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# ABORIGINAL RIGHTS AND TITLE

Legal Update – Recent Developments

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## Canada to Fully Adopt and Implement UNDRIP

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- + **Canada** announces full support of **UN Declaration on the Rights of Indigenous Peoples (UNDRIP)** on May 10, 2016
- + **UNDRIP** adopted in 2007 (25 years of negotiations)
  - + Collective and individual rights of Indigenous peoples
  - + Rights include self-determination, political status, self-government, lands and resources.
  - + **“Free prior and informed consent” (FPIC)** is best practice when dealing with Indigenous lands / other rights
- + **Canada** opposed in 2007
- + **Canada** gave qualified support in 2010 – objections to provisions on land, territories and resources and FPIC

## Canada to Fully Adopt and Implement UNDRIP

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- + **FPIC:**
  - + **Free:** no coercion, intimidation or manipulation; process self-directed by Indigenous communities
  - + **Prior:** consent sought sufficiently in advance; respect shown for time requirements of Indigenous consultation/consensus process
  - + **Informed:** detailed information including:
    - + nature, size, pace, reversibility, duration and scope of any proposed project/activity
    - + reason for or purpose of project/activity
    - + location of affected areas
    - + preliminary assessment of economic, social, cultural and environmental impacts

Source: Report of International Workshop on Methodologies Regarding Free Prior and Informed Consent, endorsed by UN Permanent Forum on Indigenous Issues (2005)



## Canada to Fully Adopt and Implement **UNDRIP**

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- + Truth and Reconciliation's *Calls to Action* (2015) supported **UNDRIP** framework
  
- + In May 2016, Indigenous and Northern Affairs Minister Carolyn Bennett announced:
  - + **UNDRIP** will breath life into section 35 of *Constitution Act, 1982* as a "full box of rights for Indigenous Peoples of Canada"
  - + Changes to domestic laws/policies to implement **UNDRIP** will require consultation with First Nations, Inuit and Métis peoples
  - + Resource sector "on notice" that it needs to seek **FPIC** before beginning projects that may impact Indigenous lands.
  
- + Questions:
  - + Implementation of **FPIC** in domestic law: veto? multiple rights-holders and major projects?
  - + Role for strength of claim analysis?

# WHY IS THIS DEVELOPMENT SIGNIFICANT?





## Today's Presentation

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- + Brief overview of Aboriginal rights and title
- + *Tsilhqot'in* (2014) decision and its significance
- + Key court decisions, litigation to watch, and other developments
  - + Development of Indigenous laws
  - + Challenges to major projects including environmental assessments
  - + Rights/title litigation, including claims for third party damages

+ **Section 35(1)** of the *Constitution Act, 1982*:

*“The existing Aboriginal and treaty rights of the Aboriginal peoples of Canada are hereby recognized and affirmed”.*

+ Highest level of protection: constitutional-level

+ Engages the “honour of the Crown”

+ Many court cases interpreting “Aboriginal rights and title”



## Key Court Decisions: *Delgamuukw* (1997)

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- + Aboriginal title exists in the province:
  - + right to exclusive use and occupation of land
  - + right to choose how the land can be used, but must be consistent with historic attachment to land
  - + “inescapable economic component”
  
- + Title can be infringed (“justification analysis”)
  
- + Title not proven in this case



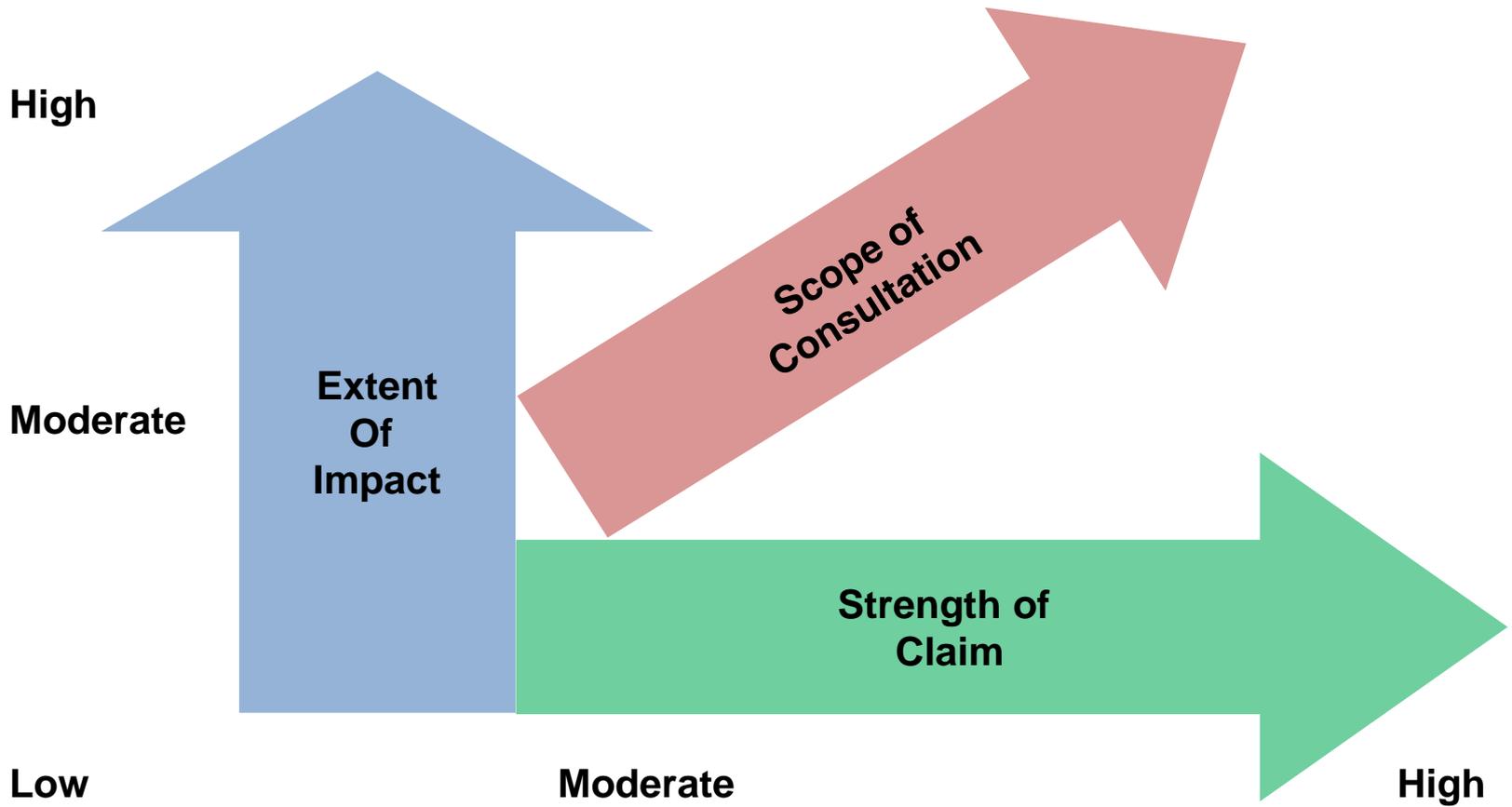
## Key Court Decisions: *Haida Nation* (2004)

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- + Duty to consult and potentially accommodate when government action contemplated that would impact proven or asserted rights/title
  
- + Crown can have actual or constructive knowledge of asserted title
  
- + Duties lie on a spectrum, dictated by
  - (a) degree of impact of action; and
  - (b) strength of asserted right
  
- + Duty lies with government; can delegate procedural aspects to project proponents

# Duty to Consult – Spectrum of Consultation

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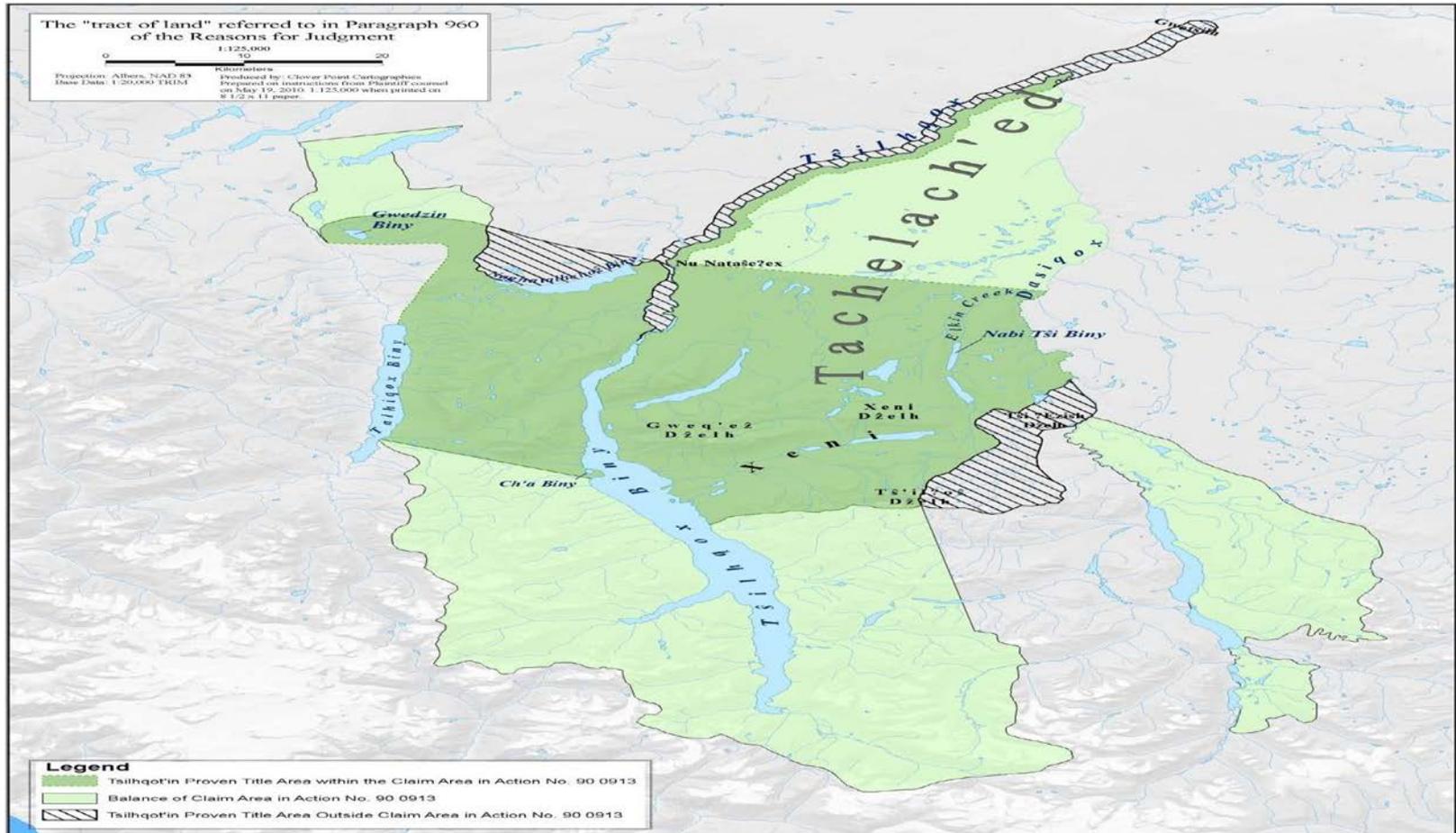


## ***Tsilhqot'in*** (2014) and Aboriginal Title

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- + Claimed title to a portion of traditional territory (approx. 4500 km<sup>2</sup>, or 5% of traditional territory)
- + Objection to logging activities in Tsilhqot'in territory
- + Case began in 1983 (30+ years for end result)
- + Tsilhqot'in Nation proved Aboriginal title over 1700 km<sup>2</sup> (less than half of the area subject to the court case, and approx. 2% of Tsilhqot'in territory)

# Tsilhqot'in Title Area





## ***Tsilhqot'in*** (2014) and Aboriginal Title

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- + First time that a First Nation proved Aboriginal title
  
- + Court addressed three key issues:
  - + What does it mean to hold Aboriginal title?
  - + How can a First Nation prove Aboriginal title?
  - + What happens to the Province's laws and powers once a court has decided that lands are subject to Aboriginal title?



## *Tsilhqot'in* (2014) and Aboriginal Title

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- + Aboriginal title includes the exclusive right to occupy, control and manage the land, and enjoy its economic benefits
  
- + May have title to large areas of land (nomadic or seasonal use), not just discrete parcels of intense use (ie: village sites)
  
- + Provincial and federal laws apply to title lands, subject to requirement that any infringements on title are either
  - (a) consented to by the First Nation; or
  
  - (b) justified by the Crown.



## ***Tsilhqot'in***: What Does Aboriginal Title Mean?

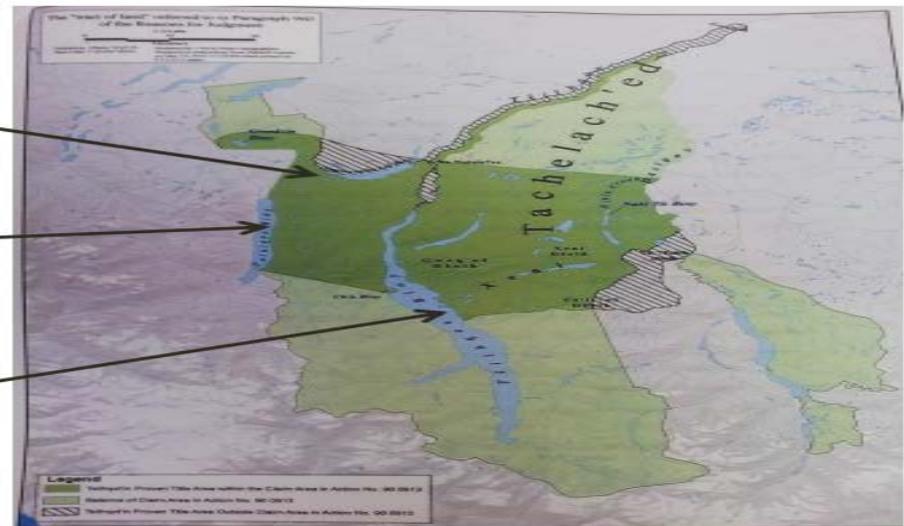
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- + **BUT...** limitations to Aboriginal title:
  - + must prove in Court with high evidentiary threshold
  - + can only transfer Aboriginal title to the government (cannot sell to individuals or companies)
  - + land uses must be reconciled with communal and ongoing nature of group's attachment to land
  - + can be infringed by government if: (1) the First Nation consents; or (2) the government can justify the infringement (more on this later)
  
- + Key Question: when to litigate over title, and when to resort to other means of enforcing your rights? Duty to consult cases are key.

## Tsilhqot'in and Consent

- + 2 Ways to Move Ahead with Resource Projects on Title Lands:
  - + Consent of the title-holding Aboriginal group
  - + Justification of infringement on rights/title

Source: <http://www.tsilhqotin.ca/>



*“Granting rights to third parties to harvest timber on Tsilhqot'in land is a **serious infringement that will not lightly be justified.**”*

*Should the government wish to grant such harvesting rights in the future, it will be required to establish that **a compelling and substantial objective** is furthered by such harvesting, something that was not present in this case.”*

[emphasis added]



## *Tsilhqot'in* (2014) and “Justification”

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- + How can the government justify infringement?
  - (a) meaningful consultation
  - (b) compelling and substantial public objective; and
  - (c) acted in a manner consistent with its fiduciary obligations
  
- + Or... consent



## *Tsilhqot'in* and Consent

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*“The right to control the land ... means that governments and others seeking to use the land **must obtain the consent of the Aboriginal title holders**. If the Aboriginal group does not consent to the use, the government’s only recourse is to establish that the proposed incursion on the land is justified ...”*

*“Governments and individuals proposing to use or exploit land ... can avoid a charge of infringement or failure to adequately consult **by obtaining the consent** of the interested Aboriginal group.”*

*“**Once title is established, it may be necessary for the Crown to reassess prior conduct** ... 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 title if continuation of the project would be unjustifiably infringing.”*

[Emphasis added].



## Key Developments Since *Tsilhqot'in*

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1. Development of Indigenous laws governing land and resources
2. Judicial review of major environmental assessment decisions
3. Lawsuits against corporations for damages
4. Title claims in the courts

## Province and Tsilhqot'in nation sign accord



Tsi Del Del (Alexis Creek) Coun. Percy Guichon (left), Yunesit'in (Stone) Chief Russell Myers Ross, Minister of Aboriginal Relations and Reconciliation John Rustad, Tsi Del Del Chief Ervin Charleyboy, Premier Christy Clark, Tlet'inqox (Anaham) Chief and Tsilhqot'in National Government Chair Joe Alphonse, Xeni Gwet'in (Nemiah) Chief and TNG vice chair Roger William, Xeni Gwet'in Councillor Loretta Williams, ?Esdilagh (Alexandria) Chief Bernie Mack and Tl'esqox (Toosey) Chief Francis Laceese during an official signing ceremony of an accord between the Tsilhqot'in and B.C. Government last Thursday. — *Image Credit: Province Of B.C. Photo*



## Indigenous Laws

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- + Tsilhqot'in Nation:
  - + *Draft Mining Policy* (July 2014)
  - + *Affirmation of the Nemiah Declaration* (March 2015)
- + Agreements with BC:
  - + Letter of Understanding (2014)
  - + Tsilhqot'in Stewardship Agreement (2014)
  - + Nenqay Deni Accord (2016)



## Indigenous Laws

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- + Nadleh Whut'en and Stellat'en Nations:
  - + Proclaimed first Aboriginal water protection and management regime

*“The one word to describe this document is consent, and it’s going to have an enormous impact on major resource development.”*

– Grand Chief Steward Phillip, Union of B.C. Indian Chiefs



## Judicial Reviews of Environmental Assessments

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- + Intersection of Aboriginal rights and environmental laws
- + Indigenous populations are key challengers
- + Crown's constitutional duty to consult and accommodate
- + Challenges create expense and uncertainty; time-consuming



## Cases: Challenge to Northern Gateway Pipeline

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- + Coastal First Nations (CFN) challenged Provincial approach to environmental assessment of Enbridge Northern Gateway pipeline
- + Province entered into an Equivalency Agreement, delegating EA to federal authority, including no requirement to obtain a provincial EA Certificate
- + CFN argued:
  - + BC must retain decision-making powers under provincial EA process
  - + BC must consult Gitga'at FN before entering Equivalency Agreement and when deciding not to terminate it

## Gitga'at celebrating 'huge victory' after court rules province failed in duty to consult

CBC News Posted: Jan 13, 2016 1:12 PM PT | Last Updated: Jan 14, 2016 4:38 AM PT



Demonstrators protest on the streets following the federal government's approval of the Enbridge's Northern Gateway pipeline in Vancouver, British Columbia June 17, 2014. (Reuters)



## Challenge to Northern Gateway Pipeline

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- + BC Supreme Court agreed with CFN:
  - + BC cannot abdicate its decision-making authority or its duty to consult to the federal Crown
  - + BC can rely on federal EAs, but it must still review results and decide whether and how to approve projects that fall under its jurisdiction
  - + BC failed to meaningfully consult and accommodate affected FN
- + Special cost award in favour of CFN (\$230,000)

See: *Coastal First Nations v BC (Environment)*,  
2016 BCSC 34 and 2016 BCSC 804



## Challenge to Northern Gateway Pipeline

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### + How did the Province respond?

- + accepted Joint Review Panel report
- + Prior to a decision on a Provincial certificate, EAO will consult Aboriginal groups (and review any prior consultation)
- + Provincial process will commence once Northern Gateway indicates ready to proceed

### + **Northern Gateway** files request for 3-year extension to sunset clause in federal EA approval:

- + **“more time is required to advance dialogue with coastal communities”**
- + **“...Northern Gateway should have done a better job of building relationships with First Nations and Metis communities...”**

(source: <http://www.gatewayfacts.ca/Newsroom/In-the-Media/File-Request-for-Extension-with-National-Energy-Board.aspx>)

## BC Hydro “Site C” Cases

- + EA Panel found significant adverse effect on fishing, hunting and other traditional land uses
- + Federal Cabinet decided project “justified” under *CEAA 2012*
- + A number of court challenges unsuccessful to date
  - + Prophet River & West Moberly First Nations (appeal pending)
  - + Peace Valley Landowners



Source: [energeticity.ca](http://energeticity.ca)



## Actions for Damages against Private Parties

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### Damages for Impact of Dam Operations:

- + Claim that Rio Tinto Alcan's Kenney Dam interfered with right to fish and cultural practices relating to the river
- + BCCA confirmed asserted Aboriginal title can give rise to claims in public and private nuisance and common law riparian rights (SCC refused leave)

*Saik'uz First Nation et al. v. Rio Tinto Alcan (2015)*

### Prevent Mining and Rail Activities:

- + Quebec Innu communities seeking permanent injunction restraining mining and rail activities
- + Court rejected application to dismiss case on basis that Innu must first prove Aboriginal title or rights were a prerequisite.

*Uashaunnuat v. Iron Ore Company of Canada (2014 – leave to appeal denied)*



## New Litigation – Aboriginal Title

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### **Claims for Private Land – not addressed in *Tsilhqot'in***

- + Kwikwetlem First Nation (filed in February 2016)
- + Claim title to land around the Coquitlam River Watershed

### **Claims to Land Hosting Major Resource Projects**

- + Stk'emlupsemc of the Secwepemc Nation (filed in September 2015)
- + Claim areas near Kamloops, including the KGHM Ajax copper-gold mine, damages and injunctions preventing activities of the Ajax Mine



## New Litigation – Aboriginal Title

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### Claims to Land with Proposed Facilities

- + Lax Kw'alaams filed in September 2015, claiming title to Lelu Island, area of proposed Petronas LNG facility

### Claims of Aboriginal Title by Treaty First Nations

- + *Chartrand v. British Columbia* (2015 BCCA) – left open possibility that Treaty First Nations may still have a claim to Aboriginal rights and title, but it will depend on the text of the treaty

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