

INDIGENOUS LAND OWNERSHIP AND TITLE IN CANADA: IMPLICATIONS FOR A NORTHERN CORRIDOR

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KEY MESSAGES

- The goal of this research paper is to outline the law of Indigenous peoples' land ownership rights, including proven and asserted title, Crown-Indigenous treaty relations and treaty obligations and Indigenous land claims agreements, and to consider the implications for a large-scale infrastructure project such as the Northern Corridor.
- The best case for successful infrastructure development that incorporates Indigenous rights is full consent and participation by all relevant Indigenous peoples. For complex projects like the Northern Corridor, achieving this may be practically challenging.
- Each type of land right raises distinctive claims and implications relevant to the development of large-scale infrastructure.
- The nature of the implications can evolve. For example, once an asserted claim to Aboriginal title is legally recognized, consent, rather than merely consultation, is ordinarily required for activity on the land. Without consent, a project must pass a demanding constitutional justification test.
- Despite the need to be attentive to differences in the forms of relevant Indigenous land rights, there are some common implications.
- Successful development of large-scale infrastructure requires good faith engagement and partnered development with affected Indigenous peoples, by both project proponents and the Crown. This includes legal obligations for adequate consultation by the Crown and a range of other requirements if a project justifiably infringes Indigenous land rights.
- There is some legal uncertainty around government's ability to support a project like the Northern Corridor by justifiably infringing Indigenous land rights in the absence of consent. The test for justified infringement has shifted in the Supreme Court's most recent case on Aboriginal title, and it is unclear that the same framework applies to historic or modern treaties.
- The law of Indigenous rights is dynamic, and a project like the Northern Corridor would almost certainly see legal changes over the project's life cycle.

- A significant source of future change may be the *United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIP). Through domestic legislation and judicial interpretation of s. 35 rights, the UNDRIP has the potential to advance Indigenous rights of self-determination and control over their lands.
- The legal content ultimately associated with the UNDRIP requirement for “free, prior and informed consent” (FPIC) by Indigenous peoples under Canadian law will significantly impact projects like the Northern Corridor.
- The resurgence of Indigenous governance and law is an evolutionary dimension of Indigenous rights that will impact projects like the Northern Corridor into the future. Understanding the implications will require further study as these developments unfold.