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Crown Consultation Obligations and a National Infrastructure Corridor: Simple Meets Complex

By: David V. Wright

Matter Commented On: National Infrastructure Corridor

Renewed interest in a cross-Canada infrastructure corridor has surfaced in recent months and weeks, including as a federal election issue. Details were thin in the recent Conservative campaign announcement, but a substantial amount of information about the concept can be found in a 2017 report from the Senate Committee on Banking Trade and Commerce. That report rightly acknowledges that "such a major undertaking – which would require the accommodation of a multitude of varying interests and priorities – would undoubtedly be difficult to complete, and a number of complex issues – including in relation [to] Indigenous peoples, financing and the environment – would need to be addressed" (p 12). In this post, I provide a brief overview and initial comments in relation to a fundamental "complexity" pertaining to the proposed corridor: Crown consultation and accommodation duties with respect to the Indigenous peoples of Canada.

Corridor Background

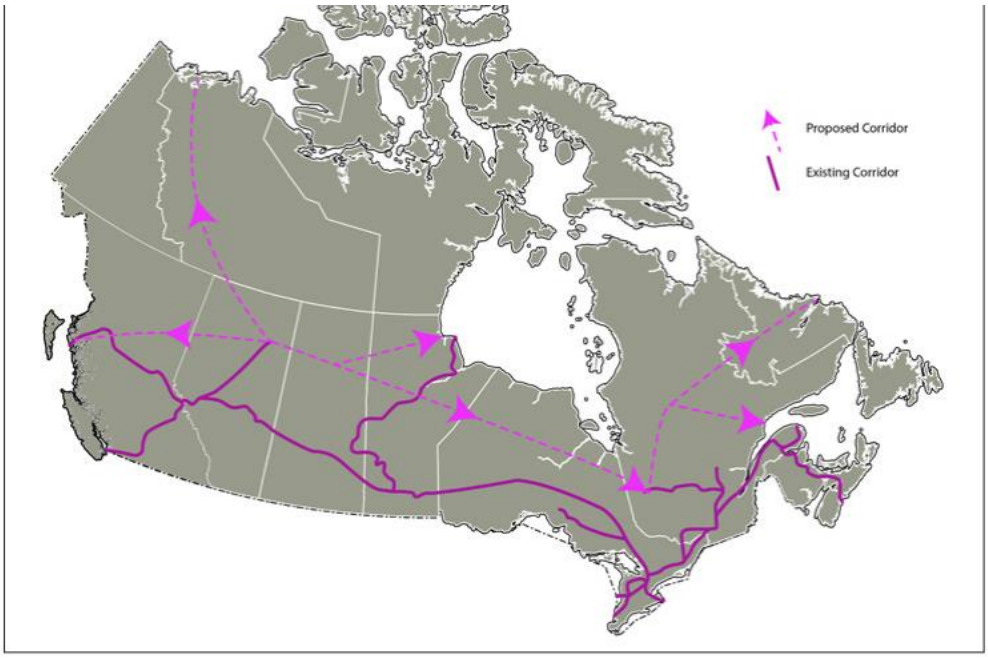
Perceived constraints on getting Canadian commodities to global markets, including Crown obligations with respect to the rights and interests of Indigenous peoples, have resulted in interest in the concept of a cross-country infrastructure corridor. This concept, however, is not new. Contemporary consideration of such a corridor across "Mid-Canada" flows from interest in the idea in the late 1960s and early 1970s, including an associated report. A reasonably representative version of today's vision is set out in the above-noted 2017 Senate Committee report entitled, *National Corridor: Enhancing and Facilitating Commerce and Internal Trade*:

> [A] 7,000-kilometre corridor in Canada's North and near-North that would establish an east-west right-of-way for road, rail, pipeline, electrical transmission and communication networks, and connect with existing networks in southern Canada. Once established, this right-of-way would facilitate the development of private- and/or public-sector projects…. (p 6)

Today's interest also flows from a 2016 article by Andrew Sulzenko and Kent Fellows, which provided the following description:

> From west to east, the Northern Corridor would largely follow the boreal forest in the northern part of the western provinces and southern part of the territories, with a spur to the Arctic Ocean down the Mackenzie Valley, and then southeast from the Churchill area to the James Bay lowlands in northern Ontario where the substantial "Ring of Fire" mineral deposits represent a potential development opportunity. Further east, the corridor would traverse northern Quebec to Labrador, with augmented Atlantic ports. The corridor would be about 7,000 kilometers in length and up to several kilometers in breadth, with contiguous roads, rail lines, pipelines and electricity transmission lines. The corridor would interconnect at various points with the existing transportation modes network. (p 16)

While clearly still in development, the concept is essentially a legally recognized right-of-way, held by the Crown, running from sea to sea (to sea?) in anticipation of multiple types of privately-led infrastructure projects (see map below). One notable aspect clearly communicated by the Senate Committee report is that the "federal government must play a leadership role" (pp 1, 8).



Preliminary Map of the Northern Corridor as presented by Suzenko & Fellows (p 15)

Elegant and simple as the Corridor concept may sound, this proposal exists in a broader context of fast-evolving jurisprudence in relation to the rights of Indigenous peoples in Canada. This evolution is being driven in part by a significant volume of litigation wherein Indigenous

communities are challenging government decision-making with respect to energy projects (see e.g. *Nunatsiavut v Newfoundland and Labrador (Department of Environment and Conservation*), 2015 CanLII 360 (NL SC)), and pipelines specifically (see e.g. *Tsleil-Waututh v Canada (Attorney General)* 2018 FCA 153, *Bigstone Cree Nation v Nova Gas Transmission Ltd*. 2018 FCA 89). Such litigation can be seen as a product of Indigenous communities' on-going efforts to establish Aboriginal rights and title, including their inherent right to self-determination, in a legal system where such rights are not assumed and must be proven on a case-by-case basis. While s 35 of the *Constitution Act, 1982* states that, "The existing aboriginal and treaty rights of the Aboriginal peoples of Canada are hereby recognized and affirmed", clarification of these rights is an ongoing process that often requires Indigenous communities use of the courts to prove the existence of these constitutionally protected rights. This reality of contemporary Canadian law understandably attracts significant criticism and calls for reform (for a wide ranging set of views, see this recent edited collection published by the Centre for International Governance and Innovation). Notwithstanding the pressing need for further normative and legal analysis with respect to revitalization of Indigenous laws and governance, this post focuses on the challenges a project would likely face even on a narrow reading of the Crown's constitutional duties.

Crown obligations with respect to the rights and interests of Indigenous peoples would be significant in relation to the proposed Corridor. 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. As such, a critical issue for the corridor is understanding Crown consultation and accommodation obligations. There would also be issues pertaining to the infringement of established rights of Indigenous communities and associated justification arguments, including with respect to expropriation, but I will leave those for a longer piece I am writing on this topic.

Crown Consultation and Accommodation Obligations

Since the landmark decisions of *Haida Nation v British Columbia (Minister of Forests)* [2004] 3 SCR 511, 2004 SCC 73 (CanLII) and *Taku River Tlingit First Nation v British Columbia (Project Assessment Director)* [2004] 3 SCR 550, 2004 SCC 74 (CanLII), courts have been engaged in a process of clarifying the contours of the duty to consult. Today, the jurisprudence offers significant clarity in many regards. In *Tsleil-Waututh*, for example, which dealt with Indigenous consultation aspects of the approval of TMX, the Federal Court of Appeal did not chart any new legal territory, the court simply applied existing law to the TMX context (as noted in this previous post). As such, while some commentators suggest that there is significant

uncertainty in the law, any uncertainty primarily arises when this now relatively well-defined area of law is applied to a new factual context.

The duty to consult framework used by courts was succinctly restated in *Tsleil Waututh*:

> The duty to consult is grounded in the honour of the Crown and the protection provided for "existing aboriginal and treaty rights" in subsection 35(1) of the *Constitution Act, 1982*. The duties of consultation and, if required, accommodation form part of the process of reconciliation and fair dealing (*Haida Nation*, paragraph 32).
>
> The duty arises when the Crown has actual or constructive knowledge of the potential existence of Indigenous rights or title and contemplates conduct that might adversely affect those rights or title (*Haida Nation*, paragraph 35). The duty reflects the need to avoid the impairment of asserted or recognized rights caused by the implementation of a specific project.
>
> The extent or content of the duty of consultation is fact specific. The depth or richness of the required consultation increases with the strength of the *prima facie* Indigenous claim and the seriousness of the potentially adverse effect upon the claimed right or title (*Haida Nation*, paragraph 39; *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, 2010 SCC 43, [2010] 2 S.C.R. 650, paragraph 36).
>
> When the claim to title is weak, the Indigenous interest is limited or the potential infringement is minor, the duty of consultation lies at the low end of the consultation spectrum. In such a case, the Crown may be required only to give notice of the contemplated conduct, disclose relevant information and discuss any issues raised in response to the notice (*Haida Nation*, paragraph 43). When a strong *prima facie* case for the claim is established, the right and potential infringement is of high significance to Indigenous peoples, and the risk of non-compensable damage is high, the duty of consultation lies at the high end of the spectrum. While the precise requirements will vary with the circumstances, a deep consultative process might entail: the opportunity to make submissions; formal participation in the decision-making process; and, the provision of written reasons to show that Indigenous concerns were considered and how those concerns were factored into the decision (*Haida Nation*, paragraph 44).
> (*Tsleil Waututh*, paras 486-489)

Seminal cases since *Haida*, notably *Mikisew Cree First Nation v Canada (Minister of Canadian Heritage)* [2005] 3 SCR 388, 2005 SCC 69 (CanLII) and *Beckman v Little Salmon/Carmacks First Nation*, [2010] 3 SCR 103, 2010 SCC 53 (CanLII) have clarified that duty exists across non-treaty, historic treaty, and modern treaty contexts. All of these different contexts would

likely be implicated in a national corridor undertaking, especially if there is a northern component (see map above).

Rather than going into great detail about the critiques (see this post from my colleague, Robert Hamilton) or contours of duty to consult jurisprudence (for detailed account of this legal landscape and associated crown obligations, see my 2018 article in the Review of Constitutional Studies), it is most useful to focus on one core characteristic of the duty to consult framework: that the extent or content of the duty is fact specific. Put another way, the extent of Crown consultation and accommodation duties is highly dependent on context.

This is where I see a difficult tension between current Canadian law and the Corridor concept. While it is conceivable that the Corridor consultation process, employing some kind of envelope approach (as discussed in *Ontario Power Generation Inc. v Greenpeace Canada*, 2015 FCA 186, paras 17, 93), could attempt to consult on all of 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. This is because Crown consultation obligations are highly context-dependent, driven primarily by the nature of the proposed activity (e.g. a pipeline, a hydro dam, a road, regulatory or licensing regime changes, etc.) and the potential impacts that such activities would have on each Indigenous communities' specific asserted or existing rights. However, the Corridor concept 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, if not impossible, to anticipate all specific potential impacts and then consult on all of them. Further, 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 sectors actors will pursue.

Path Ahead?

To say that creating this Corridor is impossible is probably going too far. After all, notwithstanding significant and legitimate criticisms of duty to consult jurisprudence, the duty is primarily procedural in nature. At the substantive level, contemporary Canadian case law continues to provide for unilateral infringement by the Crown in most contexts as long as consultation obligations have been fulfilled, and so long as such Crown infringement of rights satisfies the courts' justification test (for the test and commentary, see this article by Professor Kent McNeil or this lecture by Professor John Borrows). Contentious as this would certainly be in today's context, there is a theoretically and legally possible pathway. But it is tremendously complex and problematic. If, for example, any Indigenous communities along the route steadfastly oppose the Corridor, which is entirely foreseeable based on recent pipeline legal challenges, the Crown might be inclined to reach for blunt legal powers that, while available,

would run counter to current trends in domestic and international law toward free, prior and informed consent (FPIC) of Indigenous peoples and the Government of Canada's "full support" of UNDRIP without qualification. Put another way, the narrow legally tenable pathway in Canadian law today, which largely hinges on unilateral Crown action, including infringement, is clearly at variance with political statements and policy announcements at the federal level in recent years. Does a "renewed nation-to-nation relationship", as referenced in the federal government's 2017 "Principles respecting the Government of Canada's relationship with Indigenous peoples", really include such blunt and intrusive Crown action?

Instead, if the Corridor concept is to be pursued at all, proponents would be wise to look to the 1970s Berger Inquiry as a model. From a procedural perspective, the Berger Inquiry employed many features that today's courts point to as necessary for achieving meaningful consultation, such as community hearings, two-way dialogue, opportunities to ask questions and provide evidence, and participation funding. However, at the risk of oversimplifying, a Berger-type approach would have to be bulked up significantly if it were to serve as a primary vehicle through which the Crown engages with Indigenous peoples on a nation-to-nation basis in relation to the Corridor. At the risk of stating the obvious, the government would be wise to have any forum of this type carefully designed and structured – with close partnership and cooperation of Indigenous communities – if they are to attract the confidence of Indigenous peoples across Canada (see discussion of establishing such an analogous process in relation to the Mackenzie Gas Project in *Dene Tha' First Nation v Canada (Minister of Environment)*, 2006 FC 1354 (CanLII)). From a substantive perspective, and in line with the Berger Inquiry recommendation to Canada to first negotiate land claims agreements with First Nations and Inuit along the route (p 163), there would also need to be a parallel process or first phase that focused on working with Indigenous communities to clarify respective s 35 rights and interests, likely in the form of land claims agreements and self-government agreements. Such a forum could, for example, resemble the Aboriginal Lands and Treaties Tribunal recommended by the Royal Commission on Aboriginal Peoples (pp 48-49).

Simple Meets Complex

For many who are interested in getting Canadian resources to market, a nation-wide infrastructure corridor appears as an elegant solution to a complex mix of challenges facing linear infrastructure projects in Canada today. However, complex problems are seldom addressed through simple responses. A closer look at the relationship between the proposed Corridor and the rights of Indigenous peoples is a case in point. While Crown consultation and accommodation obligations with respect to Indigenous communities are relatively clear from the case law, the contextual nature of the duty to consult framework would make it hard for the Crown to fulfill its duties in relation to the proposed Corridor in one fell swoop. A difficult

challenge for governments pursuing this project is the disconnect that arises when overlaying an inherently abstract Corridor concept with a highly context-dependent legal test that is rooted in diverse sets of Indigenous rights and interests. What's more, further consultation with Indigenous communities would most certainly be required as specific infrastructure projects are proposed, and consultation at this stage may reveal that infringement of rights is also at issue. All of this is, of course, in a context where more change in the law is foreseeable, driven in part by trends in Canadian and international law toward requiring consent of Indigenous peoples. In sum, while there may be some efficiency associated with creating a corridor, for example with respect to environmental assessment, one should not expect that the corridor approach will reduce the burden on the Crown to consult and accommodate nor allow the Crown to discharge its obligations in a single process. Rather, and consistent with the *relationship* between the Crown and Indigenous peoples, the Crown would need to consult both with respect to the concept and with respect to particular proposals. The corridor concept is not a short cut.

I am grateful for input from Nigel Bankes, Robert Hamilton and Martin Olszynski on earlier drafts of this post. The views in this post are mine alone. This post is based on a long-form article I am writing as part of a research program flowing from the above-mentioned Senate committee report, which is being led by The School of Public Policy at the University of Calgary.

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