CROSS-CANADA INFRASTRUCTURE CORRIDOR, THE RIGHTS OF INDIGENOUS PEOPLES AND 'MEANINGFUL CONSULTATION'

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SUMMARY

Perceived constraints on getting Canadian commodities to global markets have generated renewed interest in a cross-country infrastructure corridor, a concept that was initially conceived several decades ago. Consideration of the corridor concept exists in a broader context of fast-evolving jurisprudence in relation to the rights of Indigenous peoples in Canada. The Canadian legal landscape pertaining to those rights has evolved significantly in the years since the northern corridor concept was conceived, particularly with respect to Crown consultation obligations.

Crown obligations in relation to the proposed corridor would be significant with respect to the rights and interests of Indigenous peoples. A cross-Canada corridor would, by its linear nature, directly and indirectly affect many diverse Indigenous communities that are situated in non-treaty, modern treaty and historical treaty contexts across the country. For example, the assessment and approval process for the Northern Gateway project involved more than 80 Indigenous communities and territories in Alberta and British Columbia, and the now-cancelled Energy East project would have crossed the traditional territory of 180 Indigenous communities on its route from Alberta to the Maritimes. Similarly, the review and approval process for the Trans Mountain Expansion project (TMX) involved at least 120 Indigenous communities along its route from the Edmonton area to Vancouver.

In today's legal context, the Crown (i.e., federal or provincial governments, or both) must consult, and in some situations accommodate, Indigenous communities in situations where the Crown has actual or constructive knowledge of the existence or potential existence of Aboriginal 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.

The duty to consult doctrine emerged from the 2004 landmark cases of *Haida* and *Taku*, and courts have been engaged in an exercise of clarifying the nature and

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contours of the legal landscape in the years since. A primary focus of this research paper is on "meaningful consultation," a notion that is central in judicial decisions on the duty to consult in relation to major projects. Significant clarity now exists in the case law with respect to the duty to consult, including 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.

However, as stated in *Haida* and the many duty to consult cases since, consultation obligations are highly context-dependent, driven by the nature of the proposed activity (e.g., a pipeline, a hydro dam, a road, regulatory or licensing regime changes, etc.), the potential impacts that such activities would have on a specific Indigenous community, and the nature of the asserted or existing rights of that Indigenous community. Thus, Crown consultation duties would vary widely along the corridor route. Consultation and accommodation that may satisfy the Crown's obligations in one context may not be sufficient elsewhere. For example, while consultation obligations in a modern treaty context would largely flow from relatively clear and explicit treaty provisions, such duties may be far less clear in a historical treaty or non-treaty context where the rights at issue may themselves be disputed or unclear. This diversity across Indigenous rights and interests would generate significant complexity in the pursuit of the corridor concept.

This context-dependent nature of the duty to consult presents challenges for consultation in relation to the corridor because it is a relatively abstract undertaking. Even if eventually put forward as a concrete proposal, presumably premised as a legislated right-of-way that follows a specific route, it would be very difficult to anticipate all specific potential impacts and then have the Crown consult on all of them. Such difficulty would be exacerbated by the reality that the specific infrastructure projects to follow would be primarily private-sector driven, and it would be extremely difficult to predict which projects with which attributes private-sector actors will pursue. While it is conceivable that the corridor consultation process employs some kind of envelope approach and attempts to consult on the corridor's most likely uses (e.g., road, rail, pipeline, electrical transmission and communication networks), significant additional consultation would almost certainly be required as each specific project is proposed.

Ultimately, however, under contemporary Canadian law and notwithstanding prevalent critiques from Indigenous communities, legal scholars and others, the duty to consult is primarily procedural in nature and provides legal authority for the Crown to proceed without the consent of Indigenous communities. So long as

the duty to consult is satisfied, the Crown may proceed (though, as noted in this research paper, there are ensuing legal complexities to consider with respect to infringement of rights and associated justification by the Crown, which warrants further analysis in a subsequent study). Thus, there is a possible legal pathway to follow in pursuit of the corridor, but it is a complex one wherein the highly context-dependent Crown consultation obligations would have to be fulfilled with respect to the many diverse, affected Indigenous communities.

In this context, Canadian history offers at least one model: the Berger Inquiry. The 1970s Mackenzie Valley Pipeline Inquiry, typically referred to as the Berger Inquiry, was a broad-based assessment of proposed major pipeline projects to transport oil and gas from the western Arctic region to southern Canada. It employed many features that today's courts point to as necessary for achieving meaningful consultation, such as community hearings, opportunities to ask questions and provide evidence, and participation funding.

The new federal *Impact Assessment Act* may also have significant roles to play. For example, the minister could designate the corridor as a physical activity and it would undergo a full assessment under the act. The Crown could rely on the significantly increased legal responsibilities and authorities set out in the act for consulting Indigenous communities and incorporating their knowledge and input. Also, the corridor could be the focus of a regional assessment under the new act, wherein the government studies an area of anticipated development to inform planning and management of cumulative effects and uses that study to inform subsequent project-specific impact assessments. Such regional assessments could serve as an opportunity to engage in consultation with affected and potentially affected Indigenous communities.

Notwithstanding these potential legal forums and the current state of Canadian law that permits Crown action without Indigenous consent so long as the duty to consult is discharged, the jurisprudence continues to evolve in ways relevant to the corridor. Most notably, in 2016 the federal government announced Canada's "full support" of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), including the declaration's reference to the concept of "free, prior and informed consent" (FPIC). The government has also committed to legislating the implementation of UNDRIP, a step already taken by the government of British Columbia. What implementation of UNDRIP means in today's Canadian legal context is evolving. To date, however, the federal government has largely adopted the view that UNDRIP and the notion of FPIC require only a good-faith effort to obtain consent, and not actually obtain consent in every instance. This is consistent with contemporary duty to consult case law indicating that consent is not required and there is no duty to agree. However, it is certainly foreseeable that this area of the law will continue to change.

While the law is increasingly clear with respect to Crown consultation and accommodation obligations, the context-dependent nature of the legal framework

presents significant challenges for pursuit of the corridor project, given its linear and relatively abstract natures. Further, this area of the law is evolving, particularly as governments move toward implementing UNDRIP. This article succinctly presents the diverse contexts of Indigenous rights and interests present in Canada today, provides clarity with respect to the concept of “meaningful consultation” in contemporary Canadian jurisprudence, and relates this body of law to the corridor concept. Critiques, complexities and points for further research are noted throughout, including with respect to future legal developments.