their Allowable Annual Cut under a five-year total volume, but any one year may be over or under the Allowable Annual Cut. Participants pay the Province a stumpage fee when they harvest timber from Crown land. The amount of stumpage paid is

based on the timber volumes, species and grades reported. Stumpage is usually expressed as dollars per cubic metre.

[1439] Generally, the Chief Forester must determine the Allowable Annual Cut at least once every 10 years. However, prior to the Chief Forester's 2018 decision, the Allowable Annual Cut for the Fort St. John Timber Supply Area had not been considered since 2003.

[1440] Section 8(8) of the *Forest Act* sets out the factors the Chief Forester must consider in determining the Allowable Annual Cut.

> 8 (8) In determining an allowable annual cut under subsection (1) the chief forester, despite anything to the contrary in an agreement listed in section 12, must consider
>
> (a) the rate of timber production that may be sustained on the area, taking into account
>
> (i) the composition of the forest and its expected rate of growth on the area,
>
> (ii) the expected time that it will take the forest to become re-established on the area following denudation,
>
> (iii) silviculture treatments to be applied to the area,
>
> (iv) the standard of timber utilization and the allowance for decay, waste and breakage expected to be applied with respect to timber harvesting on the area,
>
> (v) the constraints on the amount of timber produced from the area that reasonably can be expected by use of the area for purposes other than timber production, and
>
> (vi) any other information that, in the chief forester's opinion, relates to the *capability of the area to produce timber,*
>
> (b) the short and long term implications to British Columbia of alternative rates of timber harvesting from the area,
>
> (c) [Repealed 2003-31-2.],
>
> (d) the economic and social objectives of the government, as expressed by the minister, for the area, for the general region and for British Columbia, and

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> (e) abnormal infestations in and devastations of, and major salvage programs planned for, timber on the area.
>
> (emphasis added)

[1441] The Province pointed out that one of the documents relevant to s. 8(8)(d) and the consideration of "economic and social objectives of the government" in the Chief Forester's most recent determination was a letter from the Minister directing her to consider reconciliation objectives, the *UN Declaration on the Rights of Indigenous Peoples* and concerns related to cumulative effects.

[1442] The Chief Forester's jurisdiction is however circumscribed by her mandate. This is limited to ensuring the economic sustainability of the timber harvesting land base.

[1443] As noted above, the Allowable Annual Cut is determined through the Timber Supply Review process. That process involves creation of a data package, a discussion paper, and ultimately the Chief Forester's Rationale for Timber Supply Review Determination ("Rationale").

[1444] The creation of the timber harvesting land base data package is an important first step in determining the Allowable Annual Cut. The timber harvesting land base is calculated by starting with the gross Timber Supply Area (which for the Fort St. John Timber Supply Area is 4.6 million hectares), and deducting all lands that are not part of the Crown Forest Land Base (i.e., non-forested lands, private lands, federal lands, First Nation lands) and then deducting from the Crown Forest Land Base any lands that are not commercially harvestable (i.e., roads, wildlife habitat areas, ungulate winter ranges, or areas containing non-merchantable tree species such as black spruce, birch and larch).

[1445] The timber harvesting land base is the area used to model long-term sustainable forestry yields. Importantly, all of the timber harvesting land base is assumed to be harvestable, and a base case is determined accordingly. The base case is a "harvest projection." It is based on current performance with respect to the

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status of forest land, forest management practices, timber growth and yield. It attempts to avoid excessive changes or future timber shortages.

[1446] In the base case referred to in the Allowable Annual Cut determination, the critical assumption is that, over time, all of the areas of the timber harvesting land base will be harvested and turned into managed forests, and logged again.

[1447] The Fort St. John TSA Timber Supply Analysis Discussion Paper dated November 2016, and which is prepared by the Ministry's Forest Analysis and Inventory Branch, describes the forecasting process as follows at pages 11-12:

> For most AAC [Allowable Annual Cut] determinations, a timber supply analysis is carried out using three categories of information: land base inventory, timber growth and yield, and management practices. Using this information and a computer model, a series of timber supply forecasts are produced to reflect different starting harvest levels, rates of decrease or increase, and potential trade-offs between short- and long-term harvest levels.
>
> From a range of possible forecasts, one is chosen which attempts to avoid both excessive changes from decade to decade and significant timber shortages in the future, while ensuring the long-term productivity of forest lands. This is known as the 'base case' forecast and forms the basis for comparison when assessing the effects of uncertainty of the information modelled on timber supply. The base case is designed to reflect current management practices.
>
> …
>
> Due to the existence of uncertainty in the timber supply analysis, additional forecasts are usually prepared to test the effect of changing some of the assumptions or data used in the base case. These harvest forecasts are referred to as 'sensitivity analyses'. Both the base case and sensitivity analyses are prepared using a computer model that projects the future availability of timber for harvesting based on the growth of the forest and the level of harvesting, while staying within the legal land-use objectives established by the provincial government.
>
> ...
>
> The base case forecast (Figure 6) shows a harvest level of 2,115,000 cubic metres per year…

[1448] First Nations are consulted during the Timber Supply Review process on both the data package and the discussion paper.

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[1449] The Chief Forester considers the information collected throughout the Timber Supply Review process, including the base case modelling analysis and, exercising her professional opinion and discretion, makes her final Allowable Annual Cut determination, which is set out in the Rationale.

[1450] As noted, the Allowable Annual Cut is determined based on the current condition of the landscape and does not speculate on future land uses. Any changes to the land base that occur after the Timber Supply Review process is completed are considered as part of the next Timber Supply Review process, which occurs ten years later.

[1451] While future changes to land use cannot be directly considered, the Chief Forester may run a sensitivity analysis to determine how potential future changes may affect the Allowable Annual Cut determination in the short and long term. If the modelled Allowable Annual Cut base case shows that it is sensitive to changes, the Chief Forester may consider this in her final discretionary determination.

[1452] In setting the Allowable Annual Cut, the Chief Forester can also consider recommendations from any completed assessments done under the Cumulative Effects Framework.

[1453] For example, in the 2019 Allowable Annual Cut determination for the neighbouring Fort Nelson Timber Supply Area, the Deputy Chief Forester sought to consider two indicator values from the grizzly bear current conditions report that was released in 2019, specifically “core security” and “road density.” (This report was the first assessment completed under the Cumulative Effects Framework, which is discussed in greater detail below.) However, the Deputy Chief Forester found that this assessment report did not provide any “direction on the management of grizzly bears” and he therefore could not apply the information it contained to his determination. In effect, he was not able to draw any direction from this completed assessment report.

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[1454] The Chief Forester can only consider cumulative effects information that relates to her statutory authority. She cannot institute new management regimes. If cumulative effects information highlights issues that require attention through land use planning or otherwise, she will pass that information on to those responsible.

[1455] At pages 7-8 of her Rationale, the Chief Forester states:

> Treaty rights or Aboriginal Interests that may be impacted by AAC decisions will be addressed consistent with the scope of authority granted to the chief forester under Section 8 of the *Forest Act*. *When information is brought forward that is outside of the chief forester's scope of statutory authority, this information will be forwarded to the appropriate decision makers for their consideration.* Specific considerations identified by First Nations in relation to their treaty rights or Aboriginal Interests that could have implications for the AAC determination are addressed in the various sections of this rationale where it is within the statutory scope of the determination.
>
> …
>
> *With respect to cumulative effects, I must interpret related information according to my statutory authority. As emphasized above, the chief forester is authorized only to make decisions on allowable harvest levels, not to change or institute new management regimes for which other statutory decision makers have specific authority*. However, cumulative effects information can highlight important issues and uncertainties in need of resolution through land use planning, which I can note and pass on to those responsible for such planning. Information on cumulative effect can also support considerations related to Aboriginal interests and treaty rights.

[1456] I note this is yet another example, as set out in the earlier section dealing with the oil and gas regulatory framework, of a persistent problem in Provincial governmental processes of one decision-maker pointing to another decision-maker to take into account treaty rights and cumulative effects.

[1457] Finally, the Chief Forester has the power to establish a geographic or tree species specific partition within the Timber Supply Area in order to ensure the long-term objective, being a sustainable harvest supply. A partition is not legally binding, but participants are monitored on their conformance with the partition and, if they are not conforming, the Minister can order a legally binding partition under s. 75.02 of the *Forest Act*.

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[1458] Blueberry received copies of the data package and discussion paper produced as part of the Timber Supply Review process, and provided comments to the Chief Forester. Of note is Blueberry's November 29, 2017 letter to the Chief Forester.

[1459] The Court will review this letter in some detail as it raises issues relevant to this case. As was repeatedly emphasized by counsel for the Province, in these proceedings Blueberry has not applied for judicial review of any particular decisions – forestry or otherwise – and the full consultation record for the myriad of decisions made by the Ministry of Forests is not before the Court. The letter is not, however, being used to assess the adequacy of consultation during the Timber Supply Review process, but rather as an example of the types of concerns Blueberry has repeatedly raised regarding forest management and what it sees as overharvesting in its territory.

[1460] In the November 29, 2017 letter, Blueberry set out its concerns regarding forestry in the Fort St. John Timber Supply Area, and with how the Allowable Annual Cut is determined. These concerns included that the Allowable Annual Cut:

a) is set on management objectives that disproportionately harvest from the core of Blueberry's territory. In this regard, Blueberry noted that the Fort St. John Land and Resource Management Plan targets the core of its territory as an enhanced resource development zone available for high intensity forest management;

b) is set on the basis that timber is taken from the whole of the Timber Supply Area, when the reality is that the majority of harvest happens in a core area that is at the heart of Blueberry's territory; and,

c) does not include or take into account significant forest clearing from oil and gas activities.

[1461] In its letter, Blueberry also noted that too much timber was being left on site as waste, meaning that more land than necessary was being cleared. Blueberry also

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noted its concerns that too many new cutblocks were being cleared adjacent to existing clearcuts, and that this appeared to be happening to a greater extent in Blueberry's territory than in the rest of the region.

[1462] In May 2018, the Chief Forester released her Rationale, determining the Allowable Annual Cut for the Fort St. John Timber Supply Area. The document provides an "accounting of the factors" she considered and the rationale she employed in making her determination.

[1463] The Rationale includes a history of the Allowable Annual Cut for this Timber Supply Area. In 1989 the Allowable Annual Cut was set at 1.8 million cubic metres, in 1996 it was increased to just over 2 million cubic metres, and in 2003 it was set at 2,115,000 cubic metres and included a partition of 1,200,000 cubic metres per year for coniferous-leading stands, and 915,000 cubic metres per year for deciduous-leading stands.

[1464] In her May 2018 determination, the Chief Forester set the "new" Allowable Annual Cut at the same volume as had been set 15 years earlier, namely 2,115,000 cubic metres. The Allowable Annual Cut was geographically partitioned to limit the amount of harvest from the 'core' area. As discussed earlier and as reflected in one of the maps included in this judgment, the 'core' area was noted as consisting of the Blueberry, Kobes, Halfway, Lower Beatton, and the southern portion of the Tommy Lakes landscape units. The partition provides as follows:

> 1. *Coniferous species:* a maximum of 1,200,000 cubic metres for coniferous species of which no more than 672,000 cubic metres may be harvested from the 'core' area. Within the core area spruce should comprise no more than 50 percent of the conifer volume; and
>
> 2. *Deciduous species:* a maximum of 915,000 cubic metres for deciduous species of which, no more than 512,000 cubic metres may be harvested from the 'core' area.

[1465] As will be commented on later, this partition was not, as argued by the Province, set as a response to Blueberry's concerns about the exercise of its treaty rights.

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[1466] The Chief Forester did not reduce the total harvesting land base to account for future forestry roads. She noted district staff indicated participants regularly use existing oil and gas features and therefore it was assumed that areas of future harvesting would be accessible using existing roads. Nor did she reduce the timber harvesting land base to account for seismic activity. She noted that while future forest depletion due to seismic activity was likely, estimates of their extent were not modelled in the base case. Instead, a sensitivity analysis was conducted to estimate the impact on timber supply of under-estimating the total harvesting land base. She found that even if the timber harvest land base was reduced by 10%, there was no impact to the short-term timber supply, and only a minimal impact to the long-term timber supply.

[1467] A review of the Chief Forester's Rationale revealed a number of points reflecting both her limited jurisdiction and her expectation that there would be collaboration between staff and various government departments and stakeholders.

[1468] First, the Chief Forester repeatedly noted what was within and beyond the scope of her authority under s. 8 of the *Forest Act*. Second, many of the comments made by Blueberry in its November 29, 2017 letter were not directly responded to, but were directed to regional staff and staff of other ministries to implement, address, or encourage others to assist with. And third, an examination of the reasons for the partition suggests that this was not done in response to Blueberry's concerns about over-harvesting in the southern and central part of the Timber Supply Area and associated concerns about biodiversity, but rather to manage long-term timber supply.

[1469] The Chief Forester noted Blueberry's concern about too much wood waste being left and burned on site was beyond her scope of authority. That said, she noted she expected district staff and licensees to work together to use this fibre rather than leave it or burn it, and referred to the Forestry and Fibre Action Plan, and to ways of making this fibre available to secondary users.

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[1470] With respect to biodiversity, habitat management and the salvage of areas affected by wildfire or forest health issues, the Chief Forester noted she expects Ministry staff to collaborate with participants and First Nations where there is a planned salvage to ensure all landscape level biodiversity values have been adequately considered, as this is outside the scope of setting the Allowable Annual Cut or establishing a partition.

[1471] Similarly, she noted that concerns raised by Blueberry about adjacency were outside the scope of her authority. She referred to the Sustainable Forest Management Plan and how she expected participants, monitored by staff, to show how they are meeting the objectives therein with respect to the location of proposed cutblocks.

[1472] The concept of adjacency requires a brief explanation. Forest practices in BC generally recognize that a cutblock that is adjacent to a previously harvested cutblock may only be harvested if the adjacent cutblock is “greened-up” – that is, the stand has met required height, stocking and block coverage requirements. Adjacency rules, however, do not apply in the Fort St. John Timber Supply Area. Section 97 of the *Fort St. John Pilot Project Regulations* provides that a participant may harvest a cutblock that is adjacent to a previously harvested cutblock that is not greened-up, if certain requirements are met.

[1473] In the “implementation” section of her Rationale, the Chief Forester “encouraged” staff, other agencies (such as the Oil and Gas Commission) and participants (where appropriate) to support the work and studies she noted therein. In particular, she noted she expected information sharing on oil and gas related infrastructure and road development. This, she noted, would ensure that the information base used more accurately represents what is occurring on the land base.

[1474] The idea of expectation and encouragement was a theme in a number of areas. She expected First Nations, participants and staff to work together to spatially

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identify opportunities for old growth management and areas for cultural heritage protection. She expected better tracking of the locations of wildlife tree patches. She noted that the Peace-Liard Moose Management Plan was in its final stages and requested that staff work with First Nations to finalize it.

[1475] Importantly, the Chief Forester's decisions, except for the ability to impose a geographic partition, are not spatial. Once a geographic partition is granted, the authorizations or cutting permits are dealt with at the district level, by Mr. Van Dolah or Mr. Van Tassel in the Peace Natural Resource District. I will deal with this later.

[1476] Although the Province argued that the partition was ordered in specific response to concerns raised by Blueberry, the evidence established the partition was not set as a result of Blueberry's concerns, but rather to ensure the economic sustainability of the timber harvest land base. The establishment of such a partition may have collateral effects on protecting wildlife habitat, however, as noted, the dominant purpose of, and the legal authority for creating such a partition, is to manage long-term timber supply. Mr. Van Tassel stated the partition was directed at more evenly distributing the harvest of forest timber resources across the Timber Supply Area and the timber harvesting land base.

[1477] I agree therefore, that the partition was not established for the protection of wildlife habitat. The evidence indicated this was outside the purview of the Chief Forester. For example, Mr. Atmo Prasad, a manager in the Forest Analysis and Inventory Branch of the Ministry of Forests noted in correspondence that "the application of a timber supply partition for the purpose of establishing a wildlife management requirement is not within the authority of the Chief Forester."

[1478] The August 23, 2016 letter from Mr. Prasad, helps to contextualize the figures relied on in the Rationale, including the concentration of harvest in the Fort St. John Timber Supply Area.

[1479] Mr. Prasad noted the majority of the harvesting areas in the Fort St John Timber Supply Area are located in the central and southern parts. In particular,

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harvest has been concentrated in the Blueberry, Kobes, Halfway and Lower Beatton landscape units. Mr. Prasad's letter confirmed that the amount of harvesting in the Blueberry landscape unit is nearly double the amount of harvesting in proportion to the timber harvesting land base. The letter provides as follows at pages 3-4:

> Tables 1 and 2 summarize the information prepared to further assess the distribution of harvesting in the TSA [Timber Supply Area] in relation to the THLB [Timber Harvesting Land Base]. Table 1 shows the percentage of the total THLB area in each landscape unit and the percentage of the total THLB harvested in each landscape unit. For example, 28.7 percent of all of the THLB in the TSA occurs in the Blueberry Landscape Unit; whereas, 55.3 percent of the all of the THLB harvested in the TSA occurs in this landscape unit. The ratio of these two values indicates whether harvesting in a landscape unit has been proportional to its contribution to the total THLB. For example, the Blueberry Landscape Unit has a ratio of 1.9 (55.3 percent /28.7 percent), while the Tommy Lakes Landscape Unit has a ratio of 0.6 (10.5 percent / 18.3 percent). These results indicate that, to date, a higher proportion of the THLB available within the Blueberry Landscape Unit has been harvested than in the Tommy Lakes Landscape Unit.

[1480] Tables 1 and 2 of Mr. Prasad's letter note the following:

Table 1. The proportion of the total timber harvesting land base and proportion of total timber harvesting land base harvested within each landscape unit in the Fort St. John TSA.

LU	THLB	Harvested THLB	Harvest% THLB%
Blueberry	28.7%	55.3%	1.9
Crying Girl	1.3%	0.9%	0.7
Graham	2.7%	0.0%	0.0
Halfway	5.3%	7.2%	1.4
Kahntah	14.3%	5.8%	0.4
Kobes	6.1%	9.0%	1.5
Lower Beatton	6.2%	6.6%	1.1
Milligan	6.9%	1.6%	0.2
Sikanni	1.0%	0.0%	0.0
Tommy Lakes	18.3%	10.5%	0.6
Trutch	9.2%	3.0%	0.3
TOTAL	100.0%	100.0%	1.0

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Table 2. Harvest percent-to-THLB percent ratios from Table 1 for geographically-grouped landscape units in the Fort St. John TSA.

Harvest%	west	central	east	north	south
THLB%	0.6	1.4	0.5	0.4	1.6

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[1481] Furthermore, the effectiveness of the geographic partition to assist with what Blueberry sees as overharvesting in the landscape units making up the 'core' area is weak. The partition establishes that, for coniferous species, a maximum of 672,000 cubic metres may be harvested from the 'core' area. The harvest rate for the Blueberry Landscape Unit could therefore likely be continued. The actual number fixed by the Chief Forester and allowed to be harvested may not assist Blueberry or change anything. Rather a change is required to the Sustainable Forest Management Plan, which requires a change to the Forest Operation Schedule. Mr. Van Tassel confirmed there are no specific harvesting partitions identified within the Sustainable Forest Management Plan by landscape units.

3. Fort St. John Land and Resource Management Plan

[1482] The Fort St. John Land and Resource Management Plan is considered a higher level plan, and plays an important role in the strategic-level governance of forestry in the Blueberry Claim Area. Mr. Van Dolah testified that the Land and Resource Management Plan was "broadly the foundation" of the Sustainable Forest Management Plan, and "definitely influenced" forestry operations. The Sustainable Forest Management Plan and Forest Operations Schedule must be consistent with the Land and Resource Management Plan.

[1483] As noted above, the Fort St. John Land and Resource Management Plan was originally developed in the 1990s and approved by Cabinet in 1997. First Nations in the region were invited to participate in this planning process, but declined to do so.

[1484] The Fort St. John Land and Resource Management Plan divided the planning area into five broad categories or zones: agriculture/settlement (12%), enhanced

resource development (20%), general resource development (46%), special management (14%), major river corridors (4%) and protected areas (4%). As noted earlier, zoning an area for “enhanced resource development” means the lands have potential suitability for intensive resource development, that a high priority has been designated for a special or combined resource management emphasis (such as high intensity forest management regime or range management emphasis), and that investments in resource development and enhancement are encouraged. In these enhanced resource development zones, biodiversity is given a lesser value.

[1485] The Land and Resource Management Plan has very substantial ripple effects for the Sustainable Forest Management Plan process as it provides the strategic direction in terms of which landscape units in the region are priorities for resource development, and which areas have a higher priority for biodiversity conservation.

[1486] In her testimony, Ms. Pyle expressed Blueberry’s concern about the Province’s “intensive forest management” approach, the “high intensity forest management” zone, and the level of harvesting in the core of Blueberry’s territory as follows. She noted that, from her perspective, intensive forest management simply means “intensive clearcut, intensive reforestation, intensive herbicide application.” She stated “it will take generations for it [the forests] to ever come back in terms of biodiversity, in terms of the materials that our members extracted from those forests.”

[1487] Ms. Pyle continued to testify as follows:

> Q:…Are you able to explain what a high intensity forest management designation means?
>
> A: Well, my meaning as it relates to clearcutting it just means all the logging happens in there in that landscape unit. That it’s the go-to place for timber harvesting and reforestation, planting of trees and getting those trees to free growing, eventually will become a timber supply for – in the future for the licensee.
>
> So high intensity forest management means heavy clearcut, plant, herbicide, plant again, herbicide. And that’s what it means to us.

[1488] Ms. Pyle went on:

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> … And, you know, I just – I always had the question of, you know, how long can an area be designated as high intensity. And I always had that question on these levels that they designate to our core. And I – in meeting with the Province I ask that: Well, okay, how long is a pilot project going to be a pilot, how long is intensive forest management areas going to be designated as intensive. At some point you're going to run out. I mean it's not forever. It's limited.
>
> And you look at the Yahey trapline, I mean, it is decimated. Very, very minor place left. I mean, one of the family members trapped on there – well, I think last year they did portions of it, but it was such a small area he said I don't even need a skidoo to go check my traps anymore, I just walk.
>
> So an area that would take him normally you go – cabins are placed in certain areas so that can travel from one cabin to the next, and that's how they make their rounds when they're trapping on the trapline. And he had been trying to do that. He tries do that every year. I mean, it's just what's in him to do it. And last year he said I don't even need my skidoo, because he had just one little small patch to trap on.
>
> And that's what we're witnessing and that's the problem. So last winter the last portion of that area was logged out from a woodlot owned by the manager of the licensee. And it didn't matter that our member, who since passed on, had traps in that area. We had to go find them. We, being the members of Blueberry, had to go and try and locate his traps. They had been logged out.

4. Fort St. John Pilot Project

[1489] As noted above, timber harvesting in the Fort St. John Timber Supply Area is governed by the *Fort St. John Pilot Project Regulation*. The Fort St. John pilot project and the *Fort St. John Pilot Project Regulation* originated in 2001, when the Province was exploring different models of forestry management in order to reform the *Forest Practices Code of British Columbia Act,* R.S.B.C. 1996, c. 159 that was in place at the time.

[1490] The *Fort St. John Pilot Project Regulation* sought to set out a vision of what the desired management of a particular forest landscape would look like, and then develop a set of values and indicators which described the desired "result" in terms of forest management. In the Fort St. John pilot project, values, objectives, indicators and targets for forestry activities are set out in a document referred to as a Sustainable Forest Management Plan.

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[1491] So long as the values set out in the Sustainable Forest Management Plan were maintained, the participants (i.e., companies doing the harvesting in the Timber Supply Area) would be relatively free to plan and manage their operations as they saw fit and in accordance with the Forest Operations Schedules they developed.

[1492] Forest Operations Schedules are a collection of maps and analysis that identify all harvesting and road development contemplated in a Sustainable Forest Management Plan for a six year period. In these schedules, participants are required to propose blocks to harvest and model those blocks to the end of the six year period to assess what would happen to the various values identified within the Sustainable Forest Management Plan.

[1493] In other words, the Sustainable Forest Management Plan identifies the values and targets, and the Forest Operations Schedule sets out how those are going to be achieved through primary forest activities such as harvesting and road construction. These tools are discussed in greater detail below.

a) Sustainable Forest Management Plan

[1494] The Sustainable Forest Management Plan is the process through which the *Fort St. John Pilot Project Regulation* implements its “results-based” management. The goal of results-based management is to decide on a series of values that represent different biodiversity and forest management objectives and then reverse-engineer the Sustainable Forest Management Plan and the Forest Operations Schedules in order to maintain those priority values on the landscape. This is done by identifying indicators (i.e., measure to assess progress toward an objective) and setting targets (i.e., the commitments to achieve the identified objectives).

[1495] Indicators for some values may be assessed over the entire Timber Supply Area, whereas others may be assessed at a smaller scale. Certain indicators are “legal indicators” which come from legislation, regulation or policy sources. Other indicators are “non-legal indicators” which are akin to forestry best practices.

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[1496] Under s. 34 of the *Fort St. John Pilot Project Regulation*, participants are jointly responsible for the development and implementation of a Sustainable Forest Management Plan and associated Forest Operations Schedules. The participants in the pilot project are Canfor, BC Timber Sales, and a variety of other smaller companies including Chetwynd Mechanical Pulp Inc., Cameron River Logistics., Louisiana-Pacific Canada Ltd., Peace Valley OSB, and Dunne-za LP.

[1497] Sub-section 35(1) of the *Fort St. John Pilot Project Regulation* provides that the Sustainable Forest Management Plan must address the entire pilot project area, and must be consistent with Schedule A and any "higher level plan" in effect in the area. The pilot project area (which is referred to in the Sustainable Forest Management Plan as the defined forest area or "DFA") covers approximately 4.1 million hectares within the greater Fort St. John Timber Supply Area.

[1498] As discussed, the key higher level plan (or strategic plan) applying to the pilot project area, and with which the Sustainable Forest Management Plan must be consistent, is the Fort St. John Land and Resource Management Plan. Schedule A of the *Fort St. John Pilot Project Regulation* includes a detailed table that mirrors the zones established in the Fort St. John Land and Resource Management Plan.

[1499] In accordance with s. 35(2) of the *Fort St. John Pilot Project Regulation*, the Sustainable Forest Management Plan must include "landscape level" strategies for timber harvesting; road access management; patch size, seral distribution and adjacency; riparian management; visual quality management; forest health management; and range and forage management. It may also include strategies for reforestation, biodiversity management, water quality management, forest protection, and other issues.

[1500] As per section 39(1) of the *Fort St. John Pilot Project Regulation,* the regional manager and regional director approve the Sustainable Forest Management Plan if they are satisfied that it is (a) consistent with the *Fort St. John Pilot Project Regulation*, (b) consistent with the preamble to the *Forest and Range Practices Act*,

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(c) provides at least equivalent protection for forest resources and resource features as provided by the *Forest and Range Practices Act* and its regulations and (d) adequately manages and conserves the forest resources in the pilot project area.

[1501] If the decision makers are not satisfied that the Sustainable Forest Management Plan meets the requirements of s. 39(1), s. 39(2) gives the regional manager and regional director the discretion to approve only portions of the plan or make the approval of the plan subject to conditions.

[1502] Sustainable Forest Management Plan #3 was prepared by Canfor and BC Timber Sales, and approved with conditions by the Regional Executive Director and the Director of Resource Management, Northeast Forest Region (Ms. Vince and Mr. Addison) on May 4, 2018. It is a 775-page document (including appendices) that is based on the previous plan, which was approved in 2010. Significantly, the evidence showed that very little in the overall scope and layout of the plan changed between the second and third versions. In particular, the preface to Sustainable Forest Management Plan #3 notes that only "very minor revisions" were made between the second and third versions.

[1503] Part 6.0 of the Sustainable Forest Management Plan #3 states:

> … forest managers are often challenged with implementing on-the-ground practices and knowing whether or not the overall strategic objectives have been met. To overcome this uncertainty, SFMP's [Sustainable Forest Management Plans] establish one or more performance measures *(indicators)* for each objective. One or more *targets* are then identified for each indicator. This is a fundamental difference between SFMP's and other strategic plans that exist throughout the Province.

[1504] At trial, Mr. Van Tassel testified about Part 6 of the Sustainable Forest Management Plan, which sets out the values, objectives, indicators and targets for which participants manage. His testimony focussed on the following indicators: forest types (6.1), seral stages (6.2), patch size (6.3), coarse woody debris volume (6.6), riparian reserves (6.7), wildlife tree patches (6.9), permanent access structures (6.24), peak flow index (6.43), and maintenance of wildlife and fisheries habitat

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values (6.56). For each of these indicators, Mr. Van Tassel explained how it was tied to the objective, and discussed the scale over which the indicators and targets would be measured.

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[1505] In these reasons I do not discuss all of these indicators in depth, but I do note that certain indicators, such as “forest types” – which speaks to maintaining a distribution of deciduous, deciduous leading mixed wood, conifer leading mixed wood and conifer leading stands, and has the objective of maintaining the diversity and pattern of communities and ecosystems within a natural range – are measured at the landscape unit level (i.e., areas of approximately 100,000 hectares). Other indicators, such as “seral stages” or “patch sizes” are measured at the level of natural disturbance unit.

[1506] As discussed earlier, natural disturbance units (also referred to as “NDUs”) are very large areas. In particular, the Boreal Plains Natural Disturbance Unit is approximately twice the size of the Fort. St. John Timber Supply Area, and the Blueberry Claim Area is subsumed within it. Managing at this very broad level could result in significant impacts at the landscape unit level, as Blueberry points out.

[1507] The rationale for managing on the basis of the Boreal Plains Natural Disturbance Unit stems from the work of provincial ecologist S. Craig DeLong. In 2011, Mr. DeLong released a Technical Report entitled *Land Units and Benchmarks for Developing Natural Disturbance-based Forest Management Guidance for Northeastern British Columbia*. As I understand, the impetus for this work was recognition that earlier forest management policies and guidelines were setting somewhat arbitrary limits for allowable patch sizes and harvest amounts. Limits were often stated for things such as block size, species composition, and stand density. Although well meaning and easily administered, these practices resulted in landscape scale patterns bearing little similarity to those created by natural disturbance dynamics (such as wildfires).

[1508] The idea behind Mr. DeLong's 2011 work was to adopt forest management practices that approximated the natural range of variability, such as having irregular boundaries of harvest openings to increase edges, and leaving behind structure from the previous stand. The Sustainable Forest Management Plan relies on DeLong's work in setting some of the indicators and targets.

[1509] One of the issues canvassed in cross-examination with both Mr. Van Dolah and Mr. Van Tassel was the fact that the Sustainable Forest Management Plan does not contain an indicator for treaty rights. Mr. Van Tassel testified that indicator 6.56 ("maintenance of wildlife and fisheries habitat values") was an "overall composite indicator" that had "linkage to the exercise of treaty rights under Treaty No. 8 to hunt, fish and trap." Mr. Van Dolah testified that the Sustainable Forest Management Plan had no indicator for treaty rights because neither the courts nor First Nations had provided the information or advice needed to create such an indicator. Instead, Mr. Van Dolah testified that he sought to manage for treaty rights by having First Nations identify the values of interest such that potential impacts from forestry could be mitigated.

[1510] Mr. Van Dolah repeatedly stated that what he requires from First Nations, and Blueberry in particular, in order to manage in a way to take into account their treaty rights is specific information about the particular locations where rights are exercised. He expressed some frustration that Blueberry had not, in his view, provided him with the site specific information he sought, but instead provided traditional use studies that buffered specific locations where rights were exercised by 250 to 1000 metres to protect the confidentiality of the information.

[1511] Furthermore, the assumption underlying the Sustainable Forest Management Plan with regard to the exercise of Treaty rights bears note. At page 325, it states: "The DFA [Defined Forest Area to which the pilot project and Sustainable Forest Management Plan applies] is within the larger area of Treaty 8 of 1899, which established hunting, fishing and trapping as treaty rights for the local aboriginal First Nations communities. *The rights as such are available across the treaty area and*

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have no site specificity or quantum…" (emphasis added). In addition, Mr. Van Tassel expressed the view that First Nations who signed or adhered to Treaty 8 have the right to hunt throughout the entire Treaty 8 territory. This implies that while Ministry staff frequently ask Blueberry for more specific information about the exercise of their rights, in particular for potential mitigation purposes, they are also of the view that these rights can be exercised elsewhere throughout Treaty 8 territory.

[1512] Throughout this trial Blueberry has vigorously sought to show that its rights do have site specificity – they are exercised within the Blueberry Claim Area, which itself has core and peripheral areas. Each of the community members who testified at trial testified about the specific places within the territory where they hunted, trapped and fished. Blueberry was willing, in this case, to provide this kind of site specific evidence. At the same time, however, concerns have been expressed about the confidentiality of information provided by members who did not testify at trial.

[1513] The level of specificity sought by decision makers, however, seems only to be used to mitigate specific impacts, and disregards Blueberry's larger concerns about the overall (or landscape level) impacts forestry is having on the exercise of their rights. While it may be possible, for example, for the Ministry of Forests to persuade a participant to alter the location of a cutblock in order to create a buffer around a particular trail, these individual mitigation efforts do not address Blueberry's larger concerns about overharvesting in the core of their territory and the lack of mechanisms to address concerns about the cumulative impact of forestry and other industrial development on the exercise of their treaty rights.

[1514] As the provincial forestry decision makers appear to operate with the understanding that Blueberry and other adherents to Treaty 8 are at liberty to hunt, fish and trap throughout the territory, Blueberry's concerns about the level of harvesting within the core of the Blueberry Claim Area are not addressed and are dismissed too easily.

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[1515] Because the Sustainable Forest Management Plan must be consistent with the Land and Resource Management Plan, landscape units that are designated under the latter plan as being part of an “enhanced resource development zone” are considered “high intensity forest management” landscape units in the Sustainable Forest Management Plan, and timber production targets are on the high end, with biodiversity targets correspondingly on the lower end of the spectrum. The objective for these high intensity landscape units is to manage for a sustainable long term timber supply, with less focus on biodiversity objectives.

[1516] As an example of how zoning for enhanced resource development or high intensity forestry can affect the indicators used to assess performance in meeting objectives, counsel for Blueberry took Mr. Van Tassel in cross-examination to indicator 6.26 in the Sustainable Forest Management Plan #3, which deals with salvage of fire damaged timber. Under the Plan, for high intensity areas, there is an emphasis on harvesting fire damaged timber for economic value. In lower intensity zones, however, there would be an emphasis on protecting it for its biodiversity values, and therefore leaving it to decompose and create wildlife habitat.

[1517] While the Province argued that with respect to the recent fires (i.e., Beatton Burn and Tommy Lakes) Blueberry’s concerns were taken into account, Blueberry wanted the important Beatton Burn Area to be left to regenerate naturally. At the end of the day, Canfor logged about 10% of the area out of what is said was concerns for safety, economics, having road access to this area, and wildlife. While some of that was true, the dominant reason was economics. Canfor would not have done salvage logging in this area if it was not economically feasible to do so.

[1518] As can be seen, the zoning established in the land use planning process that occurred in the mid-1990s is carried through to the Sustainable Forest Management Plans that are approved today. That zoning pre-determines the kinds of forestry practices that will be used in any given area. Fundamentally, those forestry practices emphasize the harvesting and economic value of the timber supply.

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[1519] It is recognized that providing for connectivity in key habitat areas supports ecosystem functions and the habitat needs of a variety of local species. There is a real concern that the indicators used in the Sustainable Forest Management Plan do not manage for the protection of habitat features, and importantly, connectivity.

[1520] In cross-examination, Mr. Van Tassel and Mr. Van Dolah confirmed that the Sustainable Forest Management Plans that have been in place for nearly two decades did not and do not have a specific indicator for forest connectivity. In addition, Mr. Van Dolah said, unlike other districts, adjacency rules do not apply in the Fort St. John Timber supply area. Mr. Van Dolah also confirmed that the Sustainable Forest Management Plan does not contain an indicator for large intact forest, but agreed it would be a good idea for it to contain such. Mr. Van Tassel also made it clear in his testimony that direct protection of wildlife and populations of wildlife is not within the scope of the Sustainable Forest Management Plan.

[1521] First Nations are invited to review and comment on a proposed Sustainable Forest Management Plan through the public advisory group established by the *Fort St. John Pilot Project Regulation*, and are consulted during the approval process. Blueberry did not participate in the development of the first or second Sustainable Forest Management Plans, but did provide significant feedback on the third version. While this is not a consultation case, it is helpful to review the feedback provided by Blueberry as an example of the concerns they raised.

[1522] In a letter dated December 21, 2016, Blueberry set out its concerns with respect to the draft Sustainable Forest Management Plan #3. The concerns raised were based on a high-level review of the draft Sustainable Forest Management Plan, with attention to how well it maintained ecological function and protected treaty rights.

[1523] Blueberry noted that while the plan purported to be about “sustainable” forest management, under this plan the heart of its territory would continue to be subject to high intensity forestry. It criticized the Plan for not acknowledging that treaty rights

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require additional consideration over and above biophysical attributes on the landscape, and for not containing any treaty rights indicators. It noted that the Plan did not take into account the current condition of the landscape, and that it suggested dated strategies that were no longer appropriate given the cumulative impacts. It also noted that spatial planning for key forest values (such as old forest) had still not been undertaken.

[1524] Further, Blueberry noted that while the intention of the pilot project may have been to distribute risk across the broader region, the planning decisions had not followed a key tenet of sustainable ecosystem management: ensuring an adequate amount of all representative ecosystems were protected first and foremost. Blueberry noted that "less than 1% of the boreal plains natural region – which comprises the majority of the SFMP planning unit – falls within protected areas."

[1525] In its written submissions, Blueberry echoed these concerns. It noted that the Sustainable Forest Management Plan is plainly not a cumulative effects management tool and is not capable of or aimed at protecting its treaty rights from cumulative impacts of development in the Blueberry Claim Area. Among other things, it encourages large clearcuts without regard to wildlife habitat needs; provides no management for connectivity, fragmentation or old forest patch size; does not assess or track impacts of other industries; and does not set limits or thresholds (beyond those included in the Allowable Annual Cut) on the amount of logging that can occur in specific areas.

[1526] On May 4, 2018, the Regional Executive Director and the Director of Resource Management for the Northeast Region wrote to Canfor and BC Timber Sales approving the Sustainable Forest Management Plan #3, with certain conditions. These included conditions that:

a) the plan be amended within a year to take into account the Chief Forester's Allowable Annual Cut and timber supply review determinations;

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b) an additional indicator be developed to ensure a balanced distribution of harvest activities across the Timber Supply Area;

c) an additional indicator be developed to focus on improving the utilization of timber resources;

d) an amendment to the patch size, seral stage distribution, and adjacency strategy and associated indicators be submitted within two years;

e) there be specific targets for old forest retention areas to reserve them from harvest, and that these be developed spatially;

f) the plan be reviewed in the context of maintaining fur-bearer habitat; and,

g) indicators and targets be reviewed and revised to consider the requirement for forest connectivity and reduce linear disturbance throughout the landscape.

[1527] In addition, the approval letter noted that there were processes underway, including the Regional Strategic Environmental Assessment process, that may result in the establishment of new higher level plans that affect the objectives, indicators and targets within the Sustainable Forest Management Plan. If the Sustainable Forest Management Plan is inconsistent with any new higher level plans, it would need to be amended and undergo appropriate consultation.

[1528] Canfor sought and, in May 2019, obtained an extension to meet the conditions set out in the approval letter. Blueberry was not consulted on the granting of this extension. The remaining conditions were due to be addressed by May 2020, but the evidence at the time of Mr. Van Tassel's testimony was that had not occurred.

[1529] It therefore appears that notwithstanding Blueberry's detailed concerns and the Province's attempt to have some of them addressed by the participants through an amendment to the Sustainable Forest Management Plan, changes have not been made.

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[1530] It is striking that – in the context of Blueberry raising issues of cumulative impacts at all governmental levels since at least 2012 – when Blueberry provided detailed input in 2016 and requested changes to the Sustainable Forest Management Plan #3, the Plan was approved two years later with almost no change from Sustainable Forest Management Plan #1, which was approved in 2010.

b) Forest Operations Schedule

[1531] As noted above, the Forest Operations Schedule identifies all the proposed harvesting and road construction activities for a six-year period. The Forest Operations Schedule does not, however, identify when each cutblock will be harvested within the six-year period; that information is set out in annual harvest plans. Applications by participants for cutting permits (also referred to as harvest authorizations) must be consistent with the Forest Operations Schedule.

[1532] The Forest Operations Schedule translates the Sustainable Forest Management Plan into an actual on the ground plan for forestry operations. The Sustainable Forest Management Plan is in essence theoretical until actual cutblocks and roads are identified by the participants in the Forest Operations Schedule.

[1533] Under s. 45 of the *Fort St. John Pilot Project Regulation*, once a Sustainable Forest Management Plan has been approved, participants may prepare a Forest Operations Schedule and submit it to the District Manager. If a participant intends to apply for a permit to harvest timber or construct a road, it must have submitted a Forest Operations Schedule that complies with s. 45 and was made available for public review and comment.

[1534] The Forest Operations Schedule itself is not approved by the Province. Approvals only happen for each of the proposed activities under the Forest Operations Schedule for their stand-level authorizations. In other words, any application for a harvesting or road permit must be consistent with the cutblocks and roads identified within the Forest Operations Schedule.

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[1535] Forest Operations Schedules can also be amended within the six-year period, however, public review and comment are required for major amendments. This was the situation in 2016 when it was decided Canfor could do a salvage operation following the Beatton Burn, and this was added to Forest Operations Schedule #2.

[1536] The main purpose of the Forest Operations Schedule is for the participants to show how their planned activities will impact the various indicator values that are identified within the Sustainable Forest Management Plan. Certain indicator values within the Sustainable Forest Management Plan link to the location, size and values of other blocks within the Forest Operations Schedule.

[1537] Ms. Pyle described the Forest Operation Schedules as providing "too much information and not enough at the same time." On August 28, 2019 she testified as follows:

> A: …what I mean is that six years' worth of logging is around 3,000 hectares of clearcut, and so just the sheer amount of activity that's being proposed is a lot. However, the way it's presented it's a mere plan. So when they're developing the forest operating schedule they may identify a piece of timber that they will outline –
>
> Q: You mean a block or an area of timber?
>
> A: Yeah. An area of timber that they will outline and this is what we get to look at. And we're supposed to make a decision on whether or not this is going to impact our treaty right. The problem is you don't know exactly where it is. The boundary can move in or out 250 metres, or maybe it's too – it's going to shrink a lot and maybe all this area isn't going to be logged for whatever reason. Maybe it's not the type of timber they wanted or ...
>
> So when you go out there to look at these blocks where they're supposed to log it's hard for – it's difficult – I mean, for someone experienced that knows how to read these maps they can go find them. They put it in their GPS and they will have an idea. For our members and our staff to go out and look for these, it was very difficult for them to find the exact location. So to have an idea of where it was, because these blocks -- these boundaries are not ribboned yet because the licensee at that point has just identified a piece of timber that they say they're going to log at some point from year one to year six. The best they can do is say well, access constraints will cause us to log it in the winter or in the summer. That's the information we get.
>
> So it's too little information. And that's why we always wanted to see the permit because at the end of the day then we can see how it's actually going to be, how it's going to look.

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> And so it never really tell you when you look at it –well, I'll just say that there's just not enough information.

[1538] The most recent Forest Operations Schedule (#3) was submitted to the Province in October 2017.

[1539] The current Forest Operations Schedule, both in section 2.0 and in Table 6, identifies what was referred to in the evidence as "old forest retention areas" or "old forest management areas." Table 6 in the Forest Operations Schedule indicates that, upon completion of the harvesting activities proposed in this Forest Operations Schedule, within the Boreal Plains Natural Disturbance Unit, a target of 16% of the area containing conifer trees older than 140 years would be retained. In 2025, the target would be 20% retention. Table 6 shows approximately 45,000 hectares of old forest within the Blueberry landscape unit.

[1540] It must be recalled that the Boreal Plains Natural Disturbance Unit is a massive tract of land that encompasses approximately 8 million hectares. It takes in nearly all of the Blueberry Claim Area, and extends north all the way to the border with Yukon, as well as south of the Peace River. Targeting the retention of 16% of the old forest in this large area does not guarantee that old forest within the Blueberry Claim Area will be retained.

[1541] These so called "old forest management areas" are identified by the participants for planning purposes – they are not legal designations. In addition, these old forest management areas are non-spatial, in that they can be shifted around. It is therefore important to distinguish them from Old Growth Management Areas which are legally protected spatial areas which have to be declared under the *Forest and Range Practices Act*.

[1542] In cross-examination, Mr. Van Dolah agreed that the 45,000 hectare figure shown in Table 6 representing old growth in the Blueberry landscape unit could, hypothetically, be made up of 4,500 one-hectare areas of fragmented forest, or one 45,000 hectare parcel, or anywhere in between.

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[1543] Moreover, just because an area has been designated as an old forest management area does not mean it is actually composed of old forest. The Fort St. John Timber Supply Area has been divided into 53 distinct operating areas to facilitate operational planning and mapping, and 53 maps are appended to the Forest Operations Schedule. In cross-examination, Mr. Van Dolah testified about the places listed by the participants on the 53 maps as being “old forest.”

[1544] The evidence demonstrated that many areas are not old forest in a region that is characterized as “Old Forest” on the legend set out by the company. In addition, certain areas that are clearly old forest adjacent to some of these areas are left out of the designated old forest areas. Ultimately Mr. Van Dolah agreed with respect to the South Blueberry region in question that there is very little old forest within that boundary. Included within the boundary are oil and gas facilities, roads, younger forest and a number of other features.

[1545] Furthermore, the Old Growth Management Areas that are legally protected in the Dawson Creek Timber Supply Area are designated as rotating. This means that even under the spatial model, at some point in time they will be harvested. Mr. Van Dolah testified that old growth management areas do not have as much protection as a legal designation of a wildlife habitat area or an ungulate winter range. The “old forest management areas” in the Forest Operations Schedule will not reduce the Allowable Annual Cut, as the assumption is one day they will be harvested.

[1546] The Forest Operations Schedule and any amendments made to it are referred to affected First Nations. The results of this engagement and changes made as a result of engagement is forwarded to the Province. As a result of engagement licensees may voluntarily drop cutblocks, change cutblock boundaries, establish buffers around identified features or establish new wildlife tree patches or machine-free zones. If the results of engagement raise any site specific concerns they may be considered by the Province at the stand-level permitting stage.

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5. Stand Level Permits

[1547] When a participant wishes to proceed with actual forestry operations on the ground, such as harvesting or using a road for a forestry purpose, they need to apply for certain authorizations and permits from the Ministry of Forests. These types of operational permits have been described in the evidence as “stand-level” permits meaning that the permits are geographically specific to each cutblock/stand being harvested.

[1548] Stand-level permits must be consistent with the current Sustainable Forest Management Plan, Forest Operations Schedule and legal orders such as Ungulate Winter Ranges or Wildlife Habitat Areas.

[1549] At this permitting level, the decision maker will conduct a “statusing” exercise using GIS to look for other overlapping tenures or land uses such as oil and gas activity or legal orders such as Ungulate Winter Ranges or Wildlife Habitat Areas. Ministry staff will also consult with First Nations and some mitigation can occur at the stand level as a result of comments or concerns brought forward in this consultation process. Mitigation at the stand level may include placement of wildlife tree patches, visual screening, working with licensees to maintain browse species, modifying cutblock boundaries, and adjusting the timing of harvest activities.

[1550] Stand-level permits are the final approval needed for forest licensees to begin forestry operations. While these permits rely on, and must be consistent with higher-level plans and regulations, these stand-level decisions are the only time the Ministry of Forests is giving explicit permission to harvest timber or conduct forestry operations in a specified area. These permits are where the rubber hits the road.

[1551] Stand-level permits are approved by the district manager (s. 23 of *Fort St. John Pilot Project Regulation*). Mr. Van Dolah is the District Manager for the Peace Natural Resource District and regularly makes such decisions. Mr. Van Tassel is the Resource Manager but has also made such decisions as Acting District Manager in the past.

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[1552] Mr. Van Tassel testified that if a stand-level authorization is consistent with the Sustainable Forest Management Plan, the Forest Operations Schedule, legal orders in place, and consultation has been completed to the satisfaction of the statutory decision maker, the authorization will likely proceed forward as an approval decision.

[1553] While consultation is said to occur with First Nations on all stand-level authorizations and permits, the concerns that can be addressed by decision makers at the stand-level are specific to concerns raised about the actual cutblock location and features that may be protected within or in the vicinity of that cutblock. This is the kind of site-specific information the Ministry of Forests seeks from Blueberry. Broader landscape-level concerns about, for example, wildlife habitat, connectivity corridors, intensity of harvest in particular areas, are not addressed.

[1554] Mr. Van Tassel testified that he has never refused a stand-level harvest authorization on the basis of a breach of treaty rights, but he has sought legal advice on the issue. Mr. Van Tassel has never not issued a cutting permit.

[1555] Mr. Van Dolah's testimony was similar, in that he hasn't turned down a harvest authorization on the basis of an "allegation of treaty rights" or concerns about insufficient wildlife habitat. He also distinguished strategic decision-making from the operational decisions in which he is involved. He testified as follows:

> Q: And what I understand from your evidence is to turn down a project because of the impact on moose habitat and Blueberry Treaty 8 rights would be a strategic decision?
>
> A: It would happen at a – that conversation would definitely happen at a strategic level.
>
> Q: Which doesn't involve you? You don't make those decisions?
>
> A: It involves me as much as we do make recommendations to, within wildlife, for example, the Sustainable Forest Management Plan, for example, I make recommendations to the decision makers from a habitat perspective. But overall you're correct in terms of the decision.
>
> Q: So if it's a cutblock-level application… that doesn't offend the SFMP and it is listed in the Forest Operations Schedule …you're limited to putting some sort of mitigation measure on it?

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> A: So I manage – we manage those values through mitigation.
>
> Q: And you're not able to turn down a project, a cutblock-level project, because of impact on Blueberry's treaty rights based on allegations that there's not enough moose habitat left?
>
> A: So an allegation of treaty rights, I would agree with that statement.

[1556] As previously noted, the focus appears to be on site-specific mitigation measures

[1557] Some more recent progress has been made by the Ministry of Forests in engaging with Blueberry, particularly through Mr. Van Dolah's efforts. Mr. Van Dolah testified that he has been attempting a more collaborative approach with Blueberry. In early December 2017, Mr. Van Dolah attended a meeting in Vancouver that included the Regional Strategic Environmental Assessment project team involved in the Methods Pilot.

[1558] An RSEA Forestry Interim Measures Agreement between Blueberry, Canfor, BC Timber Sales and the Ministry of Forests was signed on June 16, 2018. It was to be in place for 2 years and created a "Flexibility Team" (or "Flex Team") to ensure that Blueberry has an opportunity to collaborate in the planning of the harvest schedules.

[1559] In late November 2019, the Flex Team met to discuss how to coordinate the work that needed to be completed by the Methods Pilot, and that which was to be delivered as a product of the RSEA Forestry Interim Measures Agreement – in other words, an implementation plan.

[1560] Part of the implementation plan is the development of management recommendations. The boundaries would identify specific areas of management.

[1561] The status of the RSEA Forestry Interim Measure Agreement and its connection to the Methods Pilot in mid-2020 was, however, not entirely clear on the evidence. While the Province says it remains in effect, some of the evidence suggested that Blueberry would not be renewing or extending the agreement until

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this litigation was complete. In addition, as per clause 4, the agreement is predicated upon the Fort St. John mills not running out of timber.

6. Conclusions with respect to the Province's Forestry Regime

[1562] I agree with the argument Blueberry has made about the flaws with the Province's forestry management regime. I find that the Province's forestry regime is built upon the fundamental goal of maximizing harvest and replacing all the natural forests with crop plantations that will create efficiencies for the next harvest cycle.

[1563] I also find that the operational decisions of district and resource managers are connected to higher level plans and processes that have already zoned much of the Blueberry Claim Area for high intensity forestry.

[1564] Finally, I find that decision makers lack authority to manage cumulative effects, or take into account impacts on the exercise of treaty rights. As Blueberry points out that, at the end of the day, it is the forestry companies (i.e., "participants" per the Fort St. John Pilot Project Regulation) who hold much of the power regarding what cutblocks to harvest, how and when.

[1565] The forestry evidence in this case revealed that there is a lack of effective provincial tools to deal with treaty rights and the amount of harvest in the Blueberry landscape unit, and other areas making up the 'core' of the Fort St. John Timber Supply Area and the heart of Blueberry's territory.

[1566] The Province appears to have direct control over only two of the identified tools discussed above to manage harvest in the Fort St. John Timber Supply Area – the setting of the Allowable Annual Cut, and approval of individual cutting permits. The remainder appear to be, largely, in the control of the companies/participants who harvest the forest.

[1567] The Chief Forester simply establishes the timber harvesting land base applying strict parameters and assumptions. Her decisions are made on the critical

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assumption that over time, all of the timber harvesting land base will be logged and turned into managed forest which is logged again. In her Rationale setting the Allowable Annual Cut, at pages 40-41, the Chief Forester comments that she does not have the general statutory authority to address the cumulative impacts Blueberry has identified, and she refers that concern and others to Ministry staff, including Mr. Van Tassel and Mr. Van Dolah at the district level.

[1568] As I noted earlier, the Chief Forester can only consider cumulative effects information that relates to her statutory authority. She cannot institute new management regimes. If cumulative effects information highlights issues that require attention through land use planning or otherwise, she will pass that information on to those responsible.

[1569] Ultimately, the Chief Forester's Rationale acknowledges a variety of concerns, but refers these for "Ministry staff to deal with." In cross-examination, Mr. Van Dolah indicated he anticipated these concerns may be considered as part of a review of the Land and Resource Management Plan and in the RSEA process. Once considered, they may be taken into account in the next timber supply review which would occur in 10 years. Such a lengthy timeline is significant and once again demonstrates Blueberry's concerns that the issues it raises are not realistically taken into account or addressed. Instead, they appear to consistently be moved down the road to yet another process.

[1570] In addition, Ministry staff such as Mr. Van Dolah and Mr. Van Tassel, do not believe they have the authority to deal with the kinds of issues Blueberry has been raising – issues including lack of connectivity, fragmentation of forests, intensity of harvest in the core of their territory, depleted wildlife habitat – all of which, cumulatively, are impacting the exercise of their treaty rights. Their review and approval process focuses on whether any particular harvest authorization is consistent with the Sustainable Forest Management Plan and Forest Operations Schedule and whether any identified impacts on the ground can be mitigated in a site-specific way. Their lens is not on landscape level issues.

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[1571] As Mr. Van Tassel said, there are no specific harvesting partitions identified within the sustainable Forest Management Plan by landscape units. He indicated "we have requested an amendment to the timber harvesting strategies to be consistent with the partition, and again those are in the works and would still need to go through consultation."

[1572] All this reflects the persistent problem of one government decision maker pointing to another government decision maker as being responsible for taking into account treaty rights and cumulative effects. While there was some evidence of various provincial committees in the northeast region that dealt with "operations" and "strategy," none of this evidence established any coordinated approach to the regulatory decision-making process.

[1573] The Province says harvesting within the "core" of Blueberry area is now limited by a number of factors including the Forestry Interim Measure Agreement with Blueberry, still in effect; the fact that much of the "core" is deciduous, and no longer targeted for harvest due to the relatively recent shutdown of a mill (Peace Valley Oriented Strand Board Plant) and the establishment of spatial Old Forest Management Areas. This, however, demonstrates the problem. As has been evidenced in these proceedings, the Province can withdraw from "interim" measures agreements (and has), the Plant could re-open any time, and while Old Growth Management Areas are legally enforceable, Old Forest Management Areas are not. These factors or initiatives referenced by the Province rely on the goodwill of the individuals involved – none limit or prevent harvesting going forward.

[1574] At the end of the day, it is clear that the Province manages the land and forest harvest through a Land and Resource Management Plan that directs the industrial footprint, the use of Sustainable Forest Management Plans, Forest Operations Schedules, and through the individual road and harvest authorizations. The Fort St. John Land and Resource Plan designates the heart of Blueberry's territory as an enhanced development zone essentially directing all development decisions with this fundamental proposition being determinative.

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[1575] Many of the indicators included in the Sustainable Forest Management Plan appear to be managed on the basis of the Timber Supply Area (and occasionally on the basis of the even larger Boreal Plains Natural Disturbance Unit) and, for the most part, not on the basis of Landscape Units. In addition, biodiversity considerations are listed as low due to the enhanced resource development designation. Given the scale of management, it is difficult to be responsive to the kinds of concerns Blueberry is raising about the impacts of forestry in its territory. Indeed, the scale of management appears to be contrary to the legal principle that Blueberry members are entitled to exercise their rights in their traditional territory.

[1576] Extensive and intensive forestry ought not to proceed in the Blueberry Claim Area based on the mistaken belief that Blueberry's rights are not site specific and can instead be exercised throughout the treaty area. In contrast, when it comes to authorizing particular road and harvest permits, however, the Province manages at such a site specific level that Blueberry's broader concerns go unaddressed.

[1577] The evidence also establishes that the Blueberry landscape unit is harvested at twice the level of many other landscape units – likely as it is close to the mills and therefore it is more cost effective for participants. The Province, however, has not taken this into account over the years, as the Sustainable Forest Management Plan and the Forest Operations Schedule do not manage for all indicators at that landscape unit level.

[1578] The participants create the Forest Operations Schedules and choose the blocks in which to harvest. While Mr. Van Tassel says the Province consults at the individual authorization level for harvest and roads, as long as the request is consistent with the Sustainable Forest Management Plan and the Forest Operations Schedule, authorization is granted. Everything operational, however, comes back to the Sustainable Forest Management Plan.

[1579] As noted by Blueberry, three successive Sustainable Forest Management Plans have designated the Blueberry, Halfway, Kobe and Tommy Lakes Landscape

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Units as the “high intensity” forestry zones since 2001. These landscape units surround the Blueberry community and contain many of their important hunting and trapping areas.

[1580] The Sustainable Forest Management Plans describes the timber objective in those areas as “enhance timber harvesting and a sustainable long-term timber supply” consistent with “high intensity forest management regimes.” In conjunction with this the “predominate biological diversity emphasis” is described as “low.” This reality has existed since 2001 with participants and decision makers following this direction since that time.

[1581] Mr. Van Dolah and Mr. Van Tassel emphasized that their main way of managing to take into account impacts to treaty rights was to have First Nations, including Blueberry, note the values that are culturally important to them, identify them in a site-specific way, and propose ways to mitigate impacts on those values. Once identified, the Ministry of Forests would seek to have potential impacts to those values mitigated. This may mean, for example, having participants alter the boundaries of their proposed cutblocks or set up buffers around traplines or cabins. Mr. Van Dolah said he tries to use his powers of persuasion with participants to encourage them to apply the mitigation measures First Nations propose, but those suggestions are not binding.

[1582] Mr. Van Tassel testified that he has never not issued a cutting permit on the basis of concerns about impacts on treaty rights. While he said this was because of mitigation measures put in place, so it has never arisen, that is belied by the previous injunction applications to stop harvest in cutblocks, and indeed by this lawsuit which says that impacts to treaty rights have not been mitigated.

[1583] Mr. Van Dolah acknowledged that harvest was concentrating in the core area and the Ministry of Forests had asked participants to move to the periphery, but they had not done so. While he and his staff had prepared the data package for the Chief Forester and made a recommendation to the Chief Forester with respect to this via

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that data package, he agreed that he could not turn down harvest authorizations because of overharvesting based on concentration.

[1584] What is required is a change in the Sustainable Forest Management Plan and Forest Operations Schedule with more precise partitions for particular landscape units. Mr. Van Tassel indicated that there are no specific harvesting partitions identified within the Sustainable Forest Management Plan by landscape units. He indicated the Ministry of Forests had requested an amendment to the timber harvesting strategies within the Sustainable Forest Management Plan to be consistent with the partition. Those amendments are still outstanding.

[1585] Fundamentally however, as the Fort St. John Land and Resource Management Plan designates the Blueberry area as an enhanced resource development zone, until this is changed it is difficult to see how Blueberry treaty rights have been or will be protected. The present Sustainable Forest Management Plan # 3 established in 2018 is premised on the existing Land Resource Management Plan which has a number of areas in Blueberry territory that continue to be designed as high-intensity development. The term of the Plan is six years and the conditions associated with the Plan have yet to be implemented.

[1586] While it would be helpful for the parties to continue in a collaborative process to change forestry practices for the better, the implementation of legal tools that take into account Blueberry's treaty rights in the Blueberry Claim Area, and that have legal effect, is critical.

E. Cumulative Effects Framework

[1587] The Province defines cumulative effects as changes to environmental, social and economic values caused by the combined impact of past, present and potential future human activities and natural processes. The Province says it recognizes the need for a cohesive and coordinated approach to assessing cumulative effects and a systemic way of managing for cumulative effects. However, as the evidence from the last approximately ten years has shown, the Province has been slow to produce

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the tools decision-makers need and has been hindered by a fragmented regulatory framework.

[1588] Dr. Jennifer Psyllakis, the Director of the Wildlife and Habitat Branch within the Ministry of Forests testified about the Province's efforts to assess and manage cumulative effects. From 2014 to 2016, Dr. Psyllakis was the Manager of Land and Resource Use and was responsible for developing and overseeing policies and procedures for considering cumulative effects.

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1. History of the Province's Consideration of Cumulative Effects

[1589] Dr. Psyllakis suggested that the Province first started considering cumulative effects (though not using that term) in the 1970s and referred to the *Report of the Royal Commission on Forest Resources* by Commissioner Peter Pearse. In 1992, the provincial Commission on Resources and Environment (also referred to as CORE) was established which led to the development and implementation of land use plans. Land use plans contain values that are important to British Columbians, and that can serve as a basis for balancing economic and environmental objectives and managing cumulative effects.

[1590] In the mid 2000s, the Forest Practices Board began having growing concerns about the cumulative effects of resource use on the BC land base. While in the past, forestry was the major activity to consider, that was no longer the case. In many parts of the province, forestry was but one of many human activities affecting the land – activities that were not regulated under the *Forest and Range Practices Act*.

[1591] In 2008, the Forest Practices Board began to investigate the issue, and undertook a cumulative effects assessment case study in the Kiskatinaw River watershed, looking specifically at the effects of resource development on drinking water, soil, and caribou habitat. This is an area in the southeast of the Blueberry Claim Area.

[1592] In March of 2011, the Forest Practices Board released its special report entitled *Cumulative Effects: From Assessment Towards Management*. The Board noted that cumulative effects assessments were only done for major projects, such as mines and pipelines. It concluded that, under the land management processes then in place, there was no requirement to assess the cumulative effects of the "myriad of minor activities that are continually authorized on the land" and that "[t]he cumulative effect of natural resource development remains largely unknown and unmanaged."

[1593] The Board noted that there were methods for assessing these effects but, to the extent that there is an issue, there was "no one to tell – there is no decision maker in the context of cumulative effects."

[1594] As previously noted, Dr. Holt, was a member of the Forest Practices Board from 2008 to 2014, and also served as its Vice Chair from 2012 to 2014. She testified about what the Board meant by saying there is "no one to tell":

> A: …what they're suggesting is that you should do a broad scale strategic assessment for an area and look at all of those things together and then come up with recommendations about what to do about cumulative effects.
>
> But they're pointing out at the end of that paragraph that you could do that work, it's actually quite simple to do, but the way the Province is structured there is nobody that is in charge of making a decision at that scale.
>
> So the Province is still organized into silos of people who make different decisions; one person authorizes a cutblock and one person authorizes a well site. They're not – they're not together making – looking at the whole. So they're pointing out that even if you had a really good management and analysis system, there's nobody who would take the results of that and make a decision based on that information.
>
> Q: You mean a decision in respect of development of the land?
>
> A: That's right. There's nobody tasked with looking at the output from a broad scale cumulative effects analysis and deciding whether the next well or the next road or the next cutblock crosses some kind of line. That's not how decision – decision-makers do their job in British Columbia.

[1595] The Forest Practices Board proposed a potential solution: embed and appropriately use cumulative effects assessment methods in a land management framework that is designed to meet the objectives society has for values on the land.

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Dr. Holt noted that the cumulative effects assessments and analyses are relatively straightforward, but that what is lacking is a decision-making structure: “we haven’t got a management system that sets the limits and then responds to them in a management decision-making way.”

[1596] The Board recognized that deciding what people value is a social and political process, but that determining how those values are affected by human activities should be a scientific process. It also recognized that is difficult to examine the effects of activities on human values, and that indicators representing those values would likely be necessary. In order for those indicators to be useful, the cumulative effects assessment and land management framework would need specific and measurable objectives, and would need to include the notion of limits.

2. Work on Development of the Cumulative Effects Framework

[1597] In or around 2010 the Province began working on the development of a cumulative effects framework. In particular, in April 2012, associate deputy ministers in the Ministry of Environment and Ministry of Forests signed off on a charter which provided direction for a project to develop a cumulative effects assessment framework for natural resource decision-making. The rationale for needing a cumulative effects assessment framework was noted as follows:

> The province of British Columbia continues to experience growth in many natural resource sectors, sometimes overlapping and requiring the same land base and resources. Activities and management practices that may have very little impact individually, can accumulate over time and across different sectors on the land base to have unintended outcomes on economic, social and environmental values of importance to British Columbians. As levels of development increase, there is increasing recognition of the need to assess and manage the potential cumulative effects of development in a manner that provides more reliable information and predictability, and facilitates quality proposals and timely, durable decisions.

[1598] One of the factors that created an impetus for developing a framework for assessing and managing cumulative effects was that First Nations were increasingly requesting that government consider the cumulative effects of development on their Aboriginal and treaty rights. Blueberry was one such First Nation writing in a March

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19, 2012 letter to the Oil and Gas Commissioner that the Oil and Gas Commission has "stubbornly refused" to examine the associated cumulative effects of specific projects, and saying there was an urgent need for ongoing monitoring, assessment, and management of cumulative effects; suggesting this was being pushed past a tipping point.

[1599] The charter made specific reference to the Court of Appeal's decision in *West Moberly 2011*, which confirmed that cumulative effects are not beyond the scope of consultation. The charter also noted the need for a common definition of cumulative effects and a common approach to the assessment and management of cumulative effects across the natural resource sector in BC.

[1600] In 2013 and 2014, the Province undertook some trials or pilot projects on a regional level to learn about the assessment of cumulative effects. One such trial took place in northeastern BC, in the South Peace region. During this time the Province was also engaging with the public, First Nations, stakeholders, and academics broadly on the development of the cumulative effects framework, including on identifying provincial and regional values, on cumulative effects assessments, management of cumulative effects, and discussing some of the proposed solutions.

a) Auditor General's 2015 Report

[1601] Between November 2013 and July 2014, the Auditor General conducted an audit of the Ministry of Forests' progress on cumulative effects assessment and management. In May 2015, the Auditor General released a report entitled *Managing the Cumulative Effects of Natural Resource Development in B.C.*. The Auditor General's conclusions on how the Province was doing on cumulative effects assessment and management were stark:

a) government had not provided the Ministry of Forests with clear direction or powers necessary to manage cumulative effects when deciding on natural resource use;

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b) the Ministry of Forests was not effectively considering or addressing cumulative effects in its decision-making, as demonstrated by activity in northwest BC; and,

c) the Ministry of Forests was working to improve cumulative effects management by developing an assessment framework, but how government and natural resource ministries would use it to inform and support development decisions was not clear.

[1602] The Auditor General went on to state this was concerning because if the assessments are to be of value, they must inform and support decisions about if and how development should proceed.

[1603] In looking at the work done on cumulative effects at that time, the Auditor General noted that "[a]lthough *values* (factors identified as important to manage) have been established to guide natural resource management, these values [were] potentially dated or incomplete" and that "few '*thresholds*' (levels at which values might be at risk and in need of appropriate management responses) [were] in place" (emphasis in original).

[1604] The Auditor General noted that the Ministry of Forests expected to complete province-wide implementation of a cumulative effects framework by 2021. This lengthy timeframe for full implementation meant that, in the interim, decisions about natural resource development would continue to be made without fully understanding the implications for values that are important to the province's well-being.

[1605] The Province responded to the Auditor General's report. It noted that its cumulative effects policy would have province-wide implementation by April 2016, not 2021 as the Auditor General suggested. It also pointed to a range of other tools, including statutes, land use designations, practice requirements to limit or mitigate impacts, the BC Oil and Gas Commission's Area Based Analysis, and the Environmental Assessment Office's requirement that proponents complete project-

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scale cumulative effect assessments as various ways the Province was already managing cumulative effects.

[1606] In response to the Auditor General's recommendation that the natural resource ministries and agencies be assigned clear roles and responsibilities for managing the cumulative effects of development activities on the land base, the Province noted that it had already established the Natural Resources Board, made up of deputy ministers from each natural resource sector agency and the Deputy Commissioner from the BC Oil and Gas Commission to oversee the full range of natural resource activities.

[1607] The Ministry of Forests also offered specific responses to the recommendations made by the Auditor General. In particular, it noted:

a) it would be completing assessments for the first suite of values (forest biodiversity, aquatic ecosystems, grizzly bear, and moose) by summer to mid-fall 2015; and,

b) it would be reviewing the cumulative effects assessment results and may develop recommendations to support operational-level decisions, strategic-level decisions, and impact assessments for Aboriginal and treaty rights.

b) Cumulative Effects Interim Policy for the Natural Resource Sector

[1608] In November 2016, the Natural Resource Board "approved for implementation" the *Cumulative Effects Framework Interim Policy for the Natural Resource Sector* (this document has been referred to in these proceedings as "the Cumulative Effects Framework" or simply "the Framework"). "Implementation," in this context, must be understood broadly. This did not mean that natural resource decision makers now had the information and tools necessary to take into account cumulative effects when making decisions about particular projects or resource uses. Instead, "implementation" meant the work of conducting assessments of the

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status of the identified provincial values and developing a management framework began.

[1609] Dr. Psyllakis was the responsible manager for the development and finalization of the Framework. She described the steps involved in conducting a cumulative effects assessment under the Framework as follows.

[1610] First, identify “values.” Values are recognized as being important to British Columbians, and also being sensitive to cumulative effects. Dr. Psyllakis testified that the Province had selected certain values for which assessments would be done. These values are:

a) forest biodiversity;

b) aquatic ecosystems;

c) grizzly bear; and,

d) moose.

[1611] She testified that the selection of values had taken into account Aboriginal and treaty rights associated with hunting, trapping and fishing. It was believed that selecting forest biodiversity as a value would help inform opportunities for trapping, because many fur-bearing species are associated with an assessment of forest biodiversity. Aquatic ecosystems was selected as a value because it was believed this would provide context to assess the condition of and risks to fish resources. Moose and grizzly bears were selected as values because they were consistently identified throughout BC as a highly valued species for Indigenous people. The Framework also allows for additional regional values. For northeast BC, an additional value of peaceful enjoyment has been identified.

[1612] Second, develop an assessment protocol. This involves collecting information about the value, identifying indicators and benchmarks for each component, defining the assessment unit, and setting out assumptions and uncertainties.

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[1613] Third, assess the current condition of the value. This involves considering the trends. For example, is the population of grizzly bears or moose improving or declining? What might their future condition be? It also involves setting out expected outcomes and desired conditions, considering if the current management approach is sufficient, and validating the information collected.

[1614] The fourth step is to produce a current conditions report for each value that makes recommendations on how the information contained in the report can be incorporated into natural resource management systems and decision-making.

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3. Conclusions with respect to the Province's Cumulative Effects Framework

[1615] Blueberry has argued that the Framework has not changed the Province's approach to considering or managing cumulative impacts. First, it says that the Province has not truly implemented the Framework, in that assessments are still to be completed and management mechanisms are not in place. Second, it says that the Framework does not implement any limits on development, and therefore continues to manage based on existing legislation and policies.

a) Lack of Cumulative Effects Assessments

[1616] The Framework states that available cumulative effects assessments should be considered by government decision-makers when reviewing applications for the use of land and natural resources that could affect those values. The assessment reports are intended to be a foundational source of information. The Province noted in response to the Auditor General's report that the first suite of assessments for forest biodiversity (old forests and seral stage distribution), aquatic ecosystems, grizzly bear and moose were scheduled for completion by summer to mid-fall 2015.

[1617] The problem is that as of the summer of 2020, only one such assessment had been completed – for grizzly bears. The reports for forest biodiversity, aquatic ecosystems, and moose were, in 2020, still under development. Dr. Holt testified that, in or around 2011, she had been involved in making recommendations

regarding how to do an assessment of cumulative impacts on old growth. She had expected the assessment for old growth would have been released shortly thereafter. Instead, she saw multiple drafts of that assessment, but to her knowledge it was not finalized or released.

[1618] In addition, the one assessment that is available is difficult to use in decision-making. As indicated in the decision of the Deputy Chief Forester setting the annual allowable cut for the Fort Nelson Timber Supply Area, there was no guidance as to how to use the information contained in the grizzly bear assessment when making forestry decisions. He wrote: "it is difficult to extrapolate from this information potential implications to timber supply…"

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b) Lack of Thresholds and No New Legal Requirements

[1619] Blueberry's more substantive complaint is that the Cumulative Effects Framework is fundamentally flawed as it does not set thresholds, alter existing decision-making processes, or create any new legal requirements.

[1620] Over the years, Blueberry has criticized the Province for not having a way to determine the acceptable "threshold" for development, or whether development has exceeded a "tipping point." This was one of the reasons Blueberry hired Dr. Holt to prepare a Land Stewardship Framework. Dr. Holt testified as follows:

> … to do effective Cumulative Effects Assessment and manage you have to model the value and then understand where the thresholds are, when are you going to start to be concerned.
>
> So people use the word thresholds in different ways, but… a threshold is a line beyond which you're going to be concerned about the status of that value.
>
> And the British Columbia framework has not clearly identified those so we don't have a system that is set up to effectively manage and find places where we're concerned against going beyond this point.
>
> And so the Land Stewardship Framework suggests a strong need to do that work to put those things in place and so you know how well your land base is doing.

[1621] The Framework does not refer to or set out “thresholds.” Instead it refers to “components,” “benchmarks,” “indicators,” and “objectives.”

[1622] Dr. Psyllakis explained that, in the context of the Framework, an objective is the desired outcome or condition of the value.

[1623] Notably, the Framework does not establish or change any of the objectives that government has in place. Any changes to the objectives would be done through legislation, regulation, policy, or land use plans. Dr. Psyllakis confirmed this in cross-examination:

> Q: The Cumulative Effects Framework hadn’t at that time [in May 2014] established any thresholds for acceptable change, had it?
>
> A: No, it never does.

[1624] Nor does an objective prescribe what should occur in order to ensure it is met. The Cumulative Effects Framework states that if objectives are not being achieved, or if conditions are approaching a level where further development could put their achievement at risk, the management goal is to “enhance consistent and coordinated responses” to meet the objective.

[1625] The fact that the Framework has not altered legal requirements was confirmed in correspondence regarding the Framework from the Oil and Gas Commission and from the Ministry of Forests.

[1626] In February 2017, the Commissioner and Chief Executive Officer of the Oil and Gas Commission, Paul Jeakins, wrote to all staff about the Province’s Cumulative Effects Framework. He noted that the Framework supports and strengthens integrated resource management and defined the government’s approach to considering cumulative effects in natural resource decision-making. Importantly, he noted that the Framework did not create any new legal requirements:

> The CEF Interim Policy [i.e., Framework] does not provide new or alter existing statutory decision making for legislated authorities. It also does not create new legal requirements. The extent to which cumulative effects can be taken into account in decision-making ultimately varies depending upon the

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> existing legislative framework for each decision. The CEF builds on the existing Provincial Government's Natural Resource Sector approach to managing multiple values on the land base and complements existing tools and processes such as land use plans, Forest and Range Evaluation Program monitoring, Multiple Resource Value Assessments, resource inventories, the Commission's Area-based Analysis and the Environmental Assessment Office's project-scale cumulative effects assessments. …

[1627] In July of 2017, the Northeast Region's Regional Executive Director for the Ministry of Forests, Karrilyn Vince, wrote to her staff about the Framework. She indicated it was her expectation that all departments should be turning their minds to how cumulative effects considerations could fit within their "existing decision legal/policy frameworks" and assessing what tools and information will be required.

[1628] It is clear from the above, that the Cumulative Effects Framework and the guidance provided about it did not result in a paradigm shift in the way the Province was taking into account cumulative effects. It was largely business as usual, as applicable legislation and policy remained unchanged.

[1629] Ms. Vince also noted that in the northeast region there were "high expectations and time pressures" to demonstrate the management of cumulative effects, but that implementation of the Framework and "full integration into management" was anticipated "to take years to achieve." The notion that it would take years to see full integration of the Framework was shared by Dr. Psyllakis in 2020.

[1630] This again demonstrates the problem of persistent delay that threads many of the Province's actions and initiatives.

F. Wildlife Management

1. Land Designations

[1631] Land use designations are one of the primary tools the Province uses to manage and protect wildlife and their habitat. The Province makes these designations under a variety of legislative instruments, including the *Forest and*

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Range Practices Act and the *Oil and Gas Activities Act*. Designation is generally intended to curtail or prevent certain types of development within the subject area.

[1632] These designations are also incorporated into various provincial decision-making steps, including:

a) the Ministry of Energy and Mines' Critical Information Analysis at the oil and gas tenuring stage;

b) the Oil and Gas Commission's and Area-Based Analysis at the oil and gas permitting stage; and,

c) the Ministry of Forests stand-level permitting process.

[1633] The designations listed below are spatially designated – that is, designations are given to a specific unit of land at the behest of the Minister, rather than being created by a statutory definition of their features. For example, an Old Growth Management Area is not simply any area with a certain set of defined old-growth forest features, but rather a specific tract of land designated as such by a minister.

a) Ungulate Winter Ranges and Wildlife Habitat Areas

[1634] The Province may designate Wildlife Habitat Areas and Ungulate Winter Ranges under either the *Forest and Range Practices Act* (forestry) or the *Oil and Gas Activities Act* (oil and gas).

[1635] Ungulate Winter Ranges are designed to protect winter habitat for various ungulates. The availability of suitable winter habitat is a limiting factor for caribou and moose. Wildlife Habitat Areas are likewise designed to protect critical habitat for the listed species.

[1636] There are two types of Wildlife Habitat Area and Ungulate Winter Range designations:

a) No Harvest: If designated under the *Forest and Range Practices Act*, this designation prohibits removal of forest cover or construction of roads or

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trails, though exemptions are available. If designated under the *Oil and Gas Activities Act*, operating areas are prohibited unless they will not have a "material adverse effect" (which test is described under the Oil & Gas segment of this judgment).

b) Conditional Harvest: If designated under the *Forest and Range Practices Act*, some harvesting is allowed depending on area-specific general wildlife measures; the Province may grant exemptions. If designated under the *Oil and Gas Activities Act*, activities are subject to the "material adverse effect" test just as in No Harvest zones.

[1637] Regardless of whether an Ungulate Winter Range or Wildlife Habitat Area was designated under the *Oil and Gas Activities Act*, the Oil and Gas Commission does consider the designation as part of its permitting process.

[1638] A final important distinction: though an Ungulate Winter Range can be designated for a broad array of ungulates (including moose), Wildlife Habitat Areas are restricted to species at risk or species designated as "regionally important wildlife." Moose do not fall under this designation.

b) Old Growth Management Areas

[1639] As the name suggests, Old Growth Management Areas are designated areas designed to protect old growth forest. This habitat is important to a number of species, including ungulates like caribou and moose as well as furbearers like marten and fisher. Old Growth Management Areas may be designated under the *Forest and Range Practices Act* or the *Oil and Gas Activities Act*:

a) If designated under the *Oil and Gas Activities Act*, operating areas are only allowed where they pass the no "material adverse effect" test with respect to old growth forest within the Old Growth Management Area. The Ministry of Forests has provided guidance that, for oil and gas activity in an Old Growth Management Area, "material adverse effect" should be interpreted as a 5% total disturbance for large Old Growth Management

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Areas and 10% total disturbance for small ones (i.e. those less than 100 ha). As such, provided an activity does not cause the total threshold of 5 or 10% disturbance to be exceeded, it will not be considered to have a "material adverse effect."

b) If designated under the *Forest and Range Practices Act*, major licensees may undertake forest harvesting or road construction depending on the licensee's Forest Stewardship Plan, though timber must generally be retained with only minor exceptions. The Province may grant exemptions.

[1640] Old Growth Management Areas may include "recruitment areas" which do not currently meet the old growth criteria (which varies from 80 to 120 years old based on the stand type).

[1641] Finally, Old Growth Management Areas are intended as "rotating reserves," rather than strictly protected areas. Mr. Van Dolah noted they are harvested on roughly an 80-year cycle, at which point they are replaced with another Old Growth Management Area. In other words, the Old Growth Management Area will be rotated out at some point in time and no longer have the protection.

c) Resource Review Areas

[1642] Resource Review Areas may be designated under the *Petroleum and Natural Gas Act*, R.S.B.C. 1996, c. 361. Designation results in no special constraints for forestry activities. For oil and gas, no new tenures may be issued inside of a Resource Review Area. However, this only precludes drilling or well operation; the Oil and Gas Commission may still permit other oil and gas-related surface activities. Further, they may only be designated in areas where tenures have not already been granted.

d) Provincial Parks

[1643] Where an area has been designated as a Class A Provincial Park under the *Parks Act*, R.S.B.C. 1996, c. 344:

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a) forest harvesting and road or trail construction are prohibited;

b) oil and gas activities may be authorized if activities cause no surface disturbance, although research permits may be authorized; and,

c) mining, renewable energy and recreational development are all prohibited, subject to the exception for research permits.

[1644] Motorized recreational activity, however, is allowed.

e) Ecological Reserves

[1645] Ecological Reserves may be designated under the *Ecological Reserve Act,* R.S.B.C. 1996, c. 103. They afford a significant level of protection, prohibiting essentially all industrial activity.

f) Efficacy of Designated Areas

[1646] As noted above, these designated areas are ostensibly intended to restrict development in critical wildlife habitat. The Province repeatedly referred to them as "protected areas." In discussing caribou habitat, they noted that "there are…significant protections that prevent future disturbance," before listing the various parks, Ungulate Winter Ranges, Wildlife Habitat Areas, and Resource Review Areas which overlap with caribou territory.

[1647] However, as described above, the Province actually permits development, at least to some degree, in *all* of these designated "protected" areas. These designations may reduce industrial disturbance, but they do not necessarily *prevent* it.

[1648] In an Old Growth Management Area, oil and gas activity is permitted to disturb 5–10% of the land base, depending on the size of the area. This interpretation of the "material adverse effects" test by the Ministry of Forests makes no provision for the actual effect of the activity, but only for its spatial disturbance or physical footprint. A Resource Review Area only prevents the future granting of

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tenure, but does not prevent the building of roads or pipelines (i.e. activities that do not require a tenure but only a permit).

[1649] In fact, even where an industrial activity is only permitted by specific exemption, development continues. In a 2017 federal-provincial report, it was determined that 206 forest harvesting authorizations, representing over 16,500 hectares of land, were handed out inside of *Forest and Range Practices Act* designated "No Harvest" Ungulate Winter Ranges in the Narraway/Pine River/Quintette Local Population Units.

[1650] In many cases, the issue lies in the range of discretion afforded to decision-makers. Where development is prohibited, it is always prohibited "with exceptions," which may be somewhat unclear. Consider the *Forest and Range Practices Act* Ungulate Winter Range and Wildlife Habitat Area "No Harvest" designations, which prohibit the construction of forestry roads except where it is "not practicable" to avoid constructing them. Where designated under the *Oil and Gas Activities Act*, some oil and gas drilling is still allowed.

[1651] Further, these tools apply differently to various industries depending on which enactment they were designated under – consider Ungulate Winter Ranges, Wildlife Habitat Areas and Old Growth Management Areas, as detailed above, which can be designated under either the *Forest and Range Practices Act* or the *Oil and Gas Activities Act*. Unless they are designated under both enactments, they may, for example, control forestry activity but not oil and gas activity.

[1652] There are further issues with the limited application of some of these designations. As noted, Wildlife Habitat Areas may only be designated for species at risk or "regionally important wildlife." In Mr. Curry's testimony, he noted that moose – a key species for Blueberry – do not fall under either of these designations, and as such, no Wildlife Habitat Area can be designated to protect them.

[1653] Most importantly, however, there are almost none of these designated areas in the Blueberry Claim Area.

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[1654] As noted above, the designations listed here are spatially defined; for example, not all “old growth” areas are Old Growth Management Areas. The evidence shows that very little of the Blueberry Claim Area falls within one of these protected zones. The 2016 Atlas calculates that only 1% of the Blueberry Claim Area is protected by parks, ecological reserves, or protected areas, compared to an approximate 15% provincial average (as of 2017).

[1655] There are very few Ungulate Winter Ranges or Wildlife Habitat Areas in the Blueberry Claim Area generally, and none in the water management basins surrounding the Blueberry reserve. There are no Ungulate Winter Ranges or Wildlife Habitat Areas for moose in the Fort St. John Timber Supply Area (i.e., north of the Peace River). There is a single Ungulate Winter Range south of the Peace River that falls within the Blueberry Claim Area (in the Dawson Creek Timber Supply Area), which includes moose. There are some Ungulate Winter Ranges and Wildlife Habitat Areas for caribou that overlap the Blueberry Claim Area; however, they appear mostly at the margins of the territory. Further, provincial policy is to limit the total restriction on harvesting arising from Wildlife Habitat Areas and Ungulate Winter Ranges to 1% of the provincial land base for forest and range activities.

[1656] There are no Old Growth Management Areas in the Fort St. John Timber Supply Area. There are some in the Dawson Creek Timber Supply Area which overlaps with the Blueberry Claim Area in the south, however, these areas are relatively far from the core of the Plaintiffs’ territory. In addition, as mentioned above, not all of an Old Growth Management Area is necessarily “old forest” habitat; significant portions may be “recruitment” habitat (i.e., young forest), and some may even be un-forested.

[1657] There are approximately 233,800 hectares of Resource Review Areas in the Blueberry Claim Area. A small amount (9,560 hectares) of these have been established based on Treaty Land Entitlements identified by Blueberry. More have been designated based on agreements with other Treaty 8 First Nations, or to protect caribou habitat. However, as mentioned, these areas exclusively protect

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against drilling and well operation by oil and gas proponents; forestry and non-tenure-related oil and gas activities may still occur.

[1658] Class A Park designations likely provide the largest degree of protection, as this designation is supposed to prohibit essentially all industrial activity. However, as noted above:

a) very little of the Blueberry Claim Area is protected by such a designation; and,

b) the Province still permits some industrial development to occur inside of these parks.

[1659] In 2017, the Province commissioned a review of the various statutory tools for the protection of Southern Mountain Caribou, specifically looking for the strengths and weaknesses of each tool. The resulting report, entitled “A Review of Provincial Statutory Tools for Protecting Southern Mountain Caribou” was co-authored by Dr. Holt, who testified as a fact witness and explained the report at trial. The report rated the likely efficacy of each tool based on empirical data; with respect to those listed above, the ratings were as follows:

a) Ecological Reserves: High, given the strong rules and good history of application;

b) Class A Provincial Parks: Moderate to high, given strong rules (though the report notes that 10,299 ha of oil and gas activity had still been authorized in class A parks in the Narraway/Pine River/Quintette Local Population Unit study area);

c) Protected Areas: Moderate, due to generally strong rules, excepting the allowance of motorized recreation and linear disturbances;

d) Wildlife Habitat Areas and Ungulate Winter Ranges: Low to low/moderate (depending on whether a Conditional Harvest or No Harvest designation), given the high number of documented incursions into these zones as

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allowed by the “if practicable” and “material adverse effects” tests. The low rating is also a result of the limited subset of industrial activities to which these designations apply;

e) Old Growth Management Areas: Low, as they apply only to forestry, oil and gas activity (and not other industrial activity), and because they allow discretionary destruction of habitat; and,

f) Resource Review Areas: Moderate to high, as they have the potential to limit future expansion of oil and gas tenure.

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[1660] Although the report was authored with respect to southern mountain caribou, the critique of the various statutory tools was quite general, as it considered primarily the extent of development and room for discretion allowed by each tool. Dr. Holt discussed the report in her capacity as a factual witness. She noted that some of the largest “gaps” were in Ungulate Winter Ranges, Wildlife Habitat Areas, and Old Growth Management Areas.

[1661] As noted earlier, Dr. Holt did not testify as an expert and did not provide opinion evidence; both the report and her testimony were used only for the facts they contained (for example, empirical data on how much development had been allowed inside various designated areas). However, these facts are useful in assessing the efficacy of these land designations, both individually and as a whole.

[1662] Ultimately, the Province was unable to demonstrate effective tools existed to protect wildlife in the Blueberry Claim Area. Critically, a few of these legally designated protections exist in the Blueberry Claim Area, and many of the tools only limit and do not prevent industrial activity.

2. Stewardship Programs

[1663] In addition to designated areas, there are a couple of species-specific stewardship programs relevant to the Blueberry Claim Area.

a) Boreal Caribou Recovery Implementation Plan

[1664] There have been two versions of the Boreal Caribou Recovery Implementation Plan: one in 2011, and one in 2017, which has yet to be finalized ("2017 Draft Boreal Caribou Recovery Implementation Plan"). Mr. Pasztor, who testified at trial, co-authored the 2011 Boreal Caribou Recovery Implementation Plan.

[1665] Implementation plans are designed to meet the Province's obligations to manage or recover species at risk under the *Accord for the Protection of Species at Risk in Canada* and the *Canada-British Columbia Agreement on Species at Risk*. Although they contain what the Province considers to be the best available science, the measures contained therein represent a compromise between science and economics.

[1666] The overarching population goals for the 2011 Boreal Caribou Recovery Implementation Plan were to decrease the expected rate of decline in the Boreal Caribou population, and to significantly reduce the risk of Boreal Caribou extirpation in several ranges, including the Chinchaga, within 50 years.

[1667] Specific objectives for the specified ranges (including the Chinchaga) included:

a) protecting sufficient habitat in the designated ranges to provide recovery opportunities within 50 years;

b) undertaking restoration activities in several ranges, including Chinchaga;

c) managing the size of the industrial footprint by protecting habitat and requiring practices which minimize surface disturbance;

d) mitigating effects of industrial disturbance through predator control and fire suppression; and,

e) monitoring the effectiveness of these management measures and modifying them accordingly.

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[1668] The 2011 Boreal Caribou Recovery Implementation Plan aimed to "maximize conservation efforts to benefit Boreal Caribou…while providing resource development opportunities."

[1669] In 2017, after roughly two years of engagement around revisions to the 2011 Plan, the Province made public its 2017 Draft Boreal Caribou Recovery Implementation Plan. It contained a number of changes compared to the 2011 version, including more specific objectives regarding forestry and oil and gas development. Some of those objectives included:

a) establishing a target of less than 6% early seral habitat in each Boreal Caribou range;

b) prohibiting road building and forest harvesting in 15 of the 16 identified "core" areas, with the exception being the Chinchaga Range's Milligan Core, where these activities would "be maintained" under current management practices;

c) prohibiting the creation of new early seral forest in core ranges (with possible exceptions);

d) requiring a net decrease in the density of linear features in core areas using habitat offsets (set at an initial 4:1 offset-to-development ratio). The initial targeted linear density was 2 km per km^2, excluding low-impact seismic lines;

e) replacing existing Resource Review Areas with "better aligned RRAs over untenured portions of caribou core areas"; and,

f) predator and wildlife management strategies.

[1670] The 2017 Draft Boreal Caribou Recovery Implementation Plan also contained slightly more ambitious population and habitat goals, namely: to maintain a positive habitat trend across each Boreal Caribou range, and to stabilize and achieve viable populations across each Boreal Caribou range.

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[1671] Despite these efforts, the Ministry of Environment has not yet finalized or adopted the plan.

[1672] The Province implemented some changes to the 2011 Boreal Caribou Recovery Implementation Plan due to concerns raised by Treaty 8 First Nations, including Blueberry. For example, Mr. Pasztor testified that in 2015, the Province expanded the existing Resource Review Areas from approximately 550,000 hectares to roughly 1,000,000 hectares in the specified Boreal Caribou ranges, and "initiate[d] a process to amend the existing legal designations," including Ungulate Winter Ranges and Wildlife Habitat Areas, to "make improvements and protect additional habitat."

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b) Efficacy of the Boreal Caribou Recovery Implementation Plan

[1673] When the 2011 Boreal Caribou Recovery Implementation Plan was published, it was estimated there were roughly 1,300 Boreal Caribou remaining in northeastern BC. The 2017 Draft Boreal Caribou Recovery Implementation Plan estimated the population at a "minimum" of 728 individuals, despite measures taken in the interim, including the designation of Ungulate Winter Ranges and Wildlife Habitat Areas per the 2011 Boreal Caribou Recovery Implementation Plan.

[1674] At the time the 2011 Boreal Caribou Recovery Implementation Plan was implemented, over 75% of the Boreal Caribou range was already tenured and being developed for petroleum and natural gas. The 2011 Boreal Caribou Recovery Implementation Plan accepts a maximum disturbance threshold of 61%, above which point Boreal Caribou populations are expected to decline. It goes on to state:

> Given this, and not accounting for future petroleum and natural gas activities planned within the Boreal Caribou range, the population is likely to continue to decline.

[1675] The 2011 Boreal Caribou Recovery Implementation Plan cited studies noting that even a "full moratorium" on oil and gas development would not be enough to halt the decline. However, germane to this case, modelling contained in the report

did note that a full moratorium on development would reduce the probability of extirpation (within 50 years) for the Chinchaga to only 2.8%. As justification for failing to proceed with such a moratorium, the 2011 Boreal Caribou Recovery Implementation Plan cites the “important and significant revenue stream” flowing from petroleum and natural gas development.

[1676] Mr. Pasztor, the co-author of the 2011 Boreal Caribou Recovery Implementation Plan, acknowledged in a briefing note dated November 20, 2013 that the plan “allows for the destruction of critical habitat in excess of what is required to support caribou recovery under the federal recovery strategy.” At trial, he noted that the federal strategy was based purely on science, whereas the provincial strategy was based on a combination of science and socio-economic interests.

[1677] The Province deemed habitat restoration an “essential” activity in the 2011 Boreal Caribou Recovery Implementation Plan, originally targeted to begin in the fall of 2011. However, no evidence has been presented that this restoration has been carried out. Mr. Pasztor could not say whether it has ever occurred, and the funding has only recently been made available.

[1678] The updated 2017 Draft Boreal Caribou Recovery Implementation Plan has further potential efficacy issues, despite an array of revisions.

[1679] The plan proposes to establish “temporary” Resource Review Areas only over “untenured portions of Boreal Caribou core areas,” which would defer tenure sales in these cores for a “specified length of time” while other strategies are developed. However, as mentioned above, even at the time of the 2011 Boreal Caribou Recovery Implementation Plan, over 75% of the broader Boreal Caribou range was already tenured, limiting the application of these Resource Review Areas. Further, Resource Review Areas themselves only protect against drilling and well-based activities, but do not protect against surface-disturbance-only activities.

[1680] This 2017 Caribou Recovery Plan specifically targeted linear disturbances and early seral habitat (created by both natural and industrial disturbance) as critical

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habitat risks for Boreal Caribou. However, the plan's proposed target of 2 km of linear density per km^2 is in excess of their own cited evidence on the subject. The 2017 Draft Boreal Caribou Recovery Implementation Plan notes that linear densities in excess of 1.2 km per km^2 put Boreal Caribou at risk of decline, and that a density of 1 km per km^2 is required for stable or increasing populations.

[1681] Further, the plan purports to achieve a net decrease in linear density using habitat restoration offsets, i.e., by restoring previously disturbed areas in exchange for allowing new disturbance. However, as the Plaintiffs note, the efficacy of this strategy may be limited by the significant time it takes for restoration efforts to achieve their desired effect. As the 2017 Draft Boreal Caribou Recovery Implementation Plan acknowledges, it may take 35 to 100 years (for upland and lowland habitat, respectively) for linear disturbances to be fully restored. Moreover, restoration activities apparently have yet to begin; in the meantime, the Province continues to permit forestry and oil and gas development in Boreal Caribou ranges, even in designated Ungulate Winter Ranges and Wildlife Habitat Areas.

[1682] More specific to the Plaintiffs, whose territory overlaps with the Chinchaga range, the 2011 Boreal Caribou Recovery Implementation Plan and 2017 Draft Boreal Caribou Recovery Implementation Plan both authorize continued forestry activities in the Chinchaga's Milligan Core. The plan authorizes this despite the fact that – per Mr. Simpson's testimony – forestry has a "very significant impact on habitat" which "makes it virtually unusable for caribou."

[1683] While I make no final conclusions on this point, the Province has not demonstrated that its caribou-specific stewardship plans provide effective protection for these caribou populations in the Blueberry Claim Area.

c) The Peace-Liard Moose Management Plan and RSEA Moose Working Group

[1684] The Province has developed a province-wide Cumulative Effects Framework Interim Assessment Protocol for moose in British Columbia, which describes general

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strategies the Province will use to conserve moose values. This interim protocol notes that moose are a "high-value resource," and further states:

> Moose are a wide-ranging species, and they depend upon multiple, well-connected and functioning habitat with properly functioning ecosystem processes. As such, moose are susceptible to cumulative impacts on their habitat and their populations from extensive land use activities and disturbances. As a species that can tolerate, and may even benefit from, some human activities on the landscape, moose-human interactions are common and complex.

[1685] In 2013, the Province began work on the Peace-Liard Moose Management Plan to implement the provincial framework regionally in northeastern BC. The purpose of the plan was to support the sustainable management of moose in the Northeast Region and to ensure the priority right of Treaty 8 and First Nations are maintained with respect to moose.

[1686] In 2016, the (former) Director of Resource Management at the Ministry of Forests, Mr. Addison, noted that the Peace-Liard Moose Management Plan was not an "operational level plan" but rather "a larger framework that will lead out to a multi-faceted approach to enhancing our documented knowledge and management for moose in the Peace-Liard area." The Province intended it as a "guiding document" rather than an action plan. I take this to mean the plan did not actually outline any concrete operational measures, but was instead a conceptual framework upon which the Province could base its operational measures. In letters between Blueberry and the Ministry of Forests, the Province explained that they wished to develop an operational plan in collaboration with First Nations, rather than having the Province develop such measures unilaterally. Blueberry participated in some of the technical meetings for the Peace-Liard Moose Management Plan.

[1687] The plan outlined five management "levers" or variables that affect moose populations: habitat management; population management; health and monitoring; compliance and enforcement; and hunting regulations. In letters to Blueberry, the Province noted that it intended these levers to "encompass complex issues such as the cumulative effects of habitat disturbance in relation to moose." That said, in

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correspondence relating to the plan, the Province disagreed that cumulative effects were to blame for the decline of moose in parts of the Blueberry Claim Area, and cited their belief that natural resource development had a “generally positive” effect on moose populations.

[1688] Mr. Van Dolah testified that a draft version of the Peace-Liard Moose Management Plan was completed, and, consistent with the Chief Forester’s comments, that it was awaiting provincial sign-off.

[1689] Mr. Van Dolah testified that by the time he assumed the role of District Manager for the Peace Natural Resource District in July 2018, work on the Peace-Liard Moose Management Plan had “gone quiet” as the Province prioritized other initiatives. Mr. Van Dolah was told the plan was essentially a loose end.

[1690] Mr. Van Dolah provided the draft plan to the Regional Strategic Environmental Assessment Moose Working Group in hopes they could adopt or adapt it for use under that program. He believed it provided a good framework for moose management, and that providing the plan to the Regional Strategic Environmental Assessment group would facilitate its use in operational planning.

[1691] Mr. Van Dolah testified that the plan was not halted so much as it was rolled into the more “streamlined” Regional Strategic Environmental Assessment project. This new project also allowed for joint consultation with all relevant First Nations, rather than the prior piecemeal approach. He testified that Blueberry and other First Nations were supportive of the consolidation.

[1692] Today, the Province is still developing moose-specific protection initiatives under the Regional Strategic Environmental Assessment project, with oversight by the Moose Working Group. The Moose Working Group is a collaboration between the Province, Treaty 8 First Nations, and industry proponents.

[1693] The Moose Working Group commissioned a private company, Madrone Environmental Services Ltd., to create a Habitat Effectiveness Model (the “Madrone

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Model"). Their preliminary modelling is laid out in a report dated July 16, 2019 (the "Madrone Report"). The Madrone Model is designed as "a tool to inform moose management at the Wildlife Management Unit level… specifically as an indicator of where effective habitat may be lacking for moose." The Madrone Report describes the objective as:

> …to assess factors that may be downgrading suitable habitat and to explore how it may be impacting moose populations.

[1694] Mr. Van Dolah described the Madrone Model as "critical work" required to "fill in and meet the objectives within the Peace-Liard moose management plan." He testified that it contained "very, very important information," as it would allow the Province to actually target a certain population of moose in a specific area. In this way, Mr. Van Dolah reasoned that the Province could consult with First Nations on where, exactly, they wanted to be able to harvest moose, and encourage moose populations in those areas.

[1695] At the time of Mr. Van Dolah's testimony, the Madrone Model was still in development. The Madrone Report only provides habitat modelling for three Wildlife Management Units within the Fort St. John Timber Supply Area (including unit 7-45, at the core of the Blueberry Claim Area).

d) Efficacy of the Peace-Liard Moose Management Plan and RSEA Moose Working Group

[1696] The Peace-Laird Moose Management Plan never received a Provincial sign-off and was never implemented. There has been no explanation as to why it wasn't signed off. The plan appears to have been subsumed by the Regional Strategic Environmental Assessment project.

[1697] That said, and as noted above, the Peace-Liard Moose Management Plan was a framework rather than an operational plan. Its development spanned several years before it was ultimately folded into another project. In the meantime, there is no evidence that operation-level decision makers considered the Peace-Liard Moose

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Management Plan, or in some cases, that they considered moose habitat at all. For example, the Chief Forester indicated she would not (or could not) address moose habitat under the Allowable Annual Cut until and unless the then-forthcoming Peace-Liard Moose Management Plan directed her to do so. In the Rationale for Allowable Annual Cut Determination for the Fort St. John Timber Supply Area (May 10, 2018), she stated:

> I recognize that current wildlife habitat area reductions do not specify requirements for moose. However, finalization of the *Peace-Liard Moose Management Plan* may result in changes to the legal objectives which can be factored in future [Allowable Annual Cut] determinations. Meanwhile, consistent with my *Guiding Principles*, I will not speculate on potential land use changes.

[1698] The Chief Forester also noted that the Peace-Liard Moose Management Plan was "in the final stages of sign-off with implementation pending." However, as noted above, this plan was never put into effect.

[1699] Although the work might not have been lost, folding it into the Regional Strategic Environmental Assessment project means use of the plan is delayed pending completion of this new project. Mr. Van Dolah agreed on cross-examination that the key step of identifying critical moose habitat has been deferred to the Regional Strategic Environmental Assessment initiative. He agreed that, if the Province had approved the Peace-Liard Moose Management Plan before it was rolled into the new initiative, statutory decision makers (like the Chief Forester) would currently be applying it in their decision-making process.

[1700] Moose protection initiatives are still being developed under the Regional Strategic Environmental Assessment project. Mr. Van Dolah noted that the Madrone Model is not yet in use. At the time of his testimony, modelling had only been completed for a portion of the Blueberry Claim Area. I also note that this modelling does not consider a variety of cumulative effects factors, including seismic lines or herbicides.

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[1701] It goes without saying that a plan that has not been implemented, and which is not considered in any decision-making process, cannot protect moose habitat. This plan was specifically mentioned by the Chief Forester as ready to go and simply awaiting sign off when it disappeared in 2018. There is no real explanation as to why no one signed off on it. Rather, it appears to be incorporated into another process, reflecting a pattern of delay and hand-off rather than addressing the issue at hand.

3. Hunting Regulations

[1702] In addition to testifying about the cumulative effects framework, Dr. Psyllakis testified in her capacity as the Director of the Wildlife Branch of the Ministry of Forests. She is a statutory decision maker with several roles and responsibilities, including several which lead into the decision on the Allowable Annual Harvest of each species, i.e. how many animals may be harvested by resident and non-resident hunters.

[1703] Dr. Psyllakis testified that the Ministry of Forests aims to manage wildlife populations conservatively. She stated that their goal is to manage hunting to ensure population balance (i.e., that “harvested” animals are replaced by new animals). She testified that the Province determines the Annual Allowable Harvest (how many animals can be hunted) on a Game Management Zone scale (which is larger than a Wildlife Management Unit).

[1704] The Ministry of Forests uses a variety of tools to manage populations, including animal class restrictions (for example, limiting the harvest by age, sex, or other characteristics) and site and access restrictions. Dr. Psyllakis stated that species of high concern or “red-listed” species will not be harvested except as allowed through an accepted provincial recovery strategy, or as a legal entitlement for First Nations hunters. She testified that, other than restrictions for safety purposes, none of the restrictions apply to hunters exercising their Aboriginal or treaty rights.

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[1705] Dr. Psyllakis testified that First Nations are given priority hunting or “harvest” rights; their allocations are set aside before allowing for non-First Nations hunters. She testified that the policy hierarchy is, in order: conservation; First Nations’ food, social and ceremonial uses; resident hunters; and, finally, non-resident hunters. However, as the Plaintiffs pointed out, the Ministry of Forests has authorized “resident” hunters to harvest from the Pink Mountain caribou herd, despite the fact that Blueberry members have been voluntarily abstaining from caribou hunts out of concern for the species.

[1706] Dr. Psyllakis noted that the Harvest Allocation Policy also deals with accommodation measures for First Nations’ harvest allocations outside of “proven” hunting rights. Where a First Nation has such a claim, their rights will be accommodated by taking harvest amounts out of the resident/non-resident hunter allocations.

[1707] Dr. Psyllakis stated that First Nation hunters exercising their rights in traditional territories or treaty areas do not have to obtain a hunting license or species license.

[1708] It is informative to consider how changes to these regulations can be made to address Blueberry concerns. Mr. Van Dolah testified about a July 24, 2019 meeting between Blueberry and the Ministry of Forests regarding collaboration on moose hunting regulations and a potential government-to-government agreement on such. Blueberry made a number of requests, including for a 20 kilometre area closure around Pink Mountain for conservation purposes (though they were willing to compromise and accept a 5 kilometre closure). The meeting resulted in joint recommendations on proposed changes to these regulations, which were passed on to Dr. Psyllakis.

[1709] However, Mr. Van Dolah noted that Dr. Psyllakis would have to review the proposed amendments and then make a recommendation to the Minister regarding

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implementation. By the time of Dr. Psyllakis's testimony in June of 2020, only some of the proposed changes had been accepted.

4. Conclusions on Wildlife Management

[1710] Based on the above, there are clear gaps in the Province's wildlife management regime within the Blueberry Claim Area. In particular:

a) there are very few designated areas within the Blueberry Claim Area;

b) in any case, exceptions and discretionary room allow for development inside of every type of designated area;

c) there are ultimately no "firm" thresholds or limits that actually inhibit development. While scientific thresholds are set out (for e.g. the 2011 Boreal Caribou Recovery Implementation Plan notes a maximum disturbance threshold of 61% if trying to have species recover), the current level of disturbance already surpasses what acceptable; and,

d) there is no direction as to what concrete steps should occur if a disturbance threshold is reached.

[1711] With respect to the Boreal Caribou Recovery Implementation Plan:

a) the Province has failed to implement key aspects of the plan, including habitat restoration work;

b) the plan allows for the destruction of critical habitat in excess of what is required to support caribou recovery under the federal recovery strategy, and even in excess of the Province's own cited scientific evidence on the subject; and,

c) the plan explicitly permits ongoing forestry activities in key caribou habitat within the Blueberry Claim Area, despite evidence that such activities are extremely detrimental to caribou.

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[1712] Regarding the moose-specific initiatives, it is enough to note that they are not yet operational, and statutory decision-makers are not yet factoring in either the Peace-Liard Moose Management Program or the Madrone Model into their decisions.

[1713] Overall, the Province has not demonstrated any substantive, concrete protections for wildlife or wildlife habitat within the Blueberry Claim Area.

G. Conclusions on the Province's Implementation of the Treaty

1. Parties' Positions

[1714] Ultimately, Blueberry argues that the scale of development in the Blueberry Claim Area goes well beyond what was contemplated at the time the Treaty was made, such that the Treaty – which promised that First Nations could continue their mode of life based on hunting, fishing and trapping on their lands, and which protected this way of life from forced interference – has been breached.

[1715] Relying on *Manitoba Metis*, Blueberry says the honour of the Crown applies and governs treaty implementation, and requires the Province to act in a way that accomplishes the intended purposes of the Treaty, and to diligently pursue its solemn obligations. It maintains that in the circumstances of this case, the Crown's obligation to diligently and honourably implement the Treaty means the Province must (1) *protect* the rights and promises contained in the Treaty; and, (2) establish a framework to *prevent* and *avoid* infringement of those rights. In this case, Blueberry says by failing to diligently and honourably implement the Treaty promise, the Province has caused significant harm to the Plaintiffs' treaty rights.

[1716] Blueberry says the Province has not acted diligently – or at all – to implement a regulatory structure to guide decision-making over the granting of tenure or use of resources within the Blueberry Claim Area or to deal with the taking up of lands. It says the Province has failed to protect the Blueberry Claim Area from the scale of industrial development present on the land and, moreover, has zoned the central watersheds Blueberry relies on for the highest intensity development.

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[1717] It says that the Province's consultation efforts are procedural, and fail to engage in the fundamental question of how much development in the Blueberry Claim Area is too much. It says the Province pays "lip service" to its treaty rights, and has shown a pattern of re-directing Blueberry to an endless series of decision-makers, none of whom protect its treaty rights from the cumulative impacts of development. Meanwhile, development continues to be authorized and to proceed apace.

[1718] Blueberry says that the Province has been aware of its concerns about the cumulative effects of development in the Blueberry Claim Area and the impact to the exercise of its rights for a significant period of time. It notes that in 2003, the Oil and Gas Commission commissioned a study on cumulative effects, which looked at Blueberry's territory as a case study. It notes that in 2011, the Forest Practices Board also did a cumulative effects case study in relation to the Kiskatinaw River watershed, in the southern portion of the Blueberry Claim Area. These studies showed the level of disturbance in parts of the Blueberry Claim Area increasing, and the quality of water and habitat decreasing. Yet, says Blueberry, the Province has failed to act.

[1719] Blueberry also highlights its own efforts, in particular those from around 2012 onward, to bring its concerns regarding cumulative effects to the Province's attention, to provide studies and data on the disturbance to the land base, and to provide solutions for how to proceed. Blueberry says that while the Province has recognized the issues Blueberry has raised are important, it has not taken any steps to do cumulative effects assessments in the Blueberry Claim Area specifically, to look at the impacts on Blueberry's treaty rights, or to pause or halt development while this work is underway.

[1720] Blueberry says the Province's inaction and delay breaches the Treaty, and the duty of honourable implementation. Moreover, Blueberry says the Province's action and inaction rises to the level of constituting a breach of its fiduciary obligations.

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[1721] The Province says the Court's focus should be on the question of infringement, and not on whether the Province's existing processes for authorizing industrial development ensure that the taking up of land protects the meaningful exercise of harvesting rights.

[1722] In addition, the Province emphasizes that the honour of the Crown gives rise to a duty to consult, and it challenges the way in which Blueberry has approached the issue of consultation. The Province argues, first, that Blueberry has approached consultation from the premise that the Province was bound to *prevent* all activities that might harm or pose a risk to their rights. This approach, it says, is not grounded in the law. Second, the Province notes that Blueberry has not pursued judicial review proceedings of any particular authorization, and the Court does not have a complete record of the multiplicity of consultation process.

[1723] Finally, the Province says that on the facts of this case, Blueberry members are free to hunt, fish and trap, and they have not identified regulatory restraints prohibiting their exercise of rights.

2. Analysis of the Province's Honourable and Fiduciary Obligations

a) Has the Province Honourably and Diligently Implemented the Treaty?

[1724] As noted by Blueberry, the law requires the Crown to act with diligence and integrity to implement, uphold and protect the purpose and promise of Treaty 8. The honour of the Crown is engaged by constitutional obligations and treaty promises (*Manitoba Metis* at paras. 69-71). In entering into Treaty 8, the Crown had an intention to create solemn and binding obligations. The Province does not dispute this. The meeting at Lesser Slave Lake in the summer of 1899 was a solemn affair attended by Treaty Commissioners as representatives of the Crown, the Chiefs and headmen of Indigenous Nations, and was witnessed by numerous observers. The Treaty was made for the overarching purpose of reconciling Aboriginal interests with Crown sovereignty. The honour of the Crown is engaged.

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[1725] Accordingly, the honour of the Crown requires the Province to interpret the Treaty in a purposive manner, and to act diligently to endeavour to fulfill the promises the Crown made, including and especially that the Indigenous signatories and adherents will continue to have the right to hunt, fish and trap in a meaningful way, and that there will be no forced interference with their way of life (*Manitoba Metis* at para. 75).

[1726] Clearly the promises contained in Treaty 8 differ in nature from the land grant contained in s. 31 of the *Manitoba Act* and considered by the Supreme Court of Canada in *Manitoba Metis.* Section 31 required clear and concrete actions – "the prompt and equitable transfer of the allotted public lands to the Métis children" (at para. 98) – so that it could meet the purpose for which it was designed, i.e., giving the Métis a head start over the expected influx of settlers. Time was of the essence, and a delay of over ten years in making the allotment substantially defeated its purpose.

[1727] In contrast, the protection of the rights to hunt, fish and trap and the promise that the Indigenous people could continue their modes of life free from forced interference did not necessarily require any immediate or concrete action.

[1728] At the time Blueberry adhered to Treaty 8 in 1900, and for several decades following, it remained able to hunt, fish and trap in a meaningful way and as part of its way of life as it had before the Treaty. However, as the pace of industrial development increased in the Blueberry Claim Area, the possibility arose that Blueberry's rights would be impacted. As Justice Greckol of the Alberta Court of Appeal has pointed out, the promise made in Treaty 8 is "easy to fulfill initially but difficult to *keep* as time goes on and development increases" (*Fort McKay* at para. 80, emphasis in original).

[1729] It is precisely because the promise is difficult to keep as development increases that the Province ought to have worked diligently to ensure appropriate measures were in place to protect the exercise of treaty rights and to respect treaty

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rights *before* authorizing this level of industrial development in the Blueberry Claim Area.

[1730] The Province essentially argues there is a process in place to implement the Treaty, and to take into account and protect treaty rights – the consultation process – and the Crown must consult prior to taking up land, per *Mikisew*. The Province also notes that it has been engaging with Blueberry on issues relating to forestry, oil and gas development, and the development of frameworks and regional processes to take into account cumulative effects.

[1731] The Province also points out, however, that this is not a consultation case, so the complete record is not before the Court. The Court therefore cannot and should not assess the adequacy of consultation in these matters. I agree that this case is not about consultation. It is, however, about whether the Crown has adequately and diligently implemented the Treaty that it agreed to with Blueberry, along with other Indigenous peoples. That is the focus of the analysis.

[1732] The Province has argued that if Blueberry was dissatisfied with the consultation that occurred in relation to any number of decisions, actions or projects, it ought to have applied for judicial review of those decisions or of the consultation processes generally. I do not accept that judicial review was Blueberry's only option, or that it is barred from arguing in this action that the Province's conduct in relation to a variety of decisions missed the mark.

[1733] It should be recalled that, after filing its Notice of Civil Claim, Blueberry did apply for judicial review of a decision made by the Minister of Natural Gas and Development to enter into a long term royalty agreement with an oil and gas company. In dismissing that application, Justice Skolrood referred to the comprehensive nature of the claims advanced in this action, and reasoned that Blueberry's concern about the cumulative impacts of industrial development in their traditional territories and the absence of an overall planning mechanism to ensure the protection of their treaty rights was "best addressed" in this action (*Blueberry*

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River First Nations v. British Columbia (Natural Gas Development), 2017 BCSC 540 at paras. 83 - 84). I agree.

[1734] This claim is the appropriate place to consider the merits of Blueberry's allegations that the Province has breached its honourable and fiduciary duties, and therefore breached the Treaty, in failing to address its concerns about the cumulative impacts of industrial development and failing to implement measures or mechanisms to protect their treaty rights.

[1735] The problem with the Province's emphasis in this case that consultation is the route to protect treaty rights, is that despite years of engagement, their processes have not resulted in a consequential way to assess the cumulative effects of development in the Blueberry Claim Area. The processes do not consider the impacts on the exercise of treaty rights or implement protections other than occasional site specific mitigation measures. The Province has long been on notice that a piece-meal project-by-project approach to consultation will not address Blueberry's concerns. To date, there is a lack of mechanisms to meet and implement the substantive rights and obligations contained in the Treaty.

[1736] The Province rightly points out that the honour of the Crown speaks to *how* Crown obligations are to be fulfilled, and that the Court should consider its conduct as a whole, in the context of the case and ask whether it acted with diligence to pursue the fulfillment of the purposes of the obligation. I conclude on the evidence before me that it did not. As Blueberry points out, the Crown is to be held to its promise. As per *Restoule* at para. 567: "The duty of honour must find its application in concrete practices and in legally enforceable duties."

[1737] The evidence in this case shows the Province has, for nearly twenty years, had information showing the significant level of disturbance within the Blueberry Claim Area, and that critical changes affecting Blueberry's ability to meaningfully exercise its treaty rights were occurring. The Province therefore had reasonable and credible notice that its own actions and inactions were putting it in potential breach of

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Treaty 8 by its failure to monitor cumulative impacts while continuing to permit and foster development in Blueberry's traditional territory. It therefore failed to act with diligence to ensure that despite the taking up of land, it protects the meaningful exercise of treaty rights, and this has resulted in an infringement of Blueberry's rights to hunt, fish and trap as part of their way of life.

[1738] As previously noted, in the early 2000s, the Oil and Gas Commission hired Salmo Consulting to undertake a case study looking at cumulative effects in a portion of what is here referred to as the Blueberry Claim Area. The study area was a 2,690 square kilometre area northeast of Wonowon, between the Alaska Highway to the south, and the Beatton River to the north. It appears to have been intended that this study, and others, would provide an over-arching strategy and approach for identifying, scoping, assessing and managing cumulative effects in northeastern BC.

[1739] The Oil and Gas Commission received the results of Salmo's case study in 2003. The study showed, among other things, that in 1950, 79% of "core area" remained. By 1970 that percentage had dropped to 43%, and by 1998, only 15% of core area remained. The Salmo study noted that a "core area" is an area with minimal human impacts. Core areas are relatively undisturbed and are often sources for plant and animal populations or meta-populations, and are considered one of the most practical cumulative effects indicators. Agricultural clearing was also identified in the Salmo study as a significant activity in the region, with large areas of forest converted for grazing and forage.

[1740] Dr. Holt, in the Land Stewardship Framework she prepared at Blueberry's request, said the Salmo study illustrates the "exponential increase in development from the 1950s to the late 1990s in a similar but not exactly same area as the Blueberry watershed." At page 5 of the Land Stewardship Framework. Dr. Holt wrote:

> At the time it was written, the Salmo report (2003) noted that in the Blueberry Study area, the levels of linear development already exceeded thresholds that were estimated to affect ecological functioning. The landscape condition found in the late 1990s was suggested to result in around 73% of the study

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> area having a high aquatic hazard rating (Salmo 2003) and road densities already exceeded thresholds known to impact Grizzly bear population over 65% of the watershed at the time. Today the level of development is considerably higher and this type of pervasive development is found throughout the territory.

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[1741] These kinds of figures regarding the percentage of Blueberry's central territory that was disturbed and the low level of undisturbed areas that remained would later come to the Province's attention again through studies and atlases, and through the work of the Regional Strategic Environmental Assessment working group.

[1742] In 2011, the Forest Practices Board did a cumulative effects case study focussing on the Kiskatinaw River watershed, which is in the southern portion of the Blueberry Claim Area near Dawson Creek. This study looked specifically at the effects of resource development on drinking water, forest soil and winter habitat for caribou. The results noted that caribou had retreated south of the study area, as habitat quality had deteriorated because of increased human activity. As of 2011, all indicators of winter habitat quality for caribou had exceeded the limits of concern set out in the literature. It was noted that additional industrial disturbance would drive the indicators further from the limits set. The study also showed a concern for drinking water quality, and noted that additional development and drilling had the potential to cause withdrawals from the river to exceed limits of concern.

[1743] A year later, in 2012, Blueberry provided the Province with a report prepared by Management and Solutions in Environmental Science ("Management and Solutions") looking at the effects of industrial disturbance on Blueberry's traditional resources. Specifically, Management and Solutions did a time-series disturbance analysis for a portion of the Blueberry Claim Area (namely, an area the Oil and Gas Commission was at the time using as Blueberry's Consultation Area). The Management and Solutions study showed that, at that time, 66% of the study area was disturbed as a result of the high density of linear industrial features and land clearing. At that level of disturbance, it was noted that wildlife could only persist at

very low densities. The report noted that the study area was approaching the point of maximum fragmentation, meaning there were questions as to whether the area could, in the future, maintain functional ecosystems needed for the continued practice of treaty rights.

[1744] Also in 2012, Blueberry provided the Province with the 2012 Atlas produced by Global Forest Watch. The 2012 Atlas covered an approximately 5.6 million hectare study area in northeastern BC, which included the Blueberry Claim Area as well as areas further west and south. The 2012 Atlas showed the changes from 1974 to 2010, and noted that when a 500 metre buffer was applied, nearly 70% of the study area had been "industrially-changed."

[1745] From 2012 through to the filing of the Notice of Civil Claim that began this litigation, Blueberry's leadership and technical staff wrote to the Province, including the Premier, raising their concerns about the cumulative effects of development in the Blueberry Claim Area, the accelerating pace of development, and the consequences for the exercise of their treaty rights. They requested protection of what they referred to as "critical areas" within their territory, and proposed designing a cumulative effects assessment process focused on the Blueberry Claim Area and their treaty rights. They withdrew from their Economic Benefits Agreement with the Province.

[1746] In the spring of 2016, a year after filing the Notice of Civil Claim giving rise to this action, Blueberry provided the Province with the 2016 Atlas and its Land Stewardship Framework. As discussed earlier, the 2016 Atlas showed that approximately three quarters of the Blueberry Claim Area was within 250 metres of an industrial disturbance, and Blueberry's Land Stewardship Framework called for interim protections for certain areas while other cumulative effects processes were developed.

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[1747] Blueberry's Land Stewardship Framework also outlined a process whereby the interests of Blueberry and resource development could co-exist. Norma Pyle pointed this out when she testified as follows:

> … So all my years working on my – for my band as the lands manager, you know, I always had the perspective that if there was actual land management and planning done, that resource development could happen while maintaining and managing for treaty rights.
>
> I always had that idea in my mind. And, you know…when you look at the ecosystems and you place a value, for us we place values on certain ecosystems and, you know, we want those maintained. We want them to function.
>
> You know, when you look at a wetland, the wetland isn't just a wetland sitting there. It has many influences on wildlife. Downstream you look at – you know, we look at something like Blueberry River. It starts in the wetland. All the tributaries start in the wetland. So over time when logging activities are allowed to log right up to these wetlands you see them decline.
>
> When those wetlands decline it has a negative effect on the water for those tributaries. And when you do this again and again, Blueberry River is shrinking. That's without any water being extracted from it.
>
> That's just – and so I always thought that if we could have a way to do it, it would – enable a way for these two things to exist: resource development, treaty rights. It would mean that in some very highly sensitive areas it would mean that development could only happen, if it could happen at all, you would have to tread very, very lightly.
>
> In my mind that's what I was thinking about. And, you know, when you look at in my experience years and years ago I worked for a consultant. We collected ecological data for a forest company. And what that forest company did with that data we collected was that they built a management plan based on that ecology.
>
> So it drove how they would harvest, at what rate they would harvest, and how they would reforest it. And some of these areas in the foothills are very sensitive areas, and it would mean that no development could ever happen. There were areas in that forest management area where the ecology was so sensitive that they wouldn't log in there.
>
> And this is what I had in my mind, because it existed elsewhere and it could exist – well, I don't know that it could exist now just given all the development and fragmentation that has happened already. I don't know that it could happen. But this is what I had in my mind. And Dr. Holt was able to help us and this is the result.
>
> Q: And did Blueberry submit the land stewardship framework to government?
>
> A: Yes.

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Q: Did you discuss it with them?

A: We shared it with them. We presented it to them and that was all.

[1748] Rather than engage specifically with any of this information set out above, the Province suggested that Blueberry engage with the Province on the development of a cumulative effects framework, through the Regional Strategic Environmental Assessment process, or with the Oil and Gas Commission through the Area Based Analysis tool.

[1749] I agree with the framing as set out in Blueberry's submissions that the Province had a practice of deferring real engagement and referring Blueberry to processes that were fledgling and inoperative rather than dealing substantively with their concerns about further development being continuously authorized.

[1750] I find that the Province has, for approximately two decades, been aware that the cumulative effects of development in the northeast portion of BC were leading to changes in wildlife habitat and water quality that posed serious concerns, and that by the late 1990s much of the Blueberry Claim Area was being significantly impacted by industrial development. The Province has also, for at least a decade and likely more, had notice from Blueberry that it was concerned about the impacts of cumulative development in the Blueberry Claim Area, and on the exercise of their treaty rights. Despite having notice of Blueberry's concerns, I find that the Province has failed to respond in a manner that upholds the honour of the Crown and the obligation to implement treaty promises.

[1751] I conclude that the existing processes for authorizing industrial development in the regulatory regime which the Province relies upon, do not ensure that the taking up of land protects the meaningful exercise of treaty rights. The provincial processes do not adequately consider treaty rights or cumulative effects and have contributed to the meaningful diminishment of Blueberry's treaty rights to hunt, fish and trap when viewed within the way of life from which these rights arise and are grounded.

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i. Oil and Gas

[1752] As noted earlier, with respect to oil and gas, the Ministry of Energy and Mines and the Oil and Gas Commission – the two bodies charged with issuing tenure and permits – lack effective mechanisms to take into account treaty rights and consider cumulative impacts to those rights.

[1753] Notably, the Ministry of Energy and Mines is of the view that its decisions to issue tenure do not and cannot impact treaty rights, since they are solely subsurface related. Despite this, it says that it does take into account treaty rights by, primarily, issuing caveats on tenure that identify concerns raised by First Nations. The evidence is clear that caveats are not binding and are not considered by the Oil and Gas Commission. Instead, the Oil and Gas Commission views tenure approval by the Ministry as a signal that oil and gas development can proceed. As set out earlier in these reasons, in the Court's view, the tools used by the Ministry of Energy and Mines do not show it is considering treaty rights, let alone implementing measures to ensure that such rights are protected. Tools that it pointed to were either temporary or of no force and effect, and caveats were not taken into account by the Oil and Gas Commission.

[1754] The Oil and Gas Commission pointed to the Area Based Analysis as their primary tool for assessing cumulative effects. There are numerous problems with this tool as a mechanism for considering cumulative effects on the exercise of treaty rights.

[1755] First, Area Based Analysis is applied at the level of the Boreal Plains Natural Disturbance Unit, which is too large a scale to have sensitivity to the intensity of development within smaller areas that make up that unit, such as the core of the Blueberry Claim Area.

[1756] Second, Area Based Analysis currently only considers a few values, such as riparian reserves, old forest, and designated wildlife areas, and does not consider treaty rights as a value that can be measured or assessed.

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[1757] Initially, in 2014, the Oil and Gas Commission promised a system in which nine values would be considered. It commenced with one value in 2015, and six years later now only uses four. This cannot be considered a serious effort to consider treaty rights and concerns; particularly as it does not assign a value for treaty rights.

[1758] There is also a lack of guidance for decision makers on how to consider and address concerns regarding cumulative impacts on treaty rights, and how to ensure treaty rights are respected when exercising discretion.

[1759] Area Based Analysis does not contain meaningful or enforceable thresholds or triggers. Instead, meeting a threshold simply prompts the gathering of additional information, not stopping the proposed activity. In the Court's view, the Area Based Analysis is not working as a way of ensuring that treaty rights are taken into account and protected.

[1760] Furthermore, the fact that the Oil and Gas Commission has never turned down an application because of concerns about habitat or cumulative effects on treaty rights is very telling, demonstrating that it does not take these values seriously or seek to exercise its discretion in a way that is cognizant and respectful of treaty rights. Its primary focus is the development of resources.

[1761] Finally, as reflected by Ms. Pyle's testimony, the number of applications by proponents to the Oil and Gas Commission that it requests Blueberry respond to and deal with can easily overwhelm Blueberry's small lands management department. At the same time Blueberry was also responding to a number of other major initiatives in the territory including referrals associate with the Site C dam and a major amendment to the Forestry Operations Schedule.

ii. Forestry Management

[1762] With respect to forestry, as noted earlier, the Province's regime to regulate forestry harvest is focused on the economic value of timber and is premised on

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maximizing timber harvest. The authority of the Chief Forester in setting the Allowable Annual Cut, for example, is limited to ensuring the economic sustainability of the timber harvesting land base. Ultimately, the evidence established the entire Timber Harvesting Land Base is intended to be harvested – it constitutes the land where timber harvesting is considered both available and economically feasible.

[1763] As reflected earlier, forestry in BC is a very hierarchal management system, meaning that certain higher level or strategic decisions set the parameters for forestry practices and management in the decades that follow. Since the late 1990s, the landscape units making up the core of the Blueberry Claim Area have been zoned in the Fort St. John Land and Resource Management Plan for *enhanced* resource development. This has meant that, ever since, much of Blueberry's territory has been subject to high intensity forestry.

[1764] While the Province points to values set out in the Sustainable Forest Management Plan, that plan must follow existing zoning which at present, is zoned for *enhanced* resource development. This zoning impacts all forestry decisions in this area. The Sustainable Forest Management Plan includes various values, objectives, and indicators to which participants must manage, however, it does not contain values focused on treaty rights, the protection of wildlife habitat, or connectivity. Though some of the values were said to touch on these issues, I find for the reasons set out earlier, that the Sustainable Forest Management Plan is not aimed at protecting treaty rights and is not designed to take into account cumulative effects. It cannot be described as a tool through which the Province seeks to uphold or implement the rights protected by Treaty 8.

[1765] Significantly, while the Province pointed out that Blueberry did not participate in reviewing or commenting on the first and second Sustainable Forest Management Plans, when Blueberry did provide important comments on the most recent Sustainable Forest Management Plan #3, very little if any change was made. The large document is essentially identical to Sustainable Forest Management Plan #2,

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despite the identification by Blueberry of a persistent lack of consideration of treaty rights in forest management.

[1766] The evidence from the District Manager and Resource Manager working in the Peace Natural Resource District was that they sought to consult with Blueberry on stand-level cutting permits and to address their concerns about the exercise of their treaty rights through mitigation. They were candid, however, that there was little ability to address concerns regarding treaty rights. If an application for a cutting permit was consistent with the Sustainable Forest Management Plan, the Forest Operations Schedule and higher level plans or legal orders, and the procedural aspects of consultation had been met, the authorization would likely proceed. Their exercise of discretion was circumscribed. Moreover, the evidence was that the District had never refused a harvest authorization on the basis of a breach of treaty rights.

[1767] Geoff Recknell of the Ministry of Aboriginal Relations and Reconciliation agreed in cross-examination that the consultation process directions from the Province were with respect to process only. There is no content or direction concerning upholding or implementing treaty rights. As noted in *Ahousaht*, the Crown must guard against unstructured discretion and provide a guide for the decision-maker.

[1768] In terms of addressing the concerns raised by Blueberry or other First Nations about the cumulative impacts of forestry on the exercise of their treaty rights, much of the evidence in this area showed that the Ministry of Forests sought to encourage or persuade participants (i.e., the forestry industry) to apply proposed mitigation measures and to collaborate with First Nations. A regulatory regime based on encouragement and persuasion, but ultimately without binding or effective measures to ensure that constitutionally protected rights are taken seriously, does not meet the test of diligence. While Mr. Baird, a witness for Canfor pointed out Canfor was following the rules and regulations and was implementing changes, he noted if

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change was to be made, the Province needed to provide that direction via legal regulation or effect.

[1769] There was some suggestion in the evidence that changes to forestry management in northeastern BC may, eventually, come through work done at the Regional Strategic Environmental Assessment table, through changes to the Land and Resource Management Plan, or other processes. While that may be an encouraging sign, the Court cannot speculate on potential future changes. It can only assess the actions and inactions towards implementing the Treaty, based on the evidence before it.

[1770] Finally, one of the fundamental problems with these initiatives is the lack of a definitive timely deadline to undertake these changes and a means to ensure these changes are actually implemented with some force and effect. The concern is that these processes are taking years; even decades.

iii. Cumulative Effects Framework

[1771] The Province argues that it has, and continues to, manage cumulative effects in good faith to ensure the continuing ability for Blueberry members to meaningfully exercise their treaty rights. It points to its implementation of its cumulative effects framework, and the work that preceded it.

[1772] The evidence is that the Province signed off on a charter that provided direction to develop a cumulative effects assessment framework in April of 2012.

[1773] It is clear that the process of developing a cumulative effects assessment that can apply to the whole of the province and be tailored to specific regions is a monumental task. While the Province, in various documents in evidence in these proceedings, contends that it is “implementing” its cumulative effects framework and policy, it is clear that there is much more work to do. Only one cumulative effects assessment report (i.e., the current conditions report for grizzly bear) has been

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completed to date, and there is no guidance to natural resource decision makers as to how to take into account the information included in that report.

[1774] In addition, as Blueberry has repeatedly noted, the Province's cumulative effects framework does not set out thresholds, or limits, beyond which decision makers will start being concerned about the status of a particular value, and take action. The Province notes that the use of objectives, essentially, serves the same purpose. Notably, the cumulative effects framework does not establish or change any objectives government currently has in place, and the objectives do not dictate appropriate management responses. The objectives currently in place have allowed for the Blueberry Claim Area to reach the state of disturbance that exists today.

[1775] The Court concludes that the Province has yet to implement a fully functioning regime whereby the cumulative effects of industrial development in the Blueberry Claim Area and the impacts to the exercise of treaty rights can be assessed and managed. It has been nearly ten years since the Province signed off on a charter to undertake this work. It is five years past the date when Province said (in response to the Auditor General's report) that its cumulative effects policy would have province-wide implementation.

[1776] Meanwhile, development continues to proceed apace, notwithstanding some pauses due to the pandemic. It is critical that the Province have a way of assessing and managing the cumulative effects of development and, in particular, the effects on the exercise of Blueberry's treaty rights. It cannot be said that this slow pace of developing and implementing a cumulative effects framework, along with the necessary assessment reports and management tools represents a diligent effort.

iv. Wildlife Management

[1777] In terms of designated areas, as I have noted earlier, the Province has not demonstrated that Ungulate Winter Ranges, Wildlife Habitat Areas, Old Growth Management Areas, Resource Review Areas, or provincial parks are effective tools to protect wildlife in the Blueberry Claim Area. Moreover, few of these designated

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areas exist in the Blueberry Claim Area and thus cannot be said to be ways by which the Province is protecting or implementing Blueberry's treaty rights. Surprisingly, oil and gas development is allowed in some of these protected areas if the activity will not have a "material adverse effect" in what has been characterized as a designated legally protected area.

[1778] There was some evidence about the Province's Peace-Liard Moose Management Plan, and its goal of ensuring the priority of Treaty 8 rights with respect to moose. However, this plan while completed, was never "signed off" or implemented, and work on moose management and the protection of moose habitat now seems to have shifted to the RSEA moose working group, whose work is still ongoing. Finally, I note the Caribou recovery initiatives have not been successful, with Caribou declining and some of these plans not yet finalized or adopted.

v. Conclusions on Honourable and Diligent Implementation

[1779] Based on the whole of the evidence, I find a persistent pattern of redirection on the part of government officials in resource sectors, including oil and gas and forestry, as well as those involved in Indigenous relations, telling Blueberry that its concerns regarding the cumulative effects of development on the exercise of its treaty rights would be addressed elsewhere, at other tables, through other policies or frameworks. These repeated responses, many of which were clearly a template response, particularly, from the Tenure Branch and the Oil and Gas Commission, reflected conduct that can be considered perfunctory. I conclude this is conduct that "substantially frustrates the purposes of a solemn promise" (see *Manitoba Metis* at para. 82); in particular, it frustrates the essential promise of the Treaty.

[1780] In addition, while certain officials appeared sincere in recently trying to address these concerns, they candidly admitted they had no tools to do so. The best they could do was "mitigate" an adverse effect. They could not say no to a permit or activity based on an identified concern about impacts on the exercise of treaty rights.

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That persistent reality has contributed to a compilation of adverse effects – or as is said – “death by a thousand cuts.”

[1781] The Province has not, to date, shown that it has an appropriate way of taking into account Blueberry’s treaty rights, assessing the cumulative impacts of development on the exercise of these rights, and developing a way to ensure that Blueberry can continue to exercise these rights in a manner consistent with their way of life, such that the promises made in Treaty 8 can be upheld, implemented and respected today.

[1782] The Province’s existing process for authorizing industrial development does not contain sufficient or in many cases, any guidance for discretionary decision makers, to ensure the taking up of lands by industrial development protects the meaningful exercise of treaty rights. Meanwhile, as pointed out by Blueberry, the Province has continued to promote intensive use and authorized development on a project-by-project basis without regard to the scale of cumulative impacts on Blueberry’s rights from forestry, oil and gas and other industries.

[1783] I find that the Province’s work on the development of a cumulative effects framework has been plagued by inordinate delay. Much of what the Auditor General said in 2015 regarding lack of progress on cumulative effects assessment and management remains true today. The Province has been unable to show that it is effectively considering or addressing cumulative effects in its decision-making. Current condition reports from the Regional Strategic Environmental Assessment process, whether finalized or in draft, are not currently being incorporated into decision-making and there is a lack of guidance for decision-makers as to how the various tools that are anticipated to emerge from the work on developing a cumulative effects framework are to be used. It is concerning that the Province has continued to proceed with authorizing resource use and extraction in the northeast of BC in the absence of these important tools.

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[1784] Furthermore, the Province has both zoned the core of Blueberry's territory for enhanced resource development as per the Land and Resource Management Plan; and, subsidized the oil and gas industry to ensure it continues to develop when it might not otherwise via support for marginal and ultra marginal wells in the BC royalty program. The Province is therefore encouraging wells in areas that would not otherwise be economically viable as part of its royalty program. In addition, the Province's infrastructure program is directly supporting roads and pipelines and there development in the area in order to increase provincial royalties.

[1785] As noted by Blueberry, the Crown has all the power in the relationship. When the Province and Blueberry cannot agree, the Province can proceed as it intends. Ultimately, however, by doing so on a persistent and consistent basis, the Province has failed in its obligation to diligently and honourably implement the Treaty. It cannot actively or passively allow the territory and wildlife to be drastically altered, fundamentally impacting Blueberry's ability to carry on their mode of life and meaningfully exercise their rights, by authorizing development without proper measures in place to recognize and manage cumulative impacts and protect treaty rights.

[1786] I therefore conclude that the Province has breached its obligations to Blueberry under the Treaty in failing to act in accordance with the honour of the Crown to implement the Treaty promise that Blueberry's rights to hunt, fish and trap would continue and that its mode of life would not be forcibly interfered with. The Province has failed to diligently implement the Treaty promise to protect the Plaintiffs' treaty rights and ways of life from the cumulative impacts of development on the land.

[1787] In view of all the above, I agree, as Blueberry argued, that the Province has failed to:

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a) develop processes to assess whether the ecological conditions in Blueberry's traditional territories are sufficient to support Blueberry's way of life;

b) develop processes to assess or manage cumulative impacts to the ecosystems in Blueberry's traditional territories and/or on their treaty rights;

c) implement a regulatory regime or structure that will take into account and protect treaty rights, and that will guide decision-making for taking up lands or granting interests to lands and resources within Treaty 8; and,

d) put in place sufficient interim measures to protect Blueberry's treaty rights while these other processes are developed.

b) Fiduciary Obligations

[1788] Blueberry has also sought a declaration that the Province breached its fiduciary obligations. The Plaintiffs have therefore invited the Court to consider whether the Province owes a fiduciary obligation to Blueberry and whether it has met this obligation. Blueberry says the rights to hunt, trap and fish were "transcribed in the Treaty in a simple form cognizable to the common law drafters." I note at the outset that Blueberry has not argued this aspect of its claim with as much clarity as some of the other arguments it has advanced.

[1789] Blueberry indicated it intended to raise the issue of the Province's fiduciary obligations and alleged breach in reply to the Province's justification defence. The Province did not, however, provide a justification defence.

[1790] I will, however, in light of the pleadings, make some general comments on the Crown's fiduciary obligations.

[1791] The Crown's *sui generis* fiduciary relationship with Indigenous people is about protecting the interests of Indigenous people, especially when the level of Crown discretion or control leaves their interests vulnerable to government ineptitude or

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misconduct. Since the *Sparrow* decision of 1990, the Supreme Court of Canada has recognized that the concept of the *sui generis* fiduciary duty includes the protection of Indigenous peoples' pre-existing, and still existing, Aboriginal and treaty rights within s. 35 of the *Constitution Act, 1982* (*Sparrow* at 1108; *Wewaykum* at paras. 78, 80; *Tsilhqot'in* at paras. 12-13). Indigenous peoples' interests in their constitutionally protected Aboriginal and treaty rights thus appear to presumptively attract the Crown's fiduciary obligations (*Wewaykum* at paras. 79, 81).

[1792] Blueberry appears to rely on fiduciary obligations attaching, generally, to s. 35 rights, as they have not otherwise set out with specificity the route by which the Province's fiduciary obligations are said to arise. The Province points out that not every Crown-Indigenous relationship gives rise to fiduciary obligations, and that the *sui generis* fiduciary duty only arises when the Crown assumes discretionary control over a specific or cognizable Indian interest.

[1793] One way of understanding the interest at stake, and to which the Crown's fiduciary duty attaches, is to focus on the historic rights to hunt, trap and fish that are set out in Treaty 8 and protected by s. 35. The Supreme Court of Canada has noted that rights under s. 35 "satisfy the requirement of an 'independent legal interest'" (*Williams Lake* at para. 53, citing *Sparrow* and *Guerin*). This seems to be the cognizable interest relied on by Blueberry – being a pre-existing legal interest in exercising their hunting, trapping, and fishing rights in their territory.

[1794] I must now consider whether the Province has assumed or undertaken discretionary control in relation to Blueberry's rights to hunt, trap and fish.

[1795] In 1899, the Treaty Commissioners (acting on behalf of the Crown) repeatedly promised the Indigenous people assembled at Lesser Slave Lake that their rights to hunt, fish and trap would be protected and that their way of life would not be interfered with. In addition, as a term of the Treaty, the Crown agreed to provide ammunition and twine to those peoples that preferred to continue hunting and fishing rather than turning to agricultural pursuits. In 1900, representatives of the Crown met

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with Blueberry's ancestors at Fort St. John and invited them to adhere to Treaty 8, confirming the promises made in 1899. In so doing, I find that the Crown undertook discretionary control in relation to Blueberry's interest in continuing to hunt, trap and fish in its territory.

[1796] As is clear from *Grassy Narrows*, historical treaties are agreements with the Crown, and both levels of government are responsible for fulfilling treaty promises when acting within the division of powers under the *Constitution* (*Grassy Narrows* at para. 30).

[1797] The Province has the exclusive authority to take up provincial lands for forestry, mining, settlement and other exclusively provincial matters. In addition, the Province has broad discretion to deal with various natural resource related issues, and to develop and implement decision-making structures relating to such issues. For example, and as already discussed in detail, the Province puts in place wildlife management regimes, land use planning processes, forestry management regimes, and oil and gas permitting processes.

[1798] The Province is exercising discretionary control in relation to Blueberry's treaty rights when it:

a) exercises its power to take up lands in the Blueberry Claim Area;

b) develops and implements natural resource decision-making structures that affect Blueberry's exercise of its rights; and,

c) makes individual natural resource decisions that affect the lands, water and wildlife Blueberry relies on for the exercise of their treaty rights.

Blueberry is correspondingly vulnerable to the Province's exercise of discretionary control.

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[1799] I therefore accept that Blueberry's rights to hunt, fish and trap, which are contained within Treaty 8 and are protected by s. 35, attract the Crown's fiduciary obligations.

[1800] The jurisprudence reviewed earlier recognizes that the Crown as a fiduciary is, at a minimum, required to act with loyalty, good faith in the discharge of its mandate, provide full disclosure appropriate to the subject matter, and to act with ordinary prudence with a view to the best interest of its Indigenous beneficiaries. While the Crown must meet this standard of conduct, it is not in breach of its fiduciary obligations if it fails to deliver any particular result.

[1801] The Province's fiduciary duty (along with its duties arising from the honour of the Crown) should guide its actions prior to any infringement of treaty rights. This point was made in *Grassy Narrows* at paras. 50-51 where the Supreme Court of Canada noted that Ontario's power to take up lands under Treaty 3 was not unconditional. In exercising its jurisdiction over the lands covered by Treaty 3, Ontario was bound and burdened by the honour of the Crown and was subject to fiduciary duties that exist when the Crown deals with Aboriginal interests. The Court noted that this means Indigenous harvesting rights over the land "must be respected" (at para. 51).

[1802] The usual place where the parties can discuss how to respect treaty rights and minimize any potential infringements, is in consultation. As I have noted above, consultation on a permit-by-permit basis has not served as an appropriate way of addressing Blueberry's concerns about the cumulative impacts to the Blueberry Claim Area, and on the exercise of its treaty rights. In these circumstances, acting with good faith and ordinary prudence in relation to Blueberry's treaty rights required the Province to use more than just the usual process.

[1803] This Court is mindful that the Crown, here the Province, wears many hats and represents many interests, some of which cannot help but be conflicting. The Province argued there is no presumption that the hunting, fishing and trapping rights

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in Treaty 8 must, in every case and in all circumstances, be given priority over other interests. I agree, but that is not what Blueberry is seeking.

[1804] In these circumstances, I find that the Province's fiduciary duty required that it act with good faith to seek to address Blueberry's concerns regarding the cumulative impacts of development on the exercise of its treaty rights. That good faith must be, at a minimum, more than the adoption of unwavering, unreasonable positions, as per Justice Donald's comments on the obligation of good faith in *BCTF v. British Columbia*, 2015 BCCA 184 at paras. 331-334 and 348. Justice Donald's reasons were ultimately adopted by the Supreme Court of Canada (2016 SCC 49).

[1805] Acting with ordinary prudence in this case required that the Province investigate the concerns regarding cumulative impacts by developing processes to assess cumulative effects in Blueberry's Claim Area and develop ways of managing and mitigating these effects. In the Court's view, ordinary prudence would have required that the Province pause some development in Blueberry Claim Area, or key areas within the Blueberry Claim Area, pending the results of this work. Allowing development to proceed in the face of these substantial and well grounded concerns could not be said to be acting with good faith, loyalty, or ordinary prudence with a view to Blueberry's best interests. Ordinary prudence requires long-term planning, looking ahead and considering the likely future effects of current decisions, as opposed to simply stubbornly "staying the course."

[1806] Once again I note the Province has all the power in this situation. It is not an answer, when Blueberry raises concerns, to maintain the status quo indefinitely and indicate processes are in development to take care of these matters. Some limits, including reasonable time limits, must be employed to demonstrate good faith.

[1807] I note that the Province, both in argument and via their witnesses, had a tendency to point to an ever-expanding pool of decision-making bodies as evidence that cumulative effects and/or treaty rights are being considered, without concretely describing how these issues are being addressed. In this case, the multitude of

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decision-makers has tended to show that Blueberry's concerns fall through the cracks, not that they are being addressed in a comprehensive or coordinated manner.

[1808] In making these comments, the Court is not saying that the results of this work would, in every case and in every circumstance, result in Blueberry's treaty rights having priority over other interests. As noted earlier, the Court is mindful that the Province "wears many hats." If cumulative effects assessments are completed and management processes are established to ascertain ways for Blueberry's rights to be upheld, development may continue. That is precisely what Blueberry's Land Stewardship Framework suggests when it speaks about developing thresholds of acceptable change as guiding posts for further developments.

c) Conclusions in Brief

[1809] I reiterate my conclusions set out in brief at the commencement of this judgment:

- Courts have noted that Treaty 8 is not a final blueprint. It established the beginning of an ongoing relationship. It was recognized that the relationship would be difficult to manage. The promises contained in Treaty 8 have become harder to keep as time has gone on, and the Court has been called upon to assist the parties in understanding their obligations under the Treaty.
- I find that Treaty 8 protects Blueberry's way of life from forced interference, and protects their rights to hunt, trap and fish in their territory.
- I recognize that the Province has the power to take up lands. This power, however, is not infinite. The Province cannot take up so much land such that Blueberry can no longer meaningfully exercise its rights to hunt, trap and fish in a manner consistent with its way of life. The Province's power to take up lands must be exercised in a way that upholds the promises and protections in the Treaty.

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- I find that the Province's conduct over a period of many years – by allowing industrial development in Blueberry's territory at an extensive scale without assessing the cumulative impacts of this development and ensuring that Blueberry would be able to continue meaningfully exercising its treaty rights in its territory – has breached the Treaty.
- I conclude that the extent of the lands taken up by the Province for industrial development (including the associated disturbances, impacts on wildlife, and impacts on Blueberry's way of life), means there are no longer sufficient and appropriate lands in Blueberry's territory to allow for the meaningful exercise by Blueberry of its treaty rights. The cumulative effects of industrial development authorized by the Province have significantly diminished the ability of Blueberry members to exercise their rights to hunt, fish and trap in their territory as part of their way of life and therefore constitute an infringement of their treaty rights. The Province has not justified this infringement.
- I find that, for at least a decade, the Province has had notice of Blueberry's concerns about the cumulative effects of industrial development on the exercise of its treaty rights. Despite having notice of these legitimate concerns, the Province failed to respond in a manner that upholds the honour of the Crown and implements the promises contained in Treaty 8. The Province has also breached its fiduciary duty to Blueberry by causing and permitting the cumulative impacts of industrial development without protecting Blueberry's treaty rights.
- The Province has not, to date, shown that it has an appropriate, enforceable way of taking into account Blueberry's treaty rights or assessing the cumulative impacts of development on the meaningful exercise of these rights, or that it has developed ways to ensure that Blueberry can continue to exercise these rights in a manner consistent with its way of life. The

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Province's discretionary decision-making processes do not adequately consider cumulative effects and the impact on treaty rights.

- The rights, obligations and promises made in Treaty 8 must be respected, upheld, and implemented today. Time is of the essence. Relief will follow.

IX. HAS THE PROVINCE JUSTIFIED THE INFRINGEMENT?

A. Law

[1810] As set out earlier, once a First Nation establishes that its treaty rights have been infringed, the onus shifts to the Crown to justify the infringements on the basis of the *Sparrow/Badger* test (see *Grassy Narrows* at para. 53; *Mikisew* at para. 48). The justificatory standard has been recognized as placing a "heavy burden" on the Crown (*Sparrow* at 1119).

[1811] In *Badger,* at para. 82, Justice Cory reasoned it is "equally if not more important" to justify infringements of treaty rights as it is to justify infringements of Aboriginal rights. This was said to be because the rights granted to Indigenous peoples by treaties usually form an integral part of the consideration for the surrender of their lands.

[1812] In *Sparrow*, the Supreme Court of Canada held that legislation can infringe rights protected by s. 35 of the *Constitution Act*, *1982*, but only if it passes a two-step justification analysis. The legislation must:

a) further a "compelling and substantial" purpose; and,

b) account for the priority of the infringed Aboriginal interest under the fiduciary obligation imposed on the Crown (see *Sparrow* at 1113-19; *Tsilhqot'in* at para. 13).

[1813] Chief Justice Dickson went on at 1119, to note that within the justification analysis, there are further questions or factors to be considered, depending on the circumstances:

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> These include the questions of whether there has been as little infringement as possible in order to effect the desired result; whether, in a situation of expropriation, fair compensation is available; and, whether the aboriginal group in question has been consulted with respect to the conservation measures being implemented...

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[1814] Justification of infringements to treaty rights was discussed in *Badger*, where Justice Cory noted that a challenged limitation on treaty rights must, obviously, be considered within the context of the treaty itself (at para. 85). Following that, the *Sparrow* principles were to be applied, though those were not a complete catalogue or exhaustive list of factors, and others may also influence the result.

[1815] Subsequent Supreme Court of Canada decisions, looking primarily at infringements of Aboriginal rights (as in *Gladstone*) or Aboriginal title (as in *Delgamuukw* and *Tsilhqot'in*), as opposed to infringements of treaty rights, have noted that the framework for justifying infringements to s. 35 rights generally involves considering the following. First, whether the government has consulted and, if necessary, accommodated the Indigenous group. Second, whether the government has established a "compelling and substantial" government objective. Third, whether the government's action is consistent with its fiduciary duty and the honour of the Crown (*Tsilhqot'in* at para. 77). This last step may involve considering the nature of the interest to which the Crown's fiduciary attaches, whether the action is necessary to achieve the government's objective, whether the government's action was minimally impairing of the right, and whether the benefits expected to flow from the objective were not outweighed by their effects on the Indigenous interest (*Tsilhqot'in* at paras. 82, 87).

[1816] What constitutes a compelling and substantial objective is to be considered from the Indigenous perspective, as well as from the perspective of the broader public (*Tsilhqot'in* at para. 81). Such objectives are to be directed at recognition of the prior occupation of North America by Indigenous peoples, and reconciliation of this prior occupation with the assertion of Crown sovereignty (*Gladstone* at para. 72; *Tsilhqot'in* at paras. 81-82).

[1817] In *Badger*, Justice Cory observed that the government did not lead evidence with respect to justifying s. 26(1) of the *Wildlife Act* and, in the absence of such evidence, it was not open the Supreme Court of Canada to supply its own justification (at para. 98). (I note, however, that Justice Cory did comment on the objectives of safety and conservation apparent in the licencing regime at issue, suggesting there was some evidence going to the first justification question of whether there is a valid legislative objective.) Justice Cory held that, with respect to Mr. Ominayak, s. 26(1) of the *Wildlife Act* constituted a *prima facie* infringement of his treaty right to hunt for food. The Court ordered a new trial so that the issue of justification may be addressed.

[1818] In *Marshall*, the Crown chose not to justify the discretionary licensing system at issue. The Supreme Court of Canada held that in the absence of any justification of the regulatory prohibitions, Mr. Marshall was entitled to an acquittal (at para. 66). The Court then answered the constitutional question noting that the regulatory prohibitions were inconsistent with Mr. Marshall's treaty right and therefore of no force or effect or application to him, by virtue of s. 35(1) and 52 of the *Constitution Act, 1982* (at paras. 64 and 67).

[1819] In *Marshall #2*, Justice Binnie confirmed that in the face of the Crown choosing not to seek to justify a regulatory regime, a rights holder would be allowed to exercise their right, notwithstanding the regime. He added that justification, and the merits of the government's arguments, would depend on the facts. He also observed that accommodating treaty rights may best be resolved through consultation and negotiation, not through litigation:

> [21] The fact the Crown elected not to try to justify a closed season on the eel fishery at issue in this case cannot be generalized, as the Coalition's question implies, to a conclusion that closed seasons can never be imposed as part of the government's regulation of the Mi'kmaq limited commercial "right to fish". A "closed season" is clearly a potentially available management tool, but its application to treaty rights will have to be justified for conservation or other purposes. In the absence of such justification, an accused who establishes a treaty right is ordinarily allowed to exercise it...
>
> [22] Resource conservation and management and allocation of the permissible catch inevitably raise matters of considerable complexity both for

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> Mi'kmaq peoples who seek to work for a living under the protection of the treaty right, and for governments who seek to justify the regulation of that treaty right. The factual context, as this case shows, is of great importance, and the merits of the government's justification may vary from resource to resource, species to species, community to community and time to time. As this and other courts have pointed out on many occasions, the process of accommodation of the treaty right may best be resolved by consultation and negotiation of a modern agreement for participation in specified resources by the Mi'kmaq rather than by litigation. La Forest J. emphasized in *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010 (a case cited in the September 17, 1999 majority decision), at para. 207:
>
> > On a final note, I wish to emphasize that the best approach in these types of cases is a process of negotiation and reconciliation that properly considers the complex and competing interests at stake.
>
> [23] The various governmental, aboriginal and other interests are not, of course, obliged to reach an agreement. In the absence of a mutually satisfactory solution, the courts will resolve the points of conflict as they arise case by case…

[1820] In *Ahousaht*, Justice Garson found that the cumulative effect of the federal Department of Fisheries and Oceans' regulatory system infringed the Nuu-chah-nulth's rights. She issued a declaration that the *Fisheries Act* and the regulations and policies thereunder *prima facie* infringed the Nuu-chah-nulth plaintiffs' Aboriginal rights to fish and sell fish. The Court did not rule on Canada's justification defence and did not make any declaration of unjustified infringement. Instead, it ordered the parties to consult and negotiate the manner in which the plaintiffs' rights could be accommodated. If those consultations were unsuccessful after two years, Canada had leave to apply at a subsequent trial to tender further evidence on justification. That justification trial did ultimately proceed before Justice Humphries.

B. Province's Position

[1821] The Province did not, in final oral or written submissions, advance a justification defence. The Province has taken what can be characterized as an evolving and somewhat unclear approach to the question of justification in this case.

[1822] As noted earlier, the Province's primary response to Blueberry's claim is to deny that Blueberry's treaty rights have been infringed and to deny that the Treaty has been breached. In the alternative, in its Response to Civil Claim filed on April 24,

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2015, the Province pleaded that such breaches or infringements were justified. Paragraph 23 of the Province's Response to Civil Claim states:

> 23. In response to paragraphs 27 and 28 of the Notice of Civil Claim, the Province denies that it has breached its obligations to the Plaintiffs under the Treaty or infringed the Plaintiffs' Treaty rights and puts the Plaintiffs to the strict proof thereof. *In the alternative, if the Province did breach its Treaty obligations or infringed the Plaintiffs' Treaty rights, which is denied, such breaches or infringements were justified*.
>
> (emphasis added)

[1823] In addition, in Part 3 (Legal Basis) of its Response to Civil Claim, the Province cited portions of *Mikisew* stating that infringements of Treaty 8 must be justified according to the test set out in *Sparrow*.

[1824] Blueberry's November 2, 2015 case plan proposal noted that this claim will require the Court to determine (1) whether there has been a *prima facie* infringement of the established treaty rights, and (2) whether that infringement is justified. The Province's November 13, 2015 case plan proposal did not take issue with those two determinations being dealt with in this claim, and did not suggest a phased approach was required.

[1825] The Province's February 28, 2018 Trial Brief states the following with respect to Issue C.2: "If the Plaintiffs' [*sic*] can no longer meaningfully exercise their Treaty 8 Rights…Has that infringement been justified?"

> The Province denies any infringement. If there has been an infringement it has been justified. Insofar as land use planning that permits development is concerned, Treaty 8 First Nations were invited to participate in the process leading to the development of the current land use plan, which includes areas protected from development and areas where development is allowed, subject to consultation. Insofar as specific developments are concerned, consultation and accommodation is required, as noted above. The Plaintiffs and other Treaty 8 First Nations are involved in development [footnote to *Rio Tinto Alcan Inc. v Carrier Sekani Tribal Council,* 2010 SCC 43 at para. 34]. The Plaintiffs have also participated, directly and indirectly, in revenue sharing and other economic benefits arising from industrial development within their traditional territories. From 2006-2014, the Plaintiffs participated in a number of agreements in which they agreed that industrial development activities did not amount to infringements. If any future industrial development is found by this Court to amount to an infringement, then it would be unfair to

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> hold that British Columbia has failed to justify that infringement without providing the parties the opportunity to consult or negotiate based upon the findings made, and, in the event of unsuccessful negotiations, the opportunity for British Columbia to adduce further evidence [footnote to *Ahousaht Indian Band v. Canada*, 2009 BCSC 1494 at paras. 869-873].

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[1826] As is apparent from the extensive evidence in this trial and the findings of fact and analysis in this judgment, the evidence of the Province's efforts with respect to land use planning or of the sufficiency of agreements to address Blueberry's concerns and protect important areas has been found seriously wanting.

[1827] Blueberry, and the Court, for that matter, proceeded with the understanding that the parties would be adducing evidence and making arguments on all the issues raised in this case, including whether any potential infringements of treaty rights were justified.

[1828] In its later written and oral arguments in this case, the Province has taken the position that it could not justify any infringements of Blueberry's treaty rights until, first, the scope of the rights were known, and, second, the specific infringements were identified. The Province argued that Blueberry had failed to clearly articulate its rights and was essentially asserting "a generalized right to a poorly defined 'mode of life,' which fails to account for the modern context." In its closing submissions the Province noted that justification does not arise until there has been a finding of infringement, which is "why a justification defence is not being advanced at this time."

[1829] The Province referred repeatedly to the "unsatisfactory" proceedings in *Ahousaht* where the court found that the entire regulatory regime infringed the plaintiffs' Aboriginal rights to fish and sell fish, and gave the Crown two years to consult and negotiate a regulatory regime that recognized their rights and if there was no agreement, to justify the infringement in court. When the parties came back before Justice Humphries in the justification trial, she found that to proceed with the justification analysis she first needed to "interpret" the declaration relating to the right.

[1830] The Province emphasized that specificity regarding the nature of the infringement is required in order for the Crown to seek to justify its actions. The Province underscored that previous cases have dealt with allegations of infringements arising from specific legislation or regulations, which though unwieldy if relating to the management of a fishery, are nonetheless more specified than the infringements alleged in this case which are said to arise from the cumulative effects of industrial development and the Province's actions and inactions with respect to them.

[1831] In its oral reply, counsel for Blueberry emphasized that the Province pleaded justification, and its decision not to advance a justification defence was therefore suprising. Blueberry emphasized that much of the evidence led by the Province in this case was of the type that would be expected with respect to justification. Blueberry argued that if the Court found an infringement, there would be a substantial prejudice to Blueberry to find that it was anything other than an unjustified infringement.

C. Analysis and Conclusions

[1832] I will deal first with the Province's position that it could not advance a justification defence before the scope of the rights were known.

[1833] Treaty 8 rights are established and existing rights, not claimed or asserted rights (*Mikisew 2018* at para. 138 (per Brown J., concurring); see also *West Moberly 2011* at paras. 80, 129). They arise from exchanges between the Crown and Indigenous people. The promises are set out orally and in writing. The starting point is that the Indigenous people are entitled to what they have been granted in the Treaty. In the case of Treaty 8, there is a substantial amount of jurisprudence from this court and appellate courts as to the promises included therein and the scope of those rights.

[1834] The Province must be taken to know the promises the Crown made to Indigenous people, and which it is bound to uphold today. Ensuring those rights are

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respected and upheld, or (in the alternative) ensuring that any infringements of those rights are justified, does not always need to await judicial determination on the specificity or scope of the rights. While some clarification may be needed or of assistance, to proceed on the basis that the treaty right is not known until the court determines what that right is, is unwieldy and ignores the reality of the written document, the known oral promises, the plentiful jurisprudence, and in this case the specifics set out by the Plaintiffs.

[1835] The Province relies on Justice McLachlin's dissenting reasons in *Marshall* where she states that "[t]o proceed from a right undefined in scope or modern counterpart to the question of justification would be to render treaty rights inchoate and the justification of limitations impossible" (at para. 112). She refers to the right in that case as being referred to in "generalized abstraction" and needing instead to begin by defining the "core" of that right and seeking its modern counterpart.

[1836] *Marshall* did not deal, however, with the text or the oral promises contained within Treaty 8, which have been affirmed in previous Treaty 8 cases (see, for example, *West Moberly 2011* at paras. 130-131). Moreover, in my view, at the time Mr. Marshall was charged with selling eels there was likely considerably more legal uncertainty regarding how to understand the rights reflected in the truckhouse clause in the peace and friendship treaties, than the rights and promises reflected in Treaty 8, which have been commented on extensively in the jurisprudence over the last 30 years.

[1837] Furthermore and importantly, in this case, the pleadings, supplemented by the particulars, provided the Province with significant and sufficient information on the scope of the rights from Blueberry's perspective. Paragraphs 19 to 23 of the Notice of Civil Claim set out what Blueberry referred to, collectively, as its "Treaty Rights." These allegedly included the following promises, assurances and rights:

a) there would be no forced interference with the Plaintiffs' mode of life;

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b) the same means of livelihood and patterns of economic activity would continue after the Treaty as before;

c) they would be as free to hunt, trap and fish throughout their traditional territory as they had been before entering the Treaty;

d) rights to undertake traditional and spiritual activities in their traditional territory;

e) rights to travel throughout their traditional territory;

f) rights to manage natural resources within their traditional territory;

g) rights to gather various natural resources, including plants and berries in their traditional territory;

h) rights of access to and protection and management of adequate quantities of clean and fresh water capable of sustaining life within and around their traditional territory; and,

i) rights to engage in activities incidental to the exercise of rights under the Treaty including: rights to access the lands and waters necessary for hunting, trapping and fishing; rights to maintain adequate terrestrial and riparian habitat to support the activities of hunting, trapping and fishing; rights to maintain and access traplines and trapline infrastructure, including trails and cabins; and, rights to maintain and access teaching sites to pass on their traditional mode of life.

[1838] As discussed earlier in these reasons, in its Response to the Defendant's Demand for Further and Better Particulars, Blueberry provided very comprehensive answers to the Province's queries regarding, among other things: the cultural and economic activities they alleged can no longer be meaningfully pursued and where those activities were pursued; their traditional patterns of economic activity; and, their preferred means of exercising their treaty rights.

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[1839] More importantly, this is not a situation, as was the case in *Ahousaht*, where the First Nation was alleging its rights included a right to sell fish, and the government's regime *did not* recognize such a commercial right (at para. 867). In that situation, Garson J. noted it could not be known whether and how the federal government would have managed the fishery if it had taken into account the plaintiffs' constitutional rights to fish and sell that fish. It was for that reason that Canada was not in a position to justify infringements (at paras. 868-869).

[1840] Here, the Province has repeatedly said its regulatory regimes *do* recognize and take into account First Nations' Treaty 8 rights to hunt, trap and fish throughout their traditional territories, so the suggestion that its regime cannot be justified until the scope of the rights has been delineated by the Court is circular and without merit.

[1841] In the Court's view, no further specifics regarding the nature of the rights on which Blueberry was relying was required in order for the Province to bring forward evidence and prepare an argument seeking to justify any potential infringement. At the very least, this argument could have been based on Blueberry's right to hunt, fish and trap throughout its traditional territory, which is the very right the Province says its regimes already recognize.

[1842] I now consider whether the Province needs to await determination from this Court on the nature of the infringement before it can seek to justify its regulatory regime and/or specific decisions it has made.

[1843] It is true that Blueberry's civil claim is just as, if not more, "unwieldy" than that dealt with in *Ahousaht*. The allegations of infringement are not focused on one piece of legislation, let alone one regulatory regime. It is a cumulative impacts case. It alleges various kinds of activities, projects and developments the Province has authorized, including: oil and gas, forestry, mining, hydroelectric infrastructure, roads and other infrastructure, agricultural land clearing, land alienation and encumbrance and other industrial development have resulted in significant adverse impacts to the

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lands, water, fish and wildlife, and to the exercise of Blueberry's treaty rights. It also alleges that the Province has authorized these developments without regard to the potential cumulative effects and consequent adverse cumulative impacts on the exercise of treaty rights.

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[1844] The Province was on notice that, to defend itself against this cumulative impacts case, it would need to show, among other things, that the industrial developments allegedly authorized by the Province were done pursuant to legislation that furthered a compelling and substantial purpose, that there was as little infringement as possible, that its actions were consistent with the honour of the Crown and its fiduciary duty, and that it was monitoring and taking into account cumulative effects of prior developments. Paragraphs 25, 29, and 30 of the Province's Response to Civil Claim appear to advance some of these points.

[1845] Not only was the Province on notice through these proceedings, but the evidence establishes provincial agencies and ministries have been on notice through numerous correspondence and discussions with Blueberry representatives over many years. Blueberry's correspondence to various provincial decision-makers identifies and makes clear that governmental processes authorizing development in their territory did not address Blueberry's treaty rights or consider the cumulative impact of development on Blueberry's territory.

[1846] The Province was also aware of the jurisprudence on justification, which considers the existence of a compelling and substantial objective for the infringing regime or statute, whether the Crown has properly prioritized Aboriginal rights and met its fiduciary obligations, whether there has been as little infringement as possible, and whether compensation was available.

[1847] The Province had an opportunity in the course of this trial to lead evidence on how it is managing to ensure that Blueberry's treaty rights are respected and that the promises reflected in the Treaty are met. Each of the government representatives who testified at trial, including: Mr. Van Tassel, Mr. Van Dolah, Mr. Recknell, Dr.

Psyllakis, Mr. Pasztor, Mr. Curry and Mr. O'Hanley, testified about the ways their various government ministries or agencies sought to take into account treaty rights in their decision-making processes and consider cumulative effects. By my estimate, more than half of the evidence led by the Province was aimed at explaining the role of the various natural resource and development related ministries and agencies, examining the scope of their authority, and outlining their processes for becoming informed about Indigenous peoples' rights and interests, and ensuring that concerns raised by Indigenous groups, including Blueberry, about the impacts of cumulative effects on the exercise of their treaty rights were considered.

[1848] In my view, this evidence was provided and tested for two purposes. First, it was led to support the Province's argument that treaty rights have not been infringed and the Treaty has not been breached because the Province had considered potential impacts to the exercise of Blueberry's treaty rights, and the Province is implementing processes to take into account cumulative effects. As I have already noted, I do not find that the evidence supports this argument, and instead conclude that Blueberry's treaty rights have been infringed and the Treaty has been breached.

[1849] The evidence also had a secondary purpose, namely to show the interests government officials are having to balance when making decisions about either forestry, oil and gas development, or protection of wildlife habitat. The government witnesses spoke about, among other things, the objectives their regulatory regimes were seeking to uphold, the mandate letters they received from the Premier, and the "values" the various planning documents and processes seek to manage for. Some also referred to agreements entered into with Blueberry and amounts paid to Blueberry pursuant to those agreements. In my view, this is evidence relating to justification.

[1850] The trial was not bifurcated. The Province did not seek to sever the question of infringement from that of justification.

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[1851] I agree with Blueberry that it is surprising, given the pleadings, the evidence, and the fact that the issue of justification was not severed from the issue of infringement, that the Province did not argue justification.

[1852] Scarce judicial resources should not be used to have a trial of this length and magnitude proceed, only to allow the Province a further opportunity to advance both evidence and arguments in a later trial that it ought to have raised here. The Province had an opportunity to justify any potential infringement, and it made a strategic choice not to do so.

[1853] Throughout this lengthy trial, Blueberry has understood that the Province would defend itself, at least in part or in the alternative, on the basis of the infringements being justified. So too has the Court. Blueberry ought not to be prejudiced in obtaining relief in this case simply because the Province chose not to advance a defence.

[1854] Notwithstanding the Province's primary position that Blueberry's rights have not been infringed, and even without the benefit of the Court's decision on infringement, it was open to the Province to advance a justification defence, even in the alternative. Indeed that appeared to be the Province's approach in its Response to Civil Claim.

[1855] From my review of that evidence it would have, however, been difficult for the Province to justify the infringements of Blueberry's treaty rights.

[1856] Much of the Province's arguments with respect to consultation and the honour of the Crown are relevant to the justification analysis. My earlier conclusions apply here with equal force. The Province has not demonstrated it is acting in a manner that upholds the honour of the Crown or meets its fiduciary duties in relation to Blueberry's treaty rights.

[1857] I conclude that the infringements set out earlier have not been justified by the Province.

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[1858] In the absence of justification, I turn now to remedy.

X. RELIEF

[1859] Blueberry seeks various declarations relating to the breaches alleged in this case. In particular, Blueberry seeks:

> 1. A declaration that, in causing and/or permitting the cumulative impacts of the Industrial Developments on the Plaintiffs' Treaty Rights in their Traditional Territory, the Defendant has breached its obligations to the Plaintiffs under the Treaty;
>
> 2. A declaration that the Defendant has infringed upon some or all of the Plaintiffs' Treaty Rights by causing and/or permitting the cumulative impacts of the Industrial Developments on the Plaintiffs' Treaty Rights in their Traditional Territory;
>
> 3. A declaration that the Defendant may not lawfully continue to authorize activities that breach the promises made by the Crown to the Plaintiffs in the Treaty or that infringe the Treaty Rights;
>
> 4. A declaration that the Defendant has breached its fiduciary obligations to the Plaintiffs by undertaking, causing and/or permitting some or all of the Industrial Developments within and adjacent to the Plaintiffs' Traditional Territory;…

[1860] Blueberry also seeks interim and permanent injunctions restraining the Province from undertaking, causing and/or permitting activities that breach the Province's obligations to Blueberry under the Treaty, infringe Blueberry's treaty rights, or breach the Province's fiduciary obligations to Blueberry. As reviewed earlier in these reasons, Blueberry's earlier applications for interlocutory injunctions were dismissed in *Yahey v. British Columbia*, 2015 BCSC 1302 and *Yahey 2017*.

[1861] Blueberry's arguments on remedies are brief. Essentially, Blueberry says the Court has an obligation to ensure that the constitutional law prevails, to give effect to s. 35 of the *Constitution Act, 1982*, and to address the unconstitutional harm. It says that, if an infringement is found, government should not be allowed to continue actions that are unconstitutional.

[1862] In particular, Blueberry says the Province should not be permitted to issue *further* permits in the Blueberry Claim Area until and unless it is established that

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either the permit or authorization will not cause infringement, or the infringement is justified. Blueberry seeks to stop future authorizations, but not to quash or undo existing ones.

[1863] Blueberry says that a forward-looking prohibition on taking up lands or otherwise unjustifiably infringing its treaty rights would force the Province to act with diligence to establish enforceable regulatory measures to substantively protect its treaty rights before further takings can occur. It says the Province will need to sit down and negotiate in good faith with Blueberry to establish such a structure.

[1864] As noted, the Province takes issue with the lack of specificity in Blueberry's claims. It says Blueberry has not defined the rights at stake in precise terms and has not specified with clarity what the alleged infringement is from.

[1865] The Province also says that Blueberry is seeking to impose a reverse onus, where future authorizations would be deemed infringements unless the Province establishes that they are not. It adds that Blueberry is seeking a veto over the regulatory framework that is to be developed to deal with future authorizations. It asks that existing collaborative processes that involve other Indigenous groups in addition to Blueberry be allowed to continue without the injection of a veto for Blueberry.

[1866] The Province says there should be no mandatory injunction issued against it. It points to the *Crown Proceeding Act*, R.S.B.C. 1996, c. 89, s. 11(2) and says that Blueberry has not established a high degree of probability that a specific harm will occur in the future to get the injunction sought.

[1867] I consider these points below.

[1868] The courts are the guardians of the Constitution and the duty of the judiciary is to ensure that the constitutional law prevails (*Re Manitoba Language Rights*, [1985] 1 S.C.R. 721 at para. 48; *Manitoba Metis* at para. 140).

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[1869] The Supreme Court of Canada confirmed in *Sparrow* that s. 35 is protective and remedial. In accordance with the purposive approach to construing s. 35, remedies relating to Aboriginal and treaty rights should be sensitive to and advance the distinct purposes of Aboriginal rights, including the importance of treaty-making as an honourable form of reconciliation (K. Roach, *Constitutional Remedies in Canada* (2 ed.) (Toronto: Carswell, 2019) [Roach] at 15.140).

[1870] Declarations can be awarded whenever they are capable of having a practical effect or utility in resolving the issues in the case (*Solosky v. The Queen,* [1980] 1 S.C.R. 821 at 833). Accordingly, a court looks at the practical value of the declaration when assessing if it should exercise its discretion to grant such a remedy (*West Moberly 2020* at para. 310).

[1871] For a declaration to have practical utility, it must define or clarify some aspect of the parties' rights (*West Moberly 2020* at paras. 313 and 331). Declarations issued by the courts should not go beyond the case (*Chartrand v. British Columbia (Forests, Lands and Natural Resource Operations)*, 2015 BCCA 345 at para. 62). In addition, declarations should not simply restate settled law (*West Moberly 2020* at para. 317; *Daniels v. Canada (Indian Affairs and Northern Development)*, 2016 SCC 12 at paras. 53 and 56).

[1872] Courts must determine the level of detail needed in a declaration. In some cases, a bare, broad or general declaration may be sufficient. In other cases more specificity may be required in order to facilitate negotiation and consensual resolution of disputes between the government and Indigenous people.

[1873] The level of specificity of declarations was one of the issues recently discussed by the Court of Appeal in *Ahousaht Indian Band and Nation v. Canada (Attorney General)*, 2021 BCCA 155 [*Ahousaht 2021*]. The Court of Appeal reasoned that, at best, "a court can provide legal guidance that will assist the parties (and particularly the regulators)" to craft regulations that respect the rights at issue. It

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recognized that specific areas of disagreement may have to be resolved in future applications or claims (at para. 158).

[1874] Declarations can be powerful tools in litigation involving governments as it is assumed that governments will comply with "both the letter and spirit of the declaration" (Roach at 15.1349 and 15.1253; see also *Newfoundland and Labrador (Attorney General) v. Uashaunnuat (Innu of Uashat and of Mani-Utenam)*, 2020 SCC 4 (per Justices Brown and Rowe in dissent at para. 248).

[1875] In this case, as will be seen below, I am of the view that a combination of broad declarations regarding the infringement of Blueberry's treaty rights and breach of the Treaty, along with more specific declarations about what is required to remove the breaches of the Treaty and uphold Blueberry's treaty rights is appropriate in order to guide the parties.

[1876] Blueberry has not sought a declaration regarding the scope of its rights under Treaty 8. Blueberry has, however, sought declarations regarding the Province's breaches in relation to its "Treaty Rights" (Treaty Rights being a defined term in its Notice of Civil Claim).

[1877] A significant portion of the arguments in this case focussed on the scope of Blueberry's treaty rights, including the oral promises made to the Indigenous people at the time the Treaty was entered into about having the same means of earning a livelihood after the Treaty as existed before it, being as free to hunt, trap and fish after the Treaty as they would be if they never entered into it, and that the Treaty would not lead to forced interference with their mode of life. My conclusions on the scope of the rights protected by Treaty 8 are set out earlier in these reasons. To recap, I have found that Treaty 8 protects Blueberry's way of life from forced interference and protects their rights to hunt, trap and fish in their territory. My use of the term "treaty rights" in the declarations below reflects that conclusion.

[1878] Like the *Ahousaht* case, there is no single regulatory provision or decision at issue in these proceedings. It engages provincial regimes dealing with forestry, oil

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and gas, wildlife management and also considers provincial efforts to develop mechanisms to take into account cumulative effects. It engages a multitude of authorizations for industrial development that, cumulatively, have impacted the territory on which Blueberry relies.

[1879] As Blueberry puts it in their reply submissions: “This is not a case where there is a single mechanism, or law that infringes the right – it is the cumulative effect of oil and gas and forestry authorizations in the context of existing private land, agricultural and hydro-electric authorizations, which result in the infringement…” Blueberry adds that it is the “accumulated effects of the discretionary decision-making” under various statutes that it says has led to the unjustified infringement of its rights. I agree.

[1880] I have concluded that the provincial regulatory regimes do not adequately consider treaty rights or the cumulative effects of industrial development.

[1881] I have found that it is the cumulative impacts from a range of provincially authorized industrial developments within the Blueberry Claim Area that have infringed Blueberry’s treaty rights and there are not sufficient and appropriate lands in Blueberry traditional territory to permit the meaningful exercise of their treaty rights. In addition, I have found that the Province had notice of these cumulative impacts on Blueberry’s exercise of its treaty rights. The lack of effective provincial regimes or processes for assessing, taking into account, and managing the cumulative effect of development on Blueberry’s exercise of its treaty rights breaches the Province’s obligations under the Treaty, including its honourable and fiduciary obligations to diligently implement the Crown’s solemn promises and its fiduciary obligations to act with loyalty, good faith, and with ordinary prudence with a view to Blueberry’s best interests in continuing their exercise of rights.

[1882] While the Province did not advance a justification defence, as noted, it had the opportunity to do so. Indeed much of its evidence as to land use and the

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regulatory framework was led to show that the Province has ways to protect treaty rights and it said it invited Blueberry to participate in these processes.

[1883] The Province was on notice to argue justification and did not do so. While it noted in its trial brief that it would be unfair to hold that the Province has failed to justify any infringement without providing the parties the opportunity to negotiate or for the Province to adduce further evidence, I disagree. This trial was not bifurcated, and timelines and delay have been a pervasive problem during the regulatory process as evidenced by the Province's responses over the years to Blueberry's concerns. The Province has known for a significant period of time that its processes are at issue. Accordingly, these infringements have not been justified.

[1884] I therefore find that Blueberry is entitled to the following declarations regarding the Province's actions and inactions as they relate to Blueberry's treaty rights and the cumulative effects of industrial development on the exercise of those rights:

1. In causing and/or permitting the cumulative impacts of industrial development on Blueberry's treaty rights, the Province has breached its obligation to Blueberry under Treaty 8, including its honourable and fiduciary obligations. The Province's mechanisms for assessing and taking into account cumulative effects are lacking and have contributed to the breach of its obligations under Treaty 8; and,
2. The Province has taken up lands to such an extent that there are not sufficient and appropriate lands in the Blueberry Claim Area to allow for Blueberry's meaningful exercise of their treaty rights. The Province has therefore unjustifiably infringed Blueberry's treaty rights in permitting the cumulative impacts of industrial development to meaningfully diminish Blueberry's exercise of its treaty rights in the Blueberry Claim Area.

[1885] Blueberry has also sought a declaration that the Province may not lawfully continue to authorize activities that breach the promises made by the Crown to

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Blueberry in the Treaty or that infringe its treaty rights. In addition, it has sought a permanent injunction restraining the Province from undertaking, causing and/or permitting activities that breach the Province's obligations to Blueberry under the Treaty, infringe Blueberry's treaty rights, or breach the Province's fiduciary obligations to Blueberry. This declaration and injunction appear aimed at the same result – stopping the Province from issuing further authorizations in breach of their obligations.

[1886] As legal commentators and jurists have noted, in many situations injunctions and declarations are functionally equivalent, and declarations are generally preferred and are well suited to provide relief against governments (Roach at 12.20, 12.30, 12.110, 12.120, 12.260). Declaratory remedies allow governments to conceive of ways to satisfy the judicial declaration and help to maintain the balance in our democratic institutions (Roach at 12.260, 12.261).

[1887] While the Province is not immune from injunctive relief where a constitutional violation has been found (*Doucet-Boudreau v. Nova Scotia (Minister of Education)*, 2003 SCC 62 at paras. 70-74 with respect to c*harter* violations), in my view declaratory relief is preferable here.

[1888] I therefore issue further declarations as follows:

3. 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; and,
4. 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.

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[1889] Finally, the parties are at liberty to negotiate any further resolution or apply for further direction and/or clarification of the remedy.

[1890] The task ahead is complex and difficult, but the parties have shown some ability to work together on difficult issues in the past, and some of the work is already underway through other processes. The Court has provided some legal guidance as part of its analysis that may assist with the crafting of regulations and processes that respect the constitutionally protected rights at issue.

[1891] In view of this and the evidence of processes underway to address these concerns, I am prepared to suspend declaration #3 for 6 months while the parties expeditiously negotiate changes to the regulatory regime that recognize and respect treaty rights. While time is of the essence, the matter is complex. I expect the Province to comply with the direction that it not authorize activities in a way that infringes treaty rights; I recognize, however, that the parties may wish to address specifics as a result of this decision. The parties now have the opportunity to incorporate these rights more specifically in regulating the management of the land.

[1892] In view of the result, I am inclined to award costs to Blueberry. The parties, however, will have liberty to apply if that is necessary.

[1893] I close by thanking counsel and the parties for their exceptional hard work and thorough submissions, in what has been a difficult, challenging case of first instance. In June of 2020, because of COVID-19, this was also one of the first trials in British Columbia to move to a virtual format for the latter part of the evidence. Substantial credit must go to counsel who, with significant effort, agreed to and were part of the development of this remote format, ultimately enabling the matter to proceed.

[1894] In summary, I have granted the following declarations:

1. In causing and/or permitting the cumulative impacts of industrial development on Blueberry's treaty rights, the Province has breached its obligation to

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Blueberry under Treaty 8, including its honourable and fiduciary obligations. The Province's mechanisms for assessing and taking into account cumulative effects are lacking and have contributed to the breach of its obligations under Treaty 8;

2. The Province has taken up lands to such an extent that there are not sufficient and appropriate lands in the Blueberry Claim Area to allow for Blueberry's meaningful exercise of their treaty rights. The Province has therefore unjustifiably infringed Blueberry's treaty rights in permitting the cumulative impacts of industrial development to meaningfully diminish Blueberry's exercise of its treaty rights in the Blueberry Claim Area;
3. 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; and,
4. 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.

[1895] I have suspended declaration #3 for 6 months so that the parties may negotiate changes that recognize and respect Blueberry's treaty rights.

A. Sealing Order

[1896] Blueberry provided a written application setting out the legal basis for seeking a sealing order over certain specified exhibits.

[1897] The parties also provided a consent order to address these matters.

[1898] The Court has recognized confidentiality and trust is central to the relationship between Blueberry and its members when those members are sharing traditional use information, that this information is important to the consultation process, and

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that there is a public interest in protecting this constitutionally recognized process and avoiding harm to the reconciliation process. This is further supported by the constitutional protections afforded by s. 35.

[1899] I conclude that the public interest sought to be preserved by the sealing order is the public interest in the protection of Indigenous cultural and spiritual information (including specific information about the locations for the exercise of treaty rights). This interest engages the integrity and dignity of Blueberry's culture, and of Indigenous cultures more broadly.

[1900] I, therefore, grant the sealing order over certain exhibits in the latest terms agreed to by the parties. This will be issued as a separate order to this judgment.

"Burke, J."

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