

# CROSS-CANADA INFRASTRUCTURE CORRIDOR, THE RIGHTS OF INDIGENOUS PEOPLES AND ‘MEANINGFUL CONSULTATION’

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## KEY MESSAGES

- The Canadian legal landscape pertaining to the rights of Indigenous peoples has evolved significantly in the decades since the northern corridor concept was first conceived.
- The corridor’s linear nature would directly and indirectly affect many diverse Indigenous communities that are situated in non-treaty, modern treaty and historical treaty contexts, each with different established or asserted rights, and with each context attracting different consultation obligations on the Crown’s part (i.e., the federal or provincial government, or both).
- The duty to consult and accommodate arises in situations where the Crown has actual or constructive knowledge of the existence or potential existence of Indigenous rights or title and contemplates conduct that might adversely affect those rights or title, such as approval of major infrastructure projects.
- Pursuit of the corridor project, to the extent that it involves Crown action that may adversely affect established or asserted Aboriginal rights or title, would trigger the Crown’s duty to consult, as would review and approval of specific infrastructure projects that may eventually fall within the corridor.
- Significant clarity now exists in the case law with respect to the duty to consult, including with respect to what constitutes meaningful consultation. As the Federal Court of Appeal recently stated in *Coldwater First Nation v. Canada (Attorney General)*, the “case law is replete with indicia” of what constitutes meaningful consultation.
- In practical terms, meaningful consultation includes, for example, the Crown consulting in good faith, the existence of two-way dialogue, the opportunity to participate in the process and to make submissions, open-mindedness by the Crown about accommodation of Indigenous rights, demonstrable integration of Indigenous communities’ concerns, substantive responses to information requests (including translation in some contexts), participation funding and a view to accommodation of conflicting interests.

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- Crown consultation obligations are highly context-dependent, driven in significant part by the nature of the proposed activity (e.g., a pipeline, a hydro dam, a road, regulatory or licensing regime changes, etc.) and potential impacts that such activities would have on each community's specific set of asserted or existing rights. In contrast, the corridor concept, even if eventually proposed as a legal right-of-way that follows a specific route, is a relatively abstract undertaking. It would be very challenging to anticipate all specific potential impacts and then consult on all of them.
- A significant challenge for governments pursuing this project is the disconnect that arises when overlaying an inherently abstract corridor concept with very diverse Indigenous rights and interests and a highly context-dependent duty to consult framework.
- While it is conceivable that the corridor consultation process employs some kind of envelope approach and attempts to consult on the most likely uses of the corridor (e.g., road, rail, pipeline, electrical transmission and communication networks), significant additional consultation will almost certainly be required as each specific project is pursued.
- Once details regarding the corridor's legal form are clarified, further research may generate additional clarity regarding consultation and accommodation duties and potential forums and processes for fulfilling those duties.