

# Federally Regulated Energy Transport Projects and the Rights of Indigenous Peoples in Canada: Consultation, “Consideration”, and Corridors

- *OR* -



UNIVERSITY OF  
CALGARY

All I want for Christmas is \_\_\_\_\_?

David V. Wright  
Assistant Professor, Faculty of Law  
University of Calgary

**Saturday Morning at the Law School**  
14 Dec 2019



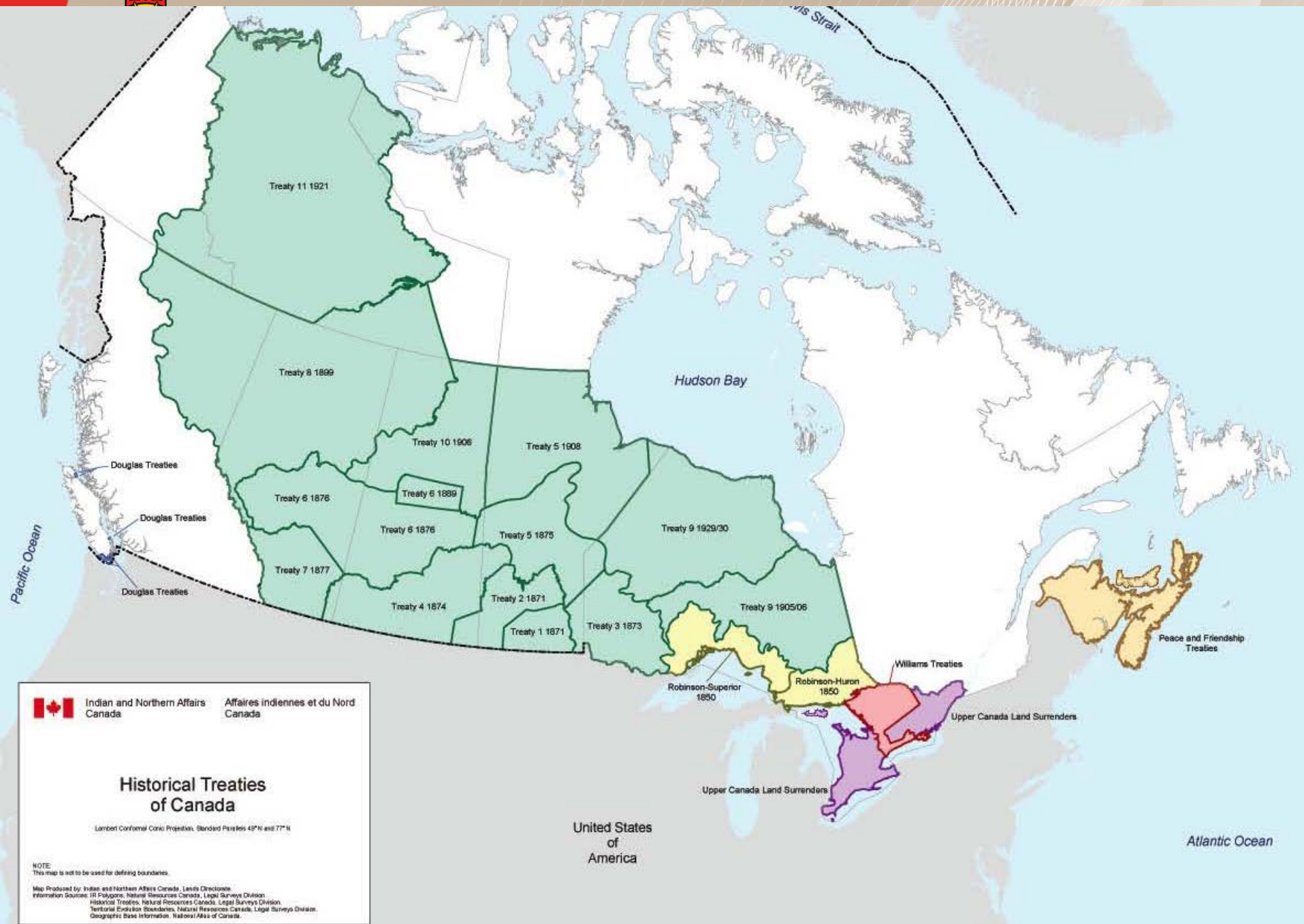




# Outline

- 1. Intro to legal landscape of Indigenous territory in Canada**
- 2. Basics of Crown-Indigenous Consultation**
- 3. New regime for review & approval of energy transport projects**
- 4. Contemporary government responses (e.g. Corridor)**
- 5. Conclusions & Questions**









# Modern Treaties and Self-Government Agreements\* (effective date)

## Yukon Agreements

- Carcross/Tagish First Nation Final Agreement (2005)
- Champagne and Aishihik First Nations Final Agreement (1995)
- First Nation of Nacho Nyak Dun Final Agreement (1995)
- Kluane First Nation Final Agreement (2004)
- Kwanlin Dun First Nation Final Agreement (2005)
- Little Salmon/Carmacks First Nation Final Agreement (1998)
- Sekik First Nation Final Agreement (1997)
- Ta'an Kwach'an Council Final Agreement (2002)
- Teslin Tlingit Council Final Agreement (1995)
- Tr'ondek Hwëch'in Final Agreement (1996)
- Vuntut Gwitchin First Nation Final Agreement (1995)

Gwich'in  
Comprehensive  
Land Claim  
Agreement (1992)

Inuvialuit Final Agreement/  
Western Arctic Claim (1984)

Sahtu Dene and  
Metis Comprehensive  
Land Claim  
Agreement (1994)

Tlicho Agreement  
(2005)

Nunavik Inuit Land  
Claims Agreement (2008)

Labrador Inuit Land Claims  
Agreement (2005)

Nunavut Land Claims  
Agreement (1993)

James Bay and Northern  
Quebec Agreement  
(1977)  
&  
The Northeastern  
Quebec Agreement  
(1979)

Nisga'a Final  
Agreement (2000)

Tla'amin Nation  
Final Agreement (2016)

Sechelt Indian Band  
Self-Government Act (1986)

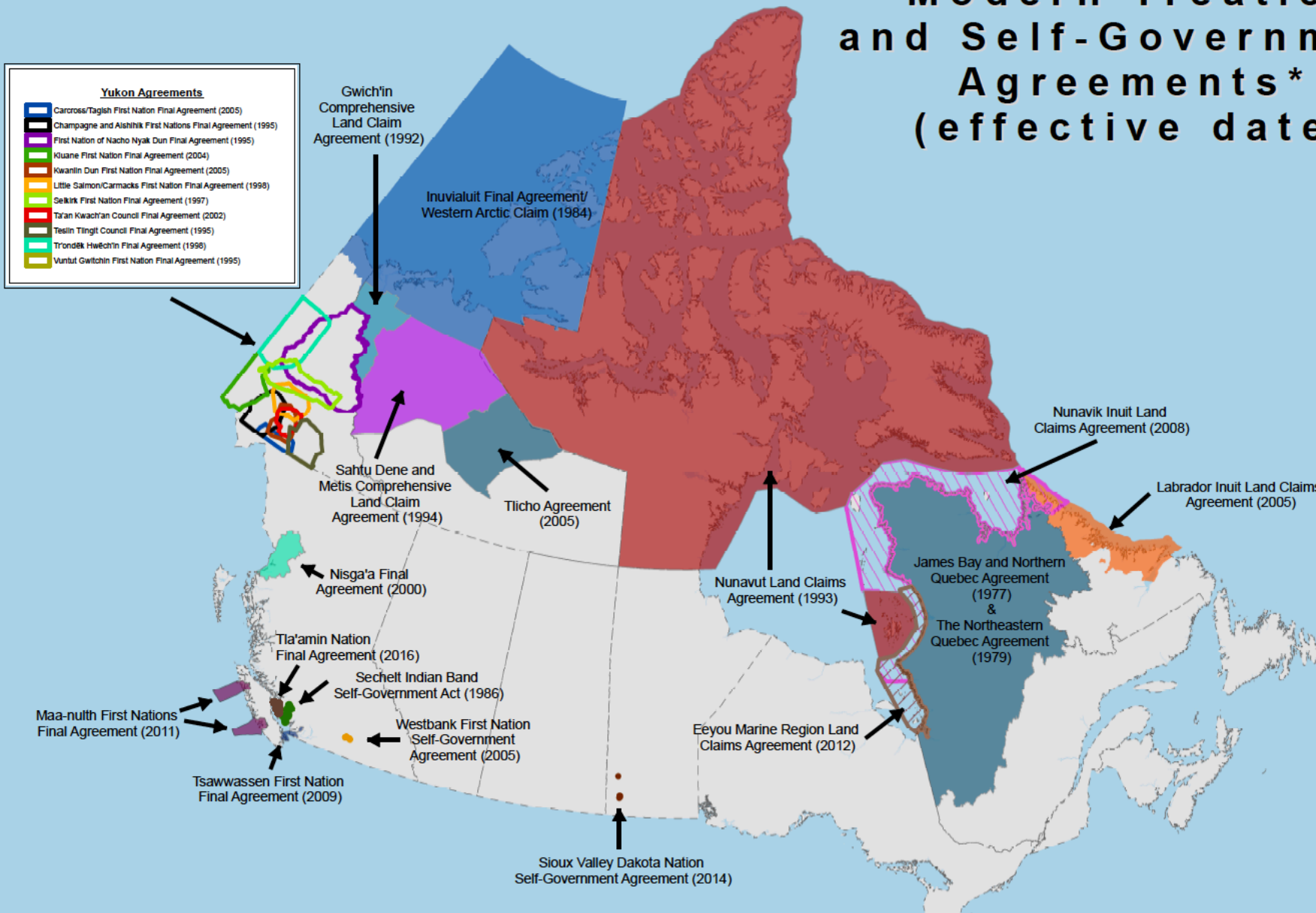
Maa-nulth First Nations  
Final Agreement (2011)

Tsawwassen First Nation  
Final Agreement (2009)

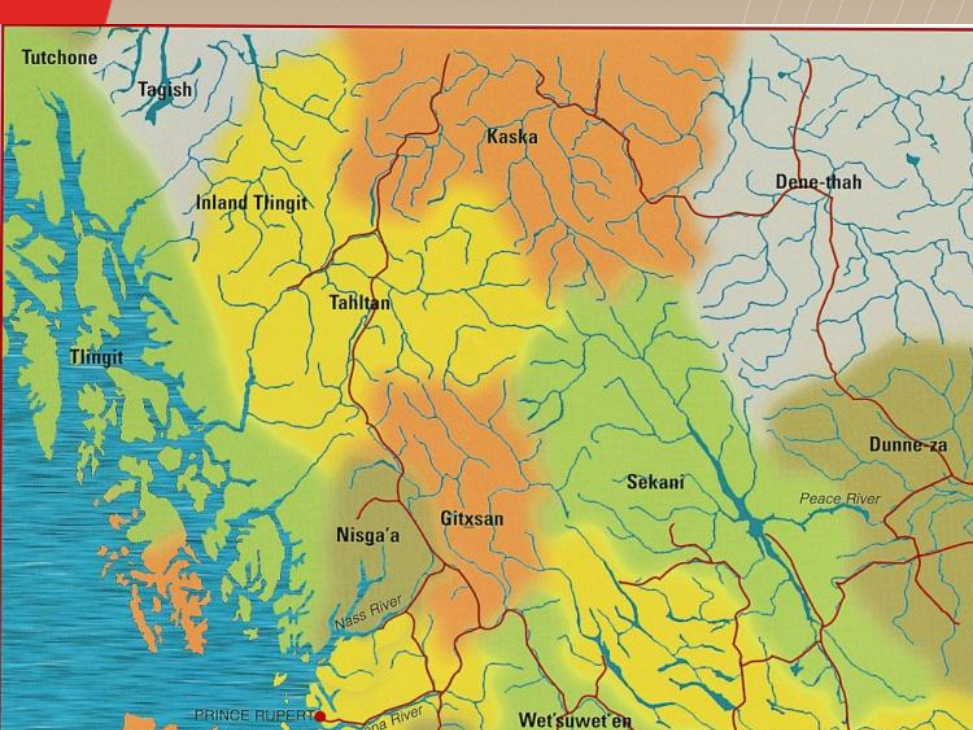
Westbank First Nation  
Self-Government  
Agreement (2005)

Eeyou Marine Region Land  
Claims Agreement (2012)

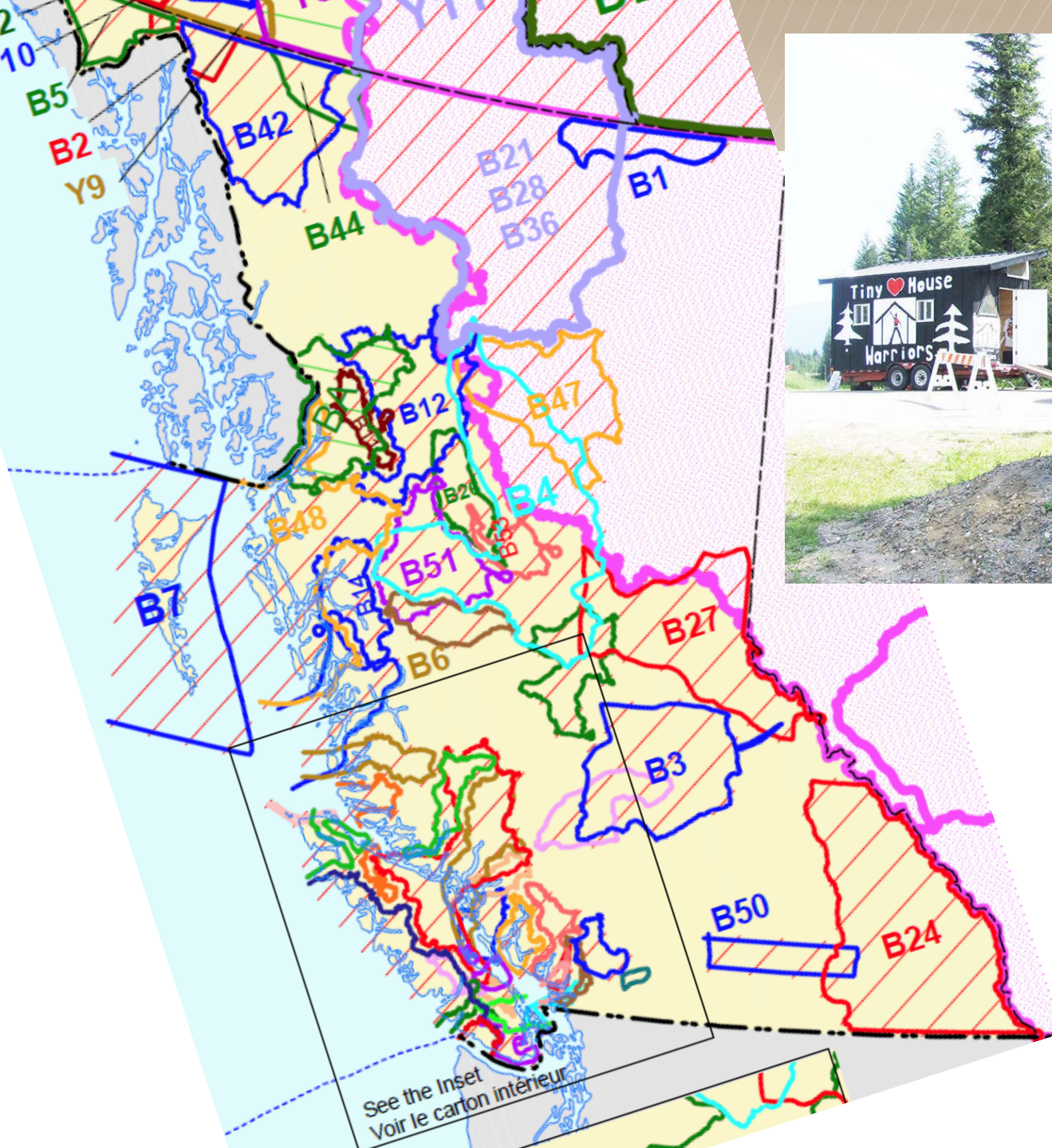
Sioux Valley Dakota Nation  
Self-Government Agreement (2014)









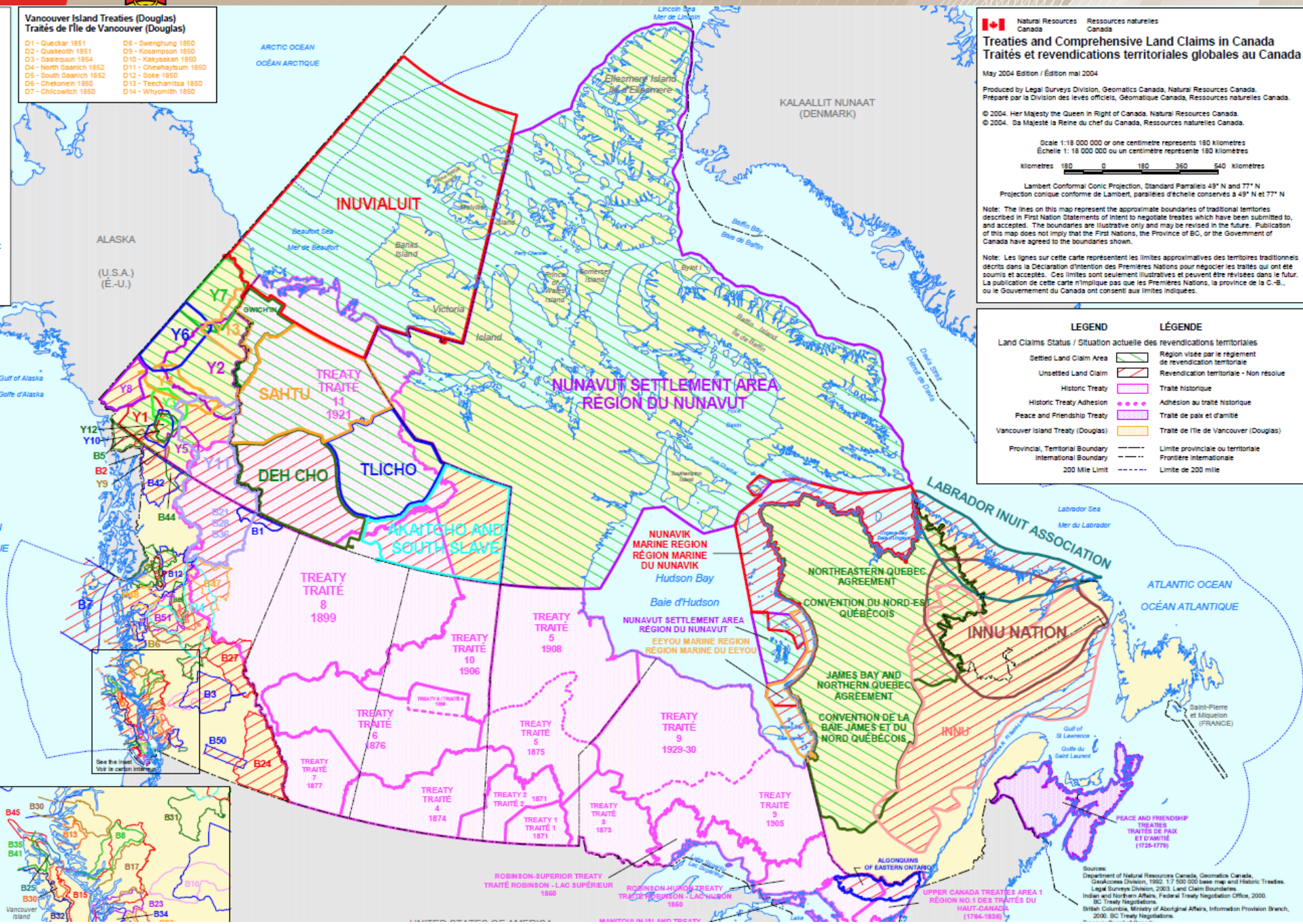






### Vancouver Island Treaties (Douglas) Traité de l'île de Vancouver (Douglas)

D1 - Quackar 1851	D8 - Swenglung 1850
D2 - Quakeoth 1851	D9 - Kosamson 1850
D3 - Saalequim 1854	D10 - Kalyaakum 1850
D4 - North Saanich 1852	D11 - Chehawaytum 1850
D5 - South Saanich 1852	D12 - Soke 1850
D6 - Chekonein 1850	D13 - Teschamibsa 1850
D7 - Chicowitch 1850	D14 - Whyomitha 1850



Natural Resources Canada  
Ressources naturelles Canada

### Treaties and Comprehensive Land Claims in Canada Traité et revendications territoriales globales au Canada

May 2004 Edition / Édition mai 2004

Produced by Legal Surveys Division, Geomatics Canada, Natural Resources Canada.  
Préparé par la Division des levés officiels, Géomatique Canada, Ressources naturelles Canada.

© 2004. Her Majesty the Queen in Right of Canada, Natural Resources Canada.  
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Scale 1:18 000 000 or one centimetre represents 180 kilometres

Échelle 1: 18 000 000 ou un centimètre représente 180 kilomètres

Kilometres 180 0 180 360 540 Kilometres

Lambert Conformal Conic Projection, Standard Parallels 49° N and 77° N  
Projection conique conforme de Lambert, parallèles d'échelle conservés à 49° N et 77° N

Note: The lines on this map represent the approximate boundaries of traditional territories described in First Nation Statements of Intent to negotiate treaties which have been submitted to, and accepted. The boundaries are illustrative only and may be revised in the future. Publication of this map does not imply that the First Nations, the Province of BC, or the Government of Canada have agreed to the boundaries shown.

Note: Les lignes sur cette carte représentent les limites approximatives des territoires traditionnels décrits dans la Déclaration d'intention des Premières Nations pour négocier les traités qui ont été soumis et acceptés. Ces limites sont seulement illustratives et peuvent être révisées dans le futur. La publication de cette carte n'implique pas que les Premières Nations, la province de la C.-B., ou le Gouvernement du Canada ont consenti aux limites indiquées.

#### LEGEND

#### LÉGENDE

Land Claims Status / Situation actuelle des revendications territoriales

- Settled Land Claim Area / Région visée par le règlement de revendication territoriale
- Unsettled Land Claim / Revendication territoriale - Non résolue
- Historic Treaty / Traité historique
- Historic Treaty Adhesion / Adhésion au traité historique
- Peace and Friendship Treaty / Traité de paix et d'amitié
- Vancouver Island Treaty (Douglas) / Traité de l'île de Vancouver (Douglas)
- Provincial, Territorial Boundary / Limite provinciale ou territoriale
- International Boundary / Frontière internationale
- 200 Mile Limit / Limite de 200 milles

Sources: Department of Natural Resources Canada, Geomatics Canada, GeoAccess Division, 1992, 1:7 500 000 base map and Historic Treaties, Legal Surveys Division, 2003, Land Claim Boundaries, Indian and Northern Affairs, Federal Treaty Negotiation Office, 2000, BC Treaty Negotiations, British Columbia, Ministry of Aboriginal Affairs, Information Provision Branch, 2000, BC Treaty Negotiations.





## Premières Nations au Canada First Nations in Canada

### Statut de la Première Nation First Nation Status

- Loi sur les Indiens (566)  
Indian Act (566)
- Loi sur la gestion des terres (34)  
Land Management Act (34)
- ▲ Autonomie gouvernementale (36)  
Self-Government (36)



Références:  
Affaires autochtones et Développement du Nord Canada -  
Système d'information sur l'administration des bandes, octobre 2011;  
Direction de la Gestion des terres - Premières Nations, février 2012.  
Carte de base: Ressources naturelles Canada, Atlas national du Canada 1: 7 500 000.

Sources:  
Aboriginal Affairs and Northern Development Canada -  
Band Governance Management System, October 2011;  
First Nations Land Management Directorate, February 2012.  
Base Map: Natural Resources Canada, National Atlas of Canada, 1: 7 500 000.

Échelle / Scale : 1:19 000 000

0 250 500 750 1 000 Km

Projection conique conforme de Lambert, parallèles standards 50°N et 70°N  
Lambert Conformal Conic Projection, Standard Parallels 50°N and 70°N



## Source of Aboriginal rights

“Aboriginal rights exist because they are derived from Aboriginal laws, governance, practices, customs and traditions. They exist in Canadian law not as a result of governmental recognition, but because they were not extinguished upon British or French assertion of sovereignty or establishment of governmental authority in what is now Canada. Aboriginal rights are therefore unlike other forms of rights that exist in Canadian society. Aboriginal rights are a part of Canadian common law and Canadian constitutional law, even though they did not arise under these regimes”.

- *Dr. John Borrows*

## **Constitution Act, 1982**

**s.35 (1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.**



## Constitution Act, 1982

- [T]he doctrine of Aboriginal Rights exists, and is recognized and affirmed by s.35 (1), because of one simple fact: when Europeans arrive in North America, aboriginal peoples were already here, living in communities on the land, and participating in distinctive cultures, as they had done for centuries. It is this fact, and this fact above all others, which separates aboriginal peoples from all other minority groups in Canadian society and which mandates their special legal and now constitutional status”.

- Chief Justice Lamer in *R v. Van der Peet*

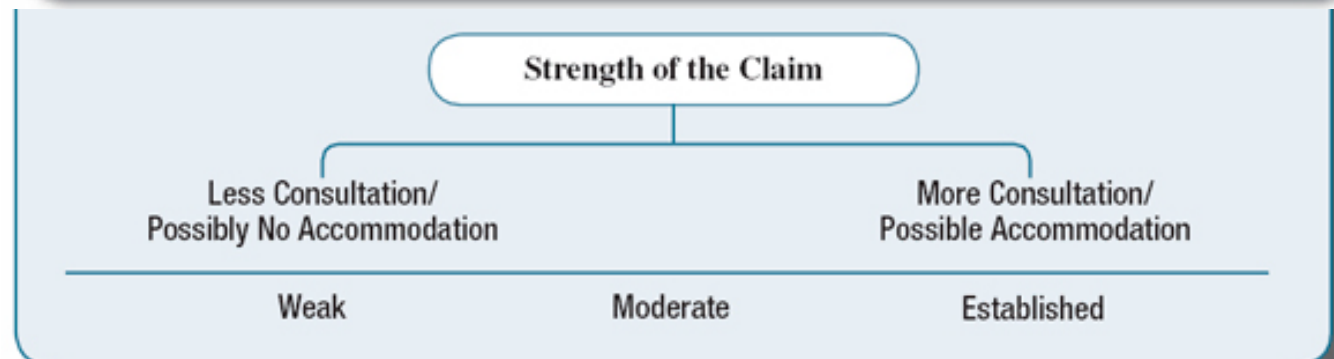
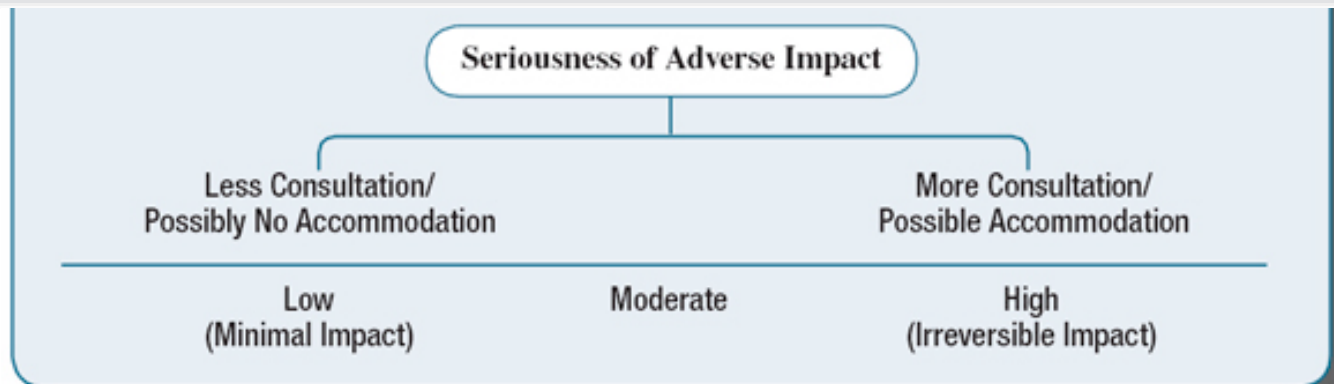
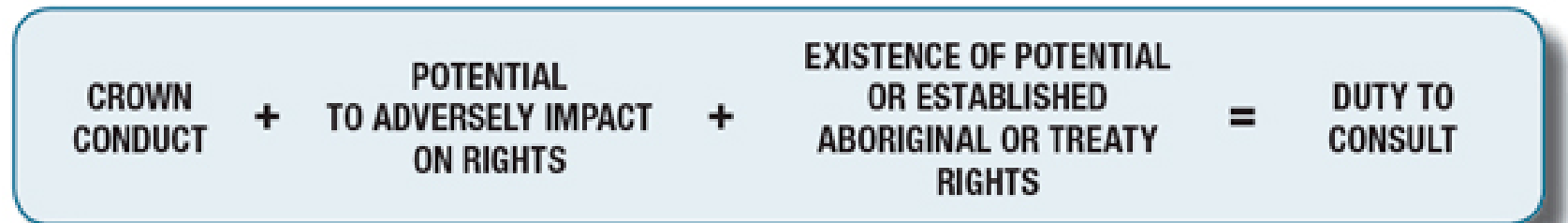
- Aboriginal and treaty rights protected under s.35 of Constitution
- Includes “Aboriginal Title” as well as “Aboriginal Rights” (e.g. fishing)

## **Rights of Indigenous Peoples – Duty to Consult**

**CROWN  
CONDUCT   +   POTENTIAL  
TO ADVERSELY IMPACT  
ON RIGHTS   +   EXISTENCE OF POTENTIAL  
OR ESTABLISHED  
ABORIGINAL OR TREATY  
RIGHTS   =   DUTY TO  
CONSULT**



# Rights of Indigenous Peoples – Duty to Consult



# Energy Transport Projects and the Rights of Indigenous Peoples

Examples: Trans Mountain, Northern Gateway, Energy East



# Energy Transport Projects and the rights of Indigenous Peoples

- **Duty to consult case law:**
  - *Gitxaala Nation v Canada, 2016 FCA 187*
  - *Tsleil-Waututh Nation v. Canada (Attorney General), 2018 FCA 153*





# Energy Transport Projects and the rights of Indigenous Peoples

## ■ Duty to consult principles: *Tsleil-Waututh*, *Gitxaala*:

- Governments may “set up regulatory schemes to address the procedural requirements appropriate to different problems at different stages, thereby strengthening the reconciliation process and reducing recourse to the courts”
- Process does not give Aboriginal groups a veto; no ‘duty to agree’
- ‘Consent’ appropriate only in cases of established right, “and then by no means in every case”
- What is required is a process of balancing interests, ‘give and take’
- Requires “good faith efforts”
- Perfection not required
- Extent and content of the duty of consultation is fact specific

## Energy Transport Projects and the rights of Indigenous Peoples

- **Duty to consult case law: *Tsleil-Waututh*, *Gitxaala*:**
  - Cabinet has power to impose additional conditions on pipeline approval
  - Cabinet must look beyond the NEB findings and impose additional conditions or measures if warranted
  - Meaningful two-way dialogue -- later consultation phase requires someone representing Canada who has the confidence of Cabinet
  - Crown must respond to each Indigenous communities' concerns in a genuine, meaningful and specific way, and in a way that gives serious consideration to amending or supplementing recommended conditions

# New Federal Impact Assessment Regime

- **Broader context: rapid change in Aboriginal law & policy**
  - Truth and Reconciliation Commission's Calls to Action (June 2015)
  - "Renewed nation-to-nation relationship" (Mandate letter, Nov 2015)
  - UNDRIP – "full support" by Trudeau gov't (May 2016)
  - Federal "Review of Laws and Policies Related to Indigenous Peoples" (Ministers WG est. in Feb 2017)
  - Federal "Principles respecting the Government of Canada's relationship with Indigenous peoples" (announced July 2017)
  - Federal "recognition and implementation of rights framework" (announced Feb 2018, including ref to Comprehensive Claims Policy and Inherent Right Policy)
  - Bill C-262 – (did not pass; but now Trudeau election commitment)
  - Federal review of environmental and regulatory processes... and ensuing Bill C-68 and C-69 leading to the new *Impact Assessment Act*.



- **Project assessment context: Bill C-69/IAA**
  - **2015 election commitment: “restore lost protections”**
  - **Review of environmental and regulatory processes**  
– expert panels and reports
  - **Bill C-69**
  - ***New Impact Assessment Act and Canadian Energy Regulator Act assented to 21 June, came into force 28 Aug***

First Session, Forty-second Parliament,  
64-65-66-67 Elizabeth II, 2015-2016-2017-2018

HOUSE OF COMMONS OF CANADA

## BILL C-69

An Act to enact the Impact Assessment Act  
and the Canadian Energy Regulator Act, to  
amend the Navigation Protection Act and to  
make consequential amendments to other  
Acts

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**AS PASSED**

BY THE HOUSE OF COMMONS

JUNE 20, 2018

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**Impact Assessment Act (S.C. 2019, c. 28, s. 1)**  
Full Document: [HTML](#) (Accessibility Buttons available) | [XML](#) [435 KB] | [PDF](#) [792 KB]  
*i* Act current to 2019-11-19 and last amended on 2019-08-28. [Previous Versions](#)

**Constitution**

Constitutional Documents

French Constitutional Drafting Committee (1990)

**Laws**

Consolidated Acts

Consolidated Regulations

Annual Statutes

Statutes Repeal Act: Reports, Deferrals and Repeals

Miscellaneous Statute Law Amendment Program

**New Layout**

New Layout for Legislation

Accessibility Buttons

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(survey)

## Impact Assessment Act

### **S.C. 2019, c. 28, s. 1**

Assented to 2019-06-21

An Act respecting a federal process for impact assessments and the prevention of significant adverse environmental effects

[Enacted by section 1 of chapter 28 of the Statutes of Canada, 2019, in force August 28, 2019, see SI/2019-86.]

**Preamble**

Whereas the Government of Canada is committed to fostering sustainability;

Whereas the Government of Canada recognizes that impact assessments provide an effective means of integrating scientific information and Indigenous knowledge into decision-making processes related to designated projects;

Whereas the Government of Canada recognizes the importance of public participation in the impact assessment process, including the planning phase, and is committed to providing Canadians with the opportunity to participate in that process and with the information they need in order to be able to participate in a meaningful way;

- **IAA: Indigenous Participation & Consultation**
  - **Prominence from the start**
  - **Preamble:**
    - ...ensuring respect for the rights of the Indigenous peoples of Canada recognized and affirmed by section 35... and to fostering reconciliation and working in partnership with them;
    - ...committed to implementing the United Nations Declaration on the Rights of Indigenous Peoples;
    - ...assessments provide an effective means of integrating scientific information and “Indigenous knowledge” into decision-making processes related to designated projects;

First Session, Forty-second Parliament,  
64-65-66-67 Elizabeth II, 2015-2016-2017-2018

HOUSE OF COMMONS OF CANADA

BILL C-69

An Act to enact the Impact Assessment Act  
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FIRST READING, FEBRUARY 6, 2019

Première session, quarante-deuxième législature,  
64-65-66-67 Elizabeth II, 2015-2016-2017-2018

CHAMBRE DES COMMUNES DU CANADA

PROJET DE LOI C-69

Loi édictant la Loi sur l'évaluation d'impact  
et la Loi sur la Régie canadienne de  
l'énergie, modifiant la Loi sur la protection  
de la navigation et apportant des  
modifications corrélatives à d'autres lois

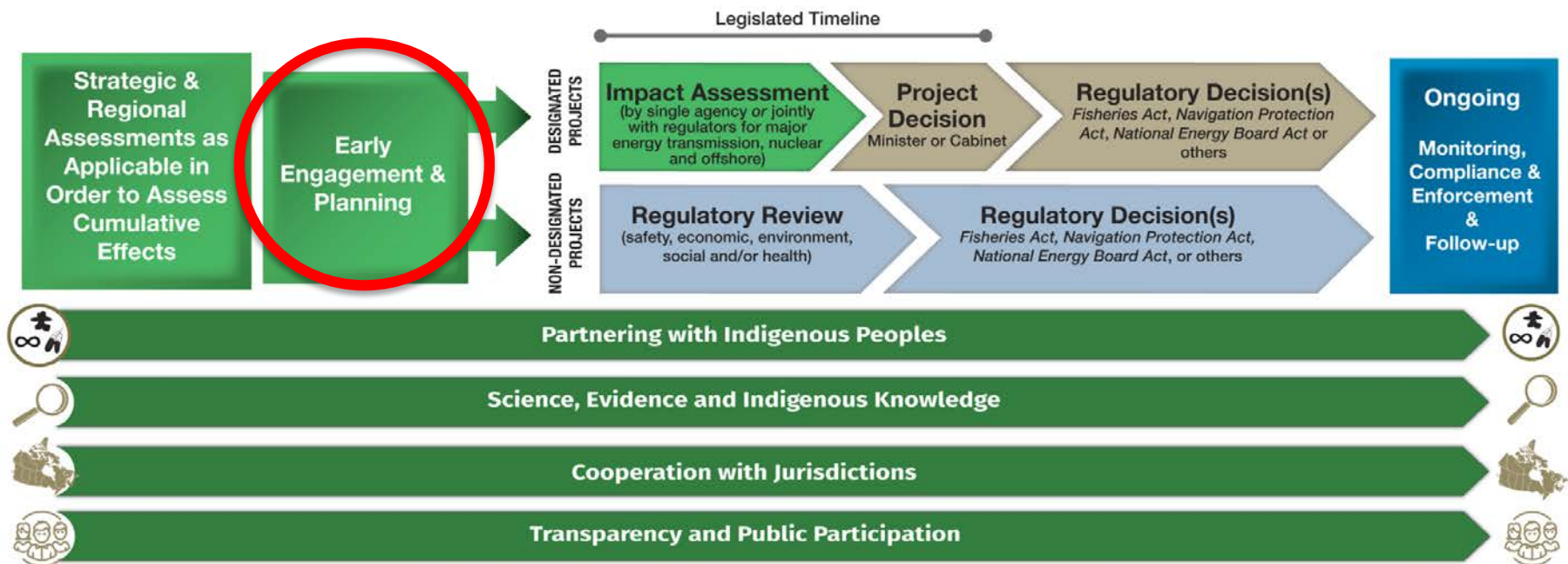
PREMIÈRE LECTURE LE 6 FÉVRIER 2019



- **IAA: Indigenous Participation and Consultation**
- **Purposes (s.6):**
  - promoting cooperation and coordinated action between governments, including “Indigenous governing bodies”
  - promoting communication and cooperation with Indigenous peoples with respect to impact assessments
  - ensuring respect for s.35 rights of Indigenous peoples in the course of impact assessments and decision-making
  - ensuring that an impact assessment takes into account “Indigenous knowledge”

- **IAA: Indigenous Participation and Consultation**
- **Mandate (s.6(2)):**
  - The Government of Canada, the Minister, the Agency and federal authorities, in the administration of this Act, must exercise their powers in a manner that fosters sustainability, respects the Government's commitments with respect to the rights of the Indigenous peoples of Canada and applies the precautionary principle.
- **Ministers power to designate a project (s.9(2)):**
  - “Minister may consider adverse impacts that a physical activity may have on the rights of the Indigenous peoples of Canada — including Indigenous women...”

- **IAA: Indigenous Participation and Consultation**
  - **Planning Phase**





- **IAA: Indigenous Participation and Consultation**
  - **Planning Phase**

## Phase 1: Planning

[Overview](#)

Phase 1

[Phase 2](#)

[Phase 3](#)

[Phase 4](#)

[Phase 5](#)



- **IAA: Indigenous Participation and Consultation**
  - **Planning Phase:**
    - Agency must **offer to consult** with any Indigenous group that may be affected by the proposed project (s.12)
    - Agency's **summary of issues** raised by any Indigenous group must be provided to the project proponent (s 14(1)); summary must be posted on the Agency's internet site (s 14(2))
    - Agency **screening decision** must consider "any adverse impact that the designated project may have on the rights of the Indigenous peoples of Canada" (s.16(2)); Agency must post screening decision on the registry with reasons (s.16(3))
    - Planning phase = 180 days or as extended by Minister or GIC (s.18)

## ■ Indigenous Participation and Consultation

### ○ Assessment Phase



### KEY PARTICIPANTS IN THE IMPACT ASSESSMENT SYSTEM





## ■ Indigenous Participation and Consultation

- **Assessment Phase: Mandatory factors to be considered (s.22):**
  - impact that the designated project may have on any Indigenous group and any adverse impact that the designated project may have on the **rights of the Indigenous peoples of Canada** recognized and affirmed by section 35 of the Constitution Act, 1982 (s 22(1)(c));
  - **Indigenous knowledge** provided with respect to the designated project (s 22(1)(g));
  - considerations related to **Indigenous cultures** raised with respect to the designated project (s 22(1)(l));
  - any **assessment of the effects** of the designated project that is conducted by or on behalf of **an Indigenous governing body** and that is provided with respect to the designated project (s 22(1)(q))
  - **Study or plan by an Indigenous government body** in respect of a region related to the designated project (s 22(1)(r))
- **Discretion** – Each factor must be ‘taken into account’ but scope of each factor is determined by Agency (s.18(1.2))

- **IAA Indigenous Dimensions and “Considerations”**
  - **Direct representation:**
    - IAA - Expert committee (s.157(2)) – “at least one Indigenous person”
    - IAA - Advisory committee (s.158(2.1)) – at least one person representing interests of First Nations, one representing Inuit, one representing Métis
    - CER Board of Directors (s.14(2))
    - CER Commissioners (s.26(2))
    - CER Advisory Committee (s.57(2)) – at least one person representing interests of First Nations, one representing Inuit, one representing Métis

## ■ Indigenous Participation and Consultation

- **“Indigenous Governing Body” (s.2)**
  - *means a council, government or other entity that is authorized to act on behalf of an Indigenous group, community or people that holds rights recognized and affirmed by section 35 of the Constitution Act, 1982.*
- **Jurisdiction of an Indigenous Governing Body (s.2)**
  - Broader scope of potential groups than *CEAA 2012*
  - Includes land claim bodies and self-governing groups, *AND*
  - Includes a body that “has powers, duties or functions in relation to an assessment of the environmental effects of a designated project” under other legislation *AND*
  - Includes Indigenous governing body that has entered into an agreement or arrangement with the Minister under 114(1)(e) (“if authorized by regulations”)
- **Indigenous-led assessments** – may now be more formally incorporated by virtue of IDG definition and s.114(1)(e) and s.31 (substitution)



## ■ Indigenous Participation and Consultation

### ○ Additional points: Cooperation and Substitution

- **Agency must offer to consult and cooperate** with Indigenous Governing Bodies within the definition of jurisdiction in s.2 that has powers, duties or functions in relation to the IA of the designated project (s.21)
- **Ministerial discretion to substitute** another jurisdiction's assessment for the federal impact assessment (s.31)
- Joint review panel may include agreement/arrangement with IDG (s.39)
- Basis for cooperation between the Minister and Indigenous groups on **Regional Assessments** under s 93(1).
- **Participant funding program** for “public”, presumably including funding to Indigenous communities (s.75)
- **Regional assessments (s.93) and strategic assessments (s.95) must take into account “Indigenous knowledge”** – including “the knowledge of Indigenous women”

## ■ Indigenous Participation and Consultation

### ○ Agency's objects

- “Coordinate” consultation with Indigenous groups that may be affected by the designated project (s.155(b))
- “Engage in consultation” with the Indigenous peoples of Canada on policy issues related to the Act (s. 155(i)) (this is virtually identical to s 105(g) of CEAA, 2012).

### Agency approach to Crown Consultation

As the federal lead and coordinator for Crown-Indigenous consultations during an IA, the Agency:

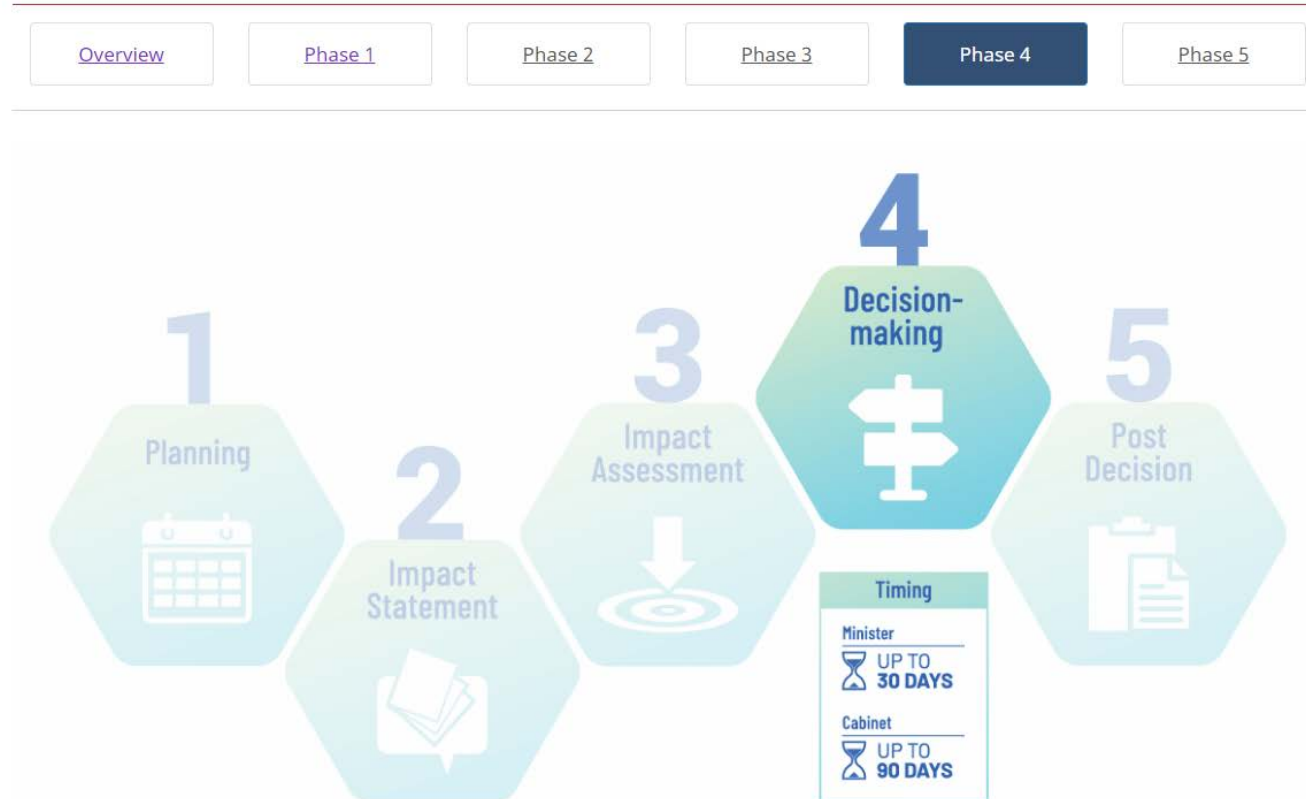
- Identifies Indigenous groups whose Aboriginal and/or treaty rights may be adversely affected by the proposed project, as well as any Indigenous jurisdictions that may have responsibilities in relation to a possible IA;
- Provides information on the proposed project and offers to consult with identified Indigenous groups and to coordinate efforts or partner with any Indigenous jurisdictions to prepare for a possible IA;
- Offers funding to assist Indigenous groups in preparing for and meaningfully participating in the IA and Crown consultation activities (see the [Agency's Participant Funding Program](#));
- Encourages participation, input from and collaboration with Indigenous groups throughout the IA;
- Considers feedback provided by Indigenous groups during the consultation process, and responds to concerns or issues raised, prior to decisions being made; and
- Identifies mitigation and other accommodation measures that may be required in order to address issues raised during the IA and associated consultation process.

The Agency will adjust the nature and scope of consultation activities it performs on a project-by-project basis, depending on each project's potential to adversely affect Indigenous communities and the exercise of rights.

The Agency's consultation approach follows the principles outlined in the [Updated Guidelines for Federal Officials to Fulfill the Duty to Consult, 2011](#), and the Agency is also guided in all of its interactions with Indigenous peoples by the [Principles respecting the Government of Canada's relationship with Indigenous peoples](#).

- **Final decision-making:**  
**“Consideration” of the rights of Indigenous Peoples**

## Phase 4: Decision Making





# Bill C-69: Indigenous Dimensions

- **Final decision-making:**
  - “Consideration” of the rights of Indigenous Peoples
    - **Decision-making – the public interest determination**
      - s.63 - Final decision “must include a consideration of”:
        - *(d) the impact that the designated project may have on any Indigenous group and any adverse impact that the designated project may have on the rights of the Indigenous peoples of Canada recognized and affirmed by section 35 of the Constitution Act, 1982;*
      - s.65(2) – reasons for determination must demonstrate consideration of all factors in s.63
      - **Cabinet retains final unilateral decision-making power**



# Bill C-69: Indigenous Dimensions

## ■ IAA and Crown Consultation

- Despite *Clyde* and *Thames*, minimal clarification in the IAA regarding to what extent a review panel or JRP may fulfill or assess fulfillment of the duty to consult (recalling that major pipeline projects will be conducted by rev panel)
- *Gitxaala* and *Tsleil Waututh* “phases” regime continued, i.e. post EA report/recs Crown consultation to fill in gaps, including re accommodation measures
- Continuation in JRP TORs continue to look like this? (Site C TOR)

2.5 The Joint Review Panel will not make any conclusions or recommendations as to:

- a) the nature and scope of asserted Aboriginal rights or the strength of those asserted rights;
- b) the scope of the Crown’s duty to consult Aboriginal Groups;
- c) whether the Crown has met its duty to consult Aboriginal Groups and, where appropriate, accommodate their interests in respect of the potential adverse effects of the Project on asserted or established Aboriginal rights or treaty rights;
- d) whether the Project is an infringement of Treaty No. 8; and
- e) any matter of treaty interpretation.

## ■ Indigenous Participation and Consultation

### ○ Agency Guidance

[/services/policy-guidance/practitioners-guide-impact-assessment-act.html](#)

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2. Impact Statement and Impact Assessment Phase

- [2.1 Guidance: Gender-based Analysis Plus in Impact Assessment](#)
- [2.2 Guidance: Considering the Extent to which a Project Contributes to Sustainability](#)
- [2.3 Framework: Implementation of the Sustainability Guidance](#)
- 2.4 Policy Context: Addressing "Need for", "Purpose of", "Alternatives to" and "Alternative means"
- 2.5 Guidance: "Need for", "Purpose of", "Alternatives to" and "Alternative means"
- 2.6 Policy Context: Considering Environmental Obligations and Commitments in Respect of Climate Change

3. Indigenous Participation and Engagement

- [3.1 Policy Context: Indigenous Participation in Impact Assessment](#)
- [3.2 Guidance: Indigenous Participation in Impact Assessment](#)
- 3.3 Policy Context: Assessment of Potential Impacts on the Rights of Indigenous Peoples
- 3.4 Guidance: Assessment of Potential Impacts on the Rights of Indigenous Peoples
- 3.5 Guidance: Collaboration with Indigenous Peoples in Impact Assessment
- 3.6 Guidance: Consideration of Indigenous Knowledge in Impact Assessment
- 3.7 Guidance: Practices for Protecting Confidential Indigenous Knowledge Impact Assessment

4. Public Participation

- [4.1 Policy Context: Public Participation in Impact Assessment](#)
- [4.2 Guidance: Public Participation in Impact Assessment](#)

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Date modified: 2019-08-27

# Bill C-69: Indigenous Dimensions

## ■ IAA and Indigenous consent

- **Explicit reference to UNDRIP implementation but...**
- Unilateral final decision-making power left with Crown
- Despite bulked up guide-posts and procedural requirements, Indigenous rights and interests boil down to “considerations”
- Canada’s view of UNDRIP/FPIC implementation = good faith effort with an “aim” to obtain consent
- Indigenous no ≠ no





# Bill C-69: Indigenous Dimensions

- **IAA – Consultation, Consent and “Considerations”**
  - **Concerns voiced by Indigenous groups**
    - Section 35 rights are not “considerations”
    - Indigenous governing body jurisdiction still subject to Crown recognition
    - Not a “nation to nation” framework; instead a bureaucratic exercise
    - Too much discretion remains
    - Consultation fatigue/volume
    - Crown retains unilateral power



## Future government responses?

- Unfinished Trudeau initiatives – more to come?
- Enhanced Indigenous participation in pipeline oversight
- Indigenous ownership?
- Proposal by Leader of Official Opposition: “Energy Corridor”

### Indigenous Energy Summit to tackle pipeline ownership, leadership issues

*First Nations will hear presentations on how they might take ownership of major energy projects, including the Trans Mountain pipeline*

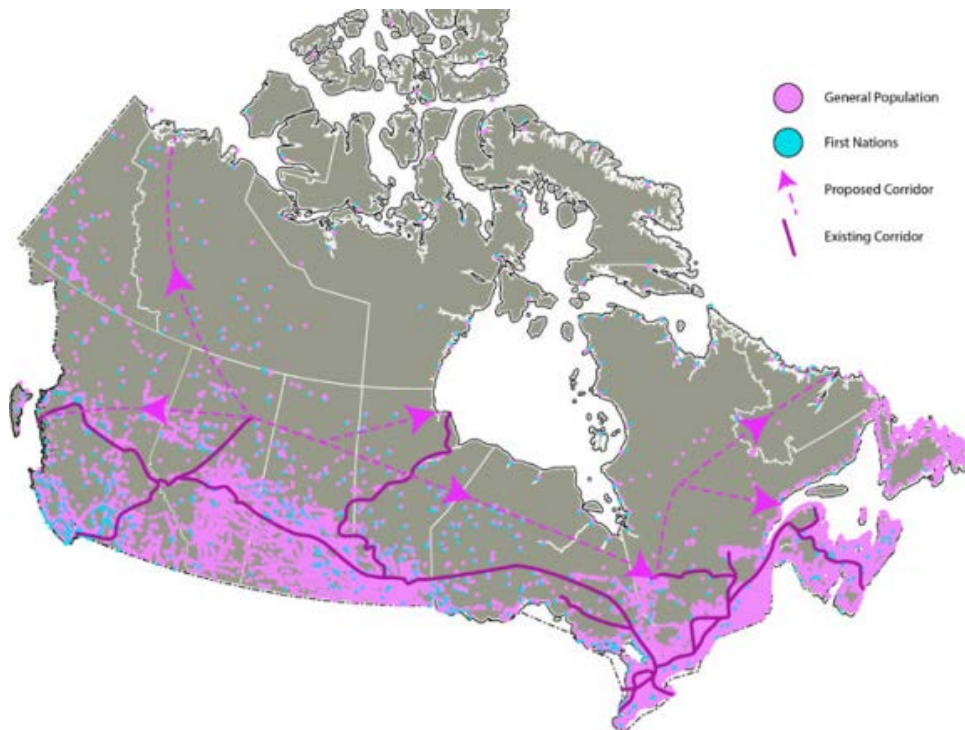


Supporters of the Union of end camp and We'leswelen walk along a bridge over the Wedzin Kwa River leading towards the main camp outside Houston, B.C., on Wednesday, January 9, 2019. THE CANADIAN PRESS/Chad Hepburn



## Future government responses?

- “East-West Energy Corridor”
- What does this mean?
- How does this relate to the rights of Indigenous Peoples?



## ■ Conclusions

- Expectations Gap: complex legal terrain vs simple responses
- New impact assessment regime will help but not solve
- Crown consultation obligations clear but will evolve
- Negotiated solutions typically preferable
- Larger debates re Indigenous self-determination and jurisdiction
- No solutions for Christmas, but probably less coal





## ■ Conclusions

- All I want for Christmas is?... reconciliation... a pipeline... partial ownership... self-government... an energy corridor... constitutional reform... emission reductions... legal clarity...?





# Questions & Discussion

## Thank you

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