

AN OVERVIEW AND ASSESSMENT OF KEY CONSTITUTIONAL ISSUES RELEVANT TO THE CANADIAN NORTHERN CORRIDOR

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SUMMARY

The visionary Northern Corridor project raises many constitutional issues, notably questions about aspects of the Canadian Constitution that may help to facilitate the Corridor's development and aspects of the Constitution that may pose barriers or challenges to its development. Surveying some of these issues at a high level is important in identifying them and the need for further, more detailed research on them. This high-level survey can also offer some preliminary indications concerning their implications for the project.

One particularly challenging dimension for the Northern Corridor arises from the jurisdictional interplay involved. There is a genuine challenge from what broader scholarship has called a "jurisdictional anti-commons," which arises from the presence of multiple decision-makers on a project. A jurisdictional anti-commons can make it tremendously difficult to reach agreement. In some ways, the Northern Corridor concept is precisely one of attempting to overcome a jurisdictional anti-commons that arises on each potential project by bundling them into a multimodal corridor, all addressed at once. But in doing so, the issues concerning the development of the Northern Corridor involve that very jurisdictional anti-commons.

Fortunately, the Canadian Constitution facilitates and supports co-operation and negotiation between governments. Considering first the situation between federal and provincial governments, there is an established body of case law on intergovernmental delegation that the Supreme Court of Canada has recently revisited. Putting the conclusions in simple terms, this area of law puts some specific constraints on intergovernmental delegation. But, for the most part, it allows for, and even encourages, co-operation and negotiation between governments and permits some elements of intergovernmental delegation; it would be sufficient to say that the Constitution is not a barrier to negotiated arrangements between federal and provincial governments that would permit the development of the Northern Corridor. The challenges would arise from the basic structure of trying to reach the pertinent agreements.

The Constitution establishes key areas of jurisdictional authority for the federal government that would, in this context, naturally place it in a leadership role and even open the possibility of unilateral action vis-à-vis the provinces. The federal authority over interprovincial transportation has come under some scrutiny in recent years that generated periods of uncertainty for some major projects, but judicial decisions have continued to reaffirm this area of federal authority and even its exclusive dimensions. While the context for the law in this area has seen some meaningful shifts, the basic constitutional law remains relatively firmly in support of an exclusive federal jurisdiction over interprovincial transportation projects that could be deployed in support of something like the Northern Corridor.

Thus, there is a significant federal constitutional power that is pertinent to the Northern Corridor. This power could be deployed co-ordinately and even co-operatively. This power could also be deployed more authoritatively and unilaterally. More authoritative and unilateral approaches would be constitutionally permissible in respect of division of powers, but would run against many aspects of Canadian tradition. It would also risk raising constitutional tensions in ways that might be undesirable, particularly if they were unnecessary, because it would alternatively have been possible to achieve co-ordination and co-operation with provincial actors.

However, in Canada, it is no longer possible to speak of the necessary co-ordination and co-operation as being just between federal and provincial actors. Relative to the past, territorial governments with devolved powers have shifted roles in the context of parts of the Northern Corridor crossing one territory, something that requires further nuanced discussion. As well, and extremely significant, there is a transformed role for Indigenous actors compared to in the past. Some of the implications of Indigenous rights have been evident in transportation infrastructure contexts in recent years, with the implications of the duty-to-consult doctrine for major projects. This series has already seen more detailed study of the duty to consult. However, aspects of the Canadian Constitution related to Indigenous rights evoke a broader set of issues and also call into play areas of law reaching beyond Canadian constitutional law.

These issues require careful examination of the Northern Corridor's potential routes since it crosses geographic areas under fundamentally different legal structures — those areas with historic treaties, those areas with modern treaties and those areas without treaties. Treaty rights issues come into play in those areas with treaties and have been in recent flux in court decisions. Aboriginal rights issues come into play especially in those areas without treaties and include Aboriginal title claims that could affect the Northern Corridor's route. In each of these different legal contexts, Indigenous governmental actors have been increasingly recognized as having a more fundamental role at the table than in the past, and the Northern Corridor project thus faces the prospect of engagement with a very substantial set of different decision-makers. The engagement with and involvement of Indigenous governmental actors raises many issues going beyond the duty to consult and beyond simply Canadian constitutional

law. In certain ways, recognition of Indigenous governmental authority expands the possibility of Indigenous law becoming relevant to parts of the route. Moreover, recent federal statutory adoption of a set of legislative commitments concerning the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) also raises a number of questions concerning the implications of that legislation for future federal exercise of legislative authority in areas including interprovincial transportation where there could be implications for Indigenous rights norms as present in international instruments.

Additional areas of law that become relevant, then, also include international law.

The Northern Corridor project faces some meaningful challenges from the Canadian Constitution and related areas of law that it evokes. At the same time, the Constitution also has facilitative provisions. Some of these establish some areas of authority and potential unilateralism, but perhaps more significantly, the Constitution contains mechanisms to facilitate, encourage and support co-ordination and co-operation.

Achieving those aspirations in the context of the Northern Corridor will require both further legal research to frame the context and options and, ultimately, meaningful federal leadership to advance the project.