

# What Does the Blueberry River Decision Mean for Next Generation IBAs?

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This presentation provides general information and is not intended to provide legal advice.

Audience members should seek legal advice for specific situations.

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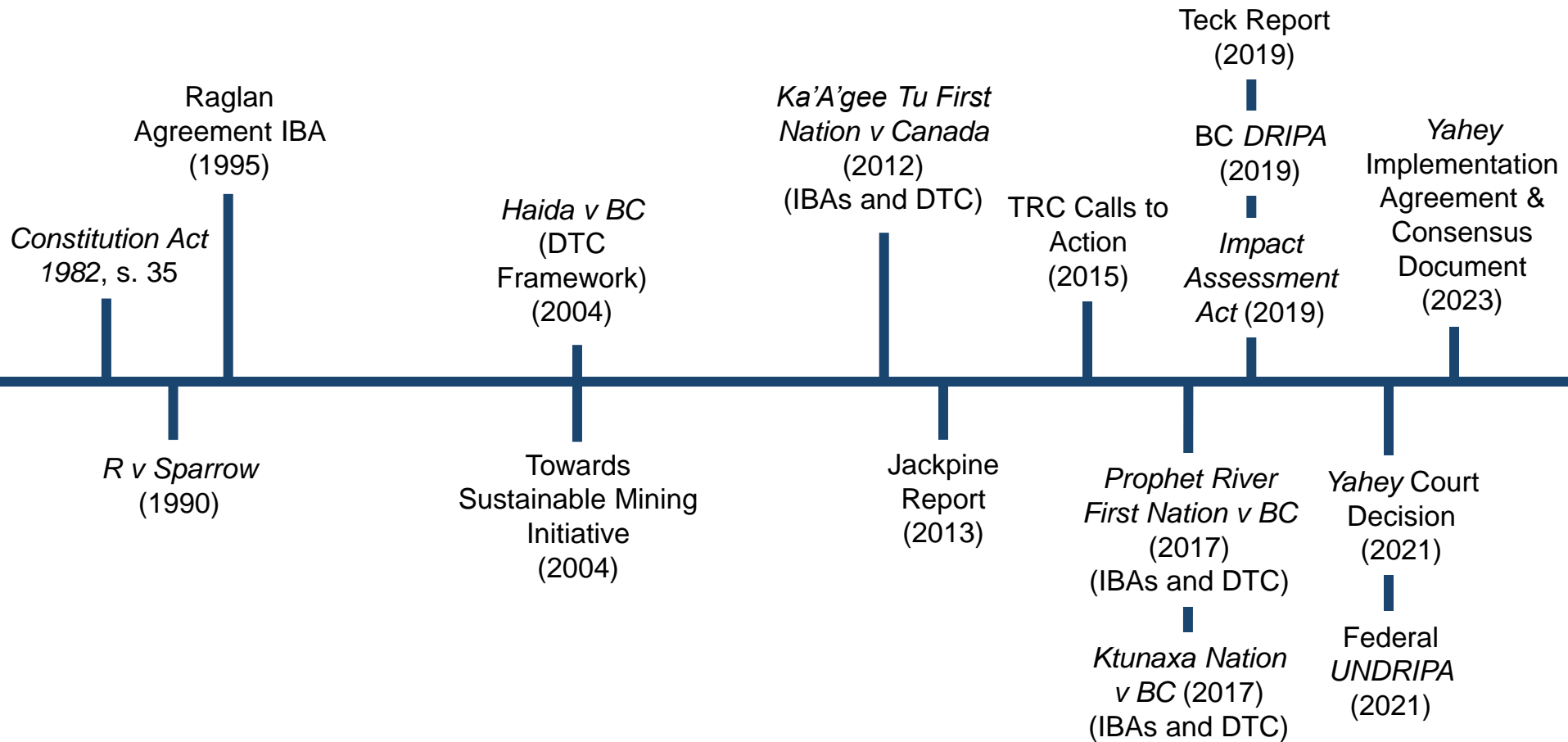
**Willms  
& Shier**  **Environment  
Indigenous  
Energy Law**

# Outline

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- **Development of IBAs in Canada**
- **Review of Yahey case and implications**
- **Discuss outcomes of Yahey and the Implementation Agreement**
- **Implications for Next Generation IBAs**

# Cumulative Effects and IBAs in Context



# Impact Benefit Agreements (IBAs)

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- **Private contract between proponent and impacted Indigenous community**
- **Context of regulatory uncertainty and shift towards corporate social responsibility**
- **Court decisions show IBAs are indicator of consultation**
- **Uneven legal landscape across Canada for IBAs means IBAs are not required in most jurisdictions**

# Early Impact Benefit Agreements

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- **Focus on agreement and certainty for proponent**
- **Prioritization of approval and production over closure and remediation**
- **Proponent-led environmental monitoring**
- **Defined project impact area**
- **Dispute settlement processes not well-developed**

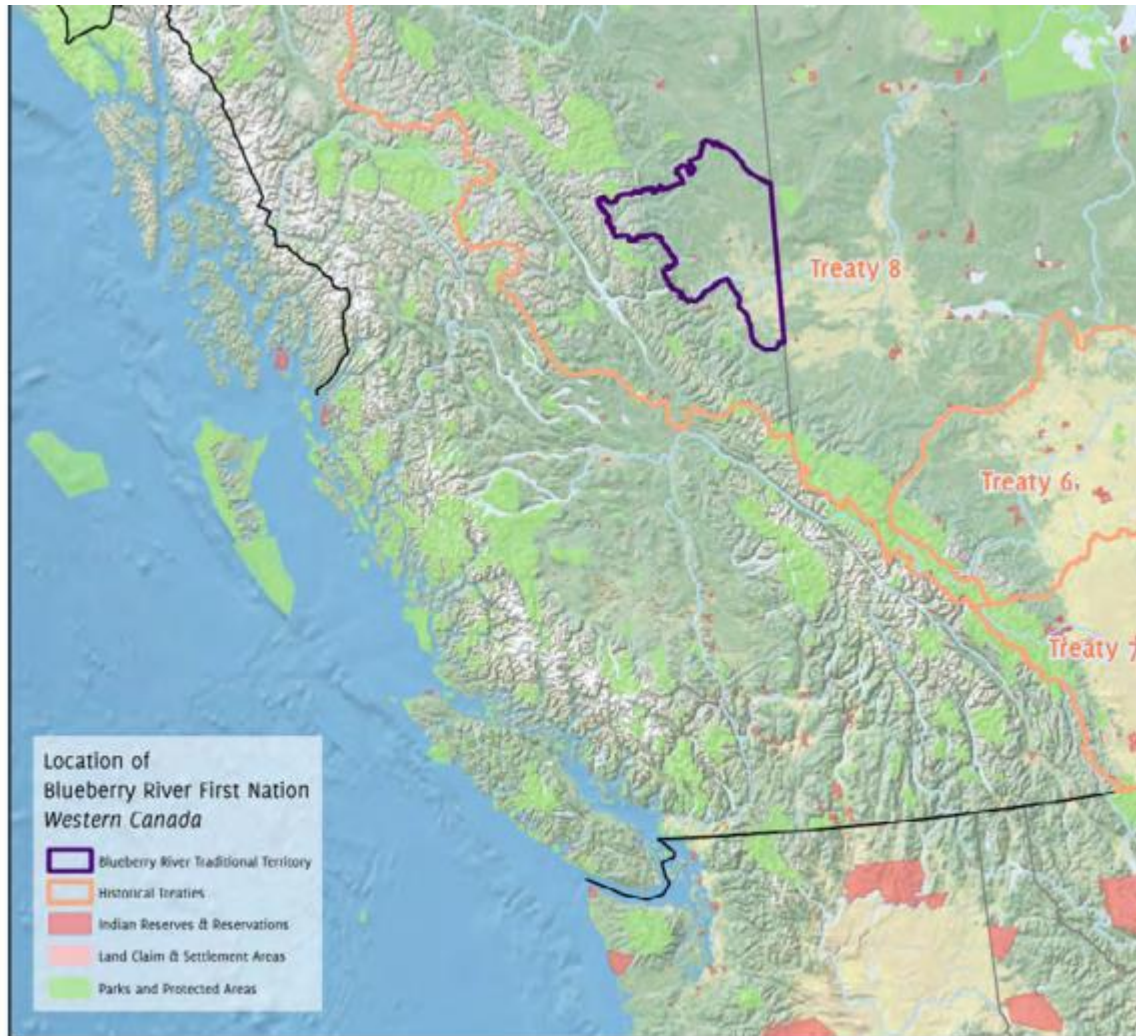
# IBAs Continue to Develop

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- **Flexible instrument**
- **Outline future ongoing relationship**
- **Framework for ESG commitments**
- **IBAs as evidence of consent of impacted Indigenous community**
- **Respond to UNDRIP**

**How will IBAs respond to *Yahey*?**

# Cumulative Effects: *Yahey v British Columbia*, 2021 BCSC 1287



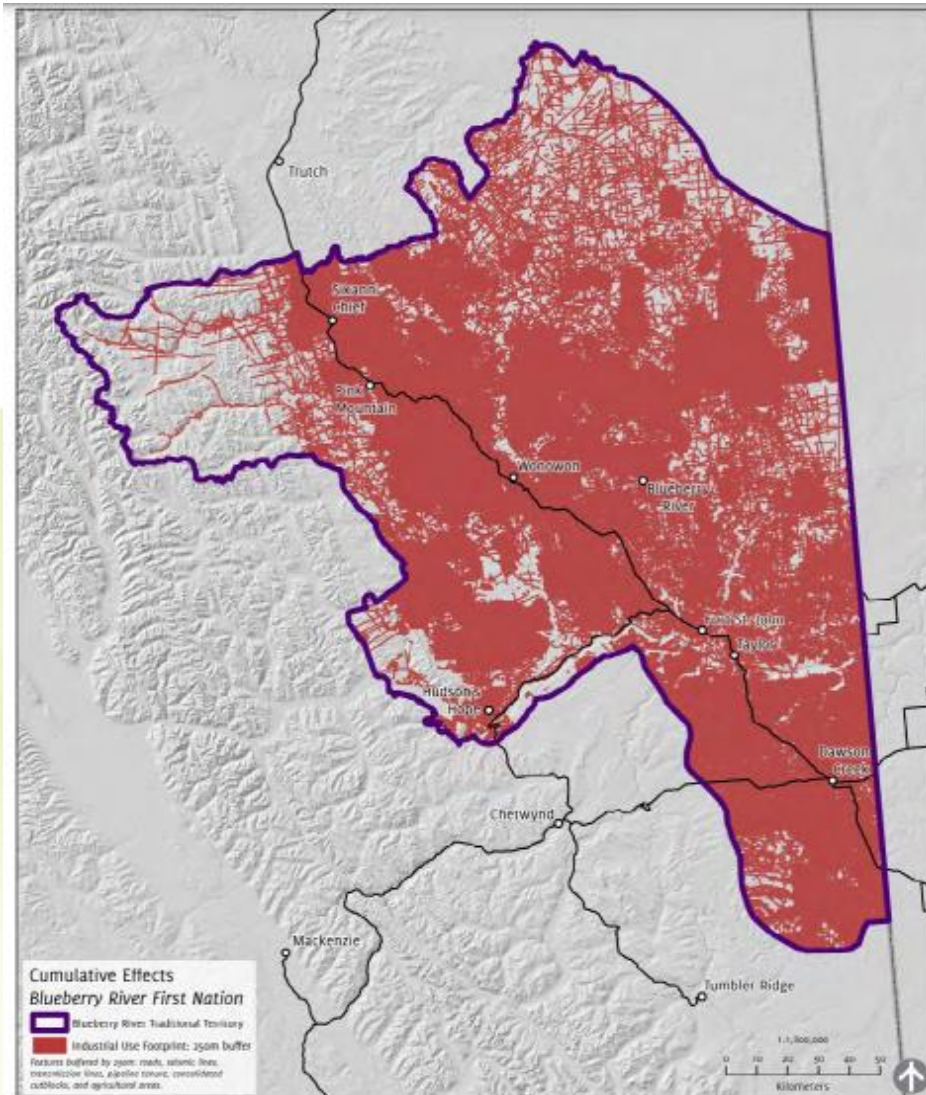
Excerpted from the Atlas of Cumulative Landscape Disturbance in the Traditional Territory of Blueberry River First Nation prepared by David Suzuki Foundation and dated 2016, Map 1

Map 1. Blueberry River First Nations traditional territory in Western Canada



# Cumulative Effects:

## *Yahey v British Columbia, 2021 BCSC 1287*



Excerpted from the Atlas of Cumulative Landscape Disturbance in the Traditional Territory of Blueberry River First Nation prepared by David Suzuki Foundation and dated 2016, Map 32



# Cumulative Effects:

## *Yahey v British Columbia, 2021 BCSC 1287*

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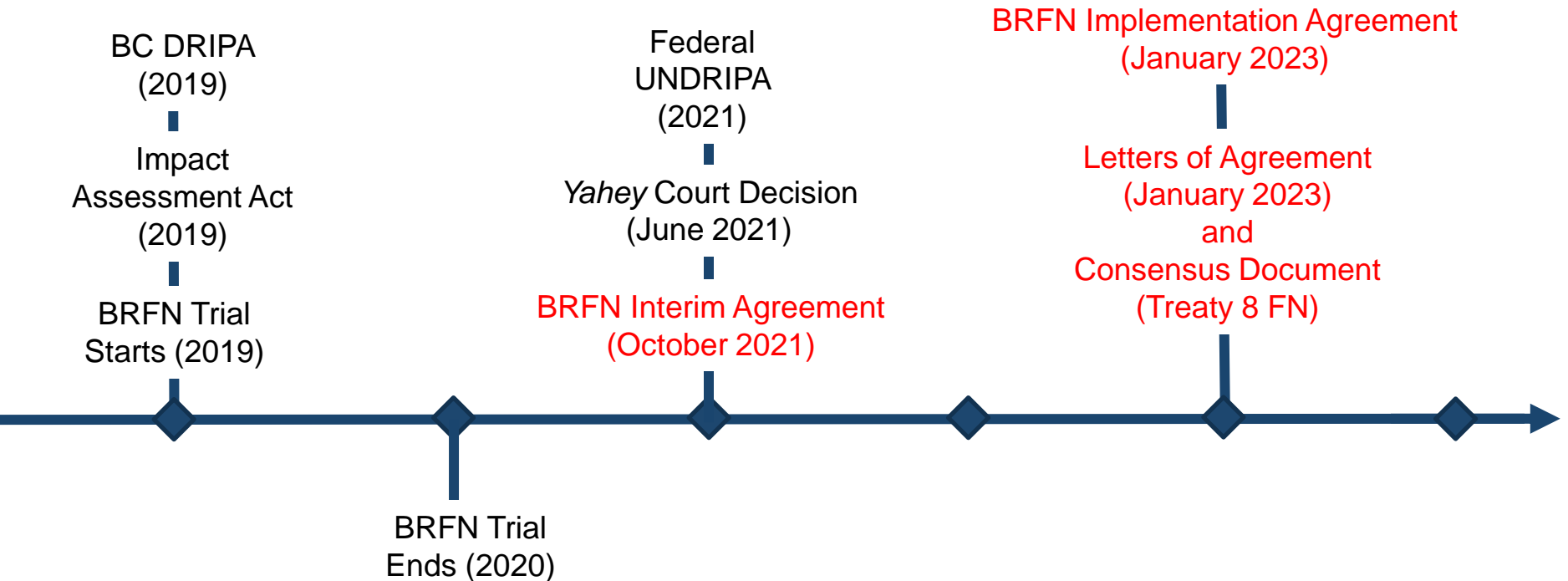
**Court held that Province infringed Blueberry's treaty rights, failed to uphold honour of the Crown, and breached fiduciary duty**

- failure to develop a process to assess or manage cumulative effects
- “Permit by permit” consultation does not consider cumulative impacts on exercise of treaty rights

**Court issued four declarations, including**

- the parties must act with diligence with consult and negotiate to establish enforceable mechanisms to assess and manage the cumulative impact of development on rights and ensure rights are respected
- the Province may not continue to authorize activities that breach its treaty promises and obligations, or that unjustifiably infringe Blueberry's exercise of its rights

# Post-Yahey Agreements



# Implementation of Yahey: Interim Agreement

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- **Signed with Blueberry River First Nations**
- **\$35M fund for land healing activities and to create jobs for members**
- **\$30M to support BRFN in protecting their way of life**
- **Forestry and oil and gas projects permitted before *Yahey* decision**
  - 195 projects to proceed
  - 20 projects in areas of high cultural importance are paused pending further negotiation and agreement
- **Update moose hunting regulations**

# Implementation of Yahey: Implementation Agreement

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- **Signed with Blueberry River First Nations**
- **Regional Strategic Environmental Assessment**
  - assess cumulative effects
  - produce new land use objectives
  - petroleum and natural gas development planning
  - wildlife management
- **Collaboration on development plans**
  - establish protected areas
- **Reduce forestry in high value areas**

# Implementation of Yahey: Letters of Agreement

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- **Separate Agreements signed with Four Treaty 8 FNs**
  - Fort Nelson, Saulneau, Halfway River and Doig River First Nations
- **Letter Agreements confirm commitment to implementing Consensus Document**
- **Separate PNG revenue sharing agreements – contribute to financial accommodation during agreement term**
- **Reflect specific priorities of each First Nation signatory**
- **Agreement to discuss further collaborations on shared decision-making**

# Implementation of Yahey: Consensus Document

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- **Discussions are ongoing with other Treaty 8 FNs**
- **Consensus Document environmental provisions include**
  - commitments to change wildlife management and hunting regulations and complete Regional Strategic EA
  - establish new forms of land and resource co-management and shared decision making
  - build a comprehensive cumulative effects management system
  - funding for a collaborative stewardship forum and for new conservation officers
  - restoration fund to heal the land and address cumulative effects
  - agreement to explore carbon credit opportunities



# Implementation of Yahey: Key Areas of Significance

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- **Collaborative cumulative effects assessment / numerous authorizations**
- **Watershed and ecosystem approach to Treaty lands**
- **Consultation process with an issues resolution process**
- **Both processes to be reviewed to see if they are effective**
- **Land protection and healing**

# Implications for IBAs

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- **Protection of land within licensed area**
  - protection as a cumulative effects goal
  - new disturbance caps with carry forward option
  - emphasis on avoiding versus minimizing
- **More focus on closure and progressive reclamation**
  - early IBAs limit collaboration on closure and reclamation planning
- **Periodic review of environmental process effectiveness**

# Implications for IBAs

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- **Indigenous environmental monitoring and reporting of spills and exceedances**
  - early IBAs tied environmental monitoring funding to production
- **co-developed environmental assessment standards or practices**
- **Consent subject to expectation that proponents will implement commercially reasonable mitigation recommendations**
  - where disagreement, third party experts may resolve

# Limitations of Implementation Agreement Model

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- **Corporate decision-making model**
- **Project-by-project**
- **Limited ability to enact regional planning/ecosystem approach**
- **IBAs governed by contract law**

# Take-aways

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- **Role for IBAs between Indigenous governments and proponents**
- **Emphasis on environmental monitoring and protection through life of the project**
- **Long-term relationships need to be sustained and maintained**

# Willms & Shier Environmental Lawyers

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- **Established nearly 50 years ago**
- **Environmental, Indigenous, and Energy law**
- **18 lawyers**
  - seven lawyers are certified by the Law Society of Ontario as Environmental Law Specialists and one in Indigenous Legal Issues
  - lawyers called to the Bars of Alberta, British Columbia, Ontario, New Brunswick, Northwest Territories, Nunavut and the Yukon
  - offices in Toronto, Ottawa, Calgary, and Yellowknife



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