

Implications of the Tsilhqot'in Decision for Engagement with First Nations



**MINISTRY OF FORESTS, LANDS AND
NATURAL RESOURCE OPERATIONS**

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BC's Duty to Consult



The duty to consult

- The province has a duty to consult First Nations respecting potential and proven aboriginal rights/title, and treaty rights.
- Consultation is required when the Province:
 - has knowledge of claimed or proven aboriginal or treaty rights; and,
 - is contemplating conduct that might impact such rights
- The depth of consultation required is:
 - proportionate to a the strength of the claim supporting the existence of the right/title; and,
 - the seriousness of potential impacts on that interest.

Consultation Process



Four Phased Approach

1. Preparation – 5 steps

Objective: to determine with whom, how and why we consult prior to engaging - “*getting our ducks in a row*”

2. Engagement – 3 steps

Objective: to learn sufficient & appropriate information about Aboriginal Interests & concerns

3. Accommodation – 3 steps

Objective: to determine if accommodation is required and proceed accordingly

4. Decision and Follow-Up – 3 steps

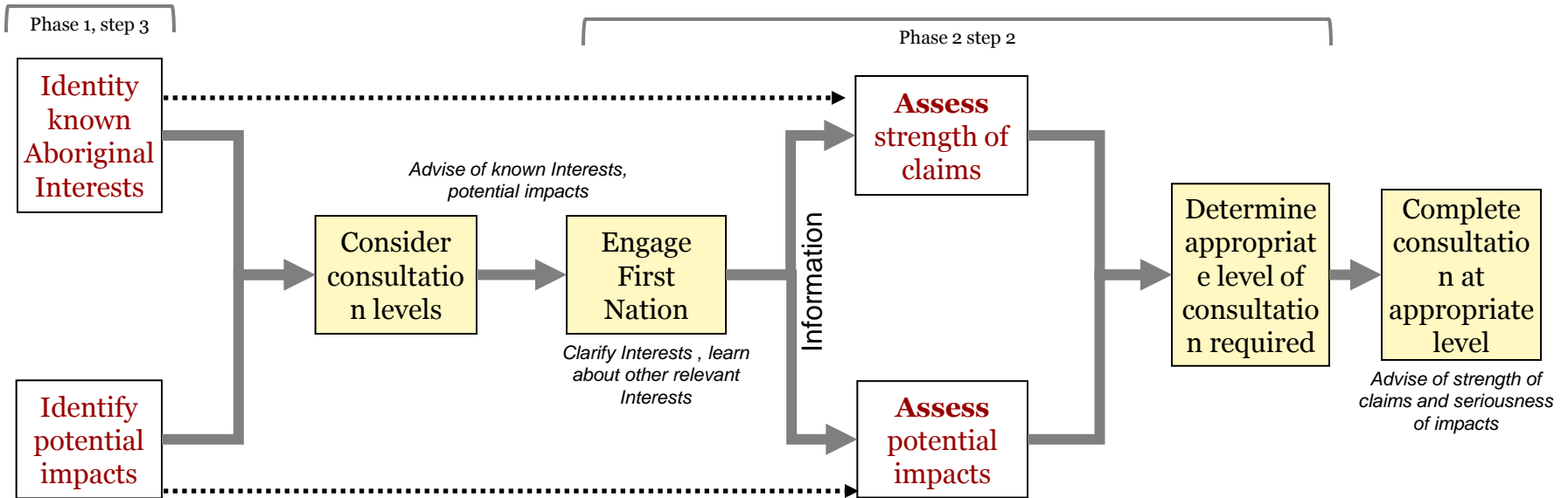
Objective: to make timely land & resource decisions that appropriately address Aboriginal Interests

Preliminary Assessments

Key Steps

Review available information

Preliminary Assessments



Impacts of the Tsilhqot'in decision on the consultation process – outside declared title area?



- The SCC's Tsilhqot'in decision has clarified that Aboriginal title claims are not restricted to only site specific locations.
- This has implications on the **consultation** process required for land and resource decisions:
 - how the **strength of claims** to Aboriginal title are to be assessed;
 - the **depth of consultation and accommodation** in areas of strong title claims

Assessing Strength of Claim for Title



At 1846 Occupation must be:

SUFFICIENT

Evidence of strong presence, that land controlled by group



EXCLUSIVE

Intention and capacity to retain exclusive control

Sufficient Occupation 1846



- means having a strong and permanent presence on the land
- means exhibiting an intention to hold and use the land for the sole purpose of that Aboriginal group
- Examples of relevant factors include:
 - constructed historic dwelling sites (village or house sites);
 - resource harvesting sites used by numerous generations;
 - historic trails that connected key sites above;
 - locations referenced in legends or oral traditions;
 - birth and burial locations of members who were alive around 1846.

Exclusive Occupation 1846



- means exhibiting an intention and capacity to retain exclusive control over the land, examples of relevant factors include:
 - lack of overlapping claims at 1846;
 - indications that other Aboriginal or non-Aboriginal groups understood that access to the land was controlled and defended;
 - territorial conflicts with other groups;
 - trespass laws and consequences for trespass;
 - permission protocols for access;
 - payments or tolls required for access;
 - geographic features (i.e. mountain passes) that provided natural barriers against intruders.

Strength of Claim Approach



- Government has established Regional SOC Teams
- Regional SOC Teams have been trained by Ministry of Justice to provide SOC assessments for all provincial decisions
- Operational policy is being developed to ensure consistent approach to consultation

Potential Impacts to Aboriginal Title



Potentially serious impacts on Aboriginal title:

- permanent alienation of land
- granting third party interests in land/resources,
- extraction of a resource
- removing the First Nation's ability to obtain future economic benefit from the land/resource, and
- strategic planning for utilization of the resource

Tsilhqot'in Nation Proper Rights Holder



Xeni Gwet'in

Tl'etinqox
(Anaham)

?Esdilagh
(Alexandria)

Yunesit'in
(Stone)

Tl'esqox
(Toosey)

Tsi Del Del
(Alexis Creek)



Title Rights

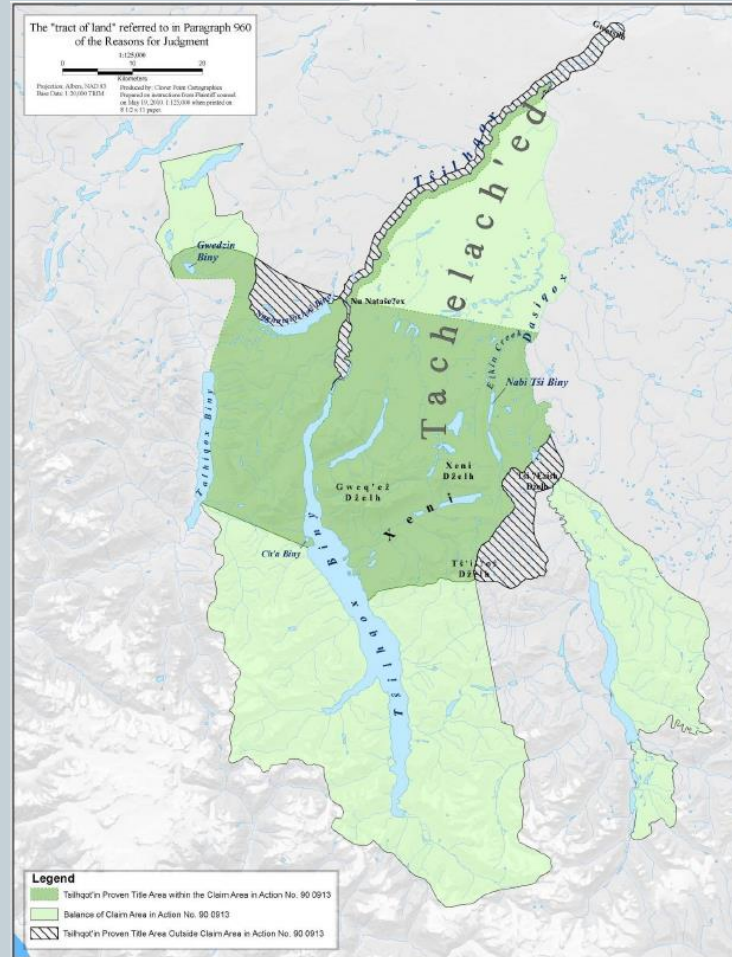


Aboriginal title confers the following rights to Tsilhqot'in:

1. exclusive use and occupation of the land
2. control of the land including determining the uses of land and resources
3. economic benefits of the land and resources

(Subject to applicable Provincial and Federal laws and the internal limitations)

Tsilhqot'in Title and Rights Areas



Tsilhqot'in Title Area



- **Impact to the Tsilhqot'in Title Area**
 - The Tsilhqot'in title area is the only area in BC that is Aboriginal Title Land
 - Tsilhqot'in Title Area map is now available on CAD
 - As an interim measure – no authorizations will be processed in the title area
 - At this time the province advises not to enter the title area for recreational use
 - The province is engaging with TN to discuss a long-term resolution to existing tenures.

Consent



“Governments and individuals proposing to use or exploit land, whether before or after a declaration of Aboriginal title, can avoid a charge of infringement or failure to adequately consult by obtaining the consent of the interested Aboriginal group” (para 97)

Justification



Justifying Infringements to Aboriginal Title

Infringements title are justified if:

1. duty to consult and accommodate is fulfilled
2. there is a compelling and substantive objective
3. actions are consistent with Crown's fiduciary duty to the Aboriginal group

Compelling and Substantive Objective



The SCC confirmed it may be possible for a range of objectives to further reconciliation: (para. 83)

“the development of agriculture, forestry, mining, and hydroelectric power, the general economic development of the interior of British Columbia, protection of the environment or endangered species, the building of infrastructure and the settlement of foreign populations to support those aims, are the kinds of objectives that are consistent with this purpose, and, in principle, can justify the infringement of Aboriginal title.”

Crown's Fiduciary Duty



- The Crown may only infringe on Aboriginal title when those actions are consistent with the fiduciary duty owed to the Aboriginal group, meaning:
 - there is a rational connection between the infringement and the Crown's objective,
 - any infringement is as minimal as possible to achieve that objective, and
 - there is proportionality between the benefit expected to be achieved for the broader public good and the infringements to the Aboriginal title.

Infringement Risks

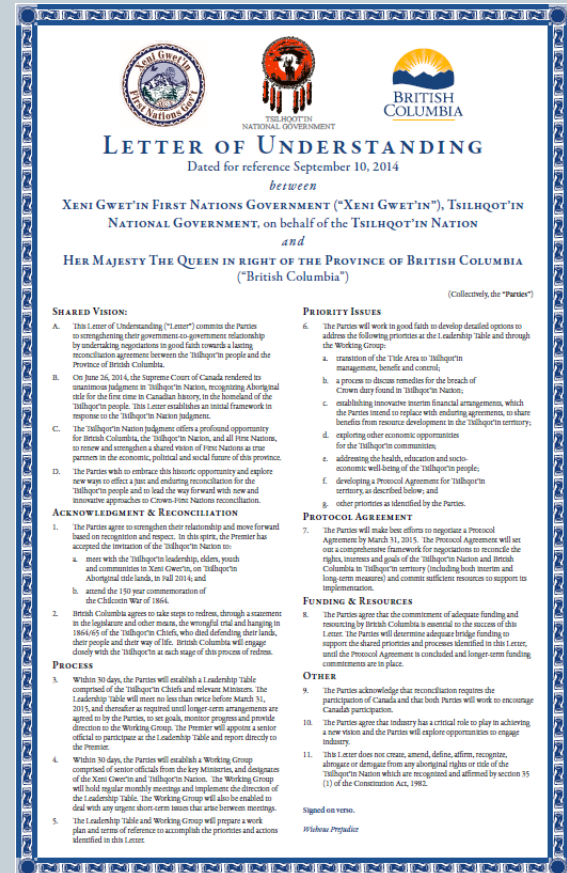


When Aboriginal Title Claims Are Proven – Potential Risks

- Project may be cancelled if it unjustifiably infringes Aboriginal title
- Cancelled authorizations may result in Crown liability to FN, proponent

Letter of Understanding between Tsilhqot'in and the Province

On September 10, 2014, the Province and the Tsilhqot'in Nation signed a Letter of Understanding that provides a response to the Supreme Court of Canada's Tsilhqot'in Nation judgment. Under the terms of the LOU, the Province and the Tsilhqot'in Nation will address the transition of the Title Area to Tsilhqot'in management, benefit and control.



Questions



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