

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

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## EXECUTIVE SUMMARY

The proposal to create a Northern Corridor that would allow for cross-country, multi-modal infrastructure development is an ambitious vision (Sulzenko and Fellows 2016; Standing Senate Committee 2017). This proposed infrastructure corridor would incorporate multiple uses, from pipelines to railways, roads, telecommunications, electricity infrastructure and more. Its geographic scale stretches continuously from coastal B.C. across Canada to the Atlantic coast, with spurs running northward to the Arctic Ocean through the Northwest Territories, Nunavut and via Manitoba to Hudson's Bay. A critical foundation for its successful development will be the ability to appreciate and incorporate the rights of Indigenous peoples affected by the project (Wright 2020; Newman 2022).

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 obligations and Indigenous land claims agreements, and to consider the implications for a large-scale infrastructure project like the Northern Corridor.<sup>1</sup> The focus is on the legal and regulatory aspects of Indigenous peoples' land rights within the non-Indigenous Canadian legal system.<sup>2</sup> The research paper uses standard legal methods to assess the land ownership rights of Indigenous peoples, drawing on relevant constitutional and statutory provisions, leading cases and secondary literature. The paper proceeds with a brief overview of these distinct types of Indigenous land rights, then provides a more detailed account of the legal content of s. 35 constitutional Aboriginal title, historic and modern treaty rights. This includes discussion of government's legal duty of consultation and accommodation, and the requirements for constitutionally justified limitation of these rights. Indigenous land ownership rights in reserve lands are also discussed. A series of case studies more fully illustrates the implications of these varied Indigenous land rights for a project like the Northern Corridor. Finally, the paper turns to the dynamic nature of Indigenous rights and the potential influence of the UNDRIP.

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<sup>1</sup> In this research paper, I will generally use the increasingly preferred term 'Indigenous,' rather than 'Aboriginal.' Use of the term 'Indigenous peoples' includes the "Indian, Inuit and Métis" peoples included in the definition of "Aboriginal peoples" under s. 35 of the *Constitution Act 1982*. When directly discussing rights and legal decisions related to s. 35, I will use the term 'Aboriginal' as the corresponding legal term. Similarly, in discussion of rights under the *Indian Act* I will use the term 'Indian' where it is used as a legal descriptor under the statute.

<sup>2</sup> The non-Indigenous Canadian legal system is sometimes referred to as 'settler law' in contrast with Indigenous law (laws that originate within Indigenous legal systems), see e.g. Borrows (2002) for discussion of Indigenous law within the Canadian legal system.

The implications of Indigenous peoples' land rights for the proposed Northern Corridor are extensive. While many of the legal obligations fall on the Crown, as represented by provincial, territorial and federal governments, industry proponents must also play a role. Project proponents engage directly with Indigenous land-rights holders and are crucial to the exchange of information, mitigation of project impacts and creation of benefits for Indigenous communities. Successful development of the Northern Corridor infrastructure project requires a partnered approach with affected Indigenous rights-holding communities.

Portions of the proposed corridor traverse the traditional territories of Indigenous peoples over which Aboriginal title is claimed. Where Indigenous claimants demonstrate sufficient, exclusive use and occupation of the land prior to Crown claims of sovereignty, title will be established. The legal test for recognizing title is one that reflects both the common law and Aboriginal perspectives, and is sensitive to context. The geographic scope for successful Aboriginal title claims that overlap with the Northern Corridor is significant.

Where Indigenous peoples hold title to the land, they are collectively entitled to exclusively enjoy the benefits of that land, and to decide on its uses. Governments or third parties seeking access to the land require consent from the title holders. In the period before title is established, governments authorizing projects like the Northern Corridor, that could negatively impact Aboriginal title, must consult with Indigenous peoples and, when appropriate, accommodate their interests. This is required to maintain the Honour of the Crown. While the legal duty falls on government, project proponents working directly with Indigenous peoples are an important part of the consultation and accommodation process.

Governments do retain a legal ability to justifiably limit Aboriginal title. They can pursue projects in the public interest that are consistent with s. 35's reconciliation purpose, if they meet the requirements of their unique obligations to and relationship with Aboriginal people (the fiduciary duty and Honour of the Crown). This means satisfying the procedural duty to consult and accommodate Aboriginal title holders, pursuing only limits on title that do not damage their long-term relationship with the land, as well as meeting a recently outlined requirement for proportionality. Proportionality means that limits on Aboriginal title must be necessary to achieve the public purpose and must be as minimal as possible, and that the overall public benefit must not be outweighed by negative impacts on title holders. Projects that go forward with participation and consent of Indigenous title holders will meet these requirements.

There is also potential for the Northern Corridor to cross reserve lands. Where these remain subject to the *Indian Act*, one of the relevant statutory mechanisms for access must be used. These require consent from the band and federal government. For bands that have transitioned to management of their reserves under the First National Land Management Act (FNLMA), only consent of the band as set out in its Land Code is required.

The Northern Corridor also crosses lands over which Indigenous people hold land rights under the historic "Numbered Treaties." While the treaties appear to include formal surrenders of Aboriginal title (an interpretation that is contested), continued rights of use over traditional territories are critical elements of these constitutionally binding agreements. Although governments can "take up" surrendered lands for development, this right is subject to a duty to consult Indigenous parties and accommodate impacts on their treaty rights. Governments can justifiably infringe historic treaty rights. This can be

done when a permissible objective is pursued in a way that meets government's fiduciary duty and upholds the Honour of the Crown. The specific requirements can vary, but generally the test is more restrictive when non-commercial treaty rights are at stake and requires some form of priority to be given to these Aboriginal rights. The requirement for justification is triggered when treaty rights are infringed — when a group is deprived of a meaningful ability to exercise its treaty rights within its traditional territory. Recent developments suggest this threshold should be assessed looking to cumulative impacts and that a process for monitoring and addressing these is part of justified limits on these historic treaty rights.

Finally, the Northern Corridor also intersects with lands covered by modern treaties. These agreements provide detailed guidance about the specific rights Indigenous parties enjoy, processes for consultation and co-management of the treaty lands as well as interactions between jurisdictional decisions under the treaty and by other levels of government. Courts have outlined a distinctive approach to the modern treaties that recognize their sophistication and the efforts to negotiate these modern governance frameworks to advance reconciliation. Courts would pay close attention to the relevant treaty terms and processes in any dispute over development of the Northern Corridor. Relatively minimal supervision of the modern treaty relationships should be expected from the courts, although the Honour of the Crown and the obligations it places on governments still apply. It is unclear whether justified infringements of modern treaty rights are possible, and whether a stricter constitutional standard would be required.

Case studies of recent infrastructure and resource development projects show that while much of the law is clear, outstanding issues remain, and the practical application of the law can be challenging. The sufficiency of consultation can be in doubt on complex projects involving multiple Indigenous communities. Basic issues such as who to consult can emerge when there is overlap between traditional and *Indian Act* governance structures and both reserves and other land rights are involved. The applicability of Indigenous laws to traditional territories under claims of Aboriginal title and interactions between Indigenous law and jurisdiction and non-Indigenous law and government authority can also be unclear. Many modern projects proceed with the consent and participation of Indigenous peoples, for example, through benefit agreements. These agreements, because of their link to the underlying Aboriginal rights, can engage the Honour of the Crown and the duty to consult if subsequent developments negatively affect benefits under the agreements.

In practice, meeting the legal obligations triggered by Indigenous land rights requires direct, good faith engagement with affected Indigenous communities. The best-case scenario is partnered development that proceeds with the consent of Indigenous rights holders. Current case law suggests that projects like the Northern Corridor might go ahead without full consensus, since there is no "veto" implicit in s. 35(1) Aboriginal rights. However, legal requirements for justified infringements, if possible, still require adequate consultation and accommodation of the rights of Indigenous peoples, and support only necessary, minimal limits on their rights. Overall benefits must outweigh negative impacts on Indigenous communities, and their ability to benefit directly from projects or be compensated for harms is generally part of justifying limits on their rights. On the ground, project proponents will be deeply involved in the relationship-building and engagement that is needed to support consensual development, or will meet the high bar for

constitutional justification. Determining whether governments' legal obligations ultimately have been met is done at a detailed, fact-specific level — not in the abstract. There are no leading cases that support constitutional justification of hypothetical, indeterminate public uses such as the proposed Northern Corridor.

The law of Indigenous rights is constantly evolving. Over the lifespan of a project like the Northern Corridor, change would be certain. Canadian approval of the UNDRIP and recent federal and provincial legislation committing to bring Canadian law into compliance are important signals of future development. The UNDRIP embraces a model of Indigenous rights grounded in self-determination and its standard of “free, prior, informed consent” appears to reflect the ability of Indigenous peoples to make their own decisions about projects that impact their rights. The legal implications of the UNDRIP for s. 35 and Indigenous land rights in Canada remain to be seen. As with modern treaties and the FNLMA, it represents a resurgence in Indigenous peoples' rights to play a direct role in governing their traditional lands and bringing their own laws to bear on developments that impact their lands and rights. Co-management and shared governance frameworks that integrate Indigenous rights holders will likely be key to successful future project development. For a proposal like the Northern Corridor, further study is required to fully appreciate the implications of these nascent developments and consider how they should be reflected in the project proposal.