



**Supporting Inclusive Resource Development (SIRD)  
East Africa  
TRAINING PROGRAM  
2019**



THE CANADIAN  
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LAW SOCIETY OF KENYA



Tanganyika  
Law Society



UGANDA LAW SOCIETY

# Land Rights

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COMMUNAL AND INDIVIDUAL LAND RIGHTS IN CANADA



# Overview

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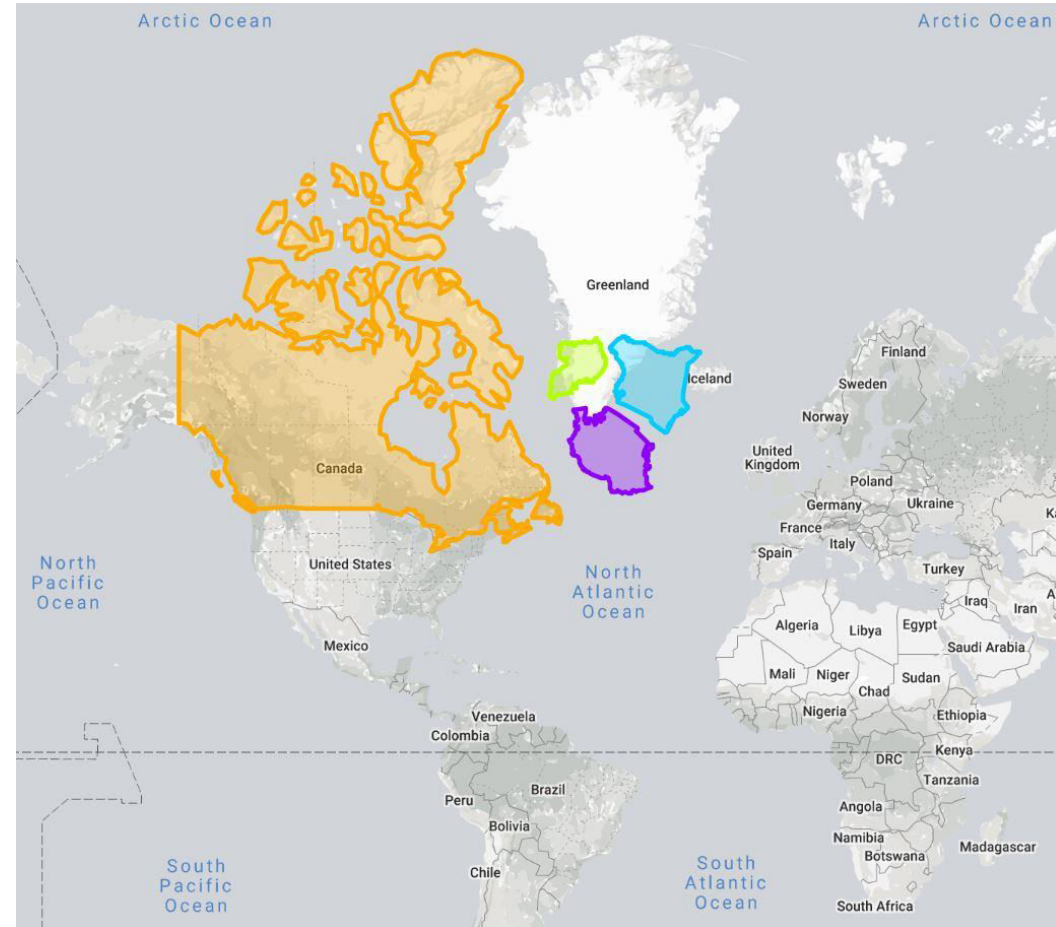
- Key Issues
- Land tenure
- Communal Land Rights
- Aboriginal Title
- Treaties
- Modern Treaties / Comprehensive Land Claims Agreements
- Individual Land Rights



# Canada in Context

- Area: 9.985 million km<sup>2</sup>
- Compared to:
  - 945,087 km<sup>2</sup> (Tanzania)
  - 580,367 km<sup>2</sup> (Kenya)
  - 241,037 km<sup>2</sup> (Uganda)
- Population: 37.06 million (2018)
- Compared to:
  - 57.31 million (Tanzania, 2017)
  - 49.7 million (Kenya, 2017)
  - 42.86 million (Uganda, 2017)
- Why is this important?

Image: <http://thetruesize.com>



# How is land held in Canada?

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- Land tenure – Crown
- Majority of lands in Canada – public lands – **Crown land**
- Provincial lands
- Federal lands
  - Majority of federal lands is in the North – Territories
  - Other federal lands such as Indian reserves
- Private ownership
- Surface vs. Subsurface



# Communal Land Rights

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# Aboriginal Rights

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- Aboriginal Title
  - Canada: recognized as *sui generis* - unique
  - Aboriginal right to land or a territory
  - Right to occupy lands
  - Interest in land itself
  - Unique and communally held right
- Duty to consult
- Different and separate from rights to non-Aboriginal Canadians
- Aboriginal title in comparative context: Canada, United States, Australia, New Zealand, and others



# Section 35, Constitution Act, 1982

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

(2) In this Act, “aboriginal peoples of Canada” includes the Indian, Inuit and Métis peoples of Canada.

(3) For greater certainty, in subsection (1) “treaty rights” includes rights that now exist by way of land claims agreements or may be so acquired.

(4) Notwithstanding any other provision of this Act, the aboriginal and treaty rights referred to in subsection (1) are guaranteed equally to male and female persons.





# Aboriginal Title

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*Delgamuukw v. British Columbia* [1997] 3 SCR 1010

“In order to make out a claim for aboriginal title, the aboriginal group asserting title must satisfy the following criteria: (i) the land must have been occupied prior to sovereignty, (ii) if present occupation is relied on as proof of occupation pre-sovereignty, there must be a continuity between present and pre-sovereignty occupation, and (iii) at sovereignty, that occupation must have been exclusive.”

<https://www.canlii.org/en/ca/scc/doc/1997/1997canlii302/1997canlii302.html>



# Aboriginal Title

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## *Tsilhqot'in Nation v. British Columbia*, 2014 SCC 44

- Recognized the Tsilhqot'in Nation's Aboriginal title to part of their traditional territory
- Aboriginal title applies to territories
- Aboriginal title can be justifiably infringed in certain circumstances
  - Compelling and substantial public purpose
  - Incursion is necessary to achieve the government's goal
  - Infringement does not infringe on Aboriginal title any further than necessary to achieve that purpose
  - Benefits expected are not outweighed by the adverse effects on Aboriginal interests
- Obtain consent or establish justified infringement?

<https://www.canlii.org/en/ca/scc/doc/2014/2014scc44/2014scc44.html>



# Aboriginal Title

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*Tsilhqot'in Nation v. British Columbia*, 2014 SCC 44

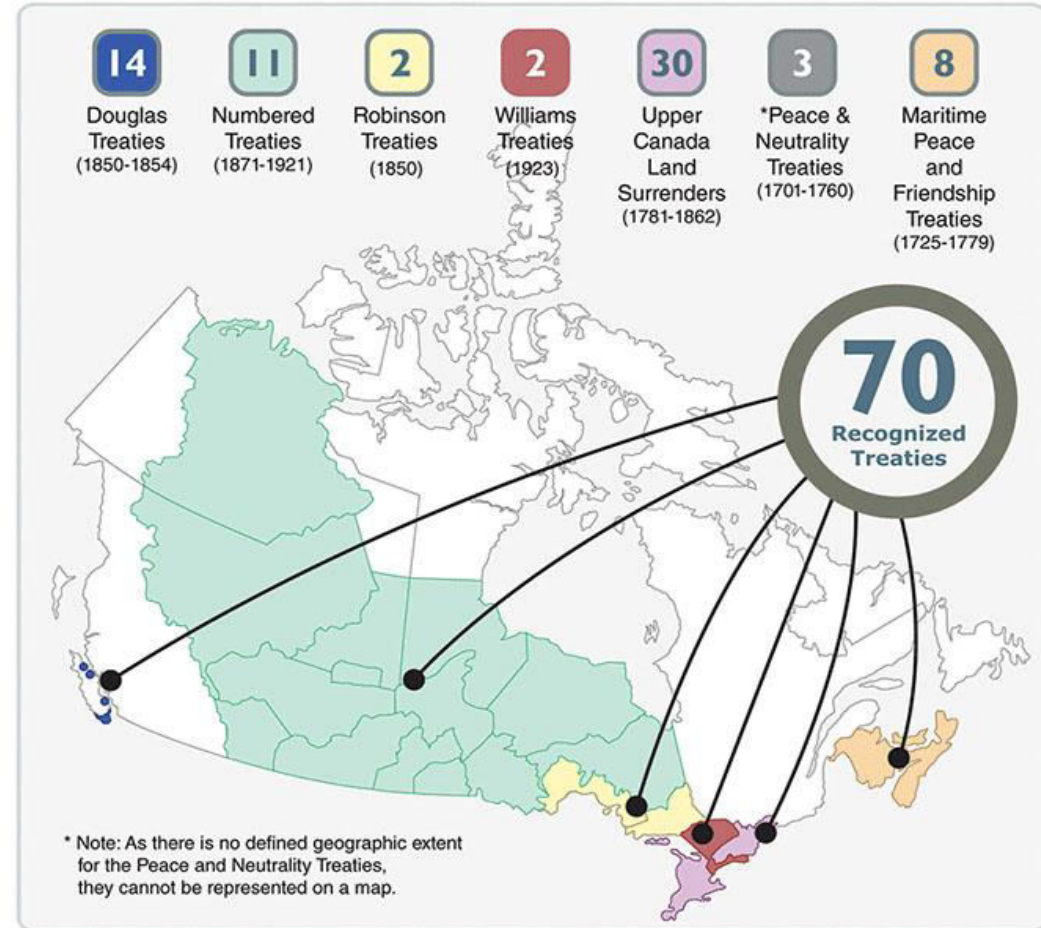
“Once title is established, it may be necessary for the Crown to reassess prior conduct in light of the new reality in order to faithfully discharge its fiduciary duty to the title-holding group going forward. For example, if the Crown begins a project without consent prior to Aboriginal title being established, it may be required to cancel the project upon establishment of the title if continuation of the project would be unjustifiably infringing.”

<https://www.canlii.org/en/ca/scc/doc/2014/2014scc44/2014scc44.html>



# Treaties

- Historic treaties
- Specific Claims
- Not all of Canada is covered by treaties
- Modern treaties

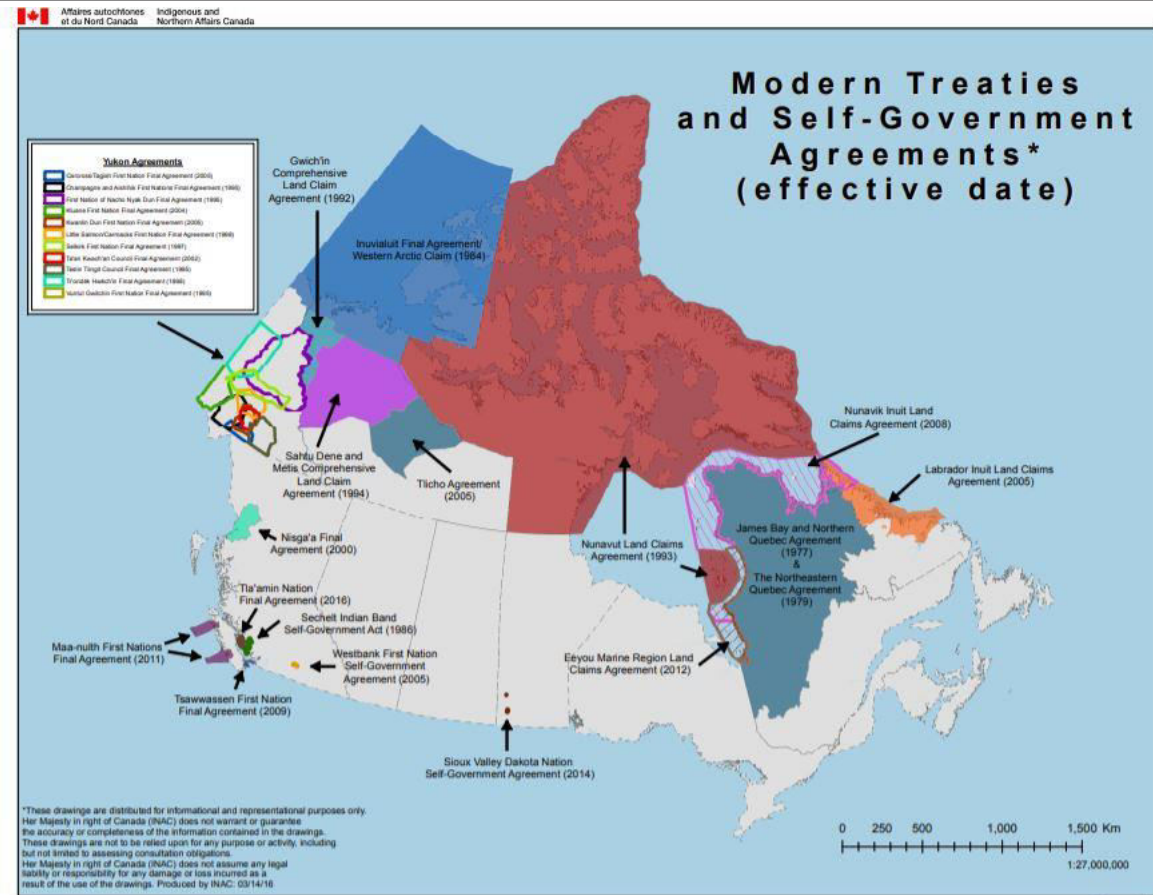


Image, Historic Treaties Illustration:  
<https://www.rcaanc-cirnac.gc.ca/eng/1380223988016/1544125243779>

# Modern Treaties


- In addition to historic treaties, Canada has signed “modern” treaties with Indigenous groups
- Comprehensive land claims agreements
- Some modern treaties include self-government
- Provided for Indigenous ownership over 600,000 km<sup>2</sup> of land
- Capital transfers

Image, Modern Treaties: [https://www.aadnc-aandc.gc.ca/DAM/DAM-INTER-HQ-AI/STAGING/texte-text/mprm\\_pdf\\_modrn-treaty\\_1383144351646\\_eng.pdf](https://www.aadnc-aandc.gc.ca/DAM/DAM-INTER-HQ-AI/STAGING/texte-text/mprm_pdf_modrn-treaty_1383144351646_eng.pdf)



# Case Study: Inuvialuit Final Agreement

- Inuvialuit, the Inuit of the Western Arctic
- [Inuvialuit Final Agreement](#), 1984
- First **comprehensive land claim agreement** or modern treaty signed north of the 60<sup>th</sup> parallel
- At that time, only the second comprehensive land agreement signed in Canada
- *Western Arctic (Inuvialuit) Claims Settlement Act (1984)*
- Designated the **Inuvialuit Settlement Region** in 1984 for the Inuvialuit

 Indian and Northern Affairs Canada / Affaires Indiennes et du Nord Canada

THE INUVIALUIT FINAL AGREEMENT  
AS AMENDED



CONSOLIDATED VERSION

April 2005

Canada



# Case Study: Inuvialuit Final Agreement

- **Inuvialuit Settlement Region**

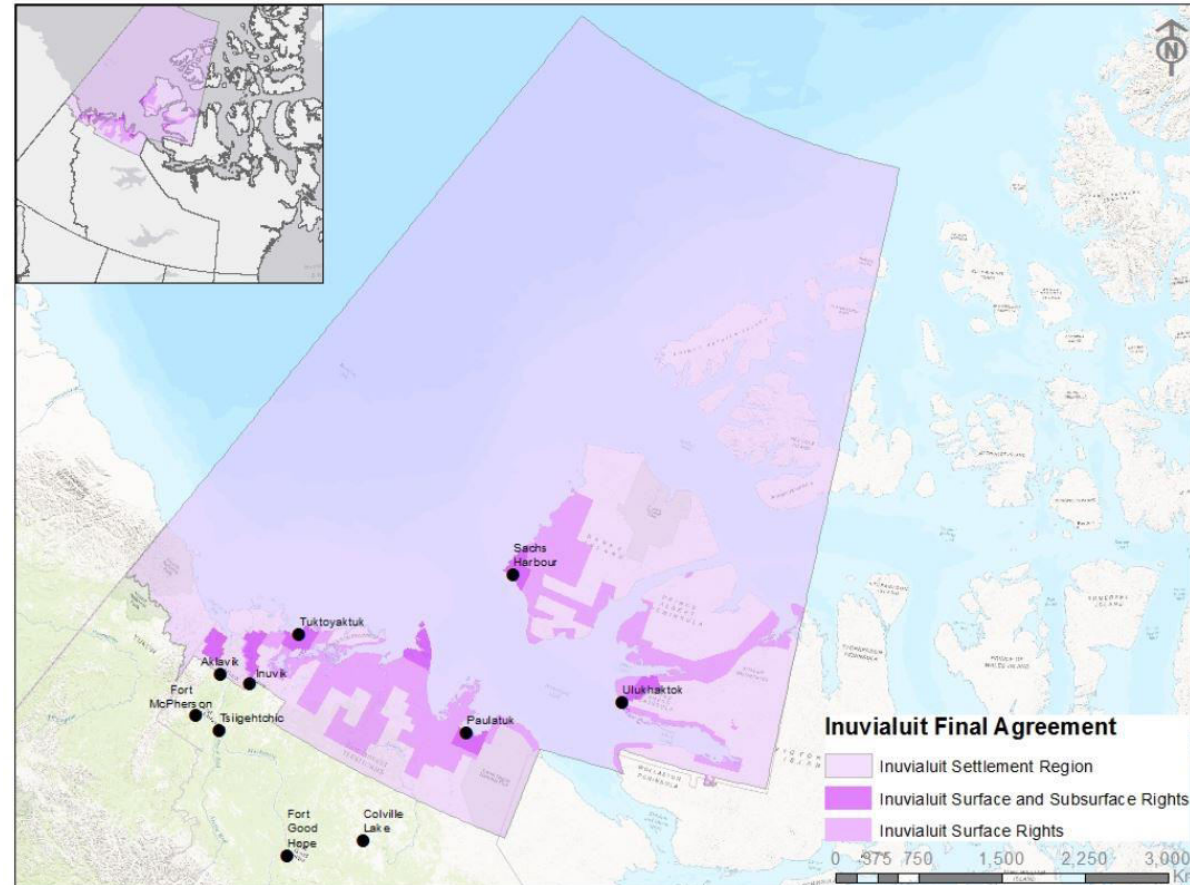
- 1,172,749 km<sup>2</sup> in size (435,000 km<sup>2</sup> lands)

- Consists of both Inuvialuit private lands and Territorial lands

- Inuvialuit own approximately 15,000 km<sup>2</sup> of **subsurface** and approximately 90,000 km<sup>2</sup> of **surface** lands

- Guaranteed rights under the IFA: land, wildlife management, financial compensation

Image, Inuvialuit Settlement Region and Lands:  
<https://www.eia.gov.nt.ca/en/priorities/concluding-and-implementing-land-claim-and-self-government-agreements/inuvialuit>

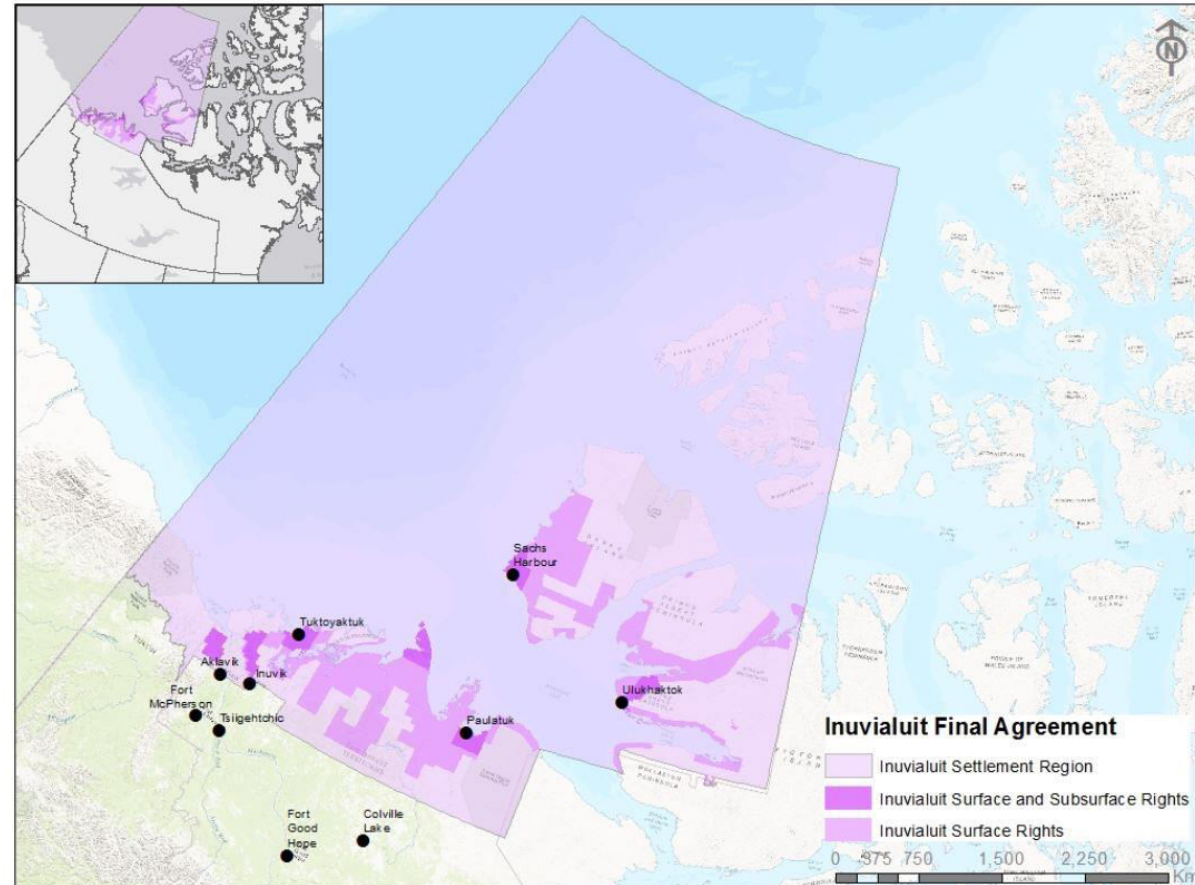


This map is for illustrative purposes only. The actual boundaries of features depicted on this map may not be exactly as shown. Department of Aboriginal Affairs and Intergovernmental Relations is not responsible for any errors or discrepancies occurring on this map.



# Case Study: Inuvialuit Final Agreement

- Land selection
- Wildlife management, harvesting rights, and co-management
- Environmental screening and review of development activities in the ISR
- Financial compensation – annual payments from 1984 to 1997
- Economic and social development measures
- Arbitration of disputes



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# Individual Land Rights

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# Overview

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- Title and ownership
- Freehold mineral rights
- Spousal property and Dower Act considerations
- Succession and inheritance considerations



# Title and Ownership

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- Title registration
- Each province and territory has its own public land registry system
- Public record of documents showing transactions affecting land
- Land titles or registry system
  - Each province and territory has its own public land registry system
  - Public record of documents showing transactions affecting land
- Reserve lands: Indian Lands Registry



# Example

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- Pipeline
- Company obtains an easement agreement with landowner
- Alternatively, Right of Entry order (Surface Rights Board)
- Registration of interest with Land Titles - notice
- Land is subject to the easement
- Easement binds lands and landowner, company, and respective successors



# Freehold Mineral Rights

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- Surface Rights and Subsurface Rights
- Most mineral rights in Canada owned by the Crown
- Historically, some grants of title included both the surface and subsurface rights
- Resulting small minority of rights are owned privately by individuals and corporations (freehold)
- Not all mineral rights ownership is identical
  - Mines and minerals
  - Petroleum, natural gas
  - Coal, petroleum



# Spousal Property Rights

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- Dower rights under common law
- Legislation: *Dower Act*
- Dower rights granted to both spouses
- Rights of a **married person** to occupy the dwelling place (**homestead**) or use household contents in the homestead which are owned in the name of their **spouse**



# *Dower Act, RSA 2000, c D-15 (Alberta)*

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1 (c) “**dower rights**” means all rights given by this Act to the **spouse of a married person in respect of the homestead and property of the married person**, and without restricting the generality of the foregoing, includes

(i) the **right to prevent disposition of the homestead by withholding consent**,

(ii) the **right of action for damages against the married person** if a disposition of the homestead that results in the registration of the title in the name of any other person is made without consent,

(iii) the **right to obtain payment** from the General Revenue Fund of an unsatisfied judgment against the married person in respect of a disposition of the homestead that is made without consent and that results in the registration of the title in the name of any other person,

(iv) the right of the surviving spouse to a life estate in the homestead of the deceased married person, and

(v) the right of the surviving spouse to a life estate in the personal property of the deceased married person that is exempt from seizure under writ proceedings;



# Spousal Property Rights – *Dower Act*

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- Any disposition of the homestead of a married person must either be consented to by the spouse of the person making the disposition or be accompanied by an order of the Court of Queen's Bench of Alberta dispensing with the consent of the spouse.
- Examples: **transfer, lease for more than 3 years**, mortgage
- Any other instrument intended to **convey or transfer an interest in land**, such as an **easement**, party wall agreement, **utility right of way**, restrictive covenant, encroachment agreement, **transfer or surrender of lease**, etc.
- The **disposition of mines and minerals** contained in or forming part of the homestead is covered by the *Dower Act* and requires the consent in writing of the spouse of the married person.





# Succession and Inheritance

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- Area of provincial jurisdiction
- Definition of “spouse”
- If a person dies *intestate* (without a will), in accordance with provincial or territorial legislation, but generally:
  - Spouse – estate goes to spouse
  - Spouse and children – specific divisions are set out in provincial or territorial legislation (can range from situations where the estate goes entirely to the spouse, to preferential amounts, to divisions)
  - No spouse but surviving children – division between children
  - No surviving spouse or children – division between other relatives
  - No survivors – the Crown

