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

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# FOREWORD

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

Cherie Metcalf

## 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.

## 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.

## I. INTRODUCTION

The proposed Northern Corridor is a complex and ambitious project. As envisioned, it would span thousands of kilometres across Canada's provinces and territories, as it runs from the East to West Coast and north to the Arctic Ocean and Hudson's Bay. It would encompass a wide range of possible infrastructure uses, from pipelines to railways, roads, communication networks, electricity transmission infrastructure and more (Sulzenko and Fellows 2016; Standing Senate Committee 2017).

A key element for success will be incorporation into its design of the land rights held by Indigenous peoples along the prospective route (Wright 2020; Newman 2022).

There are several different types of right engaged, each with distinct implications for development of the Northern Corridor. Along the notional route lie areas covered by traditional territories and areas over which Aboriginal title is claimed, as well as historic and modern treaties. There is also potential for the infrastructure route to overlap with reserve lands held by bands registered under the *Indian Act*.<sup>3</sup>

This paper will provide a brief introduction to the different land rights of Indigenous peoples engaged by the proposed Northern Corridor, applying standard approaches to legal analysis within the non-Indigenous Canadian legal system. In addition to an overview of the legal content of these rights, the implications for the development of an infrastructure project like the Northern Corridor will be considered. These are extensive. Indigenous peoples' land rights mean they must (at a minimum) be adequately consulted and ideally should consent to development, and the impacts on their rights must be

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<sup>3</sup> RSC, 1985, c 1-5 [*Indian Act*].

assessed and accommodated appropriately. Any development on Indigenous land held under s. 35(1) Aboriginal title, absent consent, can be justified only under strict conditions. Similarly, any development that infringes s. 35(1) Aboriginal treaty rights must be constitutionally justified. In the modern legal environment, it is difficult for an infrastructure project like the Northern Corridor to simply proceed by infringing Indigenous rights in pursuit of a collective goal. The direct engagement of Indigenous land-rights holders in the project and its governance is required.

The legal nature of Indigenous land rights is still evolving. The influence of the UNDRIP<sup>4</sup> is just beginning to be felt in Canada, with the federal and some provincial governments adopting acts designed to bring domestic legislation into conformity with the UNDRIP. The UNDRIP provides a legal model of Indigenous rights that is grounded in self-determination, and arguably provides broader rights over Indigenous traditional lands than currently recognized in Canadian law. Perhaps most relevant for a project like the proposed Northern Corridor is the requirement for “free, prior and informed consent” (FPIC) for development on Indigenous peoples’ lands. The UNDRIP has the potential to expand Indigenous peoples’ land rights through the evolution of domestic legislative regimes relevant to development of the Northern Corridor, as well as through continued development of constitutional s. 35(1) Aboriginal rights.

The resurgence of Indigenous governance and law also has significant potential to impact the legal environment for infrastructure projects such as the Northern Corridor. Legal institutions such as modern treaties and FNLMA land codes provide a degree of certainty and clarity, and can directly address questions about how to integrate Indigenous law and jurisdiction with federal and provincial regulatory authority. However, similar structure can be absent for s. 35 Aboriginal title or historic treaty rights. The Supreme Court has yet to address questions about how Indigenous law may apply to resource developments on traditional territories within the scope of s. 35 claims. Further research on this topic and other legal mechanisms that could allow for clear and legitimate balancing of the jurisdictional interests of provincial/territorial, federal and Indigenous governments will be needed to fully understand the prospects for a project like the Northern Corridor.

Much of the law of Indigenous land rights is clear, with leading cases mapping out the relevant legal tests and obligations for governments. However, its application is highly contextual and fact specific, as will be seen in the case studies. Close engagement is required with each affected Indigenous community to identify and address the impacts on their rights that flow from a particular project. The full implications of Indigenous land rights are hard to assess for the Northern Corridor when it is framed in the abstract as a ‘multi-modal’ infrastructure corridor that contemplates a variety of uses. While the general content and framework for addressing Indigenous land rights can be identified, only once the concrete details of a planned project are available can the practical legal constraints emerge. Specific planned uses would have to be studied to provide more accurate and detailed guidance about what would be required for a successful, operational Northern Corridor.

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<sup>4</sup> *Declaration on the Rights of Indigenous Peoples*, UN Doc A/RES/61/295 (13 September 2007).



This research paper addresses the general implications of the Indigenous land rights identified above for the Northern Corridor as proposed. As noted, it uses standard legal methods and is confined to assessing impacts within the legal and regulatory environment of the non-Indigenous Canadian legal system. Most of the formal legal obligations fall on the governments facilitating development that impacts Indigenous land rights, but in practice meeting government's obligations can depend on the work and involvement of project proponents. The successful relationship-building that provides a foundation for consensual development requires engagement by project proponents, governments and Indigenous peoples. The legal rights and frameworks outlined in the paper are relevant to all parties.

The paper proceeds in three stages. First the general law of Indigenous land rights is reviewed, including government obligations and frameworks for justified limits on these Indigenous rights. Implications of the law for the Northern Corridor are highlighted. Second, case studies are used to further illustrate the implications of Indigenous land rights for a project like the Northern Corridor, drawing on emerging legal issues from recent cases and infrastructure projects. Third, the dynamism of Indigenous rights and potential implications of the UNDRIP are reviewed. Final conclusions and recommendations close the paper.

## II. INDIGENOUS LAND RIGHTS AND THE NORTHERN CORRIDOR — THE LEGAL FRAMEWORK

### A. OVERVIEW

When European colonizers arrived in what is now Canada, they found Indigenous peoples already living here and occupying their traditional lands.

The legal implications of this fact for Indigenous peoples' rights to the land remained murky over a lengthy period of Canada's history. Early treaties focused on Indigenous-Crown relations, such as peace and friendship or military alliances (Borrows and Rotman 2018). While incorporating some distinct rights for Indigenous signatories, they generally failed to address questions of Indigenous land rights.<sup>5</sup>

The Royal Proclamation of 1763<sup>6</sup> appeared to recognize continuing rights of occupation for Indigenous peoples over their traditional lands, but whether this amounted to a legal interest in land, such as common law title, was unclear. In the early case of *St. Catherine's Milling*, the Privy Council held that Indigenous peoples had only a "personal" right to use the land, granted by the Sovereign under the Royal Proclamation itself.<sup>7</sup> This view helped support the development of "Crown" lands without much regard for Indigenous peoples'

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<sup>5</sup> See e.g., *R v Marshall*, [1999] 3 SCR 456 [*Marshall No.1*] interpreting 1760-61 Peace and Friendship treaty between British Crown and Mi'kmaq to include a right to sell and harvest marine resource in order to obtain "the necessaries," but see *R v Marshall*; *R v Bernard*, 2005 SCC 43 — treaty did not address right to land/ Aboriginal title [*Marshall*; *Bernard*].

<sup>6</sup> Royal Proclamation, 1763, reprinted in R.S.C. 1985, App. II, No. 1 (lands not already within the colonial boundary reserved for use of the "Indians," settlement precluded until the territories were "ceded or purchased" by Crown).

<sup>7</sup> *St. Catherine's Milling and Lumber Company v. The Queen (Ontario)*, [1888] UKPC 70 (12 Dec. 1888) [*St. Catherine's Milling*]. The Privy Council described it as a "personal and usufructuary right, dependent on the goodwill of the Sovereign," at 74.

rights. By 1969, the federal government denied any legal status for Indigenous peoples' outstanding claims to their traditional lands (Government of Canada 1969).

This situation shifted in 1973 following the *Calder* decision at the Supreme Court of Canada, in which the Nisga'a claimed title to their traditional lands in B.C.<sup>8</sup> In this landmark case, the Court recognized Aboriginal title to land as a continuing "legal" interest in lands occupied by Indigenous peoples. Aboriginal title at common law was held to both "predate and survive" the assertion of Crown sovereignty, giving titleholders a right to the continued occupation, use and benefit of the land.<sup>9</sup> However, common law Aboriginal title remained subject to being limited unilaterally by government through legislation — which led to continued development on lands over which title was claimed.<sup>10</sup>

The legal nature of Aboriginal title to land shifted again in 1982 following the inclusion of s. 35(1) in the constitution.<sup>11</sup> The recognition and affirmation of existing Aboriginal rights provided constitutional status for Aboriginal title, that projects like the proposed Northern Corridor must now incorporate. In addition to other implications discussed below, Aboriginal title cannot simply be overridden by legislative schemes that promote development for public purposes. A strict and evolving test for constitutionally justified limitation of Aboriginal title must be satisfied.

Despite early cases suggesting that the legal rights of Indigenous peoples in their traditional lands were limited, many historic treaties were signed between the Crown and Indigenous peoples. In the post-confederation era, the focus was often explicitly on Indigenous land rights (Borrows and Rotman 2018). The series of "Numbered Treaties" entered into between 1871 and 1921 include written provisions in which Indigenous signatories appear to formally cede title to their lands.<sup>12</sup> This is an interpretation contested by many Indigenous signatories, who argue the intention was simply to agree to sharing the treaty lands (e.g., Fumoleau 2004). In exchange, Indigenous peoples received reserve lands and other treaty promises, including the right to pursue traditional uses throughout the surrendered lands, except on "tracts... taken up" by government for purposes such as settlement, mining, forestry and other public uses.<sup>13</sup> These treaties cover vast areas of what is now Canada and opened the land for settlement and further development. They are crucial to Indigenous land rights in much of Canada.

Another 'modern' treaty-making period commenced after the *Calder* decision reaffirmed the continuing legal status of outstanding claims to Aboriginal title. The modern land claims and treaty negotiation process has often proven lengthy. While some modern agreements and treaties have been successfully implemented, others remain under negotiation with

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<sup>8</sup> *Calder et al v. Attorney-General of British Columbia*, [1973] SCR 313 (SCC) [*Calder*]

<sup>9</sup> *Ibid*, reasons of Hall J. at 352, 375-6, 404.

<sup>10</sup> See e.g., *Tsilhqot'in Nation v. British Columbia*, 2014 SCC 44 [*Tsilhqot'in Nation*] (forestry licenses granted by BC over traditional territory claimed by Tsilhqot'in Nation as Aboriginal title lands).

<sup>11</sup> *Constitution Act*, 1982, being Schedule B to the *Canada Act*, 1982 (UK), c 11, s. 35(1) — "the existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed."

<sup>12</sup> See *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, 2005 SCC 69 at para 57 [*Mikisew Cree 2005*] (Treaty 8 surrender of title); *Grassy Narrows First Nation v Ontario (Natural Resources)*, 2014 SCC 48 [*Grassy Narrows*] (Treaty 3 surrender of title).

<sup>13</sup> See e.g., Text of Treaty 8, entered into between the Crown and the Cree, Beaver and Chipewyan in the covered territory, <https://www.rcaanc-cirnac.gc.ca/eng/1100100028813/1581293624572#chp4>.

associated outstanding land claims.<sup>14</sup> Modern treaties provide clarity around land rights, as well as laying out rights of the Indigenous signatories to participate in governing the treaty lands.

Both the historic and modern treaties come within the scope of constitutionally protected rights under s. 35(1).

In addition, many Indigenous peoples have been allocated reserve lands. Historically, reserve lands have been subject to federal administration, coming under section 91(24) of the *Constitution Act*, with the Crown holding formal title (Barretto, Isaac, and Lahaie 2019).<sup>15</sup> Under the *Indian Act*, development on reserve lands requires both ministerial and community approval.<sup>16</sup> However, the *First Nations Land Management Act* now provides the opportunity for bands to opt out of the *Indian Act* regime by adopting their own land code, allowing bands to independently govern the management of reserve lands.<sup>17</sup>

In the section below, the content of these different types of legal land rights are briefly reviewed, flagging key features relevant to infrastructure projects like the Northern Corridor.

## **B. S. 35(1) CONSTITUTIONAL RIGHTS**

Section 35(1) of the constitution protects distinct forms of Aboriginal rights. Below I outline the general nature of the land rights relevant to the Northern Corridor under i) Aboriginal title, ii) historic treaties and iii) modern treaties. Section 35(1) also includes more general Aboriginal rights. These s. 35(1) rights protect historically central and distinctive cultural practices, customs and traditions, falling beyond the land rights that are the focus for this study. However, Aboriginal rights, e.g., to harvest wildlife or engage in spiritual practices, can have territorial dimensions relevant to a project like the Northern Corridor.<sup>18</sup> Much of the law related to government's 35(1) obligations would be similar to the discussion that follows. However, full consideration of the implications of Indigenous rights for the Northern Corridor would require directly including any s. 35(1) Aboriginal rights.

### **i. Aboriginal Title**

Aboriginal title is a legal right to the land itself, that includes the ability to occupy, use and enjoy the benefits of the land. The content of this right was first outlined by the Supreme Court in 1997 in the *Delgamuukw v British Columbia* case, and was most recently affirmed

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<sup>14</sup> See e.g. Figure 1 in Appendix A for a map of outstanding land claims along prospective Northern Corridor Route. Figure 3 in the Appendix illustrates modern land claims/self-government agreements.

<sup>15</sup> The federal government holds the lands in trust for the use and benefit of the beneficiary bands.

<sup>16</sup> See ss. 28, 38, 39.

<sup>17</sup> SC 1999, c 24 [FNLMA], s. 38(1), ss. 18 (powers over lands subject to land codes), 38 (excluding application of *Indian Act*).

<sup>18</sup> Aboriginal rights can be particularly important to consider for Métis peoples, who often experienced exclusion from historic treaty-making and lacked recognized land rights. See e.g. *R. v. Powley*, [2003] 2 SCR 207 [Powley], finding s. 35(1) right to hunt moose for members of historic Métis community to be exercised “in the environs” of Sault Ste. Marie. See also *Alberta (Aboriginal Affairs and Northern Development) v. Cunningham*, [2011] 2 SCR 670 [Cunningham] for discussion of distinct history of Métis regarding treaty-making and land entitlements, particularly in Alberta. Note that Métis, like other Aboriginal peoples recognized by s. 35, can claim Aboriginal title.

in 2014, in *Tsilhqot'in Nation v British Columbia*.<sup>19</sup> Aboriginal title is a unique or “*sui generis*” legal interest in land, because unlike all other rights to land in Canada, its source lies in Indigenous peoples’ exclusive occupation before the assertion of Crown sovereignty.<sup>20</sup> Aboriginal title is the recognition that Indigenous groups had pre-existing legal rights to the land before the arrival of Europeans in North America.<sup>21</sup> Part of Aboriginal title’s unique nature is that unlike other property interests that are held by individuals, it is a collective right. It is held for the benefit of all present and future generations of the Indigenous group.<sup>22</sup> As a result:

[Aboriginal title] cannot be alienated except to the Crown or encumbered in ways that would prevent future generations of the group from using an enjoying it. Nor can the land be developed or misused in a way that would substantially deprive future generations of the benefit of the land.<sup>23</sup>

Title is proven by having the Indigenous claimants show that they occupied the land prior to the Crown’s assertion of sovereignty over the relevant territory. Occupation is assessed through three related characteristics: it must be *sufficient*; it must be *continuous* (where current occupation is relied on); and it must be *exclusive*.<sup>24</sup> The unique nature of Aboriginal title and the underlying reconciliation purpose behind s. 35(1) mean that both Indigenous and common law perspectives are relevant to these elements of the legal test for title.<sup>25</sup> The “Aboriginal perspective” incorporates elements like the “laws, practices, customs and traditions” of the group.<sup>26</sup> Incorporating this perspective requires a contextual view of occupation, one that “take[s] into account the group’s size, manner of life, material resources, and technological abilities, and the character of the lands claimed.”<sup>27</sup> The common law perspective involves a requirement for physical possession, demonstrated by effective control over the land.<sup>28</sup> According to the Court’s most recent guidance:

To sufficiently occupy the land for purposes of title, the Aboriginal group in question must show that it has historically acted in a way that would communicate to third parties that it held the land for its own purposes... There must be evidence of a strong presence on or over the land claimed, manifesting itself in acts of occupation that could reasonably be interpreted as demonstrating that the land in question belonged to, was controlled by, or was under the exclusive stewardship of the claimant group.<sup>29</sup>  
[emphasis added]

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<sup>19</sup> *Delgamuukw v British Columbia*, 1997 CanLII 302 (SCC), [1997] 3 SCR 1010 [*Delgamuukw*]; *Tsilhqot'in Nation*, *supra* note 11.

<sup>20</sup> *Tsilhqot'in Nation*, *supra* note 11, at para 17.

<sup>21</sup> *Ibid*, at para 69.

<sup>22</sup> *Ibid*, at para 74.

<sup>23</sup> *Ibid*.

<sup>24</sup> *Delgamuukw*, *supra* note 20, per Lamer CJ at para 143, quoted in *Tsilhqot'in Nation*, *supra* note 11, at para 25.

<sup>25</sup> *Ibid* (*Tsilhqot'in Nation*), at para. 34.

<sup>26</sup> *Ibid* at para. 35, quoting *Delgamuukw* at para 148.

<sup>27</sup> *Ibid*, citing Slattery (1987), 758 with approval at para. 149.

<sup>28</sup> *Ibid* at para. 36.

<sup>29</sup> *Ibid* at para. 38.

This highly contextual standard means that title claims can extend well beyond intensively occupied sites, such as villages or cultivated areas, and that nomadic and semi-nomadic groups may be able to establish title to traditional lands. The Court suggests that “a culturally sensitive approach” to occupation could mean that “regular use of territories for hunting, fishing, trapping and foraging” might be sufficient to support title claims.<sup>30</sup> Current occupation can be relied on to help establish Aboriginal title. This does not require an “unbroken chain,” but current occupation must “be rooted in pre-sovereignty times.”<sup>31</sup> Occupation must also have been exclusive to establish title. This is demonstrated by “the intention and capacity to retain exclusive control’ over the lands.”<sup>32</sup> Here again, the approach is a contextual one that puts weight on both Aboriginal perspectives and the common law. Evidence of permission, Indigenous laws or treaties that allow sharing of the land may help establish exclusivity even when multiple distinct Indigenous communities occupied the land.<sup>33</sup>

Once established, Aboriginal title operates as a “burden” on the Crown’s underlying title to the land. This means that although the Crown holds an underlying legal title to the land, the Aboriginal title holders “have the right to the benefits associated with the land – to use it, enjoy it and profit from its economic development.”<sup>34</sup> This includes rights of management, the ability to use the land for modern purposes and the ability of the titleholding group to decide how the land should be used. These rights of control mean that government or others seeking to use Aboriginal titled land “must obtain the consent of the title holders.”<sup>35</sup>

The Supreme Court has interpreted the Crown’s underlying legal title to Aboriginal title lands as having two dimensions. One is a fiduciary obligation to the Indigenous title holders. This special form of equitable relationship requires the Crown to act in the best interests of titleholders when specific transactions related to the land are undertaken with Crown control.<sup>36</sup>

The other dimension of the Crown’s underlying sovereign title is “the right to encroach on Aboriginal title if the government can justify this in the broader public interest under s. 35.”<sup>37</sup> The legal test for a “justified infringement” of Aboriginal title involves multiple requirements. A government trying to justifiably limit Aboriginal title, for example to allow third-party use of the land, must:

- meet its procedural duty to consult with and accommodate the rights of Aboriginal title holders,
- be pursuing a “compelling and substantial objective” that furthers the goal of reconciliation and
- act in a way that is consistent with its fiduciary obligation.

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<sup>30</sup> *Ibid* at para. 42.

<sup>31</sup> *Ibid* at para. 45.

<sup>32</sup> *Ibid* at para. 47, citing *Delgamuukw*, at para. 156, quoting McNeil (1989), 204.

<sup>33</sup> *Ibid* at para. 49.

<sup>34</sup> *Ibid* at para. 70.

<sup>35</sup> *Ibid* at paras. 73-76 (incidents), 76 (consent).

<sup>36</sup> See e.g., *Wewaykum Indian Band v Canada*, 2002 SCC 79 [*Wewaykum*]. An example could be Crown participation in surrender of title – e.g., see *Guerin v the Queen*, 1984 CanLII 25 (SCC), [1984] 2 SCR 335.

<sup>37</sup> *Tsilhqot’in Nation*, *supra* note 11 at para. 71.

Each of these elements has its own set of complex legal standards.

The duty of consultation applies beyond the context of Aboriginal title, and has been the subject of a detailed study in the Northern Corridor series (Wright 2020). However, given its importance to potential infringement of lands claimed as Aboriginal title, it is briefly reviewed here. The Supreme Court established the test for and content of the duty to consult in *Haida Nation v British Columbia*, and affirmed it in *Rio Tinto Alcan Inc. v Carrier Sekani Tribal Council*.<sup>38</sup> The legal duty of consultation and accommodation falls on governments, although in practice project proponents play a role in engaging with affected Indigenous peoples, exchanging information, adapting projects and negotiating benefit agreements with communities to accommodate their rights. The duty of consultation “arises where the Crown has knowledge, real or constructive, of the potential existence of the Aboriginal right or title and contemplates conduct that might adversely affect it.”<sup>39</sup> This means that the duty to consult exists even before a claim to Aboriginal title is established either in court or through agreement.<sup>40</sup>

The Court in *Rio Tinto* broke down the test for when the duty to consult is triggered into three distinct elements:

- the Crown’s knowledge, actual or constructive, of a potential Aboriginal title claim or right;
- contemplated Crown conduct; and
- the potential that the contemplated Crown conduct may adversely affect the Aboriginal claim or right.<sup>41</sup>

There is a low bar to establish that the Crown had knowledge of the Aboriginal claim or right. The Court in *Rio Tinto* explained that:

actual knowledge arises when a claim has been filed in court or advanced in the context of negotiations... [and c]onstructive knowledge arises when lands are known or reasonably suspected to have been traditionally occupied by an Aboriginal community or an impact on rights may be reasonably anticipated.<sup>42</sup>

Imposing the legal duty to consult when there is real or constructive knowledge of a claim to title is grounded in the legal principle of the “Honour of the Crown.” This principle requires the Crown to act in good faith with a view to respecting all negotiations, agreements and interactions it has with Indigenous peoples.<sup>43</sup> Imposing the duty when there is *potential* for land to be held under Aboriginal title prevents government from depriving Indigenous peoples of the benefits of title by authorizing use of resources or harm to the land during the process of establishing title. Simply going ahead with development of the land pending resolution of outstanding claims conflicts with the Honour of the Crown.<sup>44</sup>

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<sup>38</sup> *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73 [*Haida Nation*], *Rio Tinto Alcan Inc v Carrier Sekani Tribal Council*, 2010 SCC 43, [*Rio Tinto*].

<sup>39</sup> *Haida Nation*, at para 35.

<sup>40</sup> *Ibid*, at para 34.

<sup>41</sup> *Rio Tinto*, *supra* note 39, at para 31.

<sup>42</sup> *Ibid*, at para 40.

<sup>43</sup> *Haida Nation*, *supra* note 39, at para 17.

<sup>44</sup> *Ibid*, at para 27.

The legal duty can be triggered by a range of Crown conduct, and does not arise only when government is relying on statutory powers.<sup>45</sup> The Court in *Rio Tinto* gave some examples where Crown conduct triggered the duty to consult, including the transfer of tree licenses which would have permitted the logging of old growth forests, the approval of a multi-year forest management plan for a large geographic area, the establishment of a review process for a major gas pipeline and the conduct of an inquiry to determine a province's infrastructure and capacity needs for electricity transmission.<sup>46</sup> Establishing a northern infrastructure corridor would engage a deep duty to consult where the route overlaps with areas of proven or claimed title. The range of contemplated uses involve substantial disturbance and permanent changes to use of the land, with potentially serious negative impacts for title claimants. All governments implicated in the review and approval of the Northern Corridor development would have to meet the duty of consultation and accommodation.

Government conduct that triggers the duty must happen in the present with current impacts on s. 35(1) Aboriginal rights.<sup>47</sup> The Supreme Court affirmed this in the 2017 case *The Chippewas of the Thames First Nations v Enbridge Pipelines Inc.*, when it held that "the duty to consult is not triggered by historical impacts."<sup>48</sup> However, the existence of past or cumulative effects can still be relevant to the nature of current impacts.<sup>49</sup>

The scope of required consultation is context specific and depends on both the strength of the claimed right (at its highest if there is a declaration of title) and the severity of the impacts from government action. Actions that infringe title by depriving Indigenous peoples of rights of use, benefit and control over their land are considered serious, particularly if they have the effect of transferring land or natural resources to third parties.<sup>50</sup> Where there is a "deep" consultation requirement, the Crown may also have an obligation to accommodate Indigenous interests. Some examples of accommodation are imposing conditions on projects, adding or removing aspects of a project, and implementing mitigation measures for predicted impacts.<sup>51</sup>

The Court has consistently held that the duty of consultation and accommodation is procedural and does not guarantee a particular result.<sup>52</sup> In particular, the Supreme Court has held that there is no "veto" that requires consultation to lead to consent of the title holders/claimants to the infringing activity.<sup>53</sup> However, the Supreme Court has also said that:

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<sup>45</sup> *Rio Tinto*, *supra* note 39, at para 43.

<sup>46</sup> *Ibid*, at para 44.

<sup>47</sup> *Ibid*, at para 45; affirmed in *Chippewas of the Thames First Nations v Enbridge Pipelines Inc*, 2017 SCC 41, [*Chippewas of the Thames*]

<sup>48</sup> *Ibid*, at para 41.

<sup>49</sup> *West Moberly First Nation v British Columbia (Chief Inspector of Mines)*, 2011 BCCA 247, at para 119 [*West Moberly*].

<sup>50</sup> *Tsilhqot'in Nation*, *supra* note 11, at paras 94-97, 124.

<sup>51</sup> *Ktunaxa Nation v British Columbia (Forests, Lands and Natural Resources)*, 2017 SCC 54, at para 112 [*Ktunaxa Nation*].

<sup>52</sup> *Ibid*, at para 79.

<sup>53</sup> *Coldwater First Nation v Canada (Attorney General)*, 2020 FCA 34, at para 134 [*Coldwater*]; note that this case was refused leave to appeal to the Supreme Court of Canada in early 2020.

Governments and individuals proposing to use or exploit land, whether before or after a declaration of Aboriginal title, can avoid a charge of infringement or failure to adequately consult by obtaining the consent of the interested Aboriginal group.<sup>54</sup> [emphasis added]

This means that while Indigenous peoples' consent is not *required* under existing law, it is viewed as providing an answer to claims of inadequate consultation or infringement of titled land from a project.

If the duty of consultation and accommodation has been met, the government can proceed to the rest of the test for justified infringement.

The Court has accepted that a wide range of purposes can potentially meet the requirements for a justified interference with Aboriginal title. In *Tsilhqot'in Nation* it affirmed objectives earlier set out in *Delgamuukw*:

the development of agriculture, forestry, mining, and hydroelectric power, the general economic development of the interior of British Columbia, protection of the environment or endangered species, the building of infrastructure and the settlement of foreign populations to support those aims.<sup>55</sup>

Very relevant to the Northern Corridor project is the reference to “building of infrastructure” as a potentially justified objective consistent with the reconciliation purpose of s. 35.

However, any development must be undertaken in a way that meets government's fiduciary obligation. The Crown's fiduciary duty requires that government act in a way that respects the inherent limit to Aboriginal title — it cannot be put to uses that are irreconcilable with the nature of the group's attachment to the land. The Court in *Tsilhqot'in Nation* explained that “[t]his means that incursions on Aboriginal title cannot be justified if they would substantially deprive future generations of the benefit of the land.”<sup>56</sup> In addition, the Crown's fiduciary obligation “infuses an obligation of proportionality into the justification process.”<sup>57</sup> The Court breaks down the obligation of proportionality into three requirements, very similar to those in the s. 1 “*Oakes* test” for permitted limits on the constitutional rights in the *Charter of Rights and Freedoms*.<sup>58</sup> Proportionality requires:

that the incursion is necessary to achieve the government's goal (rational connection); that the government may go no further than necessary to achieve it (minimal impairment); and that the benefits that may be expected to flow from the goal are not outweighed by adverse effects on the Aboriginal interest (proportionality of impact).<sup>59</sup>

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<sup>54</sup> *Tsilhqot'in Nation*, *supra* note 11, at para. 97.

<sup>55</sup> *Ibid*, at para 81.

<sup>56</sup> *Tsilhqot'in Nation*, *supra* note 11, at para 86.

<sup>57</sup> *Ibid*, at para 87.

<sup>58</sup> *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), c 11; *R. v Oakes*, [1986] 1 SCR 103 (justified limitation test under s. 1).

<sup>59</sup> *Tsilhqot'in Nation*, *supra* note 11, at para. 87.



These aspects of proportionality limit the government actions that can be justified, even if they are advancing a compelling and substantial objective.

*Tsilhqot'in* was the first case in which the Supreme Court used this *Oakes*-like approach to justified infringement in relation to a s. 35(1) right, although some elements were included in prior cases.

One key difference is the incorporation of the “internal limit” on *justified intrusions* on title that rules out actions depriving future generations of the benefit of the land. The “internal limit” has been subject to criticism (Borrows 1999; McNeil 2001; Slattery 2015) and expanding it this way raises further uncertainty about what precisely it implies about development on Aboriginal titled lands. Whose perspective is relevant to determining what “benefits of the land” will preserve the rights of future generations? The ability of titleholders, government and project proponents to enter into agreements that may involve *permanent changes to the land* in exchange for economic benefits, such as equity stakes in resource projects, revenue generation, or community employment is less clear under this standard — although perhaps it aligns with the Court’s holding that consent can preclude claims of infringement.<sup>60</sup> This would suggest that it is Indigenous title holders’ current views that are relevant to interpretation of the intergenerational “internal limit” on justified infringement. Alternatively, this intergenerational internal limit might act as a bar to any justified infringements that involve permanent, harmful changes to the land from a more ecological perspective or according to Indigenous laws (Wu 2015). Until further guidance is provided, the potential impact of this change will remain unclear.

A second significant change in *Tsilhqot'in* is the move away from integrating the “inescapable economic component” of Aboriginal title into the test for justified infringement through a requirement to compensate title holders, as outlined in *Delgamuukw*.<sup>61</sup> The new proportionality of impact inquiry requires that the collective benefits of a justified project exceed any adverse impacts on title holders but says nothing about any need for Indigenous peoples to directly share in the benefits or to be compensated for limits on their rights by either government or project proponents. The legal requirement for consultation and the advantages of coming to agreements with title holders likely preclude justified infringements in which there are no concrete economic benefits provided to Aboriginal title holders. However, this change in the test suggests that the appropriateness of any compensation may not be central to judicial review as part of justified infringement.

What is clear from the Court’s most recent guidance is that if development is commenced on lands over which Aboriginal title is established or claimed, this involves legal risks unless the title holders consent. If consultation is inadequate, it can mean overturning regulatory approvals, delay addressing the gaps, and modifications to the planned development.<sup>62</sup> Even if consultation is adequate, other elements of the test for justified infringement may not be met once title is established. This can lead to government having to cancel projects; authorizing legislation may also be found “inapplicable going forward to the extent that it

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<sup>60</sup> *Tsilhqot'in Nation*, *supra* note 11, at para. 97.

<sup>61</sup> *Delgamuukw*, *supra* note 20, at para 169.

<sup>62</sup> An example is the decision of the Federal Court of Appeal to quash approval of the Transmountain Pipeline granted by the National Energy Board (NEB) that is discussed below as a case study, see *Tsleil-Waututh First Nation v Canada (Attorney General)*, 2018 FCA 153 [TWN 2018].

unjustifiably infringes Aboriginal title.”<sup>63</sup> It will not be easy to achieve legal certainty around a multi-modal infrastructure project like the Northern Corridor, with its many possible infringing impacts on lands claimed as Aboriginal title.

## ii. Historic Treaties

Although Aboriginal title provides Indigenous peoples with the constitutional right to land most like ownership, it is not the only Indigenous land right relevant to the proposed Northern Corridor. Another important type of land rights flows from the historic treaties that cover portions of the prospective route.

The “historic treaties” were entered into between the federal government and various Indigenous groups during a period that spans over two hundred years before 1975 (Borrows and Rotman 2018). Among the most prominent historic treaties relevant to the proposed Northern Corridor are the Numbered Treaties — a series of eleven treaties concluded between 1871 and 1923 intended to “facilitate the settlement of the West.”<sup>64</sup> As discussed above, the Numbered Treaties focused on the (ostensible) surrender of traditional lands by Indigenous peoples to the Crown in exchange for a range of treaty promises, including allocations of reserve lands.

Although the Numbered Treaties were negotiated over a century ago, they remain binding on the Crown and Indigenous signatories. Both the federal and provincial governments are responsible for respecting treaty rights.<sup>65</sup> The rights contained in the treaties have also now gained constitutional protection under section 35(1).

The geographic areas associated with five Numbered Treaties intersect with the proposed Northern Corridor: Treaties 5, 8, 9, 10 and 11. Of these five treaties, Treaty 8 has been the most litigated, so provides an important example for exploring the rights and claims arising out of the Numbered Treaties.

The Supreme Court has outlined special legal principles of treaty interpretation, including some that respond to the unique context of the historic treaties. Treaties are considered “sacred,” as they represent “an exchange of solemn promises” between the Crown and Indigenous signatories.<sup>66</sup> The Honour of the Crown is always at stake; it “infuses every treaty and the performance of every treaty obligation.”<sup>67</sup> The Crown is assumed to intend to perform its treaty obligations, and these are interpreted in a generous and not a narrow and technical legal sense; the benefit of ambiguities or doubtful expressions are resolved to favour Indigenous parties.<sup>68</sup>

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<sup>63</sup> *Tsilhqot’in*, *supra* note 11, at para. 92.

<sup>64</sup> See *R v Badger*, [1996] 1 SCR 771, at para 39 [*R v Badger*].

<sup>65</sup> See *Grassy Narrows*, *supra* note 13 at para 35 (treaties binding on both federal, provincial governments when acting within their respective jurisdictions under s. 91, 92 of division of powers).

<sup>66</sup> *Ibid* at para 41; *Manitoba Métis Federation Inc v Canada (Attorney General)*, 2013 SCC 14 at paras 78–79 [*Manitoba Métis Federation*].

<sup>67</sup> See *Mikisew Cree 2005*, *supra* note 13 at para 57.

<sup>68</sup> *Marshall No. 1*, *supra* note 6, at para 78 for McLachlin CJ summarizing principles of treaty interpretation for historic treaties). This summary of relevant principles has been affirmed and applied in subsequent cases, although set out in a dissent, see e.g., *Yahey v British Columbia*, 2021 BCSC 1287, at para 79 [*Yahey*].

The approach to interpreting historic treaties is informed by the unique circumstances of their negotiation. The differences between the Crown and Indigenous parties and the role of the written treaty in the negotiations was addressed in the foundational case of *R. v. Badger*:

The treaties were drafted in English by representatives of the Canadian government who, it should be assumed, were familiar with common law doctrines. Yet, the treaties were not translated in written form into the languages ... of the various Indian nations who were signatories. Even if they had been, it is unlikely that the Indians, who had a history of communicating only orally, would have understood them any differently.<sup>69</sup>

The role of oral negotiations and assurances played a vital role in the historic treaties, and oral promises were often central to Indigenous participation. The Court in *Badger* emphasized:

The treaties, as written documents, recorded an agreement that had already been reached orally and they did not always record the full extent of the oral agreement...

The Indian people made their agreements orally and recorded their history orally. Thus, the verbal promises made on behalf of the federal government at the times the treaties were concluded are of great significance in their interpretation.<sup>70</sup>

This reality informs the interpretive approach that looks beyond the written text to include the broader negotiation process to identify the parties' common intentions in entering into the treaty being interpreted.<sup>71</sup> The Court has repeatedly confirmed that oral assurances are an important component of treaty promises.<sup>72</sup> In *Marshall No.1*, Binnie J. held that:

...where a treaty was concluded verbally and afterwards written up by representatives of the Crown, it would be unconscionable for the Crown to ignore the oral terms while relying on the written ones.<sup>73</sup>

Treaty rights can also extend to implied rights that are necessary "to support the meaningful exercise of express rights granted."<sup>74</sup> These principles have been applied to the interpretation of the Numbered Treaties that overlap with the proposed Northern Corridor.

Common elements in the Numbered Treaties include formal clauses that appear to surrender legal title rights in traditional territory in exchange for a range of treaty rights, including reserve lands and rights to continue uses of unoccupied surrendered lands. The following passage from Treaty 8 provides an example of the continuing Indigenous land rights [emphasis added]:

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<sup>69</sup> *R v Badger*, *supra* note 65, at para 52.

<sup>70</sup> *Ibid* at paras 52, 55.

<sup>71</sup> See *Marshall No. 1*, *supra* note 6, at para 78.

<sup>72</sup> *R v Sundown*, [1999] 1 SCR 393, at para 24 [*R v Sundown*].

<sup>73</sup> *Marshall No.1*, *supra* note 6, at para 12; *Guerin*, *supra* note 37, at 321.

<sup>74</sup> See *Marshall No.1*, *supra* note 6, at para 44, citing *R v Sioui*, [1990] 1 SCR, at p 1067 [*R v Sioui*], and *R v Sundown*, *supra* note 73, (right to build shelter in a provincial park to exercise Treaty 6 right to hunt) in support.

And Her Majesty the Queen HEREBY AGREES with the said Indians that they shall have right to pursue their usual vocations of hunting, trapping and fishing throughout the tract surrendered as heretofore described, subject to such regulations as may from time to time be made by the Government of the country, acting under the authority of Her Majesty, and saving and excepting such tracts as may be required or taken up from time to time for settlement, mining, lumbering, trading or other purposes.<sup>75</sup>

This right to continued use of surrendered territory and the ability to carry on traditional activities on the land was central to Indigenous signatories' understanding of the treaties. To secure their assent, the Crown promised that treaties would not interfere with their culture and way of life. For example, courts have recognized that Treaty 8 Indigenous parties received many oral assurances from Commissioner David Laird to meet their concerns:

Treaty 8 is not merely about rights to hunt, fish or trap for food; the Crown's promises also included that: the same means of earning a livelihood would continue after the Treaty as existed before it; Indigenous people would be as free to hunt and fish after the Treaty as they had been before it; and the Treaty would not lead to forced interference with their mode of life.<sup>76</sup>

However, the treaties create tension between this promise and the rights of government to impose regulations or "take up" tracts of land in the treaty territory. What can government do under the treaty to develop the surrendered lands before the substance of the treaty promise to Indigenous peoples is infringed?

A number of cases suggest that substantial impacts can occur before treaty rights are infringed. Important decisions include *Mikisew* and *Grassy Narrows*, which involved claims of infringement in relation to Treaty 8 and Treaty 3, respectively.<sup>77</sup> In both decisions, the SCC emphasized that not every taking up of land by the Crown under these treaty clauses amounts to an *infringement* of the treaty. Some changes in land use and incursions on lands previously used by Indigenous signatories were part of the treaty.<sup>78</sup> Instead, the Court tied infringement to Crown uses that would render it impossible for the Indigenous claimants to meaningfully exercise their treaty rights.<sup>79</sup> In *Mikisew* the Court clarified that the existence of a meaningful right is not assessed on a treaty-wide basis, but instead from the (practical) perspective of a particular Indigenous group within the treaty area.<sup>80</sup> If a specific group is left with no meaningful rights in relation to *its* traditional territories, an infringement has occurred.<sup>81</sup> A question raised in recent litigation is whether this is assessed with respect only to a specific individual "taking up" of land, or whether the assessment must include the cumulative impacts of all such developments under a treaty. In the recent decision, *Yahey v British Columbia* the B.C. Supreme Court found an infringement of the Treaty 8

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<sup>75</sup> *Yahey*, *supra* note 69 at para 20.

<sup>76</sup> *Ibid*, at para 264. The general importance of oral assurances in the context of the Numbered Treaties can be seen in Morris' (1991) account (cited in *R. v. Sundown* as an authority by the Supreme Court).

<sup>77</sup> See *Mikisew Cree 2005* and *Grassy Narrows*, both *supra* note 13.

<sup>78</sup> *Mikisew Cree 2005*, *supra* note 13 at paras 30-31.

<sup>79</sup> *Ibid*, at para 48 and *Grassy Narrows*, *supra* note 13, at para 52.

<sup>80</sup> *Mikisew Cree 2005*, *supra* note 13, at para 48.

<sup>81</sup> *Ibid* at para 48.

rights of the Blueberry First Nation based on the *cumulative adverse impacts* of industrial development over their traditional territory over many decades.<sup>82</sup> Once it has been found that government is infringing the treaty, constitutional justification is required to proceed with the development of the land.

However, importantly, in *Mikisew* the Court held that the Crown's ability to "take up" land under the treaty was subject to maintaining the Honour of the Crown. This meant that there was a "duty to consult and, if appropriate, accommodate First Nations' interests before reducing the area over which their members may continue to pursue their hunting, trapping and fishing rights."<sup>83</sup> *This obligation attached even before* the substantive threshold of infringing the treaty was reached, providing procedural rights to the affected Indigenous signatories whenever the Crown exercised its rights to take up surrendered land under the treaty.<sup>84</sup> As outlined in *Haida Nation*, the extent of the duty would vary contextually with the severity of the impacts.<sup>85</sup> The use of Crown land covered by the Numbered Treaties to develop the Northern Corridor would certainly engage this duty.

Governments *can* infringe historic treaty rights, taking up lands even if it would limit Indigenous signatories' rights. However, as with Aboriginal title, the requirements of a legal test for justified infringement must be satisfied. In general, the test for justified infringement of treaty rights retains two key components, as elaborated in *R.v. Badger* and affirmed in *Marshall (No. 1) and R. v. Marshall (No.2)*<sup>86</sup>:

- The government must be pursuing a sufficiently important objective consistent with the overall reconciliation purpose of s. 35.
- The government must act consistently with its fiduciary relationship and maintain the Honour of the Crown.

As with Aboriginal title, a broad array of objectives have been suggested as potentially important enough to justify infringing a treaty right.<sup>87</sup> In *Marshall (No. 2)* the Court suggested that "in the right circumstances," objectives such as "economic and regional fairness" or "historic reliance" and "participation in" a resource industry by non-Aboriginal peoples might be consistent with the overarching reconciliation purpose of s. 35, due to the importance to Canadian society.<sup>88</sup>

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<sup>82</sup> See *Yahey*, *supra* note 69.

<sup>83</sup> *Mikisew Cree 2005*, *supra* note 13 at para. 56.

<sup>84</sup> *Ibid* at paras. 54-56.

<sup>85</sup> Among other factors, see *ibid* at paras 61-63.

<sup>86</sup> See e.g., *Marshall No.1*, *supra* note 6, at para 32, citing *R. v. Badger*, *supra* note 65, at para. 97, *R. v. Marshall*, [1999] 3 SCR 533 [*Marshall (No. 2)*].

<sup>87</sup> *Marshall (No 2)*, at para 41, extending the broad range of purposes approved in *Delgamuukw*, *supra* note 20 and *R v Gladstone*, [1996] 2 SCR 723 at para 75 to the treaty context. However, note that in these cases, the lack of an "internal limit" and a commercial dimension to the right at stake helped justify the broader range of permissible objectives.

<sup>88</sup> *Ibid*.

There is perhaps some question as to whether this broader approach to permissible “public objectives” would apply to the rights of use under the Numbered Treaties, since the Supreme Court has held that the *Natural Resources Transfer Agreements*<sup>89</sup> extinguished any commercial hunting rights in the prairie provinces of Alberta, Saskatchewan and Manitoba.<sup>90</sup> The broad approach to permissible objectives for limiting treaty rights has often been justified in the cases by the lack of an “internal limit” to a s. 35 right — commercial dimensions to the right and the potential for it to become exclusive of (non-Indigenous) others. Under the original *Sparrow/Badger* approach, internally limited rights like subsistence hunting have been subject to a more restricted set of objectives (e.g., conservation, safety) that can justify *infringements* as opposed to regulations consistent with the scope of the treaty right.<sup>91</sup>

At the second step, a series of requirements must be met to satisfy the fiduciary relationship and Honour of the Crown. In *Badger*, the Court extended the justification framework set out in *Sparrow* to treaty rights, requiring courts to ask:

... whether there has been as little infringement as possible in order to effect the desired result; whether, in a situation of expropriation, fair compensation is available; and, whether the aboriginal group in question has been consulted with respect to the ... measures being implemented. [emphasis in original]<sup>92</sup>

The court has confirmed Aboriginal peoples must be consulted about restrictions on their treaty rights as an aspect of any justified infringement, with the degree of consultation varying contextually.<sup>93</sup> In *Sparrow* and subsequent cases, meeting the fiduciary relationship has required that government give priority to Aboriginal rights, along with the requirements above. However, the form of the priority requirement varies with the nature of the right. When rights are “internally limited,” such as a non-commercial food hunting right, courts have held that this need must be satisfied first before other claims on a resource can be justified.<sup>94</sup> However, when there is a commercial dimension to an Aboriginal right, or when priority would amount to a claim of exclusivity, this aspect of justification is modified.<sup>95</sup> The Court has suggested that relevant questions can include assessing whether government has accommodated the right, taken account of the need to give priority to Aboriginal peoples’ ability to exercise the right, the degree of participation by Aboriginal people in the justified activity, and the importance of the right to the economic and material wellbeing of rights holders, among other possible factors.<sup>96</sup>

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<sup>89</sup> *Alberta Natural Resources Act*, SC 1930, c 3; *Manitoba Natural Resources Act*, SC 1930, c. 29; *Saskatchewan Natural Resources Act* RSC 1930, c. 41.

<sup>90</sup> See e.g., *R v Horseman*, [1990] 1 SCR 901 [*R v Horseman*]; *R v Badger*, *supra* note 65.

<sup>91</sup> See e.g., *R v Sutherland*, [1980] 2 SCR 451 at p. 460 (pre-s. 35(1) case discussing boundary between permissible regulation consistent with Treaty 6 hunting rights and limits (even in the interest of conservation) that infringe the Treaty) [*R v Sutherland*]; *R v Sundown*, *supra* note 73, at paras 45-46.

<sup>92</sup> *R v Sparrow*, [1990] 1 SCR 1075 [*R v Sparrow*] at p 1119, applied in *R v Badger*, *supra* note 65 at para 97.

<sup>93</sup> *Marshall (No 2)* *supra* note 87, at para. 43; *Mikisew Cree 2005*, *supra* note 13, at para. 55.

<sup>94</sup> *R v Gladstone*, *supra* note 88, at paras. 58-60, citing *R v Sparrow*, *supra* note 93.

<sup>95</sup> *R v Gladstone*, *supra* note 88, at paras. 61-64.

<sup>96</sup> *Ibid* at para. 64.

As with Aboriginal title, if a project like the Northern Corridor infringes rights under the Numbered Treaties, the test for justification must be met if it is to go ahead. Direct engagement with Indigenous treaty rights-holding communities is required to determine the impact of proposed developments on their rights, and steps must be taken to accommodate them. As with the duty of consultation, the legal obligation to justify any infringements rests with the relevant government, but the practical work of engagement with Treaty peoples will necessarily involve project proponents.

### iii. Modern Treaties

The notional route for the Northern Corridor intersects areas covered by several modern treaties, agreed to since 1975. Modern treaties, unlike the historic treaties, contain extensive and detailed provisions (CIRNAC 2020). They address and attempt to provide certainty around a wide range of issues, including consultation and participation requirements for the Indigenous party; cession of claims to title in exchange for ownership of a portion of traditional territory; wildlife harvesting rights; financial settlements; participation in land-use management in specific areas; self-government and resource revenue sharing (CIRNAC 2020). Modern treaties are highly responsive to the circumstances of each negotiation, and there is significant variation in the specific form a treaty can take. However, there are some rights and features that are more common in modern treaties.

Modern treaties generally provide Indigenous beneficiaries with wildlife harvesting rights, usually for subsistence rather than commercial purposes. Agreements may stipulate harvesting rights for certain species, such as salmon, moose, or polar bear.<sup>97</sup> Agreements may also provide for the right to access both “settlement lands” (title held by the Indigenous signatories) and “non-settlement” lands (traditional territory over which Indigenous signatories have ceded their title claims) for the purpose of harvesting wildlife.

Modern treaties may also provide for other harvesting rights, such as the right to harvest trees and plants for firewood, construction and maintenance of hunting and trapping camps, and for traditional, cultural or medicinal purposes. Modern treaties may also provide a right for the Indigenous party to use water on or flowing through its land; however, it may be qualified by requirements to maintain quantity, quality or rate of flow (e.g., *Umbrella Final Agreement*).<sup>98</sup>

Modern treaties also typically provide Indigenous signatories with participatory rights in decision-making about land use and resource management. The purpose of embedding participatory rights in land claims agreements is to ensure that Aboriginal parties are consulted about matters that may impact their “eco-systemic” or socioeconomic concerns, such as wildlife harvesting quotas and industrial development on traditional lands (McClurg 2010, 80).

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<sup>97</sup> For example, under the *Nunavut Land Claims Agreement (NLCA)*, Inuit have the right to harvest wildlife, including big game (including wolves, walruses, coyotes, and bears) for subsistence under Article 5; *Nunavut Land Claims Agreement (1993)*, Schedule 5-1 (NLCA).

<sup>98</sup> *Umbrella Final Agreement (1993)* Article 14.8.2 (UFA).

The rights that modern treaties convey to Indigenous governments with respect to lands and resources are as diverse as the groups that negotiate these agreements. Rights conveyed to Indigenous governments may range from participatory rights in treaty-based land and resource management schemes to final decision-making power.

A central feature of land claims agreements is the cession of land claims to the Crown in exchange for ownership of a portion of claimed traditional lands. For example, under the Tlicho Land Claims Agreement, about 39,000 square kilometres of land is vested in the Tlicho government in fee simple, and includes rights of ownership to the mines and minerals on those lands.<sup>99</sup> Land claims agreements may provide that such lands cannot be conveyed to anyone other than another form of government in the Aboriginal group (such as the Tlicho community government) or to a provincial or territorial government, as is the case under Article 18.1.9 in the Tlicho Final Agreement. Where title to land is vested in the Aboriginal group, the Indigenous government may control access to settlement lands, for example by requiring non-members to obtain licenses before accessing lands.<sup>100</sup>

Land claims agreements may also provide for the right to resource royalty sharing. For example, the Tlicho Final Agreement provides that the Northwest Territories government shall pay to the Tlicho government a set percentage of mineral royalties.<sup>101</sup> Likewise, the Umbrella Final Agreement (UFA) in Yukon provides that where Canada transfers to Yukon the authority to receive or to levy and collect royalties in respect of the production of a resource, a percentage of royalties from those resources are to go to the Yukon First Nations.<sup>102</sup>

Modern treaties often provide, at minimum, participatory rights in decision-making about land and resources use in settlement and non-settlement lands to Indigenous governments/Aboriginal groups through co-management regimes made up of tripartite boards. Co-management boards are regulatory structures that are made up of both government (including provincial/territorial and/or federal) and Aboriginal appointees, and are tasked with conducting reviews, assessing impacts and providing recommendations to the relevant ministers with respect to matters that fall within their jurisdiction (Imai 2008, 25; White 2020). The recommendations made by co-management boards are treated by the responsible ministers as serious considerations and, for the most part, ministers are confined to making decisions based on these recommendations (McClurg 2010, 94).<sup>103</sup> The purpose of co-management boards is to facilitate consultation and to ensure that Indigenous participation is embedded in decision-making with respect to land and resource

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<sup>99</sup> Tlicho Final Agreement (2003), Article. 18.1.

<sup>100</sup> *Ibid*, Article 19.1.1.

<sup>101</sup> *Ibid*, Article. 25.1.1

<sup>102</sup> UFA, *supra* note 6, Article 23.2.0

<sup>103</sup> There have been circumstances in which ministers have made decisions that did not align with the recommendations of the co-management board: *Makiivik Corporation v Canada (Attorney General)*, 2021 FCA 184. In this case, the Nunavik Marine Region Wildlife Board (NMRWB) recommended that the total allowable take of polar bears be twenty-eight in the Southern Hudson Bay. The Minister of the Environment and Climate Change Canada reduced the total allowable take to twenty-three, and the Makiivik Corporation sought judicial review on behalf of the NMRWB. The court found that the minister failed to interpret the decision-making process for determining total allowable takes under the *Nunavik Inuit Land Claims Agreement* in a manner consistent with the honour of the Crown and allowed the appeal. Where a government minister departs from a recommendation by a co-management board, the process must uphold the Honour of the Crown for the decision to have a chance of being upheld.



use and management (McClurg 2010, 80; Imai 2008, 25). They have been described as “exist[ing] at the intersection of the three orders of government within Canada: federal, provincial/territorial, and Indigenous” (White 2020, 4).

Co-management boards may be established for a wide range of purposes in the area governed by the modern treaty. For example, the Nunavut Land Claims Agreement (NLCA) establishes several co-management boards, including the Nunavut Impact Review Board (NIRB), which conducts environmental assessments, the Nunavut Water Board (NWB), which licenses the use of water, the Nunavut Planning Commission (NPC), which is responsible for the development, implementation, and monitoring of land use plans, and the Nunavut Wildlife Board (NWMB), which conducts reviews and assessments of wildlife harvesting.<sup>104</sup>

While co-management regimes facilitate participation and consultation, primary decision-making powers over lands and resources typically remain with provincial or territorial governments. For example, Yukon First Nations are empowered by treaty to participate in land and resource management, but are not party to Yukon’s devolution agreement, meaning that primary powers over land and resource management formally rests with the Yukon government (Sabin 2017, 9). Yukon First Nations nevertheless have the right to participate in the regulation of land and resources through co-management boards, a territory-wide council, and temporary regional bodies established and convened on an as-needed basis (Sabin 2017, 9). As discussed above, the recommendations made by such bodies must be seriously considered by the relevant provincial/territorial/federal minister when making decisions about land and resource use. The “vast majority are accepted or varied only in limited ways by government” (White 2020, 303). Derogation from these recommendations may be subject to legal action by the First Nation, and the courts have found that where government does not abide by the decision-making process set out in the agreement, the decision must be quashed and sent back to an earlier stage in the process. The courts have found that such action by the government does not uphold the Honour of the Crown and undermines reconciliation, which is the primary goal of land claims agreements (Sabin 2017).

In limited circumstances, modern treaties may give primary powers over land and resources to Indigenous self-governments. In Nunavut, the Inuit self-government takes the form of the public territorial government. While Nunavut currently does not have jurisdiction over natural resources within the Nunavut Settlement Area, Article 5.1 of the *Nunavut Lands and Resources Devolution Agreement in Principle* (AIP) provides that “the Devolution Agreement will provide for the transfer to the Commissioner of administration and control of Public Lands and rights in respect of Waters.”<sup>105</sup> Following the devolution of the power over natural resources to Nunavut, the territorial government will have the authority to make decisions about natural resources within the territory as the other provincial and territorial governments do.

Although modern treaties attempt to provide certainty and predictability in resolving issues around how Indigenous signatories’ rights will be recognized, courts can still be called on to adjudicate disputes.

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<sup>104</sup> NLCA, Articles 10.1.1(b)(i), (ii), (iii), 5.2.1.

<sup>105</sup> Canada, Crown-Indigenous Relations and Northern Affairs Canada, *Nunavut Land and Resources Devolution Agreement in Principle* (August 15, 2019), Government of Canada, Article 5.1 [AIP].

The Supreme Court has recognized that the modern treaties are very different from historic treaties and other s. 35 Aboriginal rights. The Court has yet to clarify whether this would require a unique approach to infringement and justification under s. 35. However, some guidance suggests that this may be the case; it may be extremely difficult for governments to promote developments that conflict with modern treaties.

The Supreme Court in *Beckman v Little Salmon/Carmacks First Nation* drew out the contrast between historic and modern treaties and the reasons for their differential treatment by the courts:

The historical treaties were typically expressed in lofty terms of high generality and were often ambiguous. The courts were obliged to resort to general principles (such as the honour of the Crown) to fill the gaps and achieve a fair outcome. Modern comprehensive land claim agreements, on the other hand... while still to be interpreted and applied in a manner that upholds the honour of the Crown, were nevertheless intended to create some precision around property and governance rights and obligations. Instead of *ad hoc* remedies to smooth the way to reconciliation, the modern treaties are designed to place Aboriginal and non-Aboriginal relations in the mainstream legal system with its advantages of continuity, transparency, and predictability.<sup>106</sup>

The Court highlighted that unlike historic treaties, modern land claims agreements are the product of lengthy negotiations by well-resourced and sophisticated parties.<sup>107</sup> All parties were represented by counsel and professional negotiators, and the agreements themselves were meticulously crafted to create precise rights, obligations and privileges for the parties. The Court in *Quebec v Moses* held that:

The importance and complexity of the actual text is one of the features that distinguishes the historic treaties made with Aboriginal people from the modern comprehensive agreement or treaty, of which the James Bay Treaty was the pioneer. We should therefore pay close attention to its terms [emphasis added].<sup>108</sup>

Judicial deference to the text of land claims agreements is necessary when adjudicating claims of potential breaches, to fulfil the objectives of creating precision around rights and obligations around land, resources and governance.

It also allows treaties to serve as a forward-looking framework for reconciliation and positive relationships between governments and Indigenous parties.<sup>109</sup> The Supreme Court held in *First Nation of Nacho Nyak Dun v Yukon* that “courts should generally leave space for the parties to govern together and work out their differences” when resolving disputes that arise under modern treaties.<sup>110</sup> The Court emphasized that “close judicial management of the implementation of modern treaties may undermine the meaningful dialogue and

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<sup>106</sup> *Beckman v Little Salmon/Carmacks First Nation*, 2011 SCC 53, [2010] 3 SCR 103 at para 12 [*Little Salmon*].

<sup>107</sup> *Ibid*, at para 9.

<sup>108</sup> *Quebec v Moses*, 2010 SCC 17, [2010] 1 SCR 557 at para 7 [*Moses*].

<sup>109</sup> *Little Salmon*, *supra* note 107, at para 10.

<sup>110</sup> *First Nation of Nacho Nyak Dun v Yukon*, 2017 SCC 58, [2017] 2 SCR 576, at para 33 [*Nacho Nyak Dun*].

long-term relationship that these treaties are designed to foster.”<sup>111</sup> Courts will aim to interfere with dispute resolution as little as possible. They will intervene only to the extent necessary to resolve the specific dispute and determine the legality of impugned decisions under the modern treaty.<sup>112</sup>

However, the special, constitutional nature of modern treaties must still be considered. For example, in *Little Salmon*, the Court held that the treaty was not “a complete code”; the Honour of the Crown and duty to consult still apply, even if the agreement does not explicitly invoke them.<sup>113</sup> The Court stressed that modern treaties are not to be interpreted as if they are everyday commercial contracts, but are to be interpreted in light of their constitutional nature.<sup>114</sup> The Quebec Court of Appeal in *Makivik c Quebec* likewise underscored the importance of carefully construing land claims agreements due to the fact that such agreements give rise to federal and/or provincial implementation legislation (making the agreement paramount to other laws of general application), and that the rights stemming from the agreement are constitutionally protected by section 35.<sup>115</sup> Finally, the Supreme Court in *Nacho Nyak Dun* held that “judicial forbearance should not come at the expense of adequate scrutiny of Crown conduct to ensure constitutional compliance.”<sup>116</sup> While respecting the agreed-upon terms of modern treaties is essential to facilitating reconciliation, courts must ensure that the constitutional rights enshrined in the agreement are protected.

The Supreme Court has not yet determined what the appropriate application of the justified infringement test is in the context of modern treaties; however, the unique approach that courts take to modern treaties will likely impact the analysis. The Quebec Court of Appeal recognized in *Makivik c Quebec* that:

[i]t remains to be determined whether these infringements of a protected right can be justified within the meaning of the analysis required under s. 35... In that exercise, we must bear in mind that the treaty rights must not be infringed lightly; it follows that the evidence of justification must be clear and convincing.<sup>117</sup>

The Court of Appeal seems to suggest that modern treaty rights could be justifiably infringed, so long as the evidence is “clear and convincing.”<sup>118</sup> The Court of Appeal also emphasized that “the burden borne by governments in terms of justification must remain high; otherwise the rights protected by s. 35... could be neutered and the honour of the Crown distorted.”<sup>119</sup> Although the justified infringement test presumptively applies to modern treaty rights, this has yet to be confirmed by the Supreme Court. Some academic commentators have suggested that a more demanding approach is required — given the

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<sup>111</sup> *Ibid*, at para 60.

<sup>112</sup> *Ibid*, at para 60.

<sup>113</sup> *Little Salmon*, *supra* note 107 at para 38.

<sup>114</sup> *Ibid*, at para 10.

<sup>115</sup> *Makivik c Quebec (Procureure générale)*, 2014 QCCA 1455, at paras 51-2 [*Makivik*].

<sup>116</sup> *Nacho Nyak Dun*, *supra* note 111, at para 34.

<sup>117</sup> *Makivik*, *supra* note 116, at para 96.

<sup>118</sup> *Ibid*.

<sup>119</sup> *Ibid*, at para 85.

lengthy and difficult process behind modern treaty negotiation and the negative impact infringing modern treaty rights would have on relative trust between the parties, the Honour of the Crown and furthering reconciliation (Townshend 2017, 485; Bowering 2002, 12).

For portions of the prospective Northern Corridor that cross modern treaty lands, the specific requirements for development of this infrastructure will depend on the terms of each agreement and the specific uses and impacts to be assessed.

### C. RESERVE LANDS

Another form of Indigenous land ownership potentially relevant to the Northern Corridor is reserve land. There are more than 3,100 reserves in Canada, which are collectively home to over six hundred First Nations bands (NRC 2021; Pauls 2017). While many of these are located farther south than the proposed Northern Corridor route, there is still potential for the development to intersect with reserve lands.<sup>120</sup>

The federal Crown has historically held the underlying title to reserve lands, under its s. 91(24) constitutional jurisdiction; however, it is the First Nation that holds the beneficial interest in this land (Barretto, Isaac, and Lahaie 2019). Reserve lands can be accessed by third parties for development, but this requires following the relevant process under either the *Indian Act* or, alternatively, under an applicable land code under the FNLMA.

For reserve land covered by the *Indian Act*, third parties may access the land for development through permits, designations and absolute surrenders (King and Crew, 2022). Permits are for shorter-term uses and can allow a third party to occupy, use or exercise rights on reserve lands, such as during the building of a pipeline.<sup>121</sup> Designations permit longer-term arrangements; they can be used to identify an area of reserve land to be leased or similarly subject to a third-party right or interest.<sup>122</sup> A designation requires support by a majority of the electors of a band and ministerial approval.<sup>123</sup> A band can divest itself of its land permanently and convey it to a third party — but only by surrendering the reserve land to the Crown.<sup>124</sup> Such “absolute surrenders” must be assented to by a majority of the electors of a band, as well as the Crown, as set out in the Act.<sup>125</sup> Under the *Indian Act*, for the Northern Corridor to operate on reserve lands, one or more of these methods would need to be relied on to provide access. All forms essentially require consent by the beneficiary band and specify the process through which this is evidenced.

The *Indian Act* has been criticized as providing a paternalistic and unwieldy framework for bands to manage their own reserve lands (Boutilier 2016). The FNLMA provides bands with an opportunity to opt out of the land management provisions of the *Indian Act* in favour of a comprehensive land code enacted by the band. When a band makes this election, roughly

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<sup>120</sup> See GeoViewer (n.d.)

<sup>121</sup> *Indian Act*, *supra* note 4, s. 28. Both ministerial approval and consent of the band are required, typically via a supporting band council resolution (King and Crew 2022).

<sup>122</sup> See e.g., Indian Oil and Gas Canada (IOGC) (2022). See *Indian Act*, *supra* note 4, s. 37-41 (designations). The duration and purpose for which a designation is granted must be identified, along with any further conditions set by the band.

<sup>123</sup> *Indian Act*, *ibid* and CRC, c 957, <https://laws-lois.justice.gc.ca/eng/acts/i-5/>. Band majority approval is determined by a referendum under the *Indian Referendum Regulations*.

<sup>124</sup> *Ibid*, ss 37(1), 38(1).

<sup>125</sup> *Ibid*, s 39(1).

a third of the *Indian Act* ceases to apply. In its place, the adopted land code governs the management of reserve lands, including such matters as zoning, environmental assessment, natural resources and expropriation requirements (FNLMA 2019; King and Crew 2015; JFK Law LLP 2015). While the process for adopting a land code can be lengthy, once in place it allows a First Nation to assume responsibility for managing its own reserve land (Barretto, Isaac, and Lahaie 2019). Land codes typically confer on First Nations bands the rights and privileges of a landowner.<sup>126</sup> Bands are able to enter directly into agreements with third parties to grant legal interests in the land. For First Nations which have enacted land codes pursuant to the FNLMA, third-party access to reserve lands is no longer governed by the *Indian Act*, and there is no longer any ministerial oversight. Instead, third parties must seek access pursuant to the provisions of a particular First Nation's land code.

The result is that for projects like the Northern Corridor, access to reserve land would depend on the terms of any specific land codes adopted by bands along the notional route. Currently there are over ninety bands that have adopted land codes under the FNLMA.<sup>127</sup> More than 150 First Nations have signed the Framework Agreement on First Nations Land Management, committing them to developing and enacting their own land code under the FNLMA.<sup>128</sup> For this latter group, until the process is complete, the *Indian Act* regime continues to apply, but third parties should be on notice of a future transition to a land-code regime. Although the FNLMA land-code regime allows for more variability than the *Indian Act* for third parties seeking access to reserve lands, commentators have suggested it is more efficient — in addition to allowing First Nations greater autonomy over regulation of reserve lands (Bouthilier 2016).

### **III. INDIGENOUS LAND RIGHTS AND THE NORTHERN CORRIDOR — CASE STUDIES AND IMPLICATIONS**

In this section, I briefly outline some of the key implications of the legal rights and justification frameworks above for the proposed Northern Corridor. Case studies are used to help illustrate how these land rights of Indigenous peoples are implicated in large-scale infrastructure development.

#### **A. ABORIGINAL TITLE, INDIGENOUS LAND OWNERSHIP AND THE NORTHERN CORRIDOR**

The proposed Northern Corridor would certainly intersect with areas where Indigenous people claim ownership of the land. Figure 1 in Appendix A illustrates some of the title/territorial claims potentially intersecting the route. There are also many First Nations located along the notional route whose reserve lands may be impacted (CIRNAC 2022 — First Nations Profiles Interactive Map). As outlined above, applicable law would require that all these distinct Indigenous groups be consulted to determine how the development would impact their lands and address concerns.

Recent pipeline projects provide case studies to illustrate the scope of what may be required for the Northern Corridor.

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<sup>126</sup> *FNLMA*, *supra* note 18, s. 18(1).

<sup>127</sup> *Ibid*, Schedule 2.

<sup>128</sup> *FNLMA*, *supra* note 18, Schedule 1.

The Trans Mountain expansion (TMX) is a project twinning 1,147 km of an existing oil pipeline running from Alberta to shipping terminals in Burnaby, B.C., tripling its capacity. Most of the expansion lies along an established pipeline corridor (CER Trans Mountain Backgrounder 2022). Like the proposed Northern Corridor, the TMX crosses Indigenous peoples' traditional lands. The need for consultation and accommodation of their rights was recognized at the outset. Appendix B provides a timeline of the major steps in the TMX approval and construction process to date. It illustrates critical aspects of undertaking a major infrastructure project while respecting Indigenous rights.

Consultation is a foundational element. It begins by identifying the Indigenous groups potentially affected. The appropriate scope of consultation also must be determined. This is partly a function of the proposed activity — the nature of the project will point to specific impacts that need to be considered. For example, TMX would mean disruption of the land both during construction and from permanent infrastructure, along with a risk of spills from the additional line, capacity and holding facilities at the shipping terminal. Input from affected Indigenous peoples is crucial, to be sure that the range of their rights and relevant impacts is fully addressed. The failure to consider the impacts of increased marine tanker traffic resulting from the TMX expansion led to a successful judicial review of the initial Cabinet decision to approve it.<sup>129</sup> This was partly the result of the National Energy Board (NEB)'s failure to view this as part of its mandate for the TMX CEAA report and recommendations. It was also contributed to by shortcomings in government consultation (Olszynsky and Wright 2019).

The duty of consultation can be operationalized within an established statutory process, such as review under the CEAA, and procedural aspects of the duty can be delegated to statutory bodies such as the NEB. However, it is ultimately the Crown that must make sure the duty is fulfilled.<sup>130</sup> This can involve going beyond the confines of the statutory framework. It requires two-way engagement with Indigenous parties. In the TMX review, the late-stage Crown consultation fell short of this. Missing was a government representative who could do more than act as a “note-taker.” Instead, the Crown needed to “genuinely understand the concerns of the Indigenous applicants and then *consider and respond* to those concerns in a genuine and adequate way.”<sup>131</sup> This would involve assessing the outstanding concerns of each affected Indigenous party, identifying any flaws or gaps in the NEB process and recommendations, and accommodating Indigenous concerns, for example by adding conditions to the project approval. The FCA overturned Cabinet's approval of the TMX because of these shortcomings and sent it back for further review.

Subsequent consultations involved extended timelines, retention of a third-party expert to assist with consultations, additional financial support for participating Indigenous parties, individualized consideration of outstanding concerns, the addition of conditions to the project and a number of federal initiatives targeting identified concerns. Ultimately, the project was approved by Cabinet a second time, a decision that was upheld by the FCA.<sup>132</sup> The FCA noted that the second round of consultations was a “reparative” process to address specific flaws identified by the court's earlier decision; it could be “specific and

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<sup>129</sup> See *Tsleil-Waututh Nation*, *supra* note 63.

<sup>130</sup> See e.g. *Clyde River (Hamlet) v. Petroleum Geo-Services Inc.*, [2017] 1 SCR 1069, at para 22 [*Clyde River*].

<sup>131</sup> *Tsleil-Waututh Nation*, *supra* note 63 at para 560 [emphasis added].

<sup>132</sup> *Coldwater*, *supra* note 54.

focussed [and] brief and efficient.”<sup>133</sup> The FCA held that consultations could be reasonable, even if ultimately not all the Indigenous parties agreed with the project going ahead. The FCA also held that it was permissible for the Crown to consider the “broad consensus” of support among Indigenous groups consulted in approving the project.<sup>134</sup>

The involvement of Indigenous land rights-holders is an ongoing aspect of infrastructure projects such as TMX — or the proposed Northern Corridor. The impact on rights and the need to access lands over which Indigenous people claim rights is often addressed in mutual benefit agreements (MBAs) between project proponents and affected Indigenous parties. As of 2021, seventy-three groups had signed agreements in relation to TMX (Trans Mountain n.d). While the terms are generally confidential, benefits for Indigenous signatories can include education and job training, employment, business opportunities and improved community infrastructure.<sup>135</sup> Government consultations also recognize the importance of continued involvement by Indigenous parties in operation of the project. A condition was imposed on TMX to require continuing consultation with Indigenous parties after approval and throughout the lifecycle of the project, with reporting back to the NEB over the first five years of operations (Canada Energy Regulator 2020). The final consultation report also recommended creating an Indigenous Advisory and Monitoring Committee to operate over the life of the project (NEB 2019). Developed in consultation with Indigenous parties, it would create an opportunity for deep and ongoing involvement in project oversight and monitoring. In addition to limiting negative impacts from operations, this body would address the lack of trust by Indigenous parties in regulatory oversight and provide an ongoing role in governing their traditional lands when projects like the TMX are approved.<sup>136</sup>

The TMX project illustrates that a linear infrastructure project such as the proposed Northern Corridor *can* go ahead while addressing Indigenous rights. However, TMX also illustrates the complexity and potential uncertainty involved. Ultimately the government of Canada purchased the TMX pipeline. Because of delay, cost overruns and market shifts, the most recent Parliamentary Budget Office report now suggests construction will be at a loss for Canada (Office of the Parliamentary Budget Officer 2022). The Northern Corridor, with its significantly longer, new route for a range of hypothetical uses would be a much more ambitious proposal than TMX. It would likely require at least a similar level of government support, and in some respects would face greater challenges. There is now heightened attention to the adverse effects of extractive resource development, especially for climate change and Indigenous rights. Government support for the relatively more modest TMX has been sharply criticized (e.g., Bulowski 2022).

Indigenous ownership in reserve lands and Aboriginal title lands are distinct forms of legal right. While it may be possible to avoid reserve lands within the Northern Corridor, traditional territories would inevitably be crossed. This can raise complex questions about governance relationships in relation to these distinct land interests, with significant impacts for project development.

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<sup>133</sup> *Ibid* at paras. 14-18.

<sup>134</sup> *Ibid* at para. 78 (129 distinct Indigenous parties invited to participate in consultations - 120 either approved or did not oppose project; 42 had signed benefit agreements).

<sup>135</sup> *Ibid*.

<sup>136</sup> *Ibid*.

The development of the Coastal GasLink (CGL) project in B.C. is illustrative. This 670 km pipeline is to carry natural gas from northeastern B.C. to a liquefied natural gas (LNG) processing terminal in Kitimat, to promote shipment to Asian markets (Coastal Gaslink 2022). The project impacts the lands of many distinct Indigenous peoples, including traditional territories that are the subject of Aboriginal title claims. While CGL negotiated agreements with many Indigenous groups along the route who support the project, there was strong opposition by others (CGL discussed MBAs with “all” twenty groups along the route, as well as agreements that would facilitate equity participation by a subset of these groups). (Coastal Gaslink 2022a).

Significant conflict arose over construction in Wet’suwet’en traditional territory. The Wet’suwet’en claim Aboriginal title to around 22,000 sq km of unceded traditional territory in B.C. Their claim remains outstanding, as it has not been finally determined either in court or by agreement with the Crown.<sup>137</sup> The Wet’suwet’en have two systems of governance: the traditional hereditary leaders and the elected band councils formed under the Indian Act. The hereditary governance system features five clans, which are divided into thirteen houses, each of which has a hereditary chief. Decisions are made at the house level.<sup>138</sup>

When Coastal GasLink/TC Energy sought authorization from the B.C. government to build the pipeline, this triggered a duty to consult the Wet’suwet’en. Both Coastal GasLink and the Province of British Columbia consulted with the Office of the Wet’suwet’en, which represents the Wet’suwet’en hereditary chiefs, and the five Wet’suwet’en Indian Act bands along the pipeline route.<sup>139</sup> The province and Coastal GasLink also attempted to consult with Dark House, a hereditary government that asked to be consulted independently from the Office of the Wet’suwet’en.

Consultations with the elected band councils ultimately led to signed community and benefit agreements (CBAs) and support for the project. Benefits included jobs, training, infrastructure and other socio-economic benefits, but were contingent on the “material commencement” of the project.<sup>140</sup>

However, the Wet’suwet’en hereditary leadership has generally opposed the building of the pipeline. Some hereditary leaders set up a blockade (the Unist’ot’en Camp) across the major access road to prevent the Coastal GasLink pipeline from being constructed.<sup>141</sup> CGL/BC did not consult the Unist’ot’en group, which was not identified as one of the hereditary or Indian Act representatives of the Wet’suwet’en during the approval process.<sup>142</sup> While Unist’ot’en had significant ties to Dark House, this House refused to engage in consultations except to state their opposition to the pipeline and deny permission for CGL to access the traditional territory beyond the blockade.<sup>143</sup>

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<sup>137</sup> The question of title to their traditional territory was the subject of the decision in *Delgamuukw*, *supra* note 20.

<sup>138</sup> *Coastal GasLink Pipeline Ltd v Huson*, 2019 BCSC 2264, at para 54 [CGL 2].

<sup>139</sup> *Coastal GasLink Pipeline Ltd v Huson*, 2018 BCSC 2343 [CGL 1], at para 7.

<sup>140</sup> CGL 2, *supra* note 145 at para 66.

<sup>141</sup> CGL 1, *supra* note 146 at para 7.

<sup>142</sup> *Ibid* at para. 20.

<sup>143</sup> *Ibid*, at para 17; CGL 2, *supra* note 145, at paras. 71-74.



The blockade at Unist'ot'en (expanded to additional sites) led CGL to seek an injunction to secure access for pipeline construction.<sup>144</sup> In support of the injunction, project benefits such as jobs, tax revenue, long-term financial benefits for the Indigenous parties to CBA agreements, contracting and business opportunities for Indigenous businesses and investments to support community programs, and training and education for local and Indigenous communities were emphasized.<sup>145</sup> In contrast, the defendants argued that the band councils that had entered into agreements with CGL had authority only over reserve lands and lacked jurisdiction to make decisions with respect to the entire traditional territory.<sup>146</sup> The hereditary leadership alone was responsible for the whole traditional territory, and the defendants argued that they had not consented to the project. They relied on traditional Wet'suwet'en law:

[T]he Wet'suwet'en people, as represented by their traditional governance structures, have not given permission to the plaintiff to enter their traditional unceded territories in which Sections 7 and 8 of the Pipeline Project are located. They submit that the plaintiff is in their traditional territory in violation of Wet'suwet'en law and authority and their efforts in erecting the Bridge Blockade were to prevent violations of Wet'suwet'en law. The defendants assert that they were at all times acting in accordance with Wet'suwet'en law and with proper authority.<sup>147</sup> [emphasis added]

In contrast, elected Wet'suwet'en leaders argued they hold a more representative role. They argued that the reluctance of the hereditary chiefs to enter into agreements was due to concern it could compromise outstanding Aboriginal title claims. Elected band leaders had a role to negotiate agreements that would benefit all Wet'suwet'en peoples from developments like the pipeline on their traditional territories.<sup>148</sup>

Ultimately the judge deciding on the injunction found that it was not a forum appropriate for resolving difficult, constitutional questions about the scope of authority held by these distinct Wet'suwet'en governance structures, or the ability for actors outside it, such as the Unistot'en, to enforce Wet'suwet'en law or to play a role in potentially "evolving" Wet'suwet'en governance.<sup>149</sup> She also rejected the application of Indigenous law in the circumstances, holding that for it to be effective it first had to be "recognized as being part of Canadian domestic law, either through incorporation into treaties, court declarations, such as Aboriginal title or rights jurisprudence or statutory provisions."<sup>150</sup> The outstanding nature of the title claim and the failure of the defendants to engage in consultation or otherwise challenge the legality of the provincial project approval process seem to have contributed to her view that Indigenous law could not be relied on by the defendants to "exclude the application of B.C. law within Wet'suwet'en territory."<sup>151</sup> She also noted that

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<sup>144</sup> CGL first obtained an interim injunction in 2018 to prevent the Unistot'en protestors from blockading the main access road at that site (*CGL 1*). Continued protests and blockades in additional sites led to expansion of the interim injunction, with the measure finally reviewed in the 2019 decision (*CGL 2*).

<sup>145</sup> *CGL 2 supra* note 145 at para. 13.

<sup>146</sup> *Ibid*, at para 67.

<sup>147</sup> *Ibid*, at para 51.

<sup>148</sup> *Ibid*, at para. 68.

<sup>149</sup> *Ibid*, at para. 134-139

<sup>150</sup> *Ibid*, at para 127.

<sup>151</sup> *Ibid*, at para. 146 and discussion at paras. 147-158.

she lacked evidence that Wet’suwet’en law would support activity like the blockades or that this would be a way of enforcing Wet’suwet’en law.<sup>152</sup> The injunction to prevent blockading of the access road was upheld.

The Wet’suwet’en example demonstrates the challenge of consulting with Indigenous people who may be impacted by a development like the Northern Corridor when distinct governance structures are present. Courts have encouraged project proponents and governments to take “reasonable steps to ensure that all points of view with a First Nation are given appropriate consideration”<sup>153</sup> in these circumstances. However, this can be difficult if leaders hold incompatible views about resource development projects and the jurisdiction of those leaders over traditional territories is unclear.

The Wet’suwet’en case also highlights current uncertainty about how Indigenous legal systems apply in traditional territories, particularly pending final resolution of Aboriginal title claims. The position taken in the CGL decision is narrow and appears inconsistent with some other cases and literature (Borrows 2002; Walters 1999).<sup>154</sup> While Aboriginal title has been characterized as a right to the land and analogized with fee-simple “ownership,” its collective dimension and association with Indigenous territorial authority to decide on uses of the land also align it with Indigenous sovereignty and Indigenous law (Borrows 1999; Borrows 2015, 109; Metcalf 2017, 186-88).<sup>155</sup> How to approach potential conflicts similar to the one between BC’s environmental review of the CGL pipeline and Wet’suwet’en law on use of their lands remains an area of legal uncertainty.

The Wet’suwet’en/CGL conflict also illustrates the potential for practical risks for proponents of a project like the Northern Corridor. Obtaining an injunction did not halt on-the-ground resistance to CGL construction through the Wet’suwet’en lands. The threat of future blockades and checkpoints has not dissipated (PSC 2022), and a 2022 incident at a CGL construction site threatened workers and caused millions of dollars in damage (Chan 2022; Holliday 2022). While that event is not linked to the Wet’suwet’en hereditary leaders, it reflects the serious risks that can flow from continuing conflict over development on traditional territories. Indigenous leaders, community members and others may not be willing to wait for Crown-led negotiations or legal resolution of jurisdictional questions before taking actions they believe are in defense of Indigenous rights and laws on traditional lands. This reality highlights the potential difficulty in trying to proceed without a framework for partnered, consensual development.

The case studies above help to illustrate the practical challenges in implementing a project like the proposed Northern Corridor in a way that incorporates the legal requirements related to Indigenous land ownership. While many aspects of the law are now clear, practical challenges in application can remain.

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<sup>152</sup> *Ibid*, at para. 155.

<sup>153</sup> *Nlaka’pamux National Tribal Council v British Columbia*, 2011 BCCA 78, 2011 CarswellBC 284, at para 59.

<sup>154</sup> See e.g. *Mitchell v Minister of National Revenue*, 2001 SCC 33, [2001] 1 SCR 911 at para 62 (McLachlin C.J. referring to doctrine of continuity and reception of Aboriginal laws and customs within the legal system on assertion of Crown sovereignty).

<sup>155</sup> The original claim in *Delgamuukw*, *supra* note 20 at para. 7 was for “ownership” and “jurisdiction” over the lands claimed, transformed during the proceedings into a claim for Aboriginal title.

## B. HISTORIC TREATY RIGHTS AND THE NORTHERN CORRIDOR

The proposed Northern Corridor would also intersect with areas where Indigenous people have existing land use rights under historic treaties, as illustrated in Figure 2 in Appendix A. The treaty context might seem to allow development more easily, because the treaties provide a clear reference point for established s. 35 rights and often include the right for government to “take up” surrendered lands. However, recent cases illustrate that there are potential challenges here as well.

The Numbered Treaties that intersect the proposed Northern Corridor do include provisions allowing government to “take up” surrendered lands for development. However, this is subject to a procedural right of Indigenous treaty parties to be consulted and the requirement to uphold the Honour of the Crown. Existing treaty rights may need to be accommodated and the negative impacts from a project justified — even on ‘surrendered’ lands in the treaty territory. As with Indigenous land ownership, when development on treaty lands involves potentially significant impacts on treaty rights, there is a duty for substantial engagement by government and project proponents. This can lead to project-related agreements with affected Indigenous treaty rights holders as an aspect of their support of the project in treaty territory. For example, the TMX project includes agreements with Indigenous peoples holding rights under Treaty 8 and 6 (Trans Mountain n.d.a).

As illustrated in a recent case, these impact and benefit agreements can *themselves* become aligned with s. 35 rights and the Honour of the Crown. Consultation obligations can then arise due to government/project decisions that impact them.

In *Ermineskin Cree Nation*, the Ermineskin Cree Nation (ECN) sought judicial review of an Order issued by the federal Minister of Environment and Climate change to designate a proposed Phase II Expansion (Phase II) and a Test Mine under Phase I of the Vista Coal Mine under the Impact Assessment Act (IAA).<sup>156</sup> The designation halted construction while the federal government determined whether the project required a federal impact assessment. The Order reversed a previous decision by the minister in 2019 *not* to designate the project based on recommendations from the Impact Assessment Agency (IAAC), finding that the provincial environmental assessment review was sufficient.<sup>157</sup> The minister reconsidered that decision in July of 2020, following letters of complaint submitted by other Indigenous and conservation groups.<sup>158</sup> The minister did not consult with the ECN before making the Order.

The ECN are signatories to Treaty 6 and hold Aboriginal and treaty rights to hunt, fish, trap and gather throughout Treaty 6 and their traditional territory.<sup>159</sup> The whole of the Vista Coal Mine, including the proposed expansions, is situated on ECN traditional territory. In 2013 and 2019, the ECN signed impact and benefit agreements (IBAs) with the project proponent, Coalspur, providing them with economic, community and social benefits. These agreements were signed following consultation with respect to Phase I and Phase II of the project and were to compensate the ECN for any potential impacts caused by

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<sup>156</sup> *Ermineskin Cree Nation v Canada (Environment and Climate Change)*, 2021 FC 758, at para 1 [*Ermineskin Cree Nation*]. Designation was under s. 9 of the IAA, S.C. 2019, c. 28, s. 1.

<sup>157</sup> *Ibid.*, at para 12.

<sup>158</sup> *Ibid.*, at para 14.

<sup>159</sup> *Ibid.*, at para 4.

the resource development on their ability to exercise their Aboriginal rights within their traditional territory.<sup>160</sup>

The ECN argued on judicial review that the Order would adversely impact their Aboriginal and Treaty rights, including economic opportunities created by their contractual relationship with Coalspur under the 2019 IBA. The ECN argued that, as a result, the Crown was under an obligation to consult the ECN when deciding whether to designate the project, a duty it had breached by failing to consult the ECN at all.<sup>161</sup> The minister argued that the loss of economic, social and community benefits under an IBA does not adversely impact Aboriginal and treaty rights because the IBA benefits are only indirectly connected to the Aboriginal and treaty rights, are contingent on a third party and are speculative.<sup>162</sup>

However, the Federal Court held that the duty to consult extends to “economic rights and benefits closely related to and derivative from Aboriginal rights.”<sup>163</sup> The Court took a “generous and purposive approach” to the duty to consult. This meant that when Indigenous groups negotiate economic and other benefits to compensate them for the loss of Aboriginal and treaty rights flowing from resource development in their traditional territories, those benefits must be protected by the duty to consult. The Court relies on the Supreme Court’s ruling in *Rio Tinto* to support the position that the duty to consult “accommodates the reality that often Aboriginal peoples are involved in exploiting the resource.”<sup>164</sup> The Court stressed that the benefits conferred by the 2019 IBA are “closely related to and derivative from the Aboriginal right” because the benefits are designed to compensate the ECN for the loss of Aboriginal and treaty rights as a result of the taking up of some of its land.<sup>165</sup> The Court accepted evidence that these agreements are “an exercise of the Ermineskin’s right of self-determination.”<sup>166</sup> The Court held that these rights ought to be entitled to the protection of the Honour of the Crown, and that as a result the duty to consult is triggered if contemplated Crown conduct has the potential to adversely affect the rights under an IBA.<sup>167</sup>

The Court held that “[e]ven if the benefits of the 2019 IBA [had] not... started to flow, that cannot negate the 2019 IBA’s value to the Ermineskin.”<sup>168</sup> In this case, the benefits from the 2019 IBA were threatened by the order that had delayed the construction of Phase II and the underground test mine for over a year.<sup>169</sup> Therefore, the minister had breached the duty to consult the ECN by not consulting them at all before making the designation order.

The *Ermineskin Cree* case illustrates the importance of IBAs in the process of resource development in Canada. The Supreme Court has indicated that agreements like these can be a way to advance reconciliation, indicating the consent and participation of Indigenous signatories in development projects that impact their rights. However, the close ties

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<sup>160</sup> *Ibid*, at para 5.

<sup>161</sup> *Ibid*, at para 6.

<sup>162</sup> *Ibid*.

<sup>163</sup> *Ibid*, at para 8.

<sup>164</sup> *Ibid*, at para 90, citing *Rio Tinto*, *supra* note 39, at para 34.

<sup>165</sup> *Ibid*, at para 105.

<sup>166</sup> *Ibid*, at paras 70-71.

<sup>167</sup> *Ibid*, at para 110.

<sup>168</sup> *Ibid*, at para 115.

<sup>169</sup> *Ibid*, at para 117.

between these agreements and the underlying rights can then engage the Honour of the Crown in subsequent negotiations or decision-making. The case also illustrates the potential complexity of the “procedural” obligation to consult Indigenous treaty rights holders when lands are “taken up” under the Numbered Treaties. The proposed Northern Corridor would require a lengthy consultation process, that would likely generate a series of IBAs over time with impacted rights holders. The *Ermineskin Cree* case suggests that both concerns related to outstanding consultations and possible impacts on existing agreements would need to be part of the process of addressing Indigenous rights in any government review and approval.

As discussed above, although government can “take up” lands under the Numbered Treaties, there is a point at which this can infringe Indigenous parties’ treaty rights to the continued use of surrendered traditional lands. The recent case of *Yahey v British Columbia* challenges conventional ideas about how to assess treaty rights infringement.<sup>170</sup>

*Yahey* concerned a claim brought by Blueberry River First Nations (BRFN). BRFN is a party to Treaty 8; their traditional territory lies in the Peace River District in northeastern British Columbia. The BRFN alleged that the meaningful exercise of its treaty rights had been infringed by the cumulative effects of industrial development. BRFN claimed that industrial activities had “pushed its members to the margins of its territory” and deprived its members of meaningful rights to hunt, trap and fish.<sup>171</sup>

For at least a decade prior to the action, the B.C. government had taken notice of BRFN’s concerns about the cumulative impacts of industrial development, yet left those concerns largely unaddressed.<sup>172</sup> On B.C.’s view, no treaty rights infringement had occurred — the province claimed that it was merely exercising its right to take up land pursuant to the relevant provisions of Treaty 8, and had not done so in a manner that left BRFN with no meaningful rights. B.C. also pointed to its consultations with BRFN in asserting that it had taken steps to mitigate the potential impacts of industrial development.<sup>173</sup>

In an important decision, the British Columbia Supreme Court ruled that the cumulative effects of industrial activities had “significantly and meaningfully diminished” BRFN’s Treaty 8 rights to hunt, fish and trap.<sup>174</sup> Unlike in virtually all previous cases, it was not a single law, regulation or government action that infringed the treaty rights — instead, the infringement was based on cumulative impacts over a period of decades. Eighty-five per cent of the BRFN Claim Area was within 250 m of an industrial disturbance, and the Court found that these activities had produced a substantial degradation in ecosystem sustainability through loss of habitat, pollution and an increased anthropogenic presence.<sup>175</sup>

The Court further held that the infringement was not justified given that B.C. had failed to respond to BRFN’s concerns. The Honour of the Crown and the duty to respect treaty promises required B.C. to meaningfully engage with BRFN and respond to its concerns:

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<sup>170</sup> See *Yahey*, *supra* note 69.

<sup>171</sup> *Ibid* at para 3.

<sup>172</sup> *Ibid*.

<sup>173</sup> See *ibid*.

<sup>174</sup> *Ibid* at para 1116.

<sup>175</sup> *Ibid* at para 1122.

In these circumstances, I find that the Province’s fiduciary duty required that it act with good faith to seek to address Blueberry’s concerns regarding the cumulative impacts of development on the exercise of its treaty rights...

Acting with ordinary prudence in this case required that the Province investigate the concerns regarding cumulative impacts by developing processes to assess cumulative effects in Blueberry’s Claim Area and develop ways of managing and mitigating these effects. In the Court’s view, ordinary prudence would have required that the Province pause some development in Blueberry Claim Area, or key areas within the Blueberry Claim Area, pending the results of this work...<sup>176</sup> [emphasis added]

*Yahey* introduces some uncertainty into the law around infringement of treaty rights when “taking up” treaty lands for industrial uses.<sup>177</sup> It suggests that in addition to the limit that Indigenous signatories cannot be left with “no meaningful rights,” there must be a process to assess and manage the cumulative impacts of projects over time for infringement to be justified or consistent with the obligations of the Crown under the treaties. In treaty areas that have already been significantly developed, *Yahey* may make it more challenging to commence new industrial activities without triggering a treaty infringement through cumulative effects. These concerns would be relevant to trying to establish a project like the Northern Corridor, with multiple different types of industrial activity to occur along the route through treaty lands. *Yahey* suggests that a process for monitoring and mitigating its cumulative impacts, in combination with any other industrial developments in the impacted treaty territories, would be required.

The inclusion of just such a process is part of a formal agreement recently announced between BRFN and the B.C. government (BC WLRS 2023). Under the agreement, the process for managing lands and approving development will shift to a new, partnered approach between the provincial government and the BRFN. While some lands will be protected from development, and a fund for restoration is part of the agreement, it also contemplates a new process for co-approval of resource development and potential revenue sharing by the BRFN. The protected lands will contribute to B.C.’s progress toward its goal of 30 per cent land protection by 2030 under the UN Biodiversity Convention, reflecting a synergy between that goal and designating land as Indigenous Protected and Conserved Areas (BC WLRS 2023; ECCC 2022). The province is negotiating similar agreements with other Treaty 8 Indigenous peoples in B.C. (Willis and Stueck 2023). Agreements like these could serve as a potential model for development of the Northern Corridor on historic treaty lands.

### **C. MODERN LAND CLAIMS TREATIES AND THE NORTHERN CORRIDOR**

As noted above, modern land claims agreements and treaties provide Indigenous parties with a variety of rights, commonly including rights in relation to lands covered by the agreement. The Northern Corridor would intersect with several modern treaties, as shown in Figure 3 of Appendix A. The modern treaty context provides significantly more certainty in terms of incorporating specific processes for reviewing prospective development on

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<sup>176</sup> *Ibid* at para 1805.

<sup>177</sup> The province of BC did not appeal the decision, and the issue has yet to be considered by any higher court.

treaty lands. The Northern Corridor would require review under relevant provisions of the modern agreements covering the territory it would traverse. The terms for review can require multiple processes, or cooperative evaluation for complex projects that can have impacts engaging provincial/territorial, federal and Indigenous jurisdiction.

The case of *Quebec (Attorney General) v. Moses* provides a useful case study. At issue was the construction of a vanadium mine in territory covered by the James Bay and Northern Québec Agreement. The key question was what review and approval processes were required.<sup>178</sup> The majority relied on a close reading of several related provisions of the treaty to find the answer. Based on the terms of the treaty and the category of land on which the mine was located, a provincial administrator would consider the environmental review and recommendations of relevant treaty bodies to make the project approval decision. However, the mine would also require a certificate to be issued by the minister under the federal Fisheries Act, because of acknowledged harmful impacts on fish habitat. Quebec argued that once the project was approved by the provincial treaty administrator, the federal minister should issue this certificate without further independent assessment.

The treaty provided that a project should not be subject to more than one impact and review assessment procedure. However, the Supreme Court found this to be with respect to *internal* treaty processes.<sup>179</sup> Other provisions of the treaty preserved the need for project proponents to secure any “necessary authorizations or permits” from responsible governments.<sup>180</sup> The majority found that the treaty explicitly contemplated that this could include potential for an *external* federal impact and assessment review, if “required by federal law or regulation.”<sup>181</sup>

Consequently, the requirement for an assessment under the Canadian Environmental Assessment Act (CEAA) before the Fisheries Act permit could issue was *not in conflict* with the terms of the treaty. Because the treaty has constitutional status under s. 35, it would prevail if there were a conflict. However, the majority found that this was an example of cooperative federalism in the treaty’s operation, contemplated by the parties and reflected in the detailed agreement they had made.<sup>182</sup>

The majority also rejected arguments that the consultative and governance rights of the Cree under the treaty would be displaced by this result. Under the treaty, the administrator was required to consider the assessments and recommendations of treaty bodies including Cree and Inuit members.<sup>183</sup> Information about the project and its potential impacts was also transmitted to the Cree Regional Authority for their representations on the project.<sup>184</sup> The consultative and participatory rights of the Cree were preserved in the internal treaty

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<sup>178</sup> *Moses*, *supra* note 109 at para. 1.

<sup>179</sup> *Ibid* at para. 9, discussing provision 22.6.7 of the Agreement.

<sup>180</sup> *Ibid* at para. 8, discussing provision 22.7.1 of the Agreement.

<sup>181</sup> *Ibid* at para. 11, discussing provision 22.7.5.

<sup>182</sup> *Ibid* at paras. 11-13.

<sup>183</sup> *Ibid* at para. 17, the relevant bodies included: James Bay Advisory Committee on the Environment, described in the Treaty as “the preferential and official forum for responsible governments in the Territory concerning their involvement in the formulation of laws and regulations relating to the environmental and social protection regime” (s. 22.3.24); the Evaluating Committee, which recommends “the extent of impact assessment and review” of a proposed development (s. 22.5.14); and the Environmental and Social Impact Review Committee for projects “involving” provincial jurisdiction, such as the vanadium mine is issue (s. 22.6.1).

<sup>184</sup> *Ibid* at para. 24, referring to provisions 22.6.11-12 in support of this step.

processes required for approval of the project. The need for an additional external review under the CEAA would be subject to the Crown's duty to consult with the Cree on "matters affecting their James Bay Treaty rights" as set out in *Haida* and *Mikisew Cree*.<sup>185</sup> The CEAA itself contained provisions that permitted a joint or substituted panel that would have allowed harmonization through the treaty assessment bodies.<sup>186</sup> There had been an attempt to coordinate the process initiated by the CEAA, and the Court majority found that there was no federal reluctance to consult fully with the Cree. The majority rejected claims that their interpretation of the treaty would inevitably lead to "duplication, delays and additional costs for taxpayers and interested parties, and a breach of the First Nations' participatory rights" — a fear of the dissenting judges.<sup>187</sup> The majority found that "in the ordinary course," federal ministers would "pay close attention to the work done by the Treaty bodies" and take advantage of statutory and practical avenues to collaborate and harmonize their work.<sup>188</sup>

The *Moses* case highlights several important points for the Northern Corridor. One is that the terms of any modern treaty engaged by the project would need to be closely consulted to determine what process is required for review and approval of the project in the treaty territory. Depending on the terms of the treaty, this could involve both internal treaty processes *and* external approvals from other governments. *Moses* shows that even within modern treaty frameworks, the process of coordinating between co-management institutions, provincial and federal governments can be difficult. Under any process, the need to consult affected Indigenous treaty parties would be preserved. The relevant treaty bodies, incorporating participation of Indigenous representatives, would likely serve as primary mechanisms through which information, assessment and recommendations would be generated. The facts in *Moses*, related to impacts on fish habitat and the appropriate way to address them, signal the level of detail required for satisfactory review and approval of projects with the potential to impact Indigenous rights under modern treaties.<sup>189</sup> The Northern Corridor — proposed as a multi-modal infrastructure corridor with a range of possible uses — would be impossible to review under modern treaties without more concrete details of the specific developments and impacts involved.

#### **IV. EVOLUTION OF INDIGENOUS LAND RIGHTS: THE UNDRIP AND THE NORTHERN CORRIDOR**

The Northern Corridor project would need to navigate a complex legal landscape to appropriately integrate the rights of Indigenous people. An added challenge is that the law of Indigenous rights is constantly evolving. There is potential for significant change over the life cycle of a project like the Northern Corridor.

One obvious source of influence is the UNDRIP, which was adopted by the UN General Assembly in 2007, after lengthy development with extensive participation by Indigenous peoples (UN Department of Economics and Social Affairs, Indigenous Peoples n.d.). Canada was one of four countries that initially voted against the UNDRIP, because of

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<sup>185</sup> *Ibid* at para. 45.

<sup>186</sup> *Ibid* at para. 29 (citing [ss. 12\(5\)\(c\)](#) and [40\(1\)\(d\)](#) on ability to deal with bodies designated under land claims agreements; [ss. 40-45](#) on authorization to harmonize assessment under CEAA with a treaty body).

<sup>187</sup> *Ibid* at para. 58.

<sup>188</sup> *Ibid* at para. 46.

<sup>189</sup> See e.g. discussion at paras. 25-33.



concern over the core concept of “free, prior and informed consent” (FPIC) for actions affecting Indigenous peoples and their lands (Newman 2017; Flanagan 2020; Esmail 2021). While Canada endorsed the declaration in 2010, it was with reservations — that the UNDRIP was a statement of aspirations, rather than legally binding and did not displace the duty to consult under Canadian law (Flanagan 2020, i). In 2016, Canada became a “full supporter” of UNDRIP “without reservation” at the UN (Fontaine 2016). However, soon after this, the Minister of Justice, speaking to the Assembly of First Nations, suggested that direct adoption of UNDRIP in Canadian law would be unworkable; instead:

UNDRIP will get implemented in Canada ... through a mixture of legislation, policy and action initiated and taken by Indigenous Nations themselves. Ultimately, the UNDRIP will be articulated through the constitutional framework of section 35. [emphasis added]<sup>190</sup>

While the UNDRIP holds significant potential to influence Canadian law, the path forward is uncertain.

The UNDRIP is unique in being an international regime fully grounded in a model of Indigenous self-determination (Henderson 2017; DOJ 2021a; Metcalf 2003). The declaration emphasizes Indigenous peoples’ rights to autonomy and decision-making authority with respect to the substantive rights it outlines. A key aspect of this is the requirement for FPIC by Indigenous peoples for decisions that affect them (Newman 2019). There are several specific articles in the UNDRIP requiring FPIC that are especially relevant for projects like the Northern Corridor:

- Article 19 (prior to adopting/implementing legislative or administrative measures that may affect Indigenous peoples);
- Article 28(1) (when taking, occupying, using or damaging lands, territories and resources Indigenous peoples have traditionally owned, occupied or used);
- Article 29(2) (as a condition for storage or disposal of hazardous materials on Indigenous lands, territories) and
- Article 32(2) (when approving any project affecting Indigenous lands or territories and other resources, particularly in connection with resource exploitation and development) (UNDRIP 2007).

The federal government has recently passed the UNDRIP Act which affirms the declaration as a “universal international human rights instrument with application in Canadian law.”<sup>191</sup> The federal UNDRIP Act commits the federal government to:

- ensuring that Canadian laws are consistent with UNDRIP;
- preparing and implementing an action plan within two years and
- providing annual progress reports (DOJ 2021a).

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<sup>190</sup> Flanagan, 2020 at 5.

<sup>191</sup> See *United Nations Declaration on the Rights of Indigenous Peoples Act*, SC 2021, c 14, s 4(a), DOJ 2021b.

The UNDRIP Act follows B.C.'s lead; the province was the first jurisdiction in Canada to adopt UNDRIP in the 2019 Declaration on the Rights of Indigenous Peoples Act (DRIPA).<sup>192</sup> BC produced its first Action Plan in March of 2022. The plan outlines various commitments, including requiring the B.C. government to “[n]egotiate new joint decision-making agreements and consent agreements” that “reflect free, prior, and informed consent” (Government of British Columbia 2022, 1). However, what remains unclear in these legislative initiatives is how the UNDRIP relates to existing s. 35 rights and other laws, what the content of FPIC might be, and how it relates to existing law on the duty to consult.

There are differing views. The federal government has taken the position that the UNDRIP Act does not change the existing duty to consult, nor impose a requirement for consent by Indigenous peoples (DOJ 2021a). Instead, FPIC requires “working together in partnership and respect” in order to ensure “effective and meaningful participation of Indigenous peoples in decisions that affect them” (DOJ 2021a). Crown ministers have argued there is a “complete consensus” that FPIC does not amount to a “veto” — that the word appears nowhere in the UNDRIP Act.<sup>193</sup> The UNDRIP Act is not seen to impose any new requirements for project development. Instead, the role of the UNDRIP Act is to serve as a forward-looking aid to future development or amendment of the law (Duncanson et al. 2021).

While some Indigenous representatives also resist characterization of FPIC as a “veto,” FPIC is viewed as more than a procedural duty for government consultation. The concept of a veto is inaccurate because it suggests an arbitrary ability to reject a law or development that affects Indigenous peoples regardless of the circumstances (Bouthilier 2017, 6-7). Instead, FPIC is seen as tied to the UNDRIP’s model of Indigenous self-determination, that supports Indigenous peoples’ decision-making about “decisions directly impacting their lands, territories, and resources” (Bouthilier 2017, 2; Kung 2019). The Canadian Indigenous Bar Association (CIBA) has emphasized that FPIC involves an ability for Indigenous peoples to make decisions free from coercion — incorporating the ability to say no without fear of retaliation. Participation by Indigenous peoples must also occur early enough for timely information-gathering-and-sharing and decision-making processes to happen within Indigenous peoples’ own representative institutions. Plans or projects should not begin until there is agreement with *all* Indigenous peoples concerned (Mitchell et al. 2019, 8). FPIC requires consent not only to the specific project at issue, but also the process for reaching agreement (Mitchell et al. 2019, 9). This recognizes legal space for the influence of Indigenous peoples’ own governance processes and laws in shaping FPIC.

The discussion above exposes a substantial gap between government and Indigenous views of the UNDRIP and FPIC. A corresponding potential gap exists between the existing law of s. 35 Aboriginal rights and the substance of the UNDRIP and FPIC (Pappillon, Leclair, and Leydet 2020; Newman 2017). The UNDRIP’s foundation is an inherent right of self-determination, as opposed to consultation to limit impacts on Aboriginal rights as recognized under Canadian law (Newman 2017). The UNDRIP is focused on recognition of Indigenous peoples’ ability to govern themselves and their lands under their own laws. The UNDRIP directly raises questions about how the jurisdictional boundaries between Indigenous and other Canadian legal orders are to be navigated (Borrows 2017; Christie 2017).

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<sup>192</sup> SBC 2019, c 4.: <https://www.bclaws.gov.bc.ca/civix/document/id/complete/statreg/19044> [DRIPA].

<sup>193</sup> Duncanson et al (2021), respectively quoting then Minister of Crown-Indigenous relations, Carolyn Bennett and Minister of Justice, David Lametti. See also Wright 2021.

Under s. 35, while there are gestures toward these questions, they are largely sidestepped by characterizing s. 35 Aboriginal rights as analogous to the human rights in the Charter. This supports federal and provincial ability to justifiably limit the rights when doing so is a proportionate response in pursuit of the public good.<sup>194</sup> The jurisdictional authority recognized under the UNDRIP, embodied in robust views of FPIC, instead suggests that what is needed is new federalism doctrine (Borrows 2017; Christie 2017). Modern treaties incorporate constitutive rules to manage jurisdictional boundaries between Indigenous, provincial/territorial and federal governments. Perhaps the UNDRIP Act will lead to negotiation of more, similar agreements. However, the UNDRIP also includes Article 46(2), which allows limitations on rights that are (1) in accordance with international human rights obligations, (2) non-discriminatory and (3) “necessary solely for the purpose of securing due recognition and respect for the rights and freedoms of others and for meeting the just and most compelling requirements of a democratic society.” This justified limitation approach might align more readily with existing s. 35 jurisprudence. The operation of this UNDRIP limitations clause in Canadian law — and whether it alters or displaces existing s. 35 justification tests — requires judicial consideration.

The UNDRIP is very likely to play a role in the ongoing evolution of s. 35. It is doubtful that the UNDRIP could be directly applied domestically as customary international law (Newman 2019, 234; van Ert 2018). However, its influence may still be felt through s. 35, since interpretations consistent with “the values and principles of international law” are preferred.<sup>195</sup> Legislation like the UNDRIP Act and DRIPA strongly signals governments’ desire to bring Canadian law in line.

There is also significant potential for the UNDRIP to influence Canadian law of Indigenous rights through less court-centric paths. Legislative efforts, as envisioned under the federal UNDRIP Act, and similar provincial laws, will be important.<sup>196</sup> In B.C., changes to the environmental assessment regime have enhanced the role Indigenous peoples play in decision-making (Hudson 2020). B.C. has also used agreements authorized under its DRIPA to enable consensual decision-making frameworks for projects and decisions affecting traditional lands, as with the BRFN (BC WLRS 2023). Indigenous nations have already begun to assert their jurisdiction, for example conducting their own environmental assessments of projects proposed for traditional territory and declaring protected conservation areas.<sup>197</sup> Increasingly, regulatory regimes in Canada are making space for similar Indigenous law and governance initiatives.<sup>198</sup> Some industry proponents and Indigenous nations have begun to incorporate Indigenous project review, approval and oversight into project agreements, independently of any other required government approvals.<sup>199</sup>

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<sup>194</sup> See e.g., *Tsilhqot’in*, *supra* note 11 at paras. 120-125, 139,142.

<sup>195</sup> See *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817, at para 70.

<sup>196</sup> See e.g., BC’s *DRIPA*, *supra* note 201; Manitoba’s *The Path to Reconciliation Act*, C.C.S.M. c. R30.5 as examples of provincial laws reflecting commitments to honour the *UNDRIP*.

<sup>197</sup> See e.g., Tsleil-Waututh Nation (2022); for discussion of some Indigenous declared conservation areas, see Y2Y Conservation Initiative (2022).

<sup>198</sup> For example, see federal guidelines for Indigenous collaboration in environmental assessments under the federal *Impact Assessment Act*, SC 2019, c. 28, s.1.

<sup>199</sup> See e.g. Cooperation Agreement between New Gold mining company and the St’kémłúpsəmc te Secwepemc(SSN) (SSN, 2021); Boron and Markey, 2020 (on general SSN strategy of relational self-government through such agreements).

For a project like the Northern Corridor, the UNDRIP and statutory commitments to implement it underline the importance of a partnered approach with Indigenous peoples. Inclusive project governance structures that have been negotiated together with Indigenous peoples and active consensual participation by Indigenous rights holders will align with the UNDRIP's FPIC standard. These aspects are also keys to successful integration of Indigenous rights under s. 35. The legal approach to managing lack of consensus or disagreement is less clear, and it is here that questions about UNDRIP's influence may be most relevant. Existing s. 35(1) law clearly allows governments to justify limits on Indigenous rights absent consent. Whether this is consistent with UNDRIP's legal standard remains to be seen. Beyond this is the question of whether overriding FPIC will be perceived as reflecting legitimate commitment to UNDRIP and supporting the 'social license' that can be critical for project success. The sheer geographic scope of the Northern Corridor and the myriad impacts generated by a multi-use corridor will make it challenging to achieve the best-case scenario of full consensus.

## V. CONCLUSIONS AND RECOMMENDATIONS

This paper has examined the rights Indigenous people have under non-Indigenous law to lands implicated in the Northern Corridor project, through claimed or established title and historic and modern treaty rights, and through ownership of their reserve lands. Each of these distinct types of land rights gives Indigenous peoples legal and often constitutional claims over the land. For the Northern Corridor to proceed, these rights must be incorporated into the project's design and implementation.

Although the specific details vary across these land rights, there are common elements. Indigenous peoples must be consulted about prospective negative impacts on their rights. The adequacy of consultation and any required accommodation of Indigenous rights can be subject to judicial review. Where consultation falls short, as it did in the TMX initial approval, projects can be delayed while additional consultation takes place. Existing cases do not support generalized shortcuts to consultation that fail to directly engage with the details of impacts for affected Indigenous communities. Good faith engagement with Indigenous rights holders is always required.

Existing caselaw does not support the need for consent at the consultation stage, where rights are advanced but not established. However, in *Tsilhqot'in*, the Supreme Court *does* say that "ordinarily" consent will be required to access the land once Aboriginal title is established. Consensual agreements with Indigenous parties are also held to be an answer to future claims of insufficient consultation or infringement of Aboriginal rights. Combined with the potential for integration of UNDRIP and FPIC into Canadian law, these developments support a partnered, consensual approach to the Northern Corridor as the best-case scenario for respecting Indigenous land rights.

What is less clear is how disagreement and lack of consent in a complex, multi-jurisdictional project like the Northern Corridor would be evaluated. The Supreme Court shifted the test for justified limitation of Aboriginal title in *Tsilhqot'in*, and it is unclear that the same approach applies to historic or modern treaty rights. There has been little Supreme Court level application of the tests for justified infringement of s. 35 rights. Many leading cases reach the court based on government claims that there are no s. 35 rights engaged or

infringed — rather than arguing justified infringement. However, if lack of consent becomes a trigger for requiring justified infringement of Indigenous land rights, the application of this standard will likely be required for the rights of *some* Indigenous communities in any large-scale infrastructure project such as the Northern Corridor. Legal guidance and further research are required on justification frameworks and disagreements, especially in settings where the interests of multiple distinct Indigenous communities are at stake.

Indigenous land rights are closely associated with Indigenous law and jurisdiction — although the legal contours of this relationship remain imprecise at present in Aboriginal title and historic treaty contexts. Development of modern treaties and land codes under the FNLMA provide an example of how these Indigenous governance rights can be recognized. Authors have used the metaphor of ‘braiding’ to discuss the interplay and overlap between Indigenous and non-Indigenous law in what is now Canada. More research is needed into the legal mechanisms that could be used to create an integrated legal system like this. For projects like the Northern Corridor, that involve substantial investments spread over geographic distance and time, some certainty around these jurisdictional boundaries will be required for the project to be successful.

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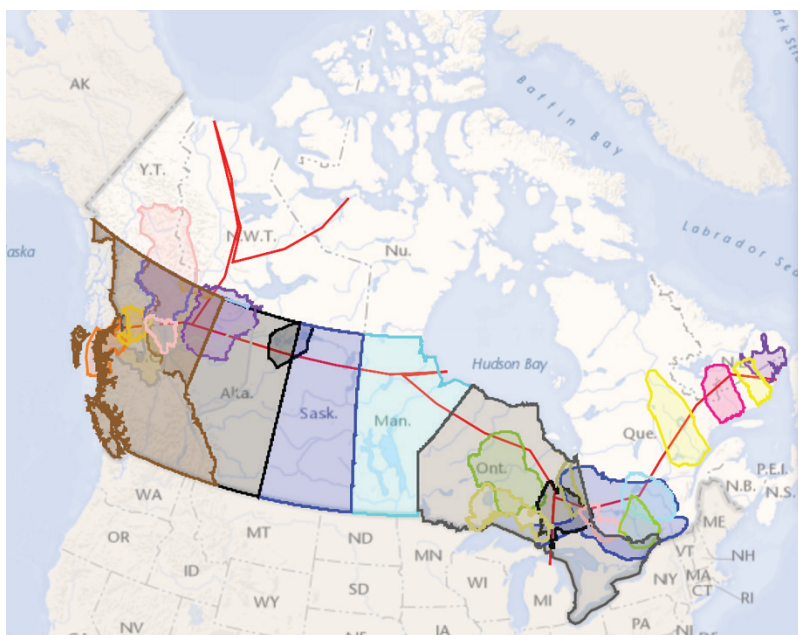
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## APPENDIX A

Figure 1: Aboriginal Title and Territorial Claims, and the Northern Corridor Route



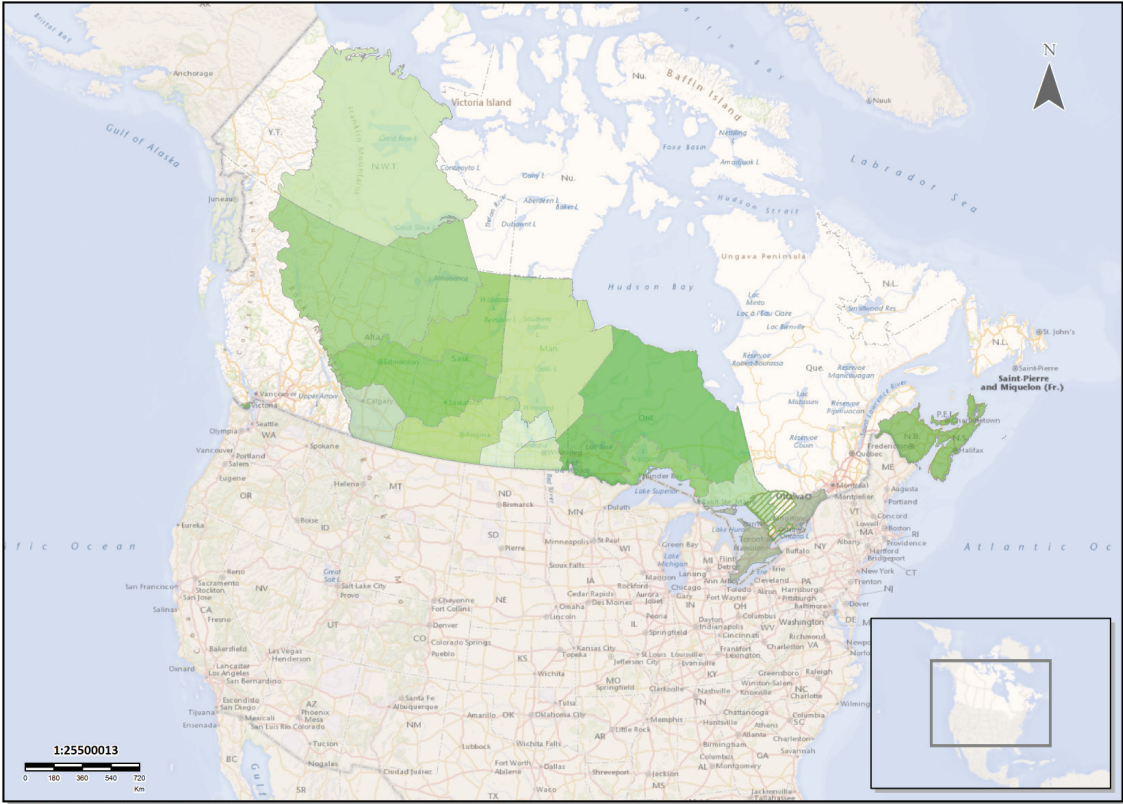
Source: CIRNAC, ATRIS mapping program: [https://sidait-atris.aadnc-aandc.gc.ca/atris\\_online/Content/Search.aspx](https://sidait-atris.aadnc-aandc.gc.ca/atris_online/Content/Search.aspx). The line drawing function was used to identify approximate corridor route (in red), and the mapping program generated information on existing and potential title claims that fall along the notional route (Senate Standing Committee 2017; Sulzenko and Fellows 2016). These include:


- **Negotiations in B.C.** – Carrier Sekani Tribal Council (BCTC claim); Gitanyow Hereditary Chiefs (BCTC claim); Gitksan Hereditary Chiefs; Kaska Nation (B.C./YK); Treaty 8 Tribal Association; Tsay Keh Dene Band; Tsimshian First Nations.
- **Title assertions in B.C.** – Métis Groups in B.C.; Métis Nation of Alberta.
- **Title assertions in Alberta** – Athabasca Chipewyan First Nation; Horse Lake First Nation; Dene Tha’ First Nation; Métis Nation of Alberta Region.
- **Title Assertions in Saskatchewan** – Métis Groups in Saskatchewan.
- **Title Assertions in Manitoba** – Métis Groups in Manitoba.
- **Title Assertions in Ontario** – Algonquin Anishinabeg Nation; Matawa First Nations Homelands and Traditional Territory; Métis Groups in Ontario.
- **Title/Traditional Territory Assertions in Quebec** – Innus de Pessamit; Conseil de la Nation Atikamekw (Nitaskinan); Kitigan Zibi Anishabeg First Nation; Montagnais de Paku Shipi; Montagnas de Unamen Shipu; Nionwents’io (Huron-British Treaty application according to Huron-Wendat Nation).
- **Newfoundland** – Les innus de Ekuanitshit.
- **Yukon** – Kaska Dena Council.

Note that this is a tentative list that is simply an indication of prospective claims, since the claims process is dynamic and only an approximation of the Northern Corridor route has been used with the interactive tool to identify rights and outstanding claims.

Figure 2: Historic Treaties and the Northern Corridor Route

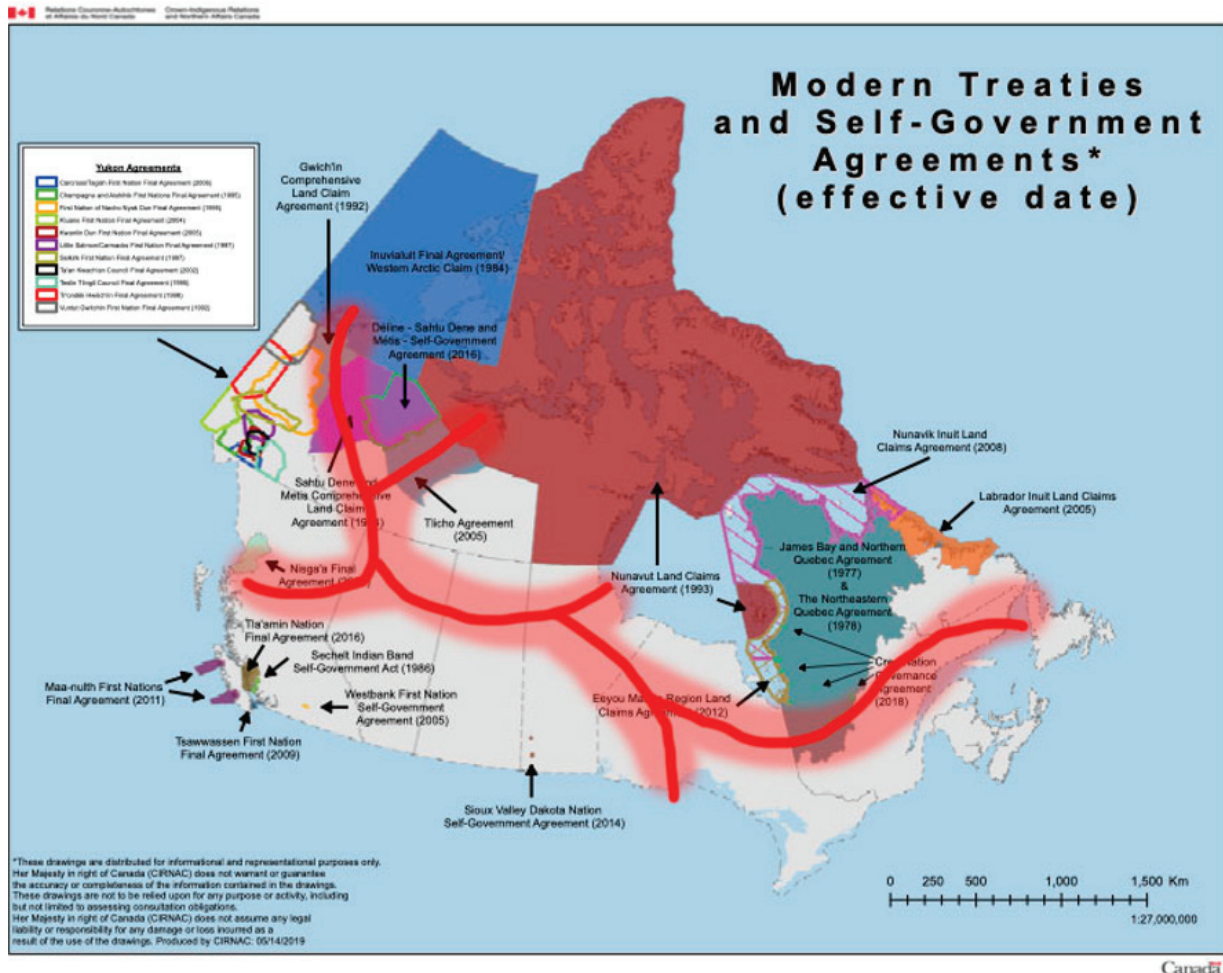
Web Map



Aboriginal and Treaty Rights Information System (ATRIS) 2022-02-20 This map is for illustrative purposes only  Indigenous Services Canada Services aux Autochtones Canada

Source: Map of historic treaties is sourced from CIRNAC (ATRIS 2022), edited to label only historic treaties that overlap with notional Northern Corridor route (overlaid in blue) (Senate Standing Committee 2017; Sulzenko and Fellows 2016). These include Treaties 5, 8, 9, 10 and 11.

Figure 3: Modern Treaties and the Northern Corridor Route



Source: CIRNAC, 2022 Map of Modern Treaties and Self-Government Agreements, with map of Northern Corridor route overlaid (in red) (Senate Standing Committee 2017; Sulzenko and Fellows 2016). Based on the prospective route and existing agreements to date on the CIRNAC map, the following modern treaty agreements would potentially be engaged: Nisga'a Final Agreement; Sahtu Dene and Métis Comprehensive Land Claims Agreement; Gwich'in Comprehensive Land Claim Agreement; Inuvialuit Final Agreement/Western Arctic Claim; Tilcho Agreement; Déline-Sahtu Dene and Métis Self-Government Agreement; Nunavut Land Claims Agreement; James Bay and Northern Quebec Agreement and The Northeastern Quebec Agreement.

## APPENDIX B

### TRANS MOUNTAIN (TMX) EXPANSION PROJECT TIMELINE

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#### 2011

- Kinder Morgan (KM) begins to identify Aboriginal groups potentially impacted by the TMX Expansion Project.
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#### 2012

##### May

- KM sends letters to Aboriginal groups identified as potentially impacted by the project.
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#### 2013

##### July

- National Energy Board (NEB) releases list of issues, which identified topics the board will consider in its review of the project.
- NEB announces it is making funding available (applicants must have standing as intervenors in the NEB process).

##### August

- NEB writes to identified Indigenous groups to advise that Trans Mountain (TM) has filed a project description on May 23, 2013, and to provide preliminary information about the upcoming review process.
- TM engages Aboriginal groups on type of information and research being undertaken to develop Technical Review of Marine Terminal Systems and Transshipment Sites (TERMPOL) studies.

##### September

- NEB issues “Filing Requirements Related to the Potential Environmental and Socio-Economic Effects of Increased Marine Shipping Activities” — a guidance document intended to assist the proponent.

##### November

- TM sends letter to Aboriginal groups to notify them of the availability of TERMPOL studies for review.
- NEB staff begins presenting information in person at community meetings to Aboriginal groups.

##### December

- Transport Canada (TRC) sends letters to Aboriginal groups with traditional territories along the project’s shipping route, provides information on the TERMPOL review process and advises that TRC had recommended the proponent engage Aboriginal groups on TERMPOL studies to incorporate traditional knowledge into studies.
- Trans Mountain formally applies to NEB to expand existing pipeline system.



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## 2014

### April

- NEB Review starts (time limit of fifteen months; time limits suspended twice).
- NEB issues ‘scoping’ decision — marine shipping activities not included in definition of “designated project” under Canadian Environmental Assessment Act (CEAA) [relevant legislation will now be federal Impact Assessment Act (IAA)].

### May

- Early engagement letters are sent to Aboriginal groups identified as potentially owed moderate to high level of consultation.
- Aboriginal groups are invited to meet to discuss how NEB hearing would be used in Crown consultations.

### June

- Early engagement meetings with Aboriginal groups take place.

### February

- NEB staff complete presenting information at in-person community meetings.

### December

- Technical Review Process of Marine Terminal Systems and Transshipment Sites (TERMPOL) review of the marine shipping component of project is completed.

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## 2015

### February

- Letters are sent out to Aboriginal groups setting out Crown consultation framework (consultation organized into four phases — 1) early engagement, 2) NEB hearing, 3) government decision-making, 4) regulatory authorizations should project be approved).

### May

- Letters are sent to offer opportunity for groups to apply for participant funding.
- Major Projects Management Office of Natural Resources Canada (MPMO) introduces evidence about government’s approach to Crown consultation with NEB.

### Summer

- Federal government announce action to respond to procedural concerns raised by Aboriginal groups.

### June

- MPMO files information requests to all Aboriginal group intervenors seeking feedback on draft issues tracking tables.

### October

- Kamloops Pipeline Summit: MPMO attends, and presents information on how Crown approaches consultation for major pipeline projects subject to regulatory review by the NEB (informal meetings).

## **December**

- Correspondence is sent to Aboriginal groups to remind of revised deadline for comments, recognizing various procedural issues raised by Aboriginal groups and the extent to which the Crown could rely on the process to support its consultation/accommodation obligations.

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## **2016**

### **January**

- MPMO and other federal departments file written arguments-in-chief and comments on draft NEB conditions.
- Oral summary argument begins (Burnaby and Calgary).
- MPMO sends letters to all potentially affected Aboriginal groups to note Crown's awareness of procedural concerns (impact of legislated time limits, limited scope of NEB review, inadequate participant funding, overreliance on NEB review for meeting Crown consultation obligations).
- Government announces interim strategy to support decisions on major resource projects.
- Governor in Council (GIC) extends time limit for decision from three to seven months, and Budget 2016 increases amount of participant funding for Indigenous groups from \$700,000 to \$2.2 million.

### **February**

- Oral summary argument is completed.
- MPMO sends letters to all potentially affected Aboriginal groups detailing government's interim measures, how the Crown intends to use additional four months of decision-making time, plans to offer additional participant funding, and information on how the Crown assesses the depth of consultation owed to each group.

### **February–May**

- Face-to-face meetings with Indigenous groups take place (individual and collective consultation meetings).
- Minister announces he is striking a three-member independent Ministerial Panel that will engage local communities and Indigenous groups.
- Ministerial panel holds a series of public meetings in Alberta and B.C., and receives emails and responses to an online questionnaire.

### **July**

- All Aboriginal groups involved in consultation are invited to apply for additional participant funding.

### **August**

- Draft Consultation and Accommodation Report are shared with Aboriginal groups for written comment and discussion.
- MPMO and BC Environmental Assessment Office (EAO) jointly send letter to Indigenous groups confirming that they are responsible for conducting consultation efforts and are coordinating by participating in joint consultation meetings, sharing information and preparing the draft "Joint Federal/Provincial Consultation and Accommodation Report for the Trans Mountain Expansion Project."

## September

- Federal Court of Appeal (FCA) dismisses Tsleil-Waututh appeal of scoping decision (without prejudice to Tsleil-Waututh's right to raise issue of proper scope of project in subsequent proceedings).

## November

- Ministerial Panel submits report to minister — identifies six high-level questions that it commended to Canada for serious consideration and remain unanswered.
- GIC approves Trans Mountain Pipeline expansion, with thirty-three groups having signed MBAs.

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## 2017

### January

- B.C. government issues environmental assessment certificate approving TMX.

### October

- Oral arguments on fifteen consolidated challenges to the federal approval of TMX began in FCA (*Tsleil-Waututh Nation v Canada*).

### November

- *Squamish Nation v British Columbia* is heard in BCSC (based on failure of B.C. government to consult Squamish Nation prior to approval of pipeline).

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## 2018

### May

- Federal government purchases pipeline from Kinder Morgan.
- BCSC rejects Squamish Nation challenge.

### August

- FCA decision in *Tsleil-Waututh Nation v Canada (Attorney General) (TWN 2018)* is released, quashing GIC decision to approve the project.

### September

- FCA is referred matter back to NEB for reconsideration and gives NEB until February 22, 2019, to produce its Reconsideration Report.

### October

- Canada announces it will reinitiate Phase III of the consultation process beginning October 5, 2018.
- Canada Reinitiates consultations directly with potentially affected Indigenous groups, with a focus on responding to and remedying concerns raised in *TWN 2018*, and retains recognized expert with extensive experience (former SCC Justice Frank Iacobucci) to oversee and provide guidance with respect to reinitiated consultations.

### November–December

- Iacobucci hosts a set of four roundtable meetings with potentially affected Indigenous groups in Edmonton, Kamloops, Vancouver and Victoria.
- The Crown organizes expanded consultation teams to meet with each potentially affected group, allocating \$5.3 million in funding to enable Indigenous groups to participate.

- 402 meetings are held in total, with 122 Indigenous groups willing to meet (TM usually in attendance).

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## 2019

### January

- Parliamentary Budget Office (PBO) releases report that values TMX at between \$3.6 billion and \$4.6 billion.

### February

- NEB recommends approval of the project again.

### March

- Federal government consults with Indigenous groups on possible equity and revenue-sharing arrangements on TMX.

### April

- GIC by way of a further Order in Council extends its timeline to make a decision within one month (deadline now June 18, 2019).
- Draft Crown Consultation and Accommodation Report shares with each Indigenous group, and groups are invited to provide comments on their respective draft annexes and then provide their own submissions to be included as part of the consultation record and to be attached to the report. This includes information on consultation and accommodation measures.
- Consultation meetings are held.

### May

- Date to provide comments is extended to May 31, 2019, and date to provide independent submissions to Crown is extended to June 6, 2019.
- *Squamish Nation v British Columbia* heard in BCCA (appeal from BCSC decision).

### June

- Project approved by Cabinet.

### September

- FCA issues judgement granting leave to bring JR and consolidating motions in *Raincoast Conservation Foundation et al v Attorney General of Canada et al*.
- Review on basis of inadequate consultation only; Court will not hear arguments on environmental risk.
- Applicants appeal to SCC regarding decision to narrow grounds.
- BCCA holds in favour of Squamish Nation in *Squamish Nation v BC* (B.C. approval of project flawed because it relies on “fundamentally flawed” NEB report; B.C. must start review process over again).

### November

- Round table talks and workshops held regarding possible equity sharing agreements with Indigenous groups.

### December

- *Coldwater FN* hearings take place at FCA.

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## 2020

### February

- FCA dismisses applicant's challenge of second approval in *Coldwater First Nation v Canada (Attorney General)*.

### March

- SCC declines to grant leave to appeal Coldwater FN decision.
- SCC declines to hear appeal of September FCA leave decision that limited scope of FCA hearing.

### Fall

- Construction is suspended for two months after multiple safety incidents.

### December

- PBO releases updated report that states TMX continues to be profitable, but that its profitability will be highly contingent on the climate policy stance of the federal government and the future utilization rate of the pipeline.

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## 2021

### June

- Minister of Transport announces \$750,000 in funding through Quiet Vessel Initiative for five Indigenous communities along TMX marine shipping route to measure and monitor the impacts of underwater vessel noise.

### November

- Sixty-seven agreements with seventy-three Indigenous groups in B.C. is signed (\$580 million in benefits and opportunities).
- Construction is halted for three weeks due to heavy rainfall and flooding in B.C.

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## 2022

### February

- Construction in Edmonton area is complete.

### April

- Construction across entire project is 50 per cent complete.

### May

- TM and District of Hope sign \$500,000 Community Benefit Agreement.

### June

- PBO releases updated report that states that TMX will result in a net loss of about \$600 million for the federal government.

### September

- TM reports that project construction is 70 per cent complete.
- Since project inception \$16.6 billion in construction capital spending has been incurred.
- Transition from project to operational status is anticipated in late 2023.

## ABOUT THE AUTHOR

Associate Professor, Queen's Faculty of Law, **Cherie Metcalf** studied Economics (BAH (Queen's), M.A., Ph.D. (UBC)) before pursuing legal studies (LL.B. (Queen's), LL.M. (Yale)). She clerked at the Federal Court of Appeal and Supreme Court of Canada before beginning her academic career. Her research combines her training in law and economics, with a focus on constitutional and environmental issues. Her research has been funded by a Fulbright / OAS Ecology Award, the Social Science & Humanities Research Council of Canada, and the Canadian Foundation for Legal Research. Together with co-author Ian Keay, she has twice (2005, 2022) been awarded the Vanderkamp Prize for the best paper in Canadian Public Policy for interdisciplinary work examining the impact of the Supreme Court's s. 35 Aboriginal rights decisions. She gratefully acknowledges the contributions of research assistants Elizabeth Benoy and Oliver Flis to this research paper.

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