Shadow Interveners

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I. A WORKING THEORY OF SHADOW INTERVENERS IN ABORIGINAL RIGHTS LITIGATION

Interveners can serve important purposes in litigation, and particularly public interest litigation where private litigants do not necessarily have the capacity to address, nor necessarily the awareness of, the complexities of the broader social context, system and interests at stake.[1] Interveners have also historically played a role in Aboriginal rights litigation. However, interveners can take litigation away from the parties and take away focus from the proper legal questions.

In this paper, we raise questions regarding the role of commercial interests in Aboriginal rights litigation and the extent to which the direct or indirect representation of those interests protects the status quo and impedes meaningful reconciliation. Without a clear framework to guide the legal analysis of the role and relevance of evidence of commercial interests in Aboriginal rights litigation, there is the very real danger that the courtroom may become the site for the political arguments that are not proper for the forum.

The distinction between the roles of the legal and political arguments on this point was expressly articulated by the Supreme Court of Canada in *R. v. Marshall* in response to arguments advanced by commercial interveners:

> In its written argument on this appeal, the Coalition also argued that no treaty right should "operate to involuntarily displace any non-aboriginal existing participant in any commercial fishery", and that "neither the

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[1] In addition to contributing argument, perspective and sometimes evidence, the participation of interveners can lend legitimacy to the outcome where questions of public interest are at stake. See Benjamin Alarie & Andrew Green, "Interventions at the SCC: Accuracy, Affiliation, and Acceptance" (2010) 48:3/4 Osgoode Hall L.J. 381. In the context of discussing public interest litigation, reference is made to the helpful discussion of the purpose and history of public interest litigation and public interest standing arises in *Canada v. Downtown Eastside Sex Workers United Against Violence Society*, [2012] S.C.J. No. 45, [2012] 2 S.C.R. 524 (S.C.C.).

> authors of the Constitution nor the judiciary which interprets it are the appropriate persons to mandate who shall and shall not have access to the commercial fisheries". The first argument amounts to saying that aboriginal and treaty rights should be recognized only to the extent that such recognition would not occasion disruption or inconvenience to non-aboriginal people. According to this submission, if a treaty right would be disruptive, its existence should be denied or the treaty right should be declared inoperative. This is not a legal principle. It is a political argument. What is more, it is a political argument that was expressly rejected by the political leadership when it decided to include s. 35 in the *Constitution Act, 1982*. The democratically elected framers of the *Constitution Act, 1982* provided in s. 35 that "[t]he existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized *and affirmed*" (emphasis added). It is the obligation of the courts to give effect to that national commitment. No useful purpose would be served by a rehearing of this appeal to revisit such fundamental and incontrovertible principles.[2]

It is important to keep this foundational principle in mind when considering the later statement made by Binnie J. in *Lax Kw'alaams Indian Band v. Canada (Attorney General)*: "The existence and scope of Aboriginal rights protected as they are under s. 35(1) of the *Constitution Act, 1982*, must be determined after a full hearing that is fair to all the stakeholders."[3]

Based on *Marshall*, a fair hearing to all the stakeholders does not promise an inquiry into how to prevent or limit disruption to the status quo. But what does it ensure? We suggest it cannot simply be an opportunity for private interests to describe to the Court the scale and extent of their interests and economic activity that may be impacted by enforcement of Aboriginal rights. Nor, by extension (or by proxy) can it simply be an opportunity for the Crown to lead such evidence on industry's behalf (as described in the case study below). Sometimes the scale and extent of commercial interests operating in culturally important territory will be the very basis for the First Nation plaintiffs' claim. What is too much economic interest to warrant — or prevent — intervention by the Court? What is the metric by which the competing interests are weighed? Without enforcing a clear framework for legal analysis, there is a real risk of slipping into political considerations.

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[2] [1999] S.C.J. No. 66, [1999] 3 S.C.R. 533, at para. 45 (S.C.C.).

[3] [2011] S.C.J. No. 56, [2011] 3 S.C.R. 535, at para. 12 (S.C.C.) [hereinafter "*Lax Kw'alaams*"].

II. COMMERCIAL ACTORS IN ABORIGINAL RIGHTS LITIGATION

1. The "Public Interest" and Aboriginal Rights

The discussion begins from the premise that there is a public interest in ensuring the Constitution is honoured and respected, and in ensuring that the honour of the Crown is upheld in its dealings with Aboriginal peoples and First Nations.[4]

According to the courts, we hold a collective public interest in ensuring the integrity of the commitments upon which Canadian sovereignty and our Constitution are founded.[5] However, that constitutional principle has special significance in Aboriginal rights litigation, since the assertion of Crown sovereignty put the honour of the Crown to the test and gave form to the doctrine of Aboriginal rights in what is now Canada. As Lamer C.J.C. (as he then was) wrote in *R. v. Van der Peet*:

> … what s. 35(1) does is provide the constitutional framework through which the fact that aboriginals lived on the land in distinctive societies, with their own practices, traditions and cultures, is acknowledged and reconciled with the sovereignty of the Crown.[6]

Later, in *Haida Nation v. British Columbia (Minister of Forests)*, McLachlin C.J.C. said:

> … Reconciliation is not a final legal remedy in the usual sense. Rather, it is a process flowing from rights guaranteed by s. 35(1) of the *Constitution Act, 1982*. This process of reconciliation flows from the Crown's duty of honourable dealing toward Aboriginal peoples, which arises in turn from the Crown's assertion of sovereignty over an Aboriginal people and *de facto* control of land and resources that were formerly in the control of that people.[7]

The complicated and fragile justification for the assertion of sovereignty over pre-existing societies requires then that we maintain, as a society, and not just as part of the law, the principle of the honour of the

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[4] *Yahey v. British Columbia*, [2015] B.C.J. No. 1600, 2015 BCSC 1302, at para. 56 (B.C.S.C.); *Wahgoshig First Nation v. Ontario*, [2012] O.J. No. 22, 108 O.R. (3d) 647, 2011 ONSC 7708, at paras. 71-72 (Ont. S.C.J.).

[5] *Reference re Manitoba Language Rights*, [1985] S.C.J. No. 36, [1985] 1 S.C.R. 721, at 745 (S.C.C.).

[6] [1996] S.C.J. No. 77, [1996] 2 S.C.R. 507, at para. 31 (S.C.C.).

[7] [2004] S.C.J. No. 70, [2004] 3 S.C.R. 511, at para. 32 (S.C.C.) [hereinafter "*Haida Nation*"].

Crown and the possibility of reconciliation. It is in the public interest to do so. Thus, in *Ahousaht Indian Band and Nation v. Canada (Minister of Fisheries and Oceans)*, Mandamin J. described that public interest as follows:

> Public interest in the reconciliation of s. 35 Aboriginal rights with the assertion of Crown sovereignty clearly favours the Applicants. Section 35 is a constitutional declaration that Canada is a country where existing Aboriginal rights and titles are recognized and affirmed …
>
> … In short, *reconciliation benefits the public interest*.[8]

Therefore, the interest in reconciliation and in upholding section 35 rights is not merely an Aboriginal interest — it is an interest shared by all Canadians. While that interest should weigh in favour of enforcement and protection of Aboriginal rights, often, however, in Aboriginal rights litigation, a more restricted interpretation of the "public interest" becomes a constraining and conservative force.

In practice, another "interest" has consistently made its way into the courtroom in Aboriginal rights litigation — that is, the interest of commercial actors who may, directly or indirectly, be affected by the enforcement of the Crown's promises to Aboriginal peoples.

These commercial actors' interests get before the court in one of two ways: either by directly asserting that their specific private interests will be affected by the enforcement of Aboriginal rights, or by the Crown's assertion of the "public interest" in preserving current economic interests and maintaining certainty and predictability in the administration of public affairs — effectively, the status quo.

The presentation and acceptance of these commercial interests as the "public interest" can supplant the broader public interest in upholding constitutional rights, and can pose a difficult problem for First Nations. When they apply to a court to enforce their Aboriginal or treaty rights, the very thing First Nations challenge is the Crown's management of lands and resources which has given rise to those commercial interests. In the adversarial context of litigation, the assertion of their rights by First Nations is cast as a disruptor to the Crown's authority and a loss to the public. When commercial interests are presented, particularly by the Crown, as the overarching public interest, First Nations are cast as an adversary not only to the Crown but also to the public interest at large.

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[8] [2014] F.C.J. No. 536, 2014 FC 197, at paras. 30, 31 (F.C.) (emphasis added) [hereinafter "*Ahousaht Indian Band*"].

2. Trust-like, Not Adversarial

This conception, or positioning, of First Nations is contrary to the law regarding the foundational principles of the Crown/Aboriginal relationship. From the first Aboriginal rights case, in *R. v. Sparrow*, the Supreme Court of Canada properly characterized the relationship between the government and First Nations as "trust like, rather than adversarial". However, when First Nations are forced to turn to the courts to enforce their rights, the Crown defendant takes on the role as adversary, undermining the Court's admonition.

It is anachronistic to continue to place First Nations in the position of adversary to the broader public interest. However, the Crown as defendant has introduced this positioning in litigation — introducing commercial interests and the possibility of economic disruption as a sceptre that looms over the courtroom and distracts from the legal questions that ought to be addressed through formal and transparent analyses.

As we saw in the Supreme Court of Canada's response to the Coalition in *Marshall*, set out above, and as discussed in the specific example set out later on, private commercial actors can be expected to pursue profits and investment returns based upon, for example, the boom of wide-scale, intensive shale gas exploration. But, at least in Treaty 8 territory, the Crown's task is to consider whether the lands at issue are appropriate for, and can sustain, such a boom in light of the competing and prior commitment of those lands to sustaining the mode of life of generations of Aboriginal peoples.

That is exactly why, as a matter of law, the Crown is, and has historically been, interposed between private economic interests and First Nations.

Despite this relationship or positioning, as recognized in *R. v. Sparrow*, "there can be no doubt that over the years the rights of the Indians were often honoured in the breach …". Over the last several decades, the Supreme Court of Canada has developed legal tests and standards to endorse the trust-like relationship and hold the Crown to its obligations. Starting with *Sparrow*, the Court developed the justification analysis to "assess the legitimacy of any government legislation that restricts Aboriginal rights".[9] In later case law, the lens on Crown action extended to asserted rights.[10]

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[9] [1990] S.C.J. No. 49, [1990] 1 S.C.R. 1075, at para. 49 (S.C.C.).

[10] *Haida Nation*, *supra*, note 7, at paras. 26-35.

The legal tests are expressly intended to modify the way that the Crown manages resources, makes decisions, and, by extension creates and sustains particular commercial interests. In every case, the Crown's historic relationship and duty to a First Nation structures the analysis. The public interest arises in determining whether the Crown's conduct lives up to its constitutional obligations.

The public interest, and specifically commercial interests, may be considered by the Crown and may be presented to the court as part of that weighing exercise. But it does not follow that this allows simply for the tendering of evidence of revenue or the magnitude of commercial activity at large. Since the constitutional relationship is between the Crown and the First Nation, and the obligation to weigh and balance the public interest belongs to the Crown, then the real — or, put more bluntly, the *relevant* — question is *what analysis has the Crown done* in considering, weighing and balancing the public interests at issue (the interest in upholding constitutional promises and other interests, including economic development and commercial activity).

The Crown is bound to consider and attend to the prior and solemn commitments made to First Nations when it is deciding the extent to which it will permit or promote development. An essential component of this exercise is a demonstrable analysis of the real social and economic value of the development activity proposed. This decision-making process should require a more complete, sophisticated and balanced analysis (as required by *Gladstone* and *Tsilhqot'in*) than the bare assertions or untethered evidence of private interest proponents, and it cannot be achieved by the Crown aligning its position with commercial interests, or by commercial interests being equated with "*the*" public interest.

In Aboriginal rights litigation, the Crown must lead evidence not simply of the interests at stake but of its consideration and weighing of the interests — pursuant to the formal elements of the justification analysis — if it seeks to rely on those interests to justify its conduct and for the court to evaluate the Crown's conduct.[11] There can, therefore, be a role for the Crown to lead evidence of commercial interests. However, that evidence must be directed at the particular legal question before the court and must be presented and accepted in keeping with the Crown's obligations. The Crown should not be permitted simply to act as advocate for the status quo or for commercial interests specifically.

[11] *R. v. Gladstone*, [1996] S.C.J. No. 79, [1996] 2 S.C.R. 723, at paras. 76-80 (S.C.C.).

3. Commercial Interest Interveners

The constraint on relevance and the admission of evidence of commercial interests should not apply only to the Crown. While commercial interest groups have frequently been granted intervener status in Aboriginal rights litigation at the appeal stage, this should not be automatic. Further, their participation at trial is, and should remain, rare.

As set out above, in *Lax Kw'alaams v. Canada*, Binnie J. stated: "The existence and scope of Aboriginal rights protected as they are under s. 35(1) of the *Constitution Act, 1982*, must be determined after a full hearing that is fair to all the stakeholders."[12]

While it may be justified in some instances to allow commercial interests to intervene, this statement should not be interpreted as an open invitation for that to happen.[13] "Stakeholder" interests can properly be accounted for in the evidence of the Crown's assessment of those interests. The relevance of evidence from, or submissions specific to, particular commercial interests will be open to question if the Court's focus is on the mutual rights and obligations between the Crown and First Nations.

4. Consideration of Commercial Interests

Thus, the introduction of commercial interests can present a complicated problem in Aboriginal rights litigation, given the overarching imperative of reconciliation inherent in the assertion of Crown sovereignty.

Allowing private interests, and especially those private interests that have benefited directly from previous and ongoing Crown conduct that adversely affects or infringes Aboriginal rights, to define the Crown's position and approach towards claims brought by Aboriginal peoples is fundamentally inconsistent with reconciliation and should be considered anachronistic.

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[12] *Supra*, note 3, at para. 12 (S.C.C.).

[13] Several commercial fishing industry groups were granted leave to intervene in the justification phase of the *Ahousaht Indian Band* Aboriginal rights trial. The court there relied on the statement from *Lax Kw'alaams*. *Ahousaht Indian Band v. Canada (Attorney General)*, [2018] B.C.J. No. 717, 2018 BCSC 633, at paras. 27, 797, 874 (B.C.S.C.); decision under appeal.

In two relatively recent injunction cases, the court considered the public interest and commercial interests in a manner we would consider to be consistent with the law. In *Ahousaht Indian Band*, Mandamin J. stated:

> There is an impact [from the requested injunction to enjoin a commercial opening] on the commercial fishing sector, but that arises from the Minister's decision to open the WCVI roe herring fishery. This impact can be mitigated to a degree by reallocation, as the DFO may reissue licences and move any displaced licence holders to different fishery locations where there is a satisfactory abundance of herring stock.
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> In any event, the commercial fishing sector's preference for a WCVI roe herring fishery is the possible securing of a higher quality catch, which would be more valuable in terms of strategic marketing. This weighs much less in the balance of convenience as against the acknowledgement of the opportunity for a First Nations people to practice their recognized Aboriginal right to fish and sell fish and reclaim their heritage.
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> Public interest also favours the upholding of the DFO conservation approach to the WCVI herring fishery lest the fishery be harmed. By observing conservation needs, the public will benefit from commercial roe herring fishery opportunities in the WCVI area in the future and the Applicants will have a future opportunity to be able to exercise their rights.[14]

In *Taseko Mines Ltd. v. Phillips*, Grauer J. wrote:

> On the other hand, it is also very much in the public interest to ensure that, in circumstances such as these, reconciliation of the competing interests is achieved through the only process available, being appropriate consultation and accommodation. Those duties, of course, attach to the Crown. Nevertheless, from the perspective of Taseko, that process is a cost and condition of doing business mandated by the historical and constitutional imperatives that are at once the glory and the burden of our nation. Only by upholding the process can reconciliation be promoted; without reconciliation, nothing is accomplished. This interest, in my view, is at risk should the injunction be denied, and weighs heavily in the balance of convenience.[15]

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[14] *Supra*, note 8, at paras. 33-35.

[15] [2011] B.C.J. No. 2350, 2011 BCSC 1675, at para. 60 (B.C.S.C.).

III. CASE STUDY

Blueberry River First Nations descend from signatories to Treaty No. 8. That Treaty makes the Crown's promise of lawful and honourable conduct express. In exchange for the surrender of title to a large territory, the Crown made promises to the signatory First Nations, including the oral promise that they would be entitled to continue their mode of life. The language of the Treaty included:

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

In interpreting this same treaty in *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, Binnie J. affirmed that the honour of the Crown infused the Crown's obligations under the treaty and observed that a unilateral approach by the Crown to the right to take up land premised on a "this is surrendered land and we can do with it what we like" approach is the "antithesis of reconciliation and mutual respect".[16]

In 2015, Blueberry River brought an action challenging the Crown's administration of the lands and resources in the First Nation's territory as contrary to the Crown's Treaty obligations to them. Although the Crown's constitutional obligations lie upstream of the legislative or statutory regime upon which the administration of the resources rests, Blueberry River alleges that the Provincial Crown has permitted industrial development without due regard to their Treaty obligations and at a pace and to an extent that infringes the meaningful exercise of Blueberry River's hunting, trapping and fishing rights.

Blueberry's territory is the epicentre of industrial activity in Northeastern British Columbia, including but not limited to:

(1) The Montney Gas Play lies right over the heart of Blueberry River's territory, and has been subject to massive exploration, drilling and fracking operations over the last 15 to 20 years.

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[16] [2005] S.C.J. No. 71, [2005] 3 S.C.R. 388, at para. 49 (S.C.C.).

(2) Forest development in the Fort St. John timber supply area is focused in particular over the Nation's territory, and is planned without regard to the clearing and development that is also undertaken by the oil and gas sector.

(3) The Site C Dam is now the third major hydro-electric dam that will lie in Blueberry River territory, along the Peace River.

(4) Much of the remainder of Blueberry River traditional territory has been converted to private and agricultural land.

A recent analysis shows that 84 per cent of the Nation's traditional territory lies within 500 metres of an industrial disturbance including roads, seismic lines, cut blocks, well sites and hydroelectric dams.[17]

Blueberry River has faced a difficult maze in their effort to protect their rights from rapid encroachment and depletion. Having put the Crown on notice for several years of their concern that the pace and extent of development was limiting and then interfering with their Treaty rights, and after filing their civil claim in March 2015, Blueberry River witnessed development continue undeterred in their territory. They therefore sought interim injunctive relief.

The First Nation brought a first injunction application seeking to enjoin the auctioning of timber licences by the Crown. There were no vested third party interests in these blocks, because they had not been auctioned and sold yet. Moreover, the evidence showed that the proposed blocks contained valuable old-growth forest, which was of particular importance to the Nation in light of the disproportionately limited old forest left in their territory.

In response to the injunction application, as the Court noted, "the Crown relies on the public interest in maintaining the certainty and predictability of forest management and operations …".[18]

Despite finding that there is a serious issue to be tried, and that irreparable harm would be suffered by the Nation upon the sale and harvest of the cut blocks, the Court denied the injunction because the amount of land that would be preserved by the injunction would not be enough to make an appreciable difference on the overall cumulative impacts at issue to weigh against the impact to the Crown and third parties.[19]

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[17] *Atlas of Cumulative Landscape Disturbance in the Traditional Territory of Blueberry River First Nations* (Eco Trust Canada and David Suzuki Foundation, 2016).

[18] *Yahey v. British Columbia*, *supra*, note 4, at para. 53.

[19] *Id*., at paras. 56-58.

The injunction expressly sought not to affect third party interests, by seeking relief regarding blocks that were still held by the Crown. Nevertheless, the Crown filed evidence in defence from a commercial third party: the main forestry company in the area. The company attested that, while it may not have vested interests in the blocks at issue, it was planning on the blocks going up for auction and this was important to its planned forestry operations. While the Court recognized there was no guarantee the company would be the successful bidder on the licences (and indeed, it was not in the end, for several of the licences),[20] that was enough to weigh against the incremental preservation of the forest for treaty rights pending trial.

The Court said, rather than a limited injunction that would not help the First Nation enough to warrant the apparent harm it would cause to the Crown and commercial actors, what might be appropriate was a more broad scale injunction.[21]

Blueberry River did thereafter seek a broader injunction. They again sought to minimize impacts to third parties by not seeking to enjoin activities based on existing or issued permits or approvals, but only future permitting over certain critical areas pending trial. This time, again, the Province submitted (more extensive) affidavit evidence from third party commercial actors in support of the Crown's defence against the injunction application.

In fact, the Province submitted affidavits from most of the major oil and gas companies operating in Blueberry's territory, as well as the major forestry company, and one local company whose business is built on helping proponents get their permits for industrial activity. The Crown filed 10 commercial proponent affidavits in all.

Again, the Court found that Blueberry had brought a serious issue to be tried, and would suffer irreparable harm if the injunction were not granted, but the balance of convenience weighed against the injunction, with potential financial losses to third party commercial interests important to that conclusion:

> … the evidence establishes adverse effects on third parties. Third-party affidavits persuasively foretell many business losses and individual job losses in a region said to be already hard hit by industry's downturn. This encompasses losses to further third-party businesses which in turn

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[20] This evidence formed part of application for leave to appeal the 2015 injunction. Leave was granted (Oral Reasons of Justice Savage, November 4, 2015, docket no. CA43040) but the appeal was adjourned.

[21] *Yahey v. British Columbia*, *supra*, note 4, at para. 64.

> have contracted with the more immediate third-party businesses in reliance on their supply. Some of the third parties are Aboriginally-owned and -run businesses within industry as well as Aboriginal individuals.[22]

Through their affidavit evidence from commercial proponents, the Crown raised alarm about unemployment and the economic downturn at the time (which was being measured against the recent boom years, *i.e.*, the very high-intensity industrial development that caused the damage that had brought Blueberry River to court). However, in the year or so after the November 2016 injunction hearing, the economy in the northeast rebounded and unemployment decreased to being second-lowest in the province.[23] That evidence was not, of course, before the Court.

The Crown also used those affidavits to raise concern about the major Pacific Northwest LNG project (attested to be worth billions of dollars), that would be at risk if the injunction were put in place. That project died anyway due to market reasons (which had been predicted by some), not because of Aboriginal treaty rights.[24] For example, the president of one major oil and gas company attested in support of the Crown's defence against the injunction application:

> If the injunction were granted it would have a significant detrimental impact on [X] and others. The purpose of this affidavit is to discuss those impacts …
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> [Y] acquired [X] for $[Q] billion in 2012 with the intention of using [X]'s Montney lands as a source of supply for a Liquefied Natural Gas ("LNG") export project …
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> …

[22] *Yahey v. British Columbia*, [2017] B.C.J. No. 1046, 2017 BCSC 899, at para. 103 (B.C.S.C.); Burke J. did note the difficult position Blueberry River was in and expressly acknowledged that commercial interests and impacts were not the only considerations.

[23] The most recent Stats Can figures are reported in Chris Newton, "Unemployment Rate in Northeast B.C. Now Second-Lowest in B.C.," Energetic City (October 6, 2017), online: <https://www.energeticcity.ca/2017/10/unemployment-rate-northeast-b-c-now-second-lowest-b-c/>. "FORT ST. JOHN, B.C. — According to numbers released by Stats Canada today, Northeast B.C.'s unemployment rate last month stayed steady compared to the rate in August, and is now tied for second-lowest in the province".

[24] Michelle Ghoussoub, "Pacific NorthWest LNG project in Port Edward, B.C., No Longer Proceeding", *CBC News* (25 July 2017), online: <https://www.cbc.ca/news/canada/british-columbia/pacific-northwest-lng-project-in-port-edward-b-c-no-longer-proceeding-1.4220936>. "Pacific NorthWest LNG project in Port Edward, B.C., no longer proceeding 'The decision was made as a result of 'changes in market conditions'".

> The requested injunction would certainly compound the delay in the development of the PNWLNG Project and risks stopping that project altogether, stranding the approximate $12 billion invested to date.

And from another company:

> 5. As a small service based company, [Q]'s success is directly tied to the amount of development in the regions in which we operate. Our Fort St. John office's survival depends heavily on the amount of oil and gas activity in this region and to a lesser extent, but still important, the amount of forestry activity. When oil and gas activity is high, there is a greater need for our services. If there is a downturn, this reduction in revenue can, and has, lead to job losses.
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> 6. In the last year we have seen a dramatic drop in the need for our services as a result of the slowdown in the oil and gas activity in the area. This is the worst I have seen it since we started operations in 2002. 2016 is on pace to be by far our worst year on record.

Much of the language in the affidavits was about the aspirations and plans for expansion of commercial actors. For example:

> [Z] is committed to continuing to grow its presence in Northeast British Columbia by developing assets that will provide producers with value-added services and to deliver to market Canadian natural gas resources.
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> …
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> [Z] expects that it will build additional natural gas and natural gas liquids processing infrastructure in Northeast British Columbia to support its Northeast British Columbia objectives, including a potential second phase expansion of the Townsend Facility which could include additional facilities for the enhanced recovery of natural gas liquids and additional fractionation facilities (the "Townsend Expansion Facilities").
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> Each of the Townsend Expansion Facilities and the Additional Lines will require a number of approvals and provincial authorizations before construction on them can begin, including from the British Columbia Oil and Gas Commission and the British Columbia Ministry of Transportation and Infrastructure. Without the Additional Lines, liquids will need to be trucked from the truck terminal, which will be less efficient.

Blueberry River's point (and case) is that neither the Province nor industry can continue unrestrained to reap the rewards that have been promised or expected, since they are premised on an unconstitutional foundation that ignores the Province's obligations under Treaty 8.

Importantly, impacts to commercial interests and industry appear to be almost the defining issue affecting remedy, yet that is not an issue between the Crown and the First Nation (*i.e.*, between the parties) directly.

Commercial and industry interests appear to lie in an interstitial zone in this case (and other cases): they are not proper interveners — and indeed, would likely violate the rule against taking the litigation away from the parties — but they are ever-present under the rubric of the Province's defence of its actions. They effectively become shadow interveners.

The plaintiff's experience to date in the *Blueberry River* case is, we suggest, not unique among Aboriginal litigants. When a First Nation seeks to enforce Crown promises, the First Nation is portrayed to be responsible or accountable for all of the profit and financial aspirations of the commercial actors who want to build upon the status quo. The balance of convenience element of the test for an interim injunction creates opportunity for consideration of commercial interests. Where the Crown aligns with commercial actors to oppose such relief being granted to the First Nation, the public interest in upholding the Crown's constitutional obligations can get lost in an ocean of dollar amounts. We argue that change in the Crown's approach to litigation and the leeway it is afforded to lead evidence regarding commercial interests is required.

At the time of writing, trial is adjourned, to allow exploration of significant reforms to land use that may lead to settlement of the claim. However, prior to this, as the parties headed toward trial, the Province had placed significant emphasis on the economic activity occurring in Blueberry River territory. This approach included arguing in pre-trial motions that economic activity engaged in by Blueberry River and its members may be a defence against a Treaty breach, even in cases where the First Nation and its members engaged in this economic activity only after development projects were approved by the Crown over the objections of the First Nation.

The Court has thus far largely rejected the Province's approach, finding in a pre-trial application that:

(1) disclosure of documents relating to economic activity of the Nation itself was required only so as not to foreclose the "novel" legal argument Crown is advancing in defence (acquiescence and "benefits"); and

(2) economic activity related to projects that occurred *over the objections* of the First Nation was expressly excluded from the disclosure obligation.[25]

Approaching trial, the Province continued to heavily rely on the magnitude of economic activity in Blueberry River's territory in defence. The Province asserts, and can be expected to attempt to admit evidence of, that activity as an element of its novel acquiescence defence. The issues before the court in the main action do not include a "balance of convenience" whereby evidence of commercial interests may be admitted. If infringement is found, the analysis shifts to the justification test, not a balance of convenience test. Thus, the relevance of the evidence of commercial interests and revenue, and the validity of the defence, will be important issues for the court.

IV. RECOMMENDATIONS

1. The Objective

If reconciliation is to be meaningful, the fact that recognition of Aboriginal rights may affect other interests must be accepted, most especially by the Crown, and reflected in litigation. Reconciliation is not easy. The lack of it has come at great expense to First Nations. Achieving it will entail costs and disruptions for non-First Nations people and Canadian society as a whole. Where the economic structure has been built on a long history of denying Aboriginal rights and title over resources, true recognition and reconciliation must mean shifts in that structure and likely a redistribution of benefits, at least to some degree. Properly constraining the role of the Crown and consideration of commercial interests and economic benefits in Aboriginal rights litigation is a step toward achieving that constitutional mandate.

In our view, to uphold its trust-like relationship, the Crown must be very careful in advancing positions and arguments of non-party commercial actors. Doing otherwise raises serious risk to the honour of the Crown, not to mention the public interest in reconciliation. The Crown ought to identify its position clearly and present commercial interests only as part of existing doctrinal frameworks, *e.g.*, the

[25] *Yahey v. British Columbia*, [2018] B.C.J. No. 113, 2018 BCSC 123, at paras. 46-48 (B.C.S.C.).

justification analysis, where they have already been identified as relevant. The Crown ought not allow those interests to infiltrate all aspects of a proceeding.

For their part, courts must be vigilant to protect against the encroaching influence of shadow interveners. Aside from outcomes (and costs, *etc*.) in particular cases, shadow interveners threaten the legitimacy of outcomes in public interest and Aboriginal rights cases.

We suggest that the proper course is:

(1) The Crown and the courts should focus their legal analysis on the First Nation/Crown relationship.

(2) This does not mean ignoring private interests and commercial actors, but does keep the lens on the Crown's analysis and consideration of those interests, and the balance struck by the Crown between obligations to First Nations and other interests.

(3) If the Crown cannot demonstrate it has engaged in this analysis, that omission will be a highly relevant fact to the case before the court. In Aboriginal or treaty rights litigation, it goes directly to the justification analysis. In the asserted rights context, it also goes to whether the Crown has upheld its duty to consult and it can influence the Crown action going forward. In *Tsilhqot'in Nation v. British Columbia*, McLachlin C.J.C. made this very clear:

> Once title is established, it may be necessary for the Crown to reassess prior conduct in light of the new reality in order to faithfully discharge its fiduciary duty to the title-holding group going forward. For example, if the Crown begins a project without consent prior to Aboriginal title being established, it may be required to cancel the project upon establishment of the title if continuation of the project would be unjustifiably infringing. Similarly, if legislation was validly enacted before title was established, such legislation may be rendered inapplicable going forward to the extent that it unjustifiably infringes Aboriginal title.[26]

(4) Only in rare cases should direct evidence or submissions from private commercial interests be admitted, and only after meeting the threshold requirements for obtaining leave to intervene — including that the perspective the proposed intervener will bring to the case is

[26] [2014] S.C.J. No. 44, [2014] 2 S.C.R. 257, at para. 92 (S.C.C.).

relevant to the questions before the court, and that the intervener will not take the litigation away from the parties. This allows the parties to make full submissions in advance on whether or how the proposed intervener evidence or perspective is legally relevant to the issues before the court, *thereby* (if leave to intervene is allowed) defining at the outset the place and role of the intervener perspective in the analysis, rather than tolerating a vague or moving target in the background against which the First Nation must shadow box.