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

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SUMMARY

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. With a goal of connecting Canada from north to south and coast to coast to coast, the CNC, and particularly any infrastructure built within it, would necessarily directly and indirectly affect a significant number of Indigenous communities and a diverse range of constitutionally protected rights and interests. As Canada commits to implementing the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), the CNC must be conceptualized in a manner that ensures respect for the rights and interests of Indigenous communities along the corridor if it is to be a forward-looking, nation-building project.

Canada is not the only country whose settler legal system has grappled with issues relating to recognition and protection of Indigenous land rights and large-scale infrastructure development. Australia has significant experience with the linear infrastructure development and infrastructure corridors affecting Indigenous land rights and interests, though not of the geographic scale conceptualized by the CNC. The goal of this article, therefore, is to examine the Australian settler legal system relating to Indigenous land rights in the context of this type of development, with a view to drawing relevant lessons from the Australian model to inform development of the CNC concept.

Australia and Canada's shared British colonial history means their settler legal systems share similarities. However, several foundational differences affect the manner in which the legal framework relating to Indigenous land rights has developed and informs the transferability of lessons. Australia has no equivalent to the *Royal Proclamation* 1763, which underpinned the settlement of North America and led to the negotiation of historical treaties. In Australia, it was instead assumed that the Crown acquired title on the assertion of sovereignty. Colonial governments and, thereafter, state governments granted land to settlers and reserved land for public purposes without regard to the rights of Indigenous peoples. Australia also has no constitutional equivalent to s 91(24) of the Canadian *Constitution Act* 1867. Subject to legislative protection, Indigenous land rights can be dealt with, expropriated or extinguished by both the Commonwealth and state/territorial governments. 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.

In 1971 the Federal Court of Australia held in the *Milirrpum v Nabalco Pty Ltd* case that the doctrine of communal native title did not form a part of the law of Australia. The Commonwealth government responded by establishing an Aboriginal Land Rights Commission to inquire into appropriate means to recognise and establish the traditional rights and interests of Aborigines to and in relation to lands in the Northern Territory. Based on the Commission's recommendations, the *Aboriginal Land Rights (Northern Territory) Act* 1976 (Cth) (ALRA 1976 (Cth)) was passed. This Act provided for the transfer of Aboriginal reserves in the Northern Territory into a form of inalienable freehold title. It also established a legislative mechanism for "traditional Aboriginal owners" to claim title over unalienated Crown land based on their spiritual affiliation to the land and entitlement by traditions, observances, customs and beliefs (i.e., Indigenous laws) to forage as of right over the land. Traditional Aboriginal land can be claimed by application to an Aboriginal Land Commissioner (a judge of the Supreme Court of the Northern Territory) or by Parliament exercising its power to recognize the land as Aboriginal land. Aboriginal land is held in fee simple by a land trust, subject to reservations of mines and minerals, and cannot be alienated, resumed, compulsorily acquired or forfeited under any law of the Northern Territory. Currently approximately 50 per cent of land in the Northern Territory is held by land trusts. Any dealings with land held by land trusts, including dealings for a public purpose, requires the consent of the traditional Aboriginal owners on agreed reasonable terms and conditions. Absent consent, the proposed use cannot proceed. The only exception to this relates to mining (minerals, petroleum and geothermal). Under the ALRA 1976 (Cth), exploration licences may be granted to a third party with either the consent of the traditional Aboriginal owners or a proclamation by the governor-general declaring that "the national interest requires that the licence be granted." However, a proclamation may only be made after a prescribed negotiation period to allow for agreement to be reached on terms and conditions to which the grant of the licence will be subject. Despite the existence of this ability to use a proclamation to override lack of consent, the importance of proceeding with consent is exemplified by the fact that this provision has never been used.

Several states have now also passed land rights legislation, although generally this legislation allows only for the transfer of land held in reserves to traditional Aboriginal owners.

It was not until 1992 that the High Court of Australia in *Mabo (No 2)* affirmed that "native title" is recognized by the common law in Australia. Its earlier *Mabo v Queensland (Mabo (No 1)* decision also confirmed that the RDA 1975 (Cth) protects native title 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, irrespective of a "clear and plain" intention to extinguish native title, legislative and executive acts that arbitrarily deprive native title holders of their property while leaving the property rights of others unimpaired were invalid. Prior to this date, however, the High Court of Australia recognized that the "parcel by parcel" extinguishment of native title had occurred from 1788 to October 31, 1975, meaning that native title no longer exists over large portions of settled area across the country.

Australia responded to the *Mabo (No 2)* decision by passing the *Native Title Act* 1993 (Cth) (NTA 1993 (Cth)). The objects of the NTA 1993 (Cth) acknowledge the need to recognize and protect native title, but also affirm that certainty is required for other members of the Australian community affected by a native title determination. The resulting need is to "balance a range of considerations, while promoting an effective and efficient system."

The legislation is very complex, with a very extensive body of case law developed around it. However, in very broad overview, the NTA (Cth) 1993 does three things: establishes a mechanism for determining (or recognizing) native title claims, provides for the validation of past acts and intermediate period acts that would otherwise be invalidated because of the existence of native title, and provides a mechanism to validate future dealings affecting native title.

The statutory definition of native title has led the courts to adopt a "strict tradition-focused approach to content," demanding continuity of laws and customs from prior to the assertion of sovereignty through to the present. This very strict approach has resulted in a much more onerous burden of proof than in Canada, and, once proven, Australian native title rights do not necessarily include the right to exclusive use and possession but may instead amount to a "disaggregation" of rights and interests based on proven traditional laws and customs. In the last decade or so, however, shifting approaches to evidentiary requirements to prove exclusive possession, use and enjoyment have led to the majority of litigated and consent determinations providing for at least some rights of exclusive possession to land.

The NTA 193 (Cth) establishes a legislative procedure for the registration and determination of native title claims. A "registration test" determines whether a claim has a reasonable prospect of success. Once registered, native title claimants are accorded procedural rights under the legislation. Following registration, parties interested in the area claimed participate in mediation with a view to agreeing on whether native title exists and, if so, who holds the title, what the nature and extent of the native title right and interests are, and how those rights and interests interact with other rights and interests in the claim area. If agreement is reached, the parties can apply to the Federal Court for a consent determination of native title. If no agreement is reached, the application is determined by the Federal Court at trial. The overwhelming majority of native title determinations in Australia now occur by consent, although depending on the complexity of the claim this may still take several years. After a claim is determined, native title is communally held by the native title group, which nominates a Registered Native Title Body Corporate to manage the rights and represent the group in relation to them.

In the name of "certainty," the NTA 1993 (Cth) provides for the statutory validation of a range of "past acts" and "intermediate period acts" that would otherwise be invalid because of the RDA 1975 (Cth). It is, however, the "future acts" process in the NTA 1993 (Cth) that determines whether an otherwise valid future act that affects native title rights and interests may proceed. Originally, the NTA 1993 (Cth) reflected the principle that future acts may be validly done only if they could also be done to "ordinary title" (meaning freehold land), and, whenever appropriate, every reasonable effort has been made to

secure the agreement of the native title holders or registered native title claimants (native title parties) through a special right to negotiate. However, the Act now allows for the validation of various categories of future acts, codifying the procedural rights prescribed for each category. Three categories are potentially relevant to linear infrastructure corridors and/or linear infrastructure.

The first category (Subdivision K of the Act) relates to facilities (defined to include roads, railways, gas pipelines, electricity transmission and distribution facilities) "operated for the general public." Provided native title parties are not prevented from having reasonable access to the land on which the facility is built, and provisions are in place to preserve and protect areas or sites of traditional significance to Indigenous peoples, Subdivision K gives native title parties have the same procedural rights they would have if they instead held ordinary title. The extent of the procedural rights is dependent on those available in the relevant jurisdiction to ordinary title holders. The second category (Subdivision M of the Act) applies when native title rights and interests are compulsorily acquired. If these rights and interests are acquired for the benefit of government, native title parties are again accorded the same procedural rights as ordinary title holders. However, if the compulsory acquisition is for the purpose of conferring rights on persons other than government, a two-month objection period applies to the compulsory acquisition. If a party objects, the government must consult with the objectors on ways to minimize the impact on native title rights and interests or the way anything authorized by the Act might be done. If the objection is not withdrawn within eight months, then it must be referred to an independent person or body to determine whether to allow the act to be done on specified conditions. This determination must then be complied with "unless" the relevant minister considers it is not "in the interests" of the relevant jurisdiction, which interests includes social and economic benefits. Subdivision M treats a "right to mine" granted for the purposes of constructing mining infrastructure in the same way, although it is unlikely that a major linear pipeline, for example, would be treated as infrastructure associated with a "right to mine." The final category of future act applies to the creation of a right to mine, which is not specific to infrastructure. The strongest procedural right available in the future act regime applies to this type of future act, although it is unlikely to be applicable to any of the linear infrastructure within a dedicated corridor.

As an alternative to the complex future acts process, the NTA 1993 (Cth) also allows for the validation of any future act through negotiated Indigenous Land Use Agreements (ILUAs). Any future act done in accordance with an ILUA is valid. An ILUA may be negotiated between native title parties, government parties and "others" to allow for, and condition, the doing of one or more future acts. Who may, and must, be a party to the agreement, and what type of matters may be covered, depends on the type of ILUA, but each is potentially very broad in scope. While registered, an ILUA takes effect as if it were a contract among the parties to the agreement, and it is binding on all persons holding native title in relation to the area covered. ILUAs are now commonly negotiated rather than resort to the future acts process when native title rights and interests will be affected by the doing of a future act.

The complex legislated approach adopted in Australia is not transferable to the Canadian experience. However, if there is a lesson to be taken, it is that as the system in Australia has matured, there is now a renewed focus on settlement by agreement. While the ALRA 1976 (Cth) adopts a standard of consent, the NTA 1993 (Cth) cannot be said to do the same. However, the use of negotiated agreements, in the form of ILUAs, does offer a "pathway to consent" that allows Indigenous communities to determine the terms and conditions upon which a future act may proceed. This appears to take a step closer to allowing Indigenous communities to influence the outcome of decision-making processes affecting them, rather than merely being involved or having their views heard, in keeping with the principle of free prior informed consent in the UNDRIP. There is, of course, significant reason to challenge the presumption that ILUAs are, indeed, "the holy grail of agreement-making," with the availability of the future acts validation process consequentially impacting the freedom with which native title holders enter agreements. However, there is reason to explore best practice agreement-making, drawing on the Australia experience and recognizing the significant role Impact and Benefit Agreements (IBAs) already play in the Canadian context, to consider whether a framework agreement with affected Indigenous communities might provide a way forward.