LIDSTONE & COMPANY
BARRISTERS AND SOLICITORS

**MEMORANDUM**

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| **TO:** | Clients |
| **FROM:** | Don Lidstone |
| **DATE:** | February 10, 2016 |
| **RE:** | Kwikwetlem Claim – Aboriginal Title |
| **FILE:** | 99999 - 000 |

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**Kwikwetlem First Nation claims aboriginal title over developed urban land**

Today, the Kwikwetlem First Nation (KFN) filed and served an aboriginal title and rights claim with the BC Supreme Court over an area of developed urban land along the Coquitlam River. Included in the claim is a major city park containing a number of soccer fields, baseball diamonds, field houses and other City of Port Coquitlam improvements. Also included in the claim is other City land, a regional district park, provincial crown corporation property and some provincial crown land. This is the first time a First Nation has gone to court to claim aboriginal title over developed municipal real property.

KFN is a small First Nation of less than 100 members, claiming a traditional territory based around the watershed of the Coquitlam River. KFN says the court case will help to ensure it is meaningfully involved in decisions made about its lands, a process highlighted by the Supreme Court of Canada, which called for a consent-based decision model in ***Tsilhqot'in Nation v British Columbia***.

***Tsilhqot'in*** in 2014 confirmed the previous case law about the existence and nature of aboriginal title. It was an important decision because it was the first time the Supreme Court of Canada found aboriginal title to exist in a specific parcel of land, following the principles set out in ***Delgamuukw v British Columbia*** (1997). ***Tsilhqot'in*** has important implications for any First Nations that have similar evidence of occupation but have not yet been able to prove aboriginal title.

In ***Tsilhqot'in,*** the Supreme Court of Canada made some important comments that clarify the nature of aboriginal title. These comments would be important for any future grants of aboriginal title. Aboriginal title is a special kind of property right that is unlike any other kind of ownership at common law. Aboriginal title gives the First Nation that holds it a beneficial interest in the land and means that the fiduciary duty the Crown owes to aboriginal people under s. 35 of the Constitution applies to their aboriginal title of that land. The Court confirmed that where a First Nation has aboriginal title they have the exclusive right to decide how land is used and the exclusive right to benefit from the uses of the land. This is subject to the restriction that the uses must be consistent with the communal nature of aboriginal title and the enjoyment of the land by

future generations. If consent is not given by a First Nation with aboriginal title, the Crown can only infringe on the aboriginal title if it can show that it has discharged its duty to consult and accommodate, that its actions were backed by a compelling and substantial objective, and that the governmental action is consistent with the Crown's fiduciary duty. The Court affirmed that the development of agriculture, forestry, mining, or the economy of the interior are among some of the compelling and substantial objectives that can justify an infringement on aboriginal title.

Another important aspect of the ***Tsilhqot'in*** case is the Court's position on the government's duty toward aboriginal groups that are in the process of claiming aboriginal title. The Court affirmed its 2004 decision from ***Haida Nation v British Columbia (Minister of Forests)***(2004) where it found that that the Crown has a duty to consult and accommodate First Nations even when there is a land claim that is underway but where aboriginal title has not yet been found. This duty to consult and accommodate is proportional to a preliminary assessment of the strength of the case supporting the existence of title and to the seriousness of the potentially adverse effect upon the right or title claimed.