> 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

> 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

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.

[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

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

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.

[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,

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.

[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

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).

[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;

> 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

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

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.

[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

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.

[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,

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

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

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.

[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.

[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…

[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:

> [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.

[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

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.

[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.

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

2012 Map, and that its approach would divide the consultation area into "Area A," "Area B" and "Area C."

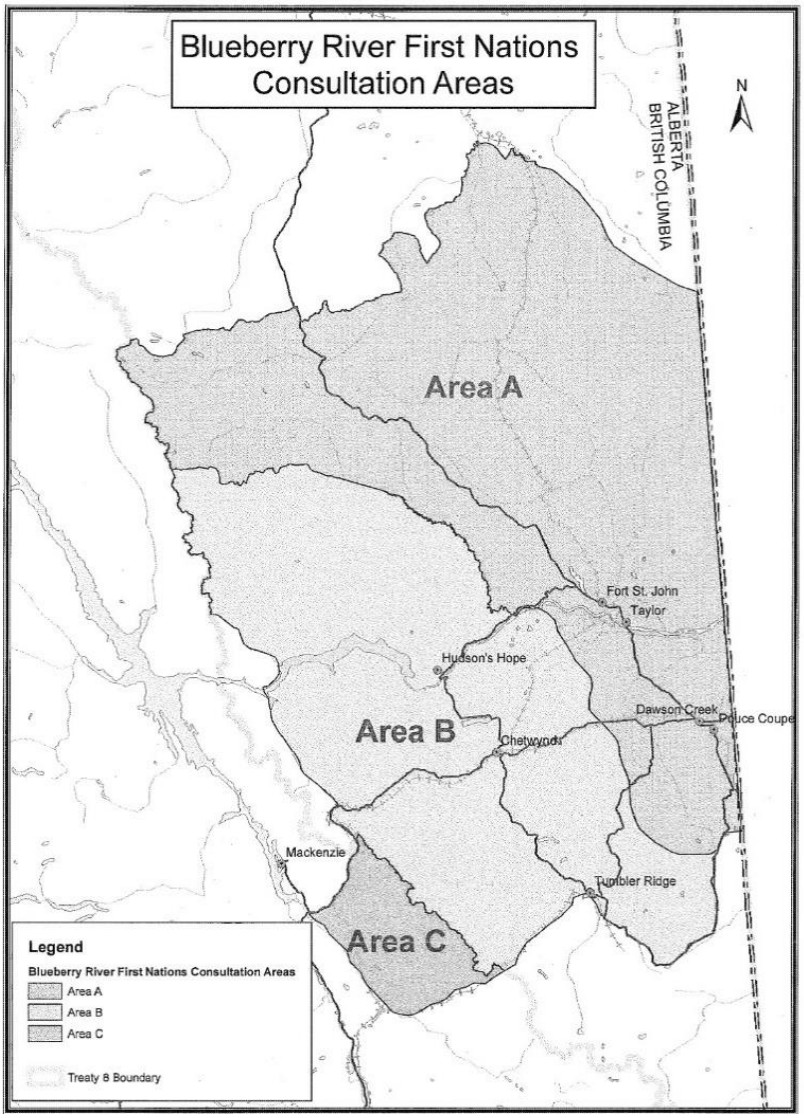


Exhibit 103, Tab 8: May 26, 2014 letter from Geoff Recknell to Chief Marvin Yahey with enclosed map titled "Blueberry River First Nations Consultation Areas."

[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

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

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.

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

> 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

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

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.

[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.

[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

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.

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.

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

Kiskatinaw River, and as far east as Clear Hills, Grand Prairie and Clearwater River in Alberta.

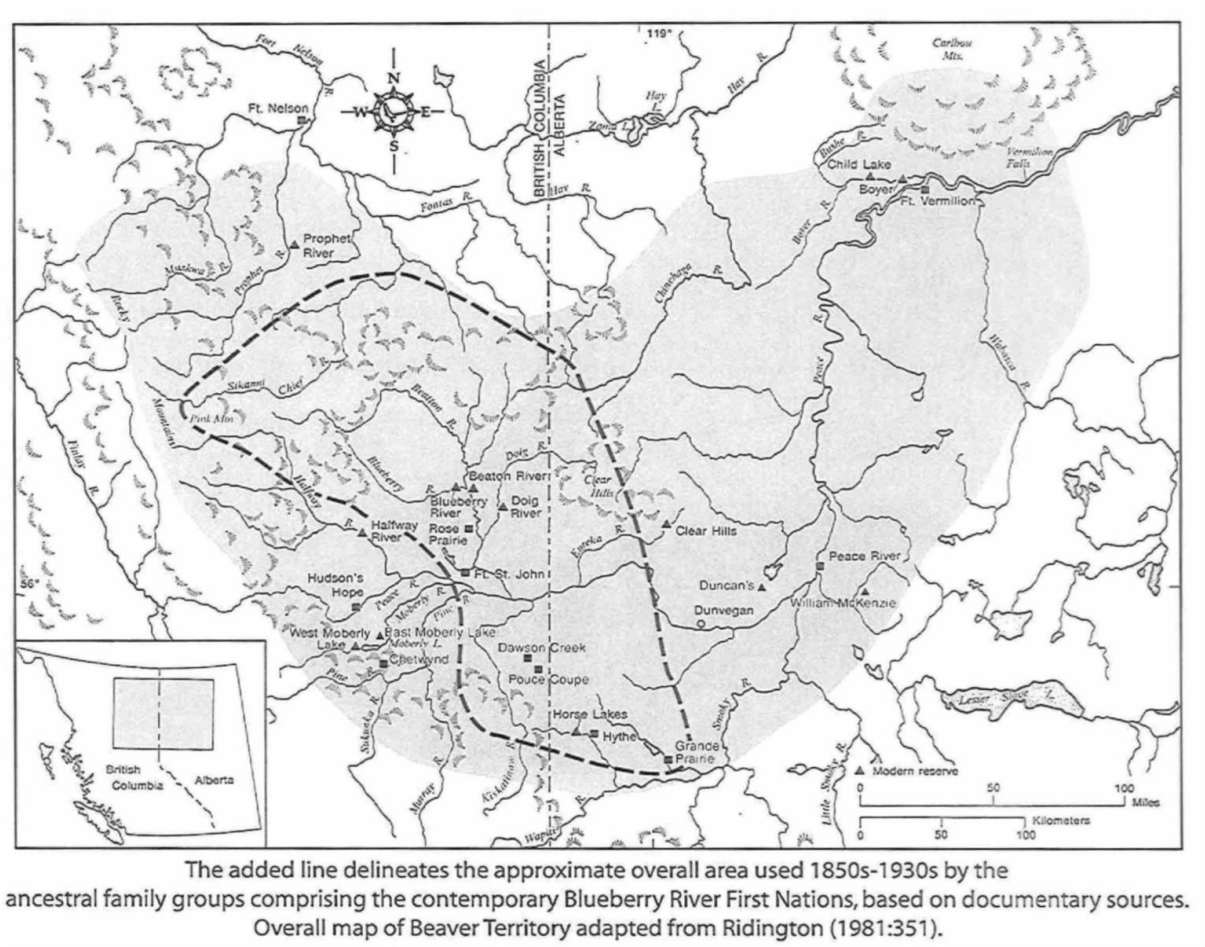
[622] Similarly, in his expert report, Dr. Ridington noted there were relationships between people living over territories that extended from the Rocky Mountains to east of the Alberta border, and from the Prophet River area to south of the Peace River. Dr. Ridington concluded at pages 11-12: “At the 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 Lęa (*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*

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.

[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

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

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:

> …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.

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

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

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

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

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

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

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.

[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.

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.

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

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.

[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

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.

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.

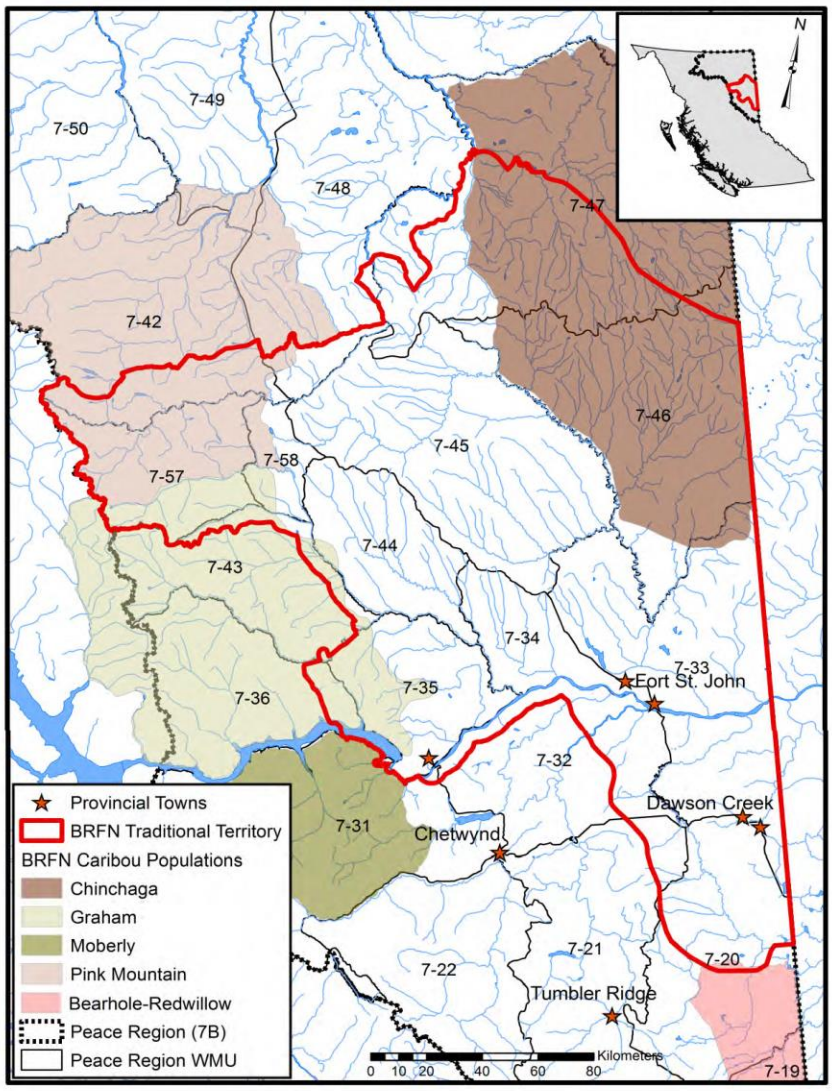
[691] I note the Province's characterization of Dr. Johnson's evidence as being "inextricably linked to the Atlas" – referring to the *Atlas of Cumulative Landscape Disturbance in the Traditional Territory of Blueberry River First Nations, 2016* ("2016 Atlas") – is not accurate. Dr. Johnson referred 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.

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:



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;

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

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

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

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.

[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.

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.

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,"

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.