

GETTING TO 'YES' FOR MAJOR ENERGY PROJECTS IN CANADA

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ENERGY LEADERS ROUNDTABLE
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ROADMAP

- 1. Partner with Indigenous communities**
- 2. Resolve constitutional issues**
- 3. Address policy issues outside of regulatory approval processes**
- 4. Relieve pressure on project-based EAs**
- 5. Develop new regulatory strategies**
- 6. Reform regulatory processes**

ISSUE #1: WHAT ARE THE CROWN'S DUTIES?

- **Where title still “unproven”**: there is a practical, rather than strictly legal, requirement to obtain consent

If development has proceeded “without consent prior to Aboriginal title being established, [the Crown] may be required to cancel the project upon establishment of the title if continuation of the project would be unjustifiably infringing” (*Tsilhqot'in*, 2014)

- **Where a title claim is strong**: Aboriginal interest must be preserved pending final resolution
- **Recognized title: Consent required or Crown required to justify infringement**:

“The right to control the land conferred by Aboriginal title 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 under s. 35 of the *Constitution Act, 1982*.” (*Tsilhqot'in*, 2014)

SOLUTION #1: PARTNER WITH INDIGENOUS COMMUNITIES

- **Key message for today: As Canada, BC and Alberta continue to move to implement UNDRIP, proponents will be required to make adjustments to how they approach obtaining and maintaining consent throughout the project lifecycle**
- **Early adopters will be rewarded with lasting, profitable partnerships and project and regulatory certainty**

SOLUTION #1: PARTNER WITH INDIGENOUS COMMUNITIES

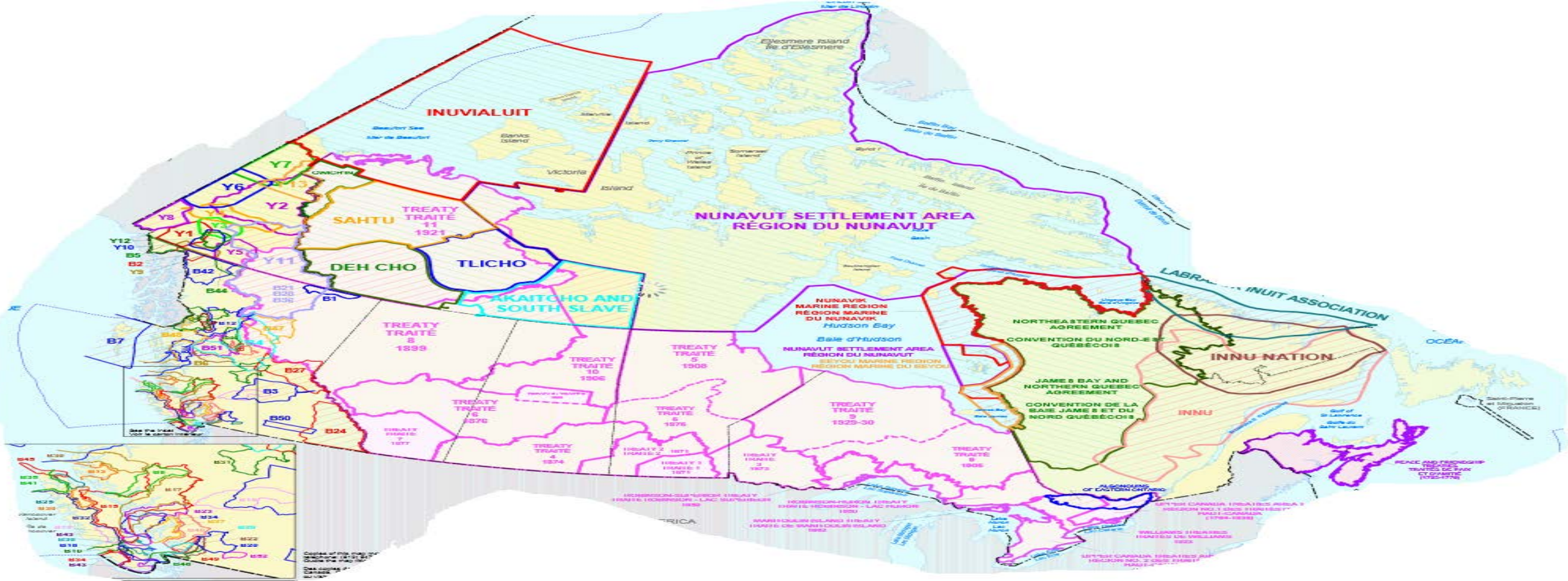
- **Create your own legal certainty by obtaining consent through agreements with Indigenous communities:**

I add this. 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. (*Tsilhqot'in*, 2014)
- **Examples of consent for major energy projects in BC**
- **Equity participation aligns Indigenous and non-Indigenous business interests, provides for smoother regulatory processes, eliminates risk, and provides competitive advantages**

SOLUTION #1: PARTNER WITH INDIGENOUS COMMUNITIES

	Proponent	Indigenous co-proponent
Project design	Can result in design problems leading to Indigenous opposition	Jointly designed based on Indigenous values, laws, etc
EA / Permitting	Used to create negotiation leverage (delays, uncertainty, legal challenges)	Facilitates obtaining EA approval and permits
Duty to consult	Difficulties obtaining consent	Facilitates obtaining consent
Negotiations with other govt's		Additional leverage based on G2G / N2N relationships
Financing	Questions about Indigenous consent	Assists in obtaining financing; Provides access to incentives, adders, loan guarantees, etc.
Competitive advantages		Tax exemptions, law-making and permitting authority

ISSUE #2: UNRESOLVED CONSTITUTIONAL ISSUES



LEGAL LANDSCAPE

- **Section 35(1) of the *Constitution Act, 1982* “recognizes and affirms” “existing” Aboriginal title and rights, and treaty rights**
- **The purpose of s. 35 is to reconcile the prior occupation of Canada by Aboriginal peoples with *de facto* Crown control**

Put simply, Canada’s Aboriginal peoples were here when Europeans came, and were never conquered. Many bands reconciled their claims with the sovereignty of the Crown through negotiated treaties. Others, notably in British Columbia, have yet to do so. (*Haida Nation*, 2004)

Emphasis on settling claims justly, out of court has been emphasized: “we are all here to stay” (*Delgamuukw*, 1997)

SOLUTION #2: COMPREHENSIVE RECONCILIATION AGREEMENTS

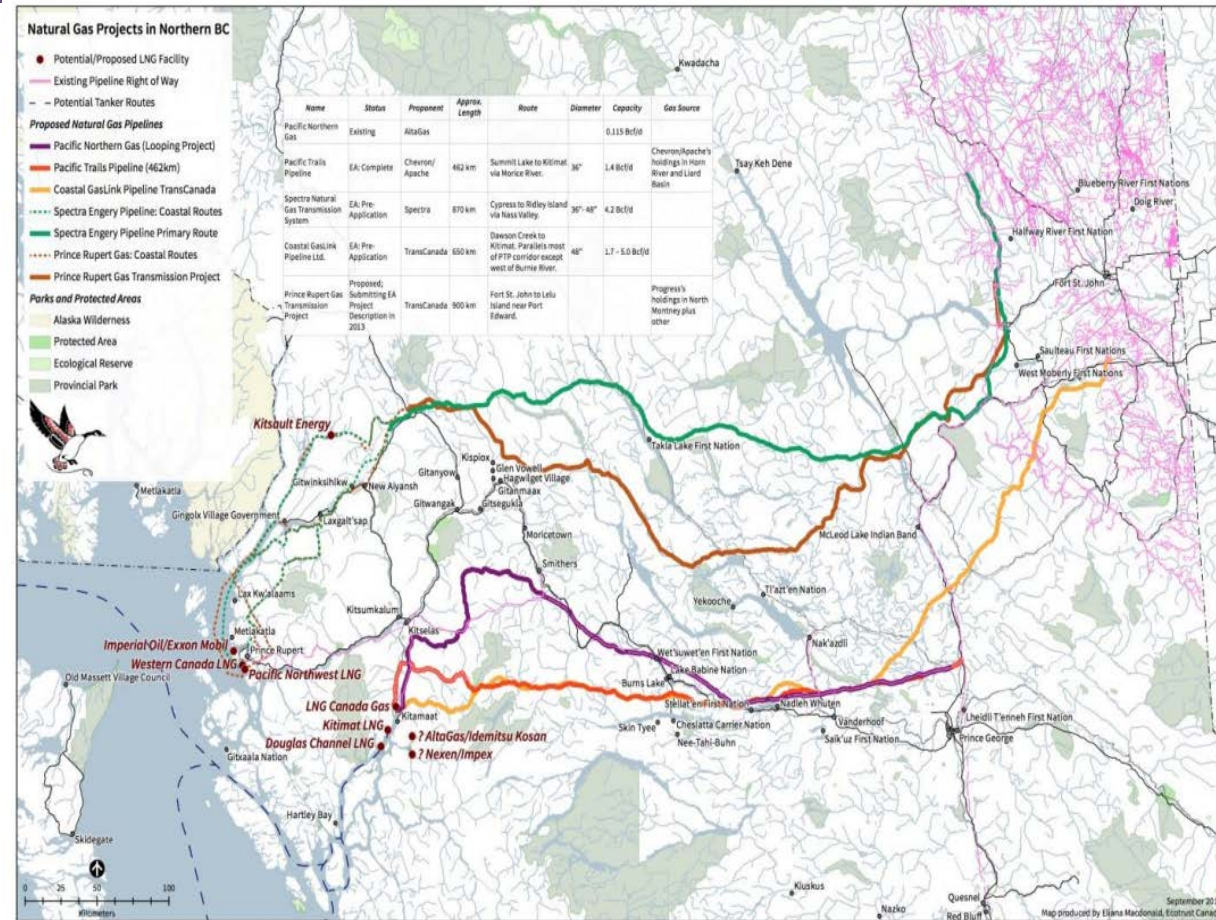
- **Aboriginal title confers ownership rights similar to those associated with ownership in fee simple**
- **Governance components of Aboriginal title and stewardship rights = decision- and law-making jurisdiction and authority**
- **Clear agreements between Canada, BC, and Indigenous governments about how they will share jurisdiction are required:**
 1. How decisions will be made and whose laws will apply
 2. How resources will be shared
 3. How resources will be managed
 4. How disputes will be resolved

SOLUTION #3: ADDRESS POLICY ISSUES OUTSIDE OF REGULATORY PROCESSES

- **Develop a Canadian Energy Strategy**
 - There is an urgent need for national discourse on the future of energy in Canada
 - Discourse should focus on achieving consensus on national energy priorities, how to balance resource development with climate change commitments and ecological stewardship, and the safest and most environmentally sound way to get resources to market
 - Energy-related infrastructure should be strategically planned and optimized to minimize costs and impacts
 - We require a national forum that is capable of promoting a solutions-based approach, independent of regulatory processes

SOLUTION #4: RELIEVE PRESSURE ON PROJECT-BASED ENVIRONMENTAL ASSESSMENTS

- Clarify the purpose of EA as a decision-making tool
- Screen out highly controversial projects from the onset of EAs (EA Readiness Decision under new BC EAA)
- Use land use planning, strategic EAs, and project-specific EAs to streamline approval processes for linear energy transportation corridors



SOLUTION #4: RELIEVE PRESSURE ON PROJECT-BASED ENVIRONMENTAL ASSESSMENTS

- **Environmental Stewardship Initiative jointly developed by BC and FNs in response to issues of concern that FNs raised during LNG EA processes**
- **ESI provides an alternative forum for addressing FN concerns that were previously being raised in project-based EAs**
- **BC and FNs jointly developing and implementing:**
 1. ecosystem assessment, monitoring, and management
 2. ecosystem restoration and enhancement
 3. ecosystem research and knowledge exchange
 4. stewardship education and training

SOLUTION #5: DEVELOP NEW REGULATORY STRATEGIES



SOLUTION #6: REFORM REGULATORY PROCESSES

- **Current regulatory framework prevents issues from being addressed early**
- **Clear rules on project scoping issue required**
- **Crown can rely on regulatory bodies to attempt to fulfil the duty; myriad regulatory bodies with unique statutory schemes = uncertainty on their capacity to do so**
- **New legislation should fully define the process by which the Crown will attempt to discharge its duties to Indigenous peoples**


QUESTIONS?



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