Aboriginal Title, Treaty Rights & Land Use Management

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Tsilhqot'in Nation
v
British Columbia

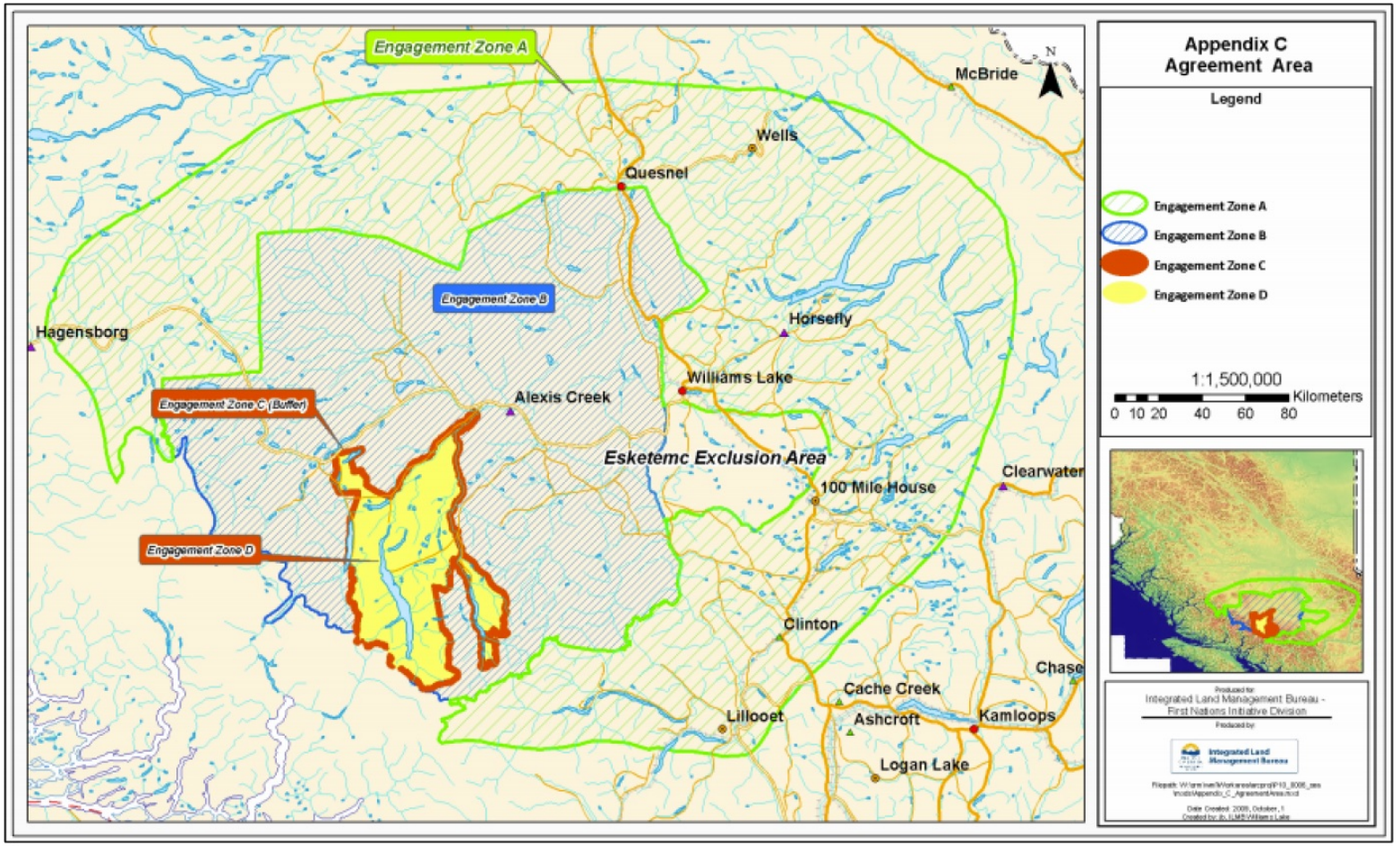
Tsilhqot'in Nation v BC

- On June 26, 2014, the Supreme Court of Canada released a unanimous decision in favour of the Tsilhqot'in's claim to Aboriginal title over 1700km^2 of land in central interior BC
- Past court decisions like *Calder* & *Delgamuukw* commented on the legal theory of Aboriginal title & the potential for it to exist if proven
- This was the first declaration of the existence of Aboriginal title in Canadian history in spite of a long history of Aboriginal title claims being litigated & pursued through direct advocacy

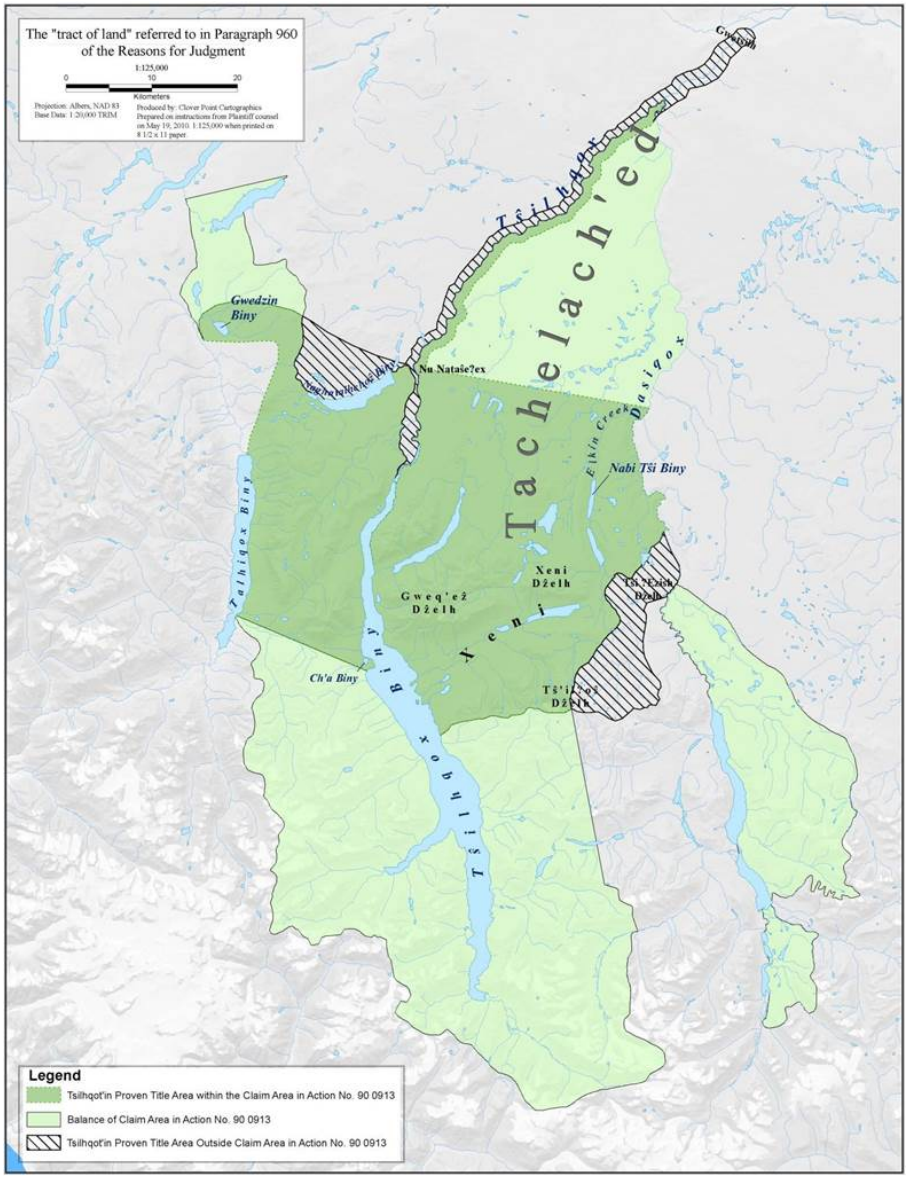
Tsilhqot'in Nation v. BC

- Xeni Gwet'in formally commenced its action against BC in 1989, seeking recognition of Aboriginal title in order to oppose commercial logging in the area
- Xeni Gwet'in's claim covered ~5% of the Tsilhqot'in traditional territory as a whole
- At trial, a judge held that the Tsilhqot'in people had evidence supporting a claim of Aboriginal title over a little less than half of that area & Aboriginal rights to hunt & trap throughout the claim area, but refused to issue a declaration of Aboriginal title based on a technicality

Tsilhqot'in Title Claim Area (Source: CBC News)



Tsilhqot'in Territory/Engagement Areas
(Source: Tsilhqot'in Draft Mining Strategy)



Tsilhqot'in Title vs. Tsilhqot'in Rights (Source: APTN News)

Light green = claim area as a whole
Dark green = proven title within claim area
Cross-hatched = evidence supporting title outside claim area

What is Aboriginal title?

- The Supreme Court of Canada's conception of Aboriginal title provides the Tsilhqot'in with:
  - Ownership-like rights to possess, enjoy & occupy their Aboriginal title lands
  - The right to decide how their title land will be used
  - The (sole) right to utilize the economic benefits of the land &
  - The right to pro-actively use & manage the land
- The Supreme Court of Canada's conception of Aboriginal title can also be territorial in scope, rather than limited to "intensively occupied areas" such as village sites, buffalo jumps, etc.

What is Aboriginal title?

- The Supreme Court clarified that the test for Aboriginal title must be applied in a culturally sensitive manner
- Essentially, the rules for determining the metes & bounds of Aboriginal title need to be flexible to account for the circumstances of different Indigenous peoples; Aboriginal title is not a right restricted to Indigenous peoples with European-like property systems
- Courts will look to the historic size, way of life, material resources & technological abilities of the Indigenous people claiming title to decide whether title has been proven
- Courts will also look to the character of the lands claimed

Communal ownership requires self-government

- Aboriginal title is a collective right that belongs to the Tsilhqot'in people or collective as a whole, not to any one Tsilhqot'in band
- Cannot be governed like other jointly-held property with corporate or shareholder model
- You cannot buy into Aboriginal title land & the land belongs to present & future generations
- Decision making over the use & management of Aboriginal title must be made by the community
- Some argue that Aboriginal title has closer parallels to provincial Crown lands than a mere property right
- It implies a form of Indigenous (self-)government

Communal ownership requires self-government

- As the BC Supreme Court said in *Campbell v. BC* (2000):

> "On the face of it, it seems that a right to Aboriginal title, a communal right which includes occupation & use, must of necessity include the right of the communal ownership to make decisions about that occupation & use, matters commonly described as governmental functions. This seems essential when the ownership is communal."

Territorial title requires complex land governance & planning

- Tsilhqot'in people now incontrovertibly control a broad section of their traditional territory & own all the resources on & under that land
- They have the right to pro-actively use & manage many 100s of km of title land & resources
- They have the right to put their title land to more uses than just hunting & trapping & can put their title land to almost any use they see fit
- For the Tsilhqot'in people to decide on use of this land, whether for hunting & trapping or mining & logging, will require complex land use planning

Meeting the needs of future generations

- One restriction on use of Aboriginal title: the Tsilhqot'in must preserve "the group nature of the interest & the enjoyment of the land by future generations"
- Considering & planning for the needs of future generations is the very essence of land use planning
- A need for today's land uses to be reconciled with the needs of future generations strongly implies a need for complex self-government & land use planning processes

Other governments must seek Tsilhqot'in consent

- One of the strongest statements from the Supreme Court of Canada in this decision was that once Aboriginal title is proven, provincial & federal governments must seek consent before pursuing development on Aboriginal title land
- While some infringements of Aboriginal title may be justified by the Crown, they must show that a public interest in infringement outweighs the Aboriginal interest & that the infringement is as minor as possible, among other requirements
- The presumption is that the Aboriginal title holders get to decide unless special circumstances warrant otherwise

The importance of Indigenous law to Aboriginal title

- The test for Aboriginal title involves looking to an Indigenous people's own laws, practices, customs & traditions (the "Aboriginal perspective")
- The Tsilhqot'in gave evidence of their traditional land use laws (*dechen ts'edilhtan*) in order to show that they held title in their own legal world
- The Supreme Court of Canada says that modern Aboriginal title "reflects all pre-sovereignty incidents of use & enjoyment that were part of the collective title enjoyed by [their] ancestors"
- So shouldn't traditional laws still apply?

The importance of Indigenous law to Aboriginal title

- Traditional Indigenous laws have been recognized by Canadian courts in other contexts
- For example, marriages & adoptions made under Indigenous laws have been recognized & found enforceable by Canadian courts so long as they weren't displaced by Canadian laws
- Why not Indigenous laws governing land use?
- Traditional Indigenous land use laws are part of the evidence used to prove Aboriginal title, so there is a fair argument that they remain relevant to its governance & planning

Aboriginal title is not absolute

- Provincial & federal governments can still infringe Tsilhqot'in title if they can justify infringement as consistent w/their fiduciary duty to Aboriginal peoples:
  - Has the infringement been mitigated as much as possible in order for the province to meet its goal?
  - Was fair compensation offered for the infringement?
  - Was there adequate consultation & accommodation?
- However, only the Tsilhqot'in people have a beneficial interest in Tsilhqot'in title
- The Crown has no right to profit from Tsilhqot'in lands so it is difficult to conceive of justified extraction for third party companies, for example

What has the Tsilhqot'in Nation done since?

- In July 2014, the Tsilhqot'in Nation released a draft law for the consideration of "culturally & ecologically conscious development of mineral resources in the Tsilhqot'in traditional territory"
- This Tsilhqot'in law communicates Tsilhqot'in values with respect to its *nen* (land), provides greater certainty for mining & exploration companies, & ensures meaningful Tsilhqot'in participation in mining & exploration
- The bilingual law sets out the Tsilhqot'in objectives, principles, values & worldview regarding mining

What has the Tsilhqot'in Nation done since?

- On March 19, 2015 the Tsilhqot'in Nation affirmed the Nemiah Declaration made by the Xeni Gwet'in in 1989 based on their "inherent jurisdiction & law-making authority"
- The Declaration bans all commercial logging, mining & exploration, commercial road building, flooding or dam construction or use of ATVs for any purpose other than trapping, but invites non-Aboriginals to come as tourists with permission
- All activities & development on Tsilhqot'in's title claim area must comply unless FPIC obtained

What have other BC First Nations done since?

- In November 2014, the Northern Secwepemc te Qelmucw, released their own mining policy NStQ's policy demands "free, prior & informed consent" (FPIC) to mining & sets out principles NStQ wishes to have govern mining projects
- NStQ details unique impacts they plan to consider when deciding whether to consent to any given project, such as "community & family cohesion" & "income disparity & wealth management"
- NStQ sets out expectations for IBAs & involvement throughout a mining project's life cycle

New cases of importance

- Jan 2015: Quebec Court of Appeal allows Innu First Nation to proceed with lawsuit against private companies for infringement of Aboriginal rights & title, as well as Treaty rights (*Iron Ore Co v Uashaunnuat*)
- April 2015: BC Court of Appeal allows 2 First Nations to proceed with lawsuit over private law harms to asserted Aboriginal rights & title (*Saik'uz First Nation v Rio Tinto*)
- June 2015: Alberta Court of QB allows First Nation to proceed with lawsuit over private law harms to Aboriginal rights (*Lubicon Nation v Penn West*)
- Oct 2015: Supreme Court of Canada denies leave to appeal from *Saik'uz* & *Uashaunnuat* decisions

New cases of importance

"…the law is clear that [Aboriginal rights & title] do exist prior to declaration or recognition. All that a court declaration or Crown acceptance does is to identify the exact nature & extent of the title or other rights."

Saik'uz First Nation v Rio Tinto Alcan Inc, 2015 BCCA 154 at para 61

What have other First Nations done since?

- In March 2016, the Yinka Dene ‘uza’hné (traditional leadership) from Stellat’en & Nadleh Whut’en First Nations enacted a water management regime for surface waters throughout their traditional territories
- They seek to set higher standards for surface water quality than what the Province currently requires & set out requirements for revenue sharing, benefits agreements or equity arrangements for projects that meet these higher standards
- They assert a need for their consent to any new projects declared in their traditional territories that might impact its rivers, lakes, streams or creeks

Why should any of this matter to Treaty First Nations?

- The Supreme Court's current conception of Aboriginal title may now reflect the common law view on the legal interest of Treaty First Nations before entering into Treaties with the Crown
- If Indigenous peoples legally owned large swaths of their traditional territories, as well as the resources on & beneath those territories, what was exchanged?
- Did they give up resource rights under Treaty lands?
- Did they extinguish Aboriginal title in reserve lands?
- Did they give up their rights to exercise Indigenous law over their traditional territory?

Grassy Narrows First Nation v. Ontario

Grassy Narrows v. Ontario

- Less than one month after releasing the *Tsilhqot'in* decision, the Supreme Court of Canada released its decision in *Grassy Narrows First Nation v Ontario*, confirming that Ontario has the constitutional authority to take up Treaty 3 lands without Canada's involvement
- A dispute over logging arose in 1997 when Ontario issued a license for clear-cutting on Treaty 3 lands
- In 2005, Grassy Narrows started legal action to challenge the license as a Treaty infringement
- Trial judge held that Ontario could not take up lands & infringe Treaty rights without involving Canada

Grassy Narrows v. Ontario

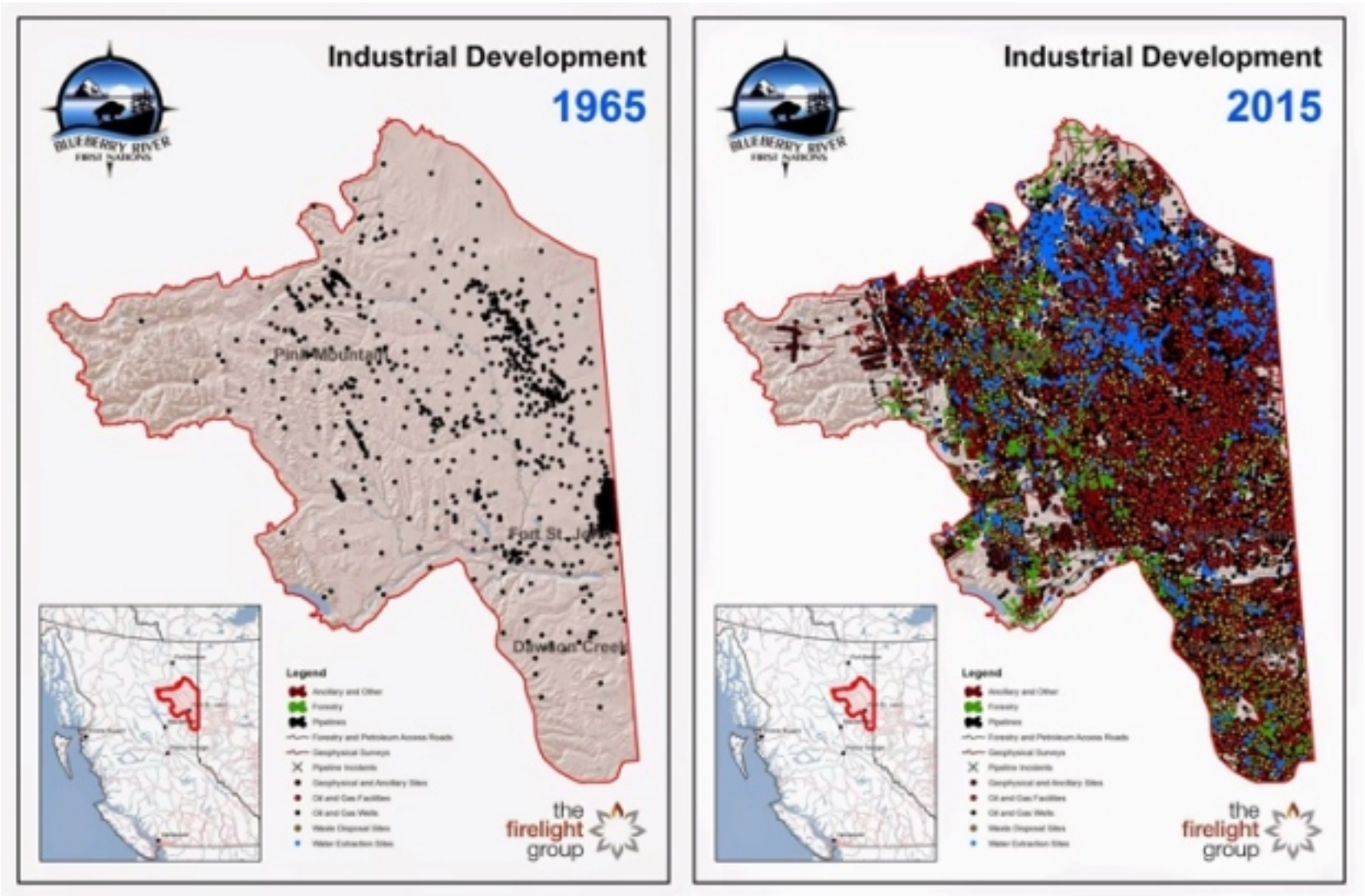
- Grassy Narrows signed Treaty 3 with Canada, not Ontario, so it argued that only Canada had powers & obligations under the Treaty & Ontario needed federal approval before taking up Treaty lands
- The Supreme Court of Canada disagreed
- However, the Court noted that Ontario must first consult with & (if appropriate) accommodate Treaty rights before taking up land under Treaty 3
- Ontario must: 1) inform itself of a project's impact on Treaty rights, 2) communicate those impacts & 3) deal w/Treaty rights-holder in good faith "with the intention of substantially addressing their concerns"

Grassy Narrows v. Ontario

- If the "taking up" of land infringes a Treaty right then the province must justify the infringement as consistent with its fiduciary duty to Aboriginal peoples:
  - Has the infringement been mitigated as much as possible in order for the province to meet its goal?
  - Was fair compensation offered for the infringement?
  - Was there adequate consultation & accommodation?
- An infringement arises if a "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 & trapped"

How much 'taking up' is too much?

- Two important cases to watch on this issue
- Beaver Lake Cree Nation is suing Alberta & Canada over the number of oil & gas projects approved within their traditional territory in Treaty 6 country
- Blueberry River First Nations is suing BC over impacts of oil & gas, lumber & hydro projects approved in their traditional territory in Treaty 8 country
- Relevant factors to consider for treaty infringement:
  - Inventory of remaining habitat, species (plant or animal)
  - Where is prime habitat for hunting? Berry picking?
  - How much traditional territory is already 'taken up'?
  - Any studies showing decline of habitat, species, etc.



Blueberry River First Nations Traditional Territory 1965 & 2015 (Source: CBC News)

Why does this matter to land use planning?

- The information necessary to sue for infringement of Treaty rights may also be necessary for consultations with the Province, which must inform itself of impacts
- Fair negotiations will not happen without leverage
- Treaty infringements require fair compensation, extensive mitigation & consultation to justify so it's important to link projects to potential infringement
- The Province's consultation must be directed at substantially addressing rights-holders' concerns
- Detailed land use planning informed by science, traditional knowledge & Indigenous laws clarifies & supports these concerns so they are taken seriously

Make your expectations known in advance

- Blueberry River was unable to go to court to stop the issuance of licences for old growth logging in their traditional territory
- The Court noted that a past band council knew about the proposed logging & expressed no concerns during consultations
- A new band council came to a different view, which they are entitled to, but the Court was concerned about fairness to the companies
- Robust land use planning means calling the tune that industry dances to rather than being reactive
- Show industry the path to less uncertainty

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Thank you!

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