INDIGENOUS LAND RIGHTS IN AUSTRALIA: LESSONS FOR A CANADIAN NORTHERN CORRIDOR

Sharon Mascher

KEY MESSAGES

- The Canadian Northern Corridor (CNC) research project is currently exploring the concept of creating a pan-Canadian infrastructure corridor consisting of a multi-modal (road, rail, pipeline, electrical transmission and communication) transportation right-of-way traversing Canada's north and near north. If the CNC is to be a forward-looking, nation-building project, it must be conceptualized in a manner that ensures respect for the rights and interests of Indigenous communities along the corridor.

- Given its shared British colonial history with Canada, Australia's experience may offer some relevant lessons for the CNC conceptualization. Several important foundational differences between the settler legal systems of these countries inform the development of the law and the transferability of lessons. Most notably, Australia also has no constitutional equivalent to s 35 of Canada's *Constitution Act*, 1982. Rather, it is the Commonwealth's *Racial Discrimination Act* 1975 (Cth) (RDA 1975 (Cth)), passed to give domestic effect to the International Convention on the Elimination of All Forms of Racial Discrimination, that affords Indigenous land-rights protection as a human right entitled to equality before the law.

- The RDA 1975 (Cth) protects Indigenous land rights from being singled out and treated differently from other types of property interests. This means that from October 31, 1975, when the RDA 1976 (Cth) took effect, legislative and executive acts that arbitrarily deprive native title holders of their property while leaving the property rights of others unimpaired are invalid.

- The *Aboriginal Land Rights (Northern Territory) Act* 1976 (Cth) (ALRA 1976 (Cth)), which applies in the Northern Territory, established a legislative mechanism for "traditional Aboriginal owners" to claim "traditional Aboriginal title" over unalienated Crown land. Once recognized, Aboriginal land cannot be alienated, resumed, compulsorily acquired or forfeited under any law and, except for mining, any dealings require the consent of the traditional Aboriginal owners. Any linear infrastructure corridor crossing Aboriginal land in the Northern Territories require consent to proceed.

- The *Native Title Act* 1993 (Cth) (NTA 1993 (Cth)), passed following the *Mabo v Queensland (No 2)* decision, establishes a statutory mechanism for determining (or recognizing) native title claims, provides for the validation of past acts and intermediate period acts that otherwise contravene the RDA 1976 (Cth), and legislates a mechanism to validate future dealings affecting native title.

- The "future acts" process in the NTA 1993 (Cth) allows for the validation of various categories of future acts, codifying the procedural rights prescribed for each category. The categories of potential relevance to the building of linear infrastructure contemplate procedural rights that range from procedural rights available to "ordinary title" (freehold) holders, to an objection process, to a legislated right to negotiate.

- The NTA 1993 (Cth) provides for the voluntary negotiation of an Indigenous Land Use Agreement (ILUA) between native title parties, government parties and "others" as an alternative to validation in accordance with the complex future acts process. Any future act done in accordance with a registered ILUA is valid, with the ILUA binding all persons holding native title in relation to the area covered.

- ILUAs are now commonly negotiated to allow for the doing of future acts, on agreed terms. These agreements do, in some ways, resemble Impact and Benefit Agreements (IBAs), although the scope is potentially very broad, and relevant governments may also be parties.

- While not equivalent to the standard of consent adopted in the ALRA 1976 (Cth), the focus on agreement-making, allowing Indigenous communities to influence the outcome of decision-making processes affecting them, rather than merely being involved, is an important change in the Australian system.

Australia's legislative response to Indigenous land rights is not transferable to Canada. However, the renewed focus on agreement-making is a high-level lesson that is transferable. As a nation-building exercise, the CNC concept should be built on a presumption that it will proceed in a manner that recognizes the importance of agreement with Indigenous communities whose rights and interests may be affected along the corridor.