

CANADIAN NORTHERN CORRIDOR SPECIAL SERIES

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

DAVID V. WRIGHT

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## FOREWORD

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**Program Director, Canadian Northern Corridor Research Program**

# CROSS-CANADA INFRASTRUCTURE CORRIDOR, THE RIGHTS OF INDIGENOUS PEOPLES AND ‘MEANINGFUL CONSULTATION’<sup>†</sup>

David V. Wright\*

## 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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\* Assistant professor and member of the Natural Resources, Energy & Environmental Law Research Group, Faculty of Law, University of Calgary.

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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.

# CORRIDOR D'INFRASTRUCTURE TRANSCANADIEN, DROITS DES PEUPLES AUTOCHTONES ET CONSULTATION VÉRITABLE<sup>†</sup>

David V. Wright\*

## MESSAGES CLÉS

- Au Canada, le paysage juridique relatif aux droits des peuples autochtones a considérablement évolué dans les décennies qui ont suivi la conception initiale du concept de corridor nordique.
- La nature linéaire du corridor affecte directement et indirectement plusieurs communautés autochtones dont les contextes varient entre groupes non signataires de traités, signataires de traités contemporains ou signataires de traités historiques. Chacun des contextes entraîne des obligations de consultation de la part de la Couronne (c'est-à-dire, le gouvernement fédéral ou provincial, ou les deux).
- L'obligation de consulter et d'accommoder les groupes autochtones s'impose quand la Couronne a une connaissance réelle ou par extrapolation de l'existence de droits ou de titres autochtones et envisage des mesures qui pourraient nuire à ces droits ou titres, comme l'approbation de grands projets d'infrastructure.
- Dans la mesure où il demande, de la part de la Couronne, une action qui pourrait nuire aux droits ou titres ancestraux établis ou revendiqués, le projet s'inscrit dans l'obligation de consulter, tout comme le sont les projets d'infrastructure spécifiques qui pourraient éventuellement s'ajouter au corridor.
- La jurisprudence est claire en ce qui concerne l'obligation de consulter, notamment en ce qui concerne sa validité. Comme la Cour d'appel fédérale l'a récemment déclaré dans l'affaire *Coldwater Première Nation c. Canada (Procureur général)*, « les indices abondent dans la jurisprudence » sur ce qui constitue une consultation véritable.
- En termes pratiques, une consultation véritable comprend, par exemple, la consultation de bonne foi, l'existence d'un dialogue bilatéral, la possibilité de participer au processus et de présenter des mémoires, une ouverture d'esprit de la part de la Couronne au sujet de l'accommodement des droits des Autochtones, l'intégration démontrable des préoccupations des communautés autochtones, des réponses complètes aux demandes d'information (notamment

\* Professeur adjoint et membre du groupe de recherche sur le droit relatif aux ressources naturelles, à l'énergie et à l'environnement, Faculté de droit, Université de Calgary.

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la traduction dans certains contextes), le financement de la participation et un moyen de concilier des intérêts conflictuels.

- Pour la Couronne, l'obligation de consulter dépend fortement du contexte, qui est en grande partie déterminé par la nature de l'activité proposée (p. ex., un oléoduc, un barrage hydroélectrique, une route, des changements au régime de réglementation ou de licence, etc.) et par l'impact potentiel de cette activité sur les droits propres à chaque communauté. En revanche, le concept du corridor demeure une entreprise relativement abstraite, même si dans sa forme définitive la proposition prévoit une emprise légale qui suivra un tracé précis. Il est donc très difficile d'en prévoir tous les impacts potentiels, puis de procéder à des consultations pour chacun d'eux.
- Un des défis importants pour les gouvernements qui s'intéressent à ce projet concerne la déconnexion qui survient quand on superpose un concept intrinsèquement abstrait à des droits et intérêts autochtones très divers et à un cadre d'obligation de consulter fortement dépendant du contexte.
- Bien qu'il soit possible que le processus de consultation du corridor fonctionne comme une sorte d'« enveloppe de Rochdale » et procède à des consultation sur les diverses utilisations du corridor (route, rail, oléoduc, réseaux de transport électrique ou de communication), des consultations supplémentaires s'ajouteront presque certainement au fur et à mesure que chacun des projets se réalisera.
- Une fois que les détails concernant la forme juridique du corridor seront clarifiés, des recherches plus poussées pourraient apporter des éclaircissements supplémentaires concernant le devoir de consultation et l'accommodement, ainsi que les forums et processus pour s'acquitter de ces fonctions.

## 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 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.

## RÉSUMÉ

Les contraintes perçues quant à l'acheminement des produits de base canadiens vers les marchés mondiaux ont suscité un regain d'intérêt pour un corridor d'infrastructure transnational, un concept initialement conçu il y a plusieurs décennies. L'idée du concept de corridor s'articule dans un contexte de jurisprudence en évolution rapide concernant les droits des peuples autochtones au Canada. Le paysage juridique relatif à ces droits a beaucoup évolué depuis la création du concept de corridor nordique, particulièrement en ce qui concerne l'obligation de consulter de la part de la Couronne.

Les obligations de la Couronne liées au corridor proposé sont importantes en ce qui concerne les droits et intérêts des peuples autochtones. Un corridor pancanadien aurait, de par sa nature linéaire, une incidence directe et indirecte sur plusieurs communautés autochtones dont les contextes varient entre groupes non signataires de traités, signataires de traités modernes, ou encore de traités historiques. Par exemple, le processus d'évaluation et d'approbation du projet Northern Gateway concernait plus de 80 communautés et territoires autochtones de l'Alberta et de la Colombie-Britannique. Quant au projet Énergie Est, maintenant annulé, il aurait traversé le territoire traditionnel de 180 communautés autochtones sur son trajet de l'Alberta aux Maritimes. Dans le même ordre d'idée, le processus d'examen et d'approbation du projet d'agrandissement du réseau de Trans Mountain (TMX) concernait quelque 120 communautés autochtones le long du trajet entre la région d'Edmonton et Vancouver.

Dans le contexte juridique actuel, la Couronne (c'est-à-dire, les gouvernements fédéral et provinciaux) doit consulter et, dans certains cas, accommoder les communautés autochtones si la Couronne a une connaissance réelle ou par extrapolation de l'existence de droits ou de titres autochtones et qu'elle envisage des mesures qui pourraient nuire à ces droits ou titres, comme l'approbation de grands projets d'infrastructure. Dans la mesure où il demande, de la part de la Couronne, une action qui pourrait nuire aux droits ou titres ancestraux établis ou revendiqués, le projet s'inscrit dans l'obligation de consulter, tout comme le sont les projets d'infrastructure spécifiques qui pourraient éventuellement s'ajouter au corridor.

L'obligation de consulter émane des arrêts *Nation Haïda* et *Taku River*, tous deux de 2004. Dès les années suivantes, les tribunaux se sont engagés dans un exercice visant à clarifier la nature du paysage juridique. Un des principaux sujets de cet article concerne la « consultation véritable », notion qui est au cœur des décisions judiciaires sur l'obligation de consulter dans le cadre de grands projets. La jurisprudence est claire en ce qui concerne l'obligation de consulter, notamment en ce qui concerne sa validité. Comme la Cour d'appel fédérale l'a récemment déclaré dans l'affaire *Coldwater Première Nation c. Canada (Procureur général)*, « les indices abondent dans la jurisprudence » sur ce qui constitue une consultation véritable. En termes pratiques, une consultation véritable comprend, par exemple, la consultation de bonne foi, l'existence d'un dialogue bilatéral, la possibilité de participer au processus et de présenter des mémoires, une ouverture d'esprit de

la part de la Couronne au sujet de l'accommodement des droits des Autochtones, l'intégration démontrable des préoccupations des communautés autochtones, des réponses complètes aux demandes d'information (notamment la traduction dans certains contextes), le financement de la participation et un moyen de concilier des intérêts conflictuels.

Cependant, tel qu'indiqué dans l'arrêt *Nation Haïda* et dans les nombreux cas sur cette question, l'obligation de consulter dépend fortement du contexte, qui est en grande partie déterminé par la nature de l'activité proposée (p. ex., un oléoduc, un barrage hydroélectrique, une route, des changements au régime de réglementation ou de licence, etc.) et par l'impact potentiel de ces activités sur les droits propres à chaque communauté. Ainsi, le devoir de consulter variera considérablement le long du tracé du corridor. La consultations et l'accommodement qui répondent aux obligations de la Couronne dans un contexte donné pourraient ne pas s'appliquer ailleurs. Par exemple, dans le contexte d'un traité moderne, l'obligation de consulter est en grande partie sujette à des dispositions relativement claires et explicites. La situation est parfois beaucoup moins claire dans le contexte d'un traité historique ou pour les groupes non signataires de traité. Dans ces cas, les droits en cause pourraient être jugés peu clairs ou faire l'objet de contestation. Cette diversité de droits et d'intérêts autochtones complexifie considérablement la réalisation du concept de corridor.

Cette dépendance au contexte présente des défis pour la consultation en ce qui concerne le corridor, car il s'agit d'une entreprise relativement abstraite. Même si dans sa forme définitive la proposition prévoit une emprise légale qui suivra un tracé précis, cela demeure une entreprise relativement abstraite et il est très difficile d'en prévoir tous les impacts potentiels, puis de procéder à des consultations pour chacun d'eux. Cette difficulté est exacerbée par le fait que les projets d'infrastructure sont principalement initiés par le secteur privé et il est très difficile de prédire quels projets intéresseront les acteurs du secteur privé. Bien qu'il soit possible que le processus de consultation du corridor fonctionne comme une sorte d'« enveloppe de Rochdale » et procède à des consultation sur les diverses utilisations du corridor (route, rail, oléoduc, réseaux de transport électrique ou de communication), des consultations supplémentaires s'ajouteront presque certainement au fur et à mesure que chacun des projets se réalisera.

Au final, cependant, en vertu du droit canadien contemporain et malgré les critiques de la part des communautés autochtones, des juristes ou autres, l'obligation de consulter est principalement de nature procédurale et confère à la Couronne le pouvoir juridique d'agir sans le consentement des communautés autochtones. Tant que l'obligation de consulter est remplie, la Couronne peut aller de l'avant (bien que, comme indiqué dans le présent article, il faut tenir compte des répercussions juridiques en cas d'atteinte aux droits et de sa justification par la Couronne, problème qui demande une analyse plus approfondie). Par conséquent, il y a une voie juridique à suivre pour la réalisation du corridor, mais c'est une voie

complexe dans laquelle il faut respecter l'obligation de consulter les nombreuses communautés autochtones concernées.

Dans ce contexte, l'histoire canadienne présente au moins un modèle : la Commission Berger. L'enquête des années 1970 sur le pipeline de la vallée du Mackenzie, généralement appelée Commission Berger, visait l'évaluation générale des grands projets d'oléoduc proposés pour le transport du pétrole et du gaz de l'Arctique de l'Ouest au sud du Canada. L'enquête comprenait plusieurs caractéristiques que les tribunaux d'aujourd'hui jugent nécessaires pour mener des consultations, tel que les audiences communautaires, la possibilité de poser des questions et de présenter des données ainsi que le financement de la participation.

La *Loi sur l'évaluation d'impact* récemment adoptée par gouvernement fédéral devrait également avoir un rôle important à jouer. Par exemple, le ministre pourrait désigner le corridor comme une activité physique et il ferait ainsi l'objet d'une évaluation complète en vertu de la Loi. La Couronne pourrait s'appuyer sur les responsabilités et pouvoirs juridiques considérablement accrus énoncés dans la Loi pour consulter les communautés autochtones et intégrer leurs connaissances et commentaires. Par ailleurs, le corridor pourrait aussi faire l'objet d'une évaluation régionale en vertu de la nouvelle Loi, dans laquelle le gouvernement étudie une aire de développement afin d'assurer la planification et la gestion des effets cumulatifs. Ensuite, le gouvernement peut faire appel à cette étude pour d'éventuelles évaluations d'impact liées au projet. De telles évaluations régionales peuvent être l'occasion d'amorcer les consultations auprès des communautés autochtones concernées.

Nonobstant ces forums juridiques et l'état actuel du droit canadien qui autorise l'action de la Couronne sans le consentement des Autochtones tant que l'obligation de consulter a été respectée, la jurisprudence continue d'évoluer de manière pertinente pour le corridor. Plus particulièrement, en 2016, le gouvernement fédéral a annoncé le « plein appui » du Canada à la Déclaration des Nations Unies sur les droits des peuples autochtones (DNUDPA), notamment pour la question du « consentement préalable donné librement et en connaissance de cause (CPLCC) ». Le gouvernement s'est également engagé à légiférer sur la mise en œuvre de la DNUDPA, une mesure déjà prise par le gouvernement de la Colombie-Britannique. La mise en œuvre de la DNUDPA dans le contexte juridique canadien est en pleine transformation. Cependant, le gouvernement fédéral adopte largement le point de vue selon lequel la DNUDPA et la notion de CPLCC ne nécessitent qu'un effort de bonne foi pour obtenir le consentement; il n'y a pas d'obtention réelle de consentement dans tous les cas. Cela est conforme au devoir de se référer à la jurisprudence, qui indique que le consentement n'est pas requis et qu'il n'y a pas d'obligation d'accord. Cependant, il est certainement prévisible que ce domaine du droit continuera d'évoluer.

Bien que la législation soit de plus en plus claire en ce qui concerne l'obligation de consulter et l'accommodement de la part de la Couronne, la dépendance au

contexte juridique présente des défis importants pour la réalisation du projet de corridor, compte tenu de sa nature linéaire et relativement abstraite. En outre, ce domaine du droit évolue, en particulier à mesure que les gouvernements travaillent à la mise en œuvre de la DNUDPA. Cet article présente succinctement les divers contextes des droits des Autochtones et des intérêts présents au Canada, clarifie le concept de « consultation véritable » dans la jurisprudence canadienne contemporaine et applique cet ensemble de lois au concept du corridor. Les critiques, la complexité et les points à approfondir sont mentionnés tout au long de l'article, notamment en ce qui concerne les développements juridiques à venir.

## INTRODUCTION

Perceived constraints on getting Canadian commodities to global markets (Markusoff 2015; Standing Senate Committee 2017), including Crown obligations with respect to the rights and interests of Indigenous peoples, have generated interest in a cross-country infrastructure corridor (Sulzenko and Fellows 2016; CPC n.d.). Contemporary consideration of such a corridor across “mid-Canada” flows from interest in the idea in the late 1960s and early 1970s (Rohmer and Simpson 1970; Standing Senate Committee 2017). This concept has received renewed attention in recent years (Coates and Crowley 2013; Sulzenko and Fellows 2016; Standing Senate Committee 2017; Council of the Federation 2019; Trudeau 2019b), typically referred to as a “Northern Corridor” or “Northern Corridor right-of-way” (Standing Senate Committee 2017).<sup>1</sup> The vision is similar to that of the past: “a 7,000 kilometer 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” (see Figure 1) (Senate Standing Committee 2017, 6; see also Sulzenko and Fellows 2016). What has changed significantly, however, is the Canadian legal landscape pertaining to the rights of Indigenous peoples (Grammond 2013).

Linear infrastructure projects can directly and indirectly involve multiple, diverse Indigenous communities,<sup>2</sup> each possessing constitutionally protected rights and interests. A single pipeline project could easily involve more than 100 Indigenous communities,<sup>3</sup> and this would certainly be the case in relation to the proposed northern corridor initiative. The importance and complexities associated with large linear projects and potential impacts on Indigenous peoples have been recognized for many decades, most notably in the Mackenzie Valley Pipeline Inquiry led by Justice Thomas Berger (1978).<sup>4</sup> More recently, the tension between the project assessment regime for linear infrastructure projects and the rights of Indigenous peoples has been front and centre, as seen, for example, in the legal challenges to

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<sup>1</sup> For the purposes of this article, unless otherwise stated, the proposed corridor initiative will be referred to as either the “northern corridor” or simply “corridor” throughout.

<sup>2</sup> The term “Indigenous communities” is used throughout this article as a deliberately broad term that encompasses the diverse types of Indigenous communities across the country, including First Nations, Inuit and Métis communities that are organized in different ways such as self-governing nations (which may include Inuit), *Indian Act* bands, Métis locals and more. This is premised on the reality that the Crown may have a duty to consult in relation to any of these communities. However, there is a complex underlying issue outside the scope of this paper: how the Crown and Indigenous peoples identify what is an Indigenous community and when such communities may be potentially affected by Crown conduct. Indigenous community is also common terminology in recent case law. See e.g., *Coldwater First Nation v. Canada (Attorney General)*, 2020 FCA 34, paras. 133, 167, 177.

<sup>3</sup> For example, the Trans Mountain Pipeline Expansion Project, which consists of 987 kilometres of new buried pipeline, involved at least 120 Indigenous communities along its route (National Energy Board 2016). Similarly, the cancelled Energy East project, perhaps a better analogue for the corridor, would have crossed the traditional territory of 180 Indigenous communities (McCarthy 2017).

<sup>4</sup> The process and outcomes of this inquiry are revisited in the final part of this paper.

major pipeline projects such as the Northern Gateway Project<sup>5</sup> (NGP) and the Trans Mountain Expansion (TMX) Project.<sup>6</sup>

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. A primary focus is on “meaningful consultation,” a notion that is central in judicial decisions on Indigenous rights in relation to major projects. All nuances in this vast area of law, however, cannot be captured in this short article. This is noted as appropriate throughout, and the final part of the paper identifies several questions that will drive further consideration of consultation obligations in relation to the corridor.

Part II provides a brief description of the corridor concept and then sets out the diverse legal landscape of the rights of Indigenous peoples in treaty, non-treaty and modern treaty contexts across Canada. Part III explains Crown consultation and accommodation obligations, providing a basis for exploring meaningful consultation in relation to the corridor.<sup>7</sup> Part IV puts forward comments with respect to legal forms that the corridor concept may take (e.g., new legislation) and formal forums in which Crown consultation may take place. This part also includes discussion of the recently overhauled federal impact assessment regime, including preliminary observations on how the corridor could be assessed as a “designated project” or as a “regional assessment” under the new *Impact Assessment Act*. Part V provides a short conclusion and identifies several questions that will drive further consideration of Crown consultation in relation to the corridor.

Overall, this paper presents a legal landscape that has changed substantially since the time of initial consideration of a cross-Canada infrastructure corridor. There have been particularly significant changes in how courts approach asserted and established rights of Indigenous peoples (Grammond 2013) and many changes to the federal assessment process for major natural resource projects (Bankes et al 2018). With the passage of the new impact assessment legislation, a highly politically charged and complicated policy context (CBC 2019), and ever-evolving jurisprudence in relation to Aboriginal law and Indigenous law,<sup>8</sup> now is an opportune time to explore these issues. Notwithstanding fluctuating commodity prices in the contemporary context, it is foreseeable that the corridor concept

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<sup>5</sup> *Gitxaala Nation v. Canada*, 2016 FCA 187.

<sup>6</sup> *Tsleil-Waututh v. Canada (Attorney General)*, 2018 FCA 153.

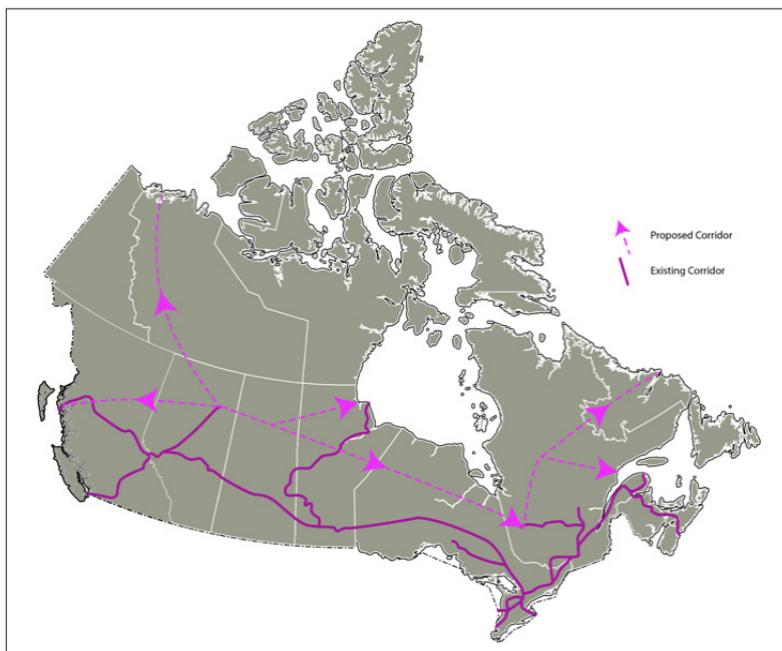
<sup>7</sup> See *infra* Part III.

<sup>8</sup> The terms “Aboriginal law” and “Aboriginal and treaty rights” and “Aboriginal rights” are used throughout the paper to refer to the body of Canadian law that pertains to Indigenous peoples. In this way, these terms refer to “settler law” or “non-Indigenous law,” which stands in contrast to the past, present and future laws of Indigenous peoples. For an in-depth discussion of Indigenous law and laws in Canada, see Borrows (2002) and Christie (2019). The terms “Indigenous rights” and “rights of Indigenous peoples” are also used throughout this paper, recognizing that this term has become preferred in Canada and internationally in accordance with usage in the United Nations Declaration on the Rights of Indigenous Peoples, GA Res 61/295.



will receive increased attention as leaders and policy-makers search for ways to generate economic activity following the COVID-19 pandemic.

**Figure 1. Preliminary Map of the Northern Corridor**



Source: Sulzenko and Fellows (2016)

## **PART II. RIGHTS OF INDIGENOUS PEOPLES: THE LEGAL LANDSCAPE**

Before discussing the rights and interests of Indigenous communities potentially affected by the proposed northern corridor initiative, including meaningful consultation, it is important to describe the corridor proposal and associated rationale. The initial idea, put forward in the late 1960s by a private-sector group led by honorary Lieut.-Gen. Richard Rohmer and examined through a subsequent “Mid-Canada Development Conference” and associated report (Sulzenko and Fellows 2016, 14, 23), was to develop a corridor that would serve as a basis for construction of east-west transportation infrastructure in Canada’s northern regions (Senate Standing Committee 2017). This article uses as its starting point the descriptions and rough maps set out in a 2016 article by Sulzenko and Fellows and the subsequent report of the Standing Senate Committee on Banking, Trade and Commerce entitled “National Corridor: Enhancing and Facilitating Commerce and Internal Trade.” Sulzenko and Fellows (2016, 16) provide 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.

Citing Sulzenko and Fellows (2016), the Standing Senate Committee (2017, 6) describes the concept as follows:

[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.

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. As will be discussed in Parts III and IV below, Crown obligations with respect to the rights and interests of Indigenous communities will depend in part on what types of legal tools are used to formalize and implement the concept.<sup>9</sup> One key aspect clearly communicated by the Standing Senate Committee (2017, 8) is that the “federal government must play a leadership role” (See also Sulzenko and Fellows 2016, 28).

The rationale behind the concept, as laid out by Sulzenko and Fellows (2016) and the Standing Senate Committee (2017), appears to be manifold (though it should be noted that Sulzenko and Fellows state their position to be “agnostic” with respect to the costs and benefits of the corridor). First, it is suggested that the corridor would establish a “shared transportation right-of-way” that would allow modes of transportation to “co-locate in order to realize economies of agglomeration,” including mitigating environmental risks and reducing emissions of transportation in Canada’s North and near-North (Sulzenko and Fellows 2016, 2). Second, it is seen as a way for Canada to address the currently restricted ability to export commodities to world markets (Sulzenko and Fellows 2016, 2; Senate Standing Committee 2017, 5, 7). Third, it is thought to hold the potential to assist in a broader initiative to address a lack of infrastructure that is perceived to be limiting further development of mining and oil and gas commodity sectors, in anticipation of a time when “better prices will return for Canada’s commodity exports” (Sulzenko and Fellows 2016, 2). Fourth, a northern corridor could facilitate increased economic development in the North, accompanied by raised standards of living and reduced costs of living (Sulzenko and Fellows 2016, 2; Standing

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See *infra* Part IV for discussion of questions such as: Would it be a “project” under the new federal impact assessment regime? Would it be underpinned by a stand-alone tailored legislative initiative? Would there be any initial physical activity such as tree clearing or water crossings?

Senate Committee 2017, 7, 12). The Standing Senate Committee (2017, 12), noting these potential benefits,<sup>10</sup> concluded that “[t]he federal government must seize this opportunity.” It further concluded that the corridor proposal “should receive attention,” and recommended a research program ensue. This article is part of that research program.

Importance and complexity of the rights and interests of Indigenous peoples were noted by Sulzenko and Fellows (2016) and, to some extent, the Standing Senate Committee (2017, 11), which underscored that “participation of Indigenous peoples in the development of the proposed northern corridor would be fundamental to its success.” Sulzenko and Fellows (2016, 31) noted similar opportunities, but also correctly highlighted that “Indigenous communities are not just stakeholders; they are rights-holders,” and that in some cases, Indigenous communities have opposed linear projects and that such projects could be at odds with those communities’ interests.

The corridor proposal exists in a broader context of case law that is quickly evolving, largely as a product of the significant volume of litigation wherein Indigenous communities are challenging government decision-making with respect to energy projects,<sup>11</sup> and pipelines specifically.<sup>12</sup> Such litigation can be seen as a product of Indigenous communities’ ongoing efforts to establish Aboriginal rights and title,<sup>13</sup> 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 (Promislow and Metallic 2017, 109). So, while s. 35 of the *Constitution Act, 1982* states: “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 includes Indigenous peoples having to use the courts to prove the existence of these constitutionally protected rights (Borrows and Rotman 2012). This reality of contemporary Canadian law attracts significant criticism and calls for reform (McNeil 2002; Metallic 2017; Gunn 2019; Hamilton and Nichols 2019). While there is a pressing need for legal analysis with a normative approach, particularly with respect

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<sup>10</sup> While asserted benefits are worthy of further study and scrutiny, and such research was called for by the Standing Senate Committee, it is beyond the scope of this legally oriented article to engage in such debate. Rather, this article focuses on setting out the rights and interests of Indigenous communities that may be potentially affected by the proposed Corridor.

<sup>11</sup> See e.g., *Nunatsiavut v. Newfoundland and Labrador (Department of Environment and Conservation)*, 2015 CanLII 360 (NLSC) (challenging provincial authorization related to construction of the Muskrat Falls hydroelectric generating facility in Labrador); see also *Clyde River (Hamlet) v. Petroleum GeoServices Inc.*, 2017 SCC 40 (challenging National Energy Board approval of seismic testing off Baffin Island); see also *Prophet River First Nation v. British Columbia (Environment)*, 2017 BCCA 58 (challenging approval of the Site C hydro project).

<sup>12</sup> See e.g., *Chippewas of the Thames First Nation v. Enbridge Pipelines Inc.*, 2017 SCC 41 (challenging National Energy Board approval of Enbridge’s Line 3 pipeline project); see also *Gitxaala*, (see note 11); see also *Bigstone Cree Nation v. Nova Gas Transmission Ltd.*, 2018 FCA 89.

<sup>13</sup> For a discussion of these concepts, see *infra* Part II.

to the revitalization of Indigenous laws and governance (Borrows 2002),<sup>14</sup> this article focuses on the current content of Canadian law (sometimes referred to as “settler law” (Harland 2018)) as it pertains to Indigenous peoples.

Canada’s long and troubled history of law-making in relation to Indigenous peoples has resulted in a complex legal landscape that features significant differences in the rights of Indigenous communities across the country. The remaining portion of this part of the article describes the legal landscape across Canada in this context: non-treaty, historical treaty and modern treaty. As will be discussed further below, what constitutes “meaningful consultation” within a duty to consult analysis will vary in non-treaty, historical treaty or modern treaty contexts. Given that consultation obligations are inherently context- and fact-specific, it is important to set out each of these contexts before turning to specific duty to consult jurisprudence.

## 2.1 NON-TREATY

While vast portions of today’s Canada are subject to “Historical Treaties” and “Modern Treaties” (Isaac 2016), significant areas are not and never have been. This is the situation in much of British Columbia, as well as parts of Quebec, Newfoundland and Labrador, Yukon and the Northwest Territories. However, the absence of a treaty certainly does not mean no rights exist (Slattery 1987). As Borrows and Rotman (2012, 91) explain:

Aboriginal rights exist because they are derived from Aboriginal laws, governance, practices, customs and traditions. They exist in Canadian law not as a result of governmental recognition, but because they were not extinguished upon British or French assertion of sovereignty or establishment of governmental authority in what is now Canada.

In areas not subject to a treaty, constitutionally protected Aboriginal rights and title, as opposed to treaty rights, may exist (McNeil 1997a; Slattery 2000). The courts have been clear in explaining that at no point was there extinguishment of such Aboriginal rights through military conquest, occupation or legislative action (Borrows and Rotman 2012, 98). Rather, courts have found that Aboriginal rights survived the Crown’s assertion of sovereignty, and the Crown bears the onus of proving extinguishment (McNeil 2002; Isaac 2016, 4, 25).

Prior to constitutional amendments in 1982, Aboriginal rights were subject to unilateral extinguishment by the federal Crown.<sup>15</sup> Since the 1982 constitutional reform resulting in s. 35, however, extinguishment of Aboriginal rights is no longer

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<sup>14</sup> For a dedicated research unit committed to the recovery and renaissance of Indigenous laws, see Indigenous Law Research Unit, University of Victoria, accessed April 25, 2020, <https://www.uvic.ca/law/about/indigenous/indigenouslawresearchunit/index.php>.

<sup>15</sup> *R v. Marshall (sub nom R v. Bernard)*, 2005 SCC 43, para. 38.

available to the Crown.<sup>16</sup> Instead, courts have been engaged in an exercise of clarifying the nature and content of “existing” Aboriginal rights. A number of landmark decisions from the Supreme Court of Canada, while subject to ongoing criticism (McNeil 2002; Metallic 2017; Gunn 2019; Hamilton and Nichols 2019), define the contours of this legal landscape.<sup>17</sup> A critical foundational point explaining the source of Aboriginal rights was articulated by Lamer C.J. in *R v. Van der Peet*:

[T]he doctrine of Aboriginal Rights exists, and is recognized and affirmed by s. 35(1), because of one simple fact: when Europeans arrived in North America, aboriginal peoples were already here, living in communities on the land, and participating in distinctive cultures, as they had done for centuries. It is this fact, and this fact above all others, which separates aboriginal peoples from all other minority groups in Canadian society and which mandates their special legal and now constitutional status.<sup>18</sup>

While never explicitly defining the term “Aboriginal rights” (Grammond 2013), courts have engaged in a process of identifying types of Aboriginal rights and setting out analytical steps to be used for establishing the existence of an Aboriginal right under s. 35.<sup>19</sup> Examples of Aboriginal rights that have been proven to date include the right to fish for food, social and ceremonial purposes, hunting rights and the right to harvest timber (Isaac 2016). The courts have also recognized commercial rights.<sup>20</sup> These rights are typically collective in nature,<sup>21</sup> and they are not contingent on the use or occupation of the land nor on proof of Aboriginal title.<sup>22</sup>

A unique and fundamentally important type of Aboriginal right, and one that would be of primary relevance in relation to a cross-country infrastructure corridor, is Aboriginal title. It has been fairly characterized as the “highest form of Aboriginal rights” (Isaac 2016). The Supreme Court of Canada succinctly explained the legal nature of Aboriginal title in the landmark 2014 case of *Tsilhqot’in Nation v. British Columbia*:

Aboriginal title confers ownership rights similar to those associated with fee simple, including: the right to decide how the land will be used; the right of enjoyment and occupancy of the land; the right to possess the land; the right

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<sup>16</sup> *Marshall/Bernard*, para. 38.

<sup>17</sup> *R v. Sparrow* [1990] 1 SCR 1075; *R v. Badger* [1996] 1 SCR 771 at 793; *R v. Van der Peet*, [1996] 2 SCR 507; *Delgamuukw v. British Columbia*, [1997] 3 SCR 1010; *R v. Marshall* [1999] 3 SCR 456; *Tsilhqot’in Nation v. British Columbia*, 2014 SCC 44.

<sup>18</sup> *Van der Peet*, para. 30.

<sup>19</sup> *Van der Peet*, paras. 48-75 (setting out the legal analytical framework).

<sup>20</sup> See e.g., *Ahousaht Indian Band and Nation v. Canada (Attorney General)*, 2018 BCSC 633.

<sup>21</sup> *R v. Van der Peet*, [1996] 2 SCR 507, para. 41

<sup>22</sup> *Delgamuukw v. British Columbia*, [1997] 3 SCR 1010, para. 159.

to the economic benefits of the land; and the right to pro-actively use and manage the land.<sup>23</sup>

*Tsilhqot'in* was the first time the court issued a declaration of Aboriginal title. It is entirely foreseeable that there will be declarations of this type in the future in non-treaty contexts, as well as some historical treaty contexts (Hamilton 2016).

Today, the process of identifying “existing” Aboriginal rights in treaty and non-treaty areas is ongoing, often involving litigation by Indigenous communities. Where communities have established Aboriginal rights and title, such rights result in certain Crown obligations, including the duty to consult and accommodate, discussed further below. Under current Canadian law, courts will not treat established rights as superior to all others — the Crown may still infringe these rights so long as such infringement is justified in the circumstances under the test set out in *R v. Sparrow* (Isaac 2016, 85-88).<sup>24</sup> In many if not most non-treaty areas, however, such rights have not yet been proven and the law views them as “asserted rights.”<sup>25</sup> In such contexts, the Crown still has obligations, most notably in terms of consultation. Indeed, it was from the non-treaty context that the duty to consult emerged.<sup>26</sup>

## 2.2 HISTORICAL TREATIES

In Canadian law, treaties exist as legal mechanisms that set out the parties' rights and define Crown-Indigenous relations.<sup>27</sup> Treaty-making activities across Canada have been a long time running. The British Crown, and now the federal government of Canada, has been engaged in treaty-making since the 1700s (CIRNAC 2018). Today, a patchwork of treaties covers most of Canada.<sup>28</sup> These treaties are typically described as either historical treaties or modern treaties. The former are the focus of this portion of the article (and depicted in Figure 2 below), and the latter are discussed in the next section below.

There is significant variance across historical treaties; these differences evolved as the treaty-making process unfolded across the land (Grammond 2013, 41-166). Generally, treaty-making unfolded as follows: treaties of peace and neutrality (1701-1760), peace and friendship treaties (1725-1779), Upper Canada land surrenders

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<sup>23</sup> *Tsilhqot'in*, para. 73 (see note 56).

<sup>24</sup> See *Sparrow*, para.1079 (see note 56). Justification test: 1) Does the infringement serve a valid legislative objective?; 2a) If no, not justified; 2b) If yes, can the legislation be justified in light of the Crown's responsibility to, and trust relationship with, Aboriginal peoples? This can be shown through the government employing means consistent with their fiduciary duty: (i) Was the infringement as minimal as possible?; (ii) Were their claims given priority over other groups?; (iii) Was the affected Aboriginal group consulted?; and (iv) If there was expropriation, was there fair compensation?.

<sup>25</sup> *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, para. 36.

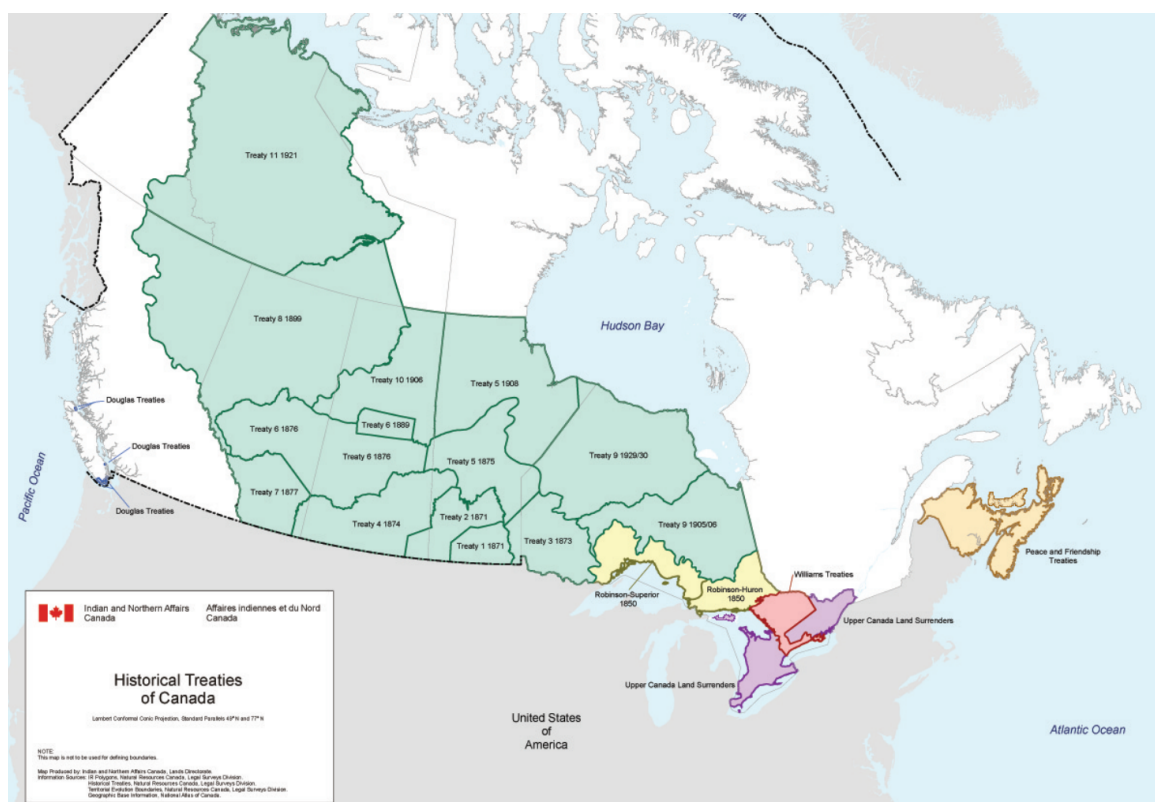
<sup>26</sup> *Haida*. See also *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, 2004 SCC 74.

<sup>27</sup> *Marshall*, para. 78 (see note 56).

<sup>28</sup> See Figure 4, *infra* Appendix 1.

and the Williams treaties (1781-1862/1923), Robinson treaties and Douglas treaties (1850-1854), and the numbered treaties (1871-1921) (Bergner 2017). Historical treaties are typically distinguished as peace and trade treaties and land treaties (Grammond 2013, 289-293), or as pre- and post-Confederation treaties (Isaac 2016, 150-164).

**Figure 2. Historical Treaties of Canada**



Source: INAC (2006)

Treaty rights stemming from historical treaties may be procedural or substantive in nature.<sup>29</sup> For example, a treaty may recognize substantive rights to hunting and fishing.<sup>30</sup> This can be seen in Treaty 3, which states that “the said Indians, shall have the right to pursue their avocations of hunting and fishing throughout the tract surrendered ...”<sup>31</sup> Courts have ruled that treaty rights are not frozen in time and must be interpreted in a way that provides for modern exercise of these rights.<sup>32</sup> Case law also indicates that historical treaties are bound by geographic limits,

<sup>29</sup> *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)* 2005 SCC 69, para. 57.

<sup>30</sup> *Ibid.*, para. 57.

<sup>31</sup> *Treaty 3 between Her Majesty the Queen and the Saulteaux Tribe of the Ojibbeway Indians at the Northwest Angle on the Lake of the Woods with Adhesions*, 3 October 1873, <https://www.aadnc-aandc.gc.ca/eng/110010028675/1100100028679>.

<sup>32</sup> *Marshall*, para. 78 (stating these specific points and summarizing key principles governing interpretation of historical treaties) (see note 56).



either by the express terms of the treaty or by interpretation.<sup>33</sup> In the context of the three Prairie Provinces, the Supreme Court has held that numbered treaties protect Indigenous treaty parties' rights to hunt throughout their traditional areas, but that the natural resource transfer agreements<sup>34</sup> extinguished the right to hunt for commercial purposes.<sup>35</sup> Similar to Aboriginal rights and title discussed above, the Supreme Court has ruled that treaty rights are not absolute and are subject to justified infringements.<sup>36</sup>

A key distinguishing feature between different historical treaties is whether the treaty contains a land-cession provision or not. Generally speaking, it is the earlier historical treaties, often referred to as the "peace treaties,"<sup>37</sup> that do not include land cession provisions. In such areas, courts have found that Aboriginal rights exist, either by the terms of the treaty, interpretation of the treaty or otherwise as proven Aboriginal rights.<sup>38</sup> Such rights, including hunting, trapping and fishing rights, were not extinguished,<sup>39</sup> meaning that, similar to Aboriginal rights in non-treaty areas discussed above, these rights result in certain Crown obligations, including the duty to consult and accommodate.<sup>40</sup> Aboriginal title may also exist in these areas, though to date no such rights have been proven in court (Hamilton 2016).<sup>41</sup>

Land cession treaties are those that include a clause surrendering land to the Crown. All numbered treaties, for example, included some version of such a clause. For example, Treaty 6, which covers much of what is today central Alberta and central Saskatchewan, includes the following:

The Plain and Wood Cree Tribes of Indians, and all the other Indians inhabiting the district hereinafter described and defined, do hereby cede,

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<sup>33</sup> Ibid., para. 42.

<sup>34</sup> *Alberta Natural Resources Act*, SC 1930, c 3; *Manitoba Natural Resources Act*, SC 1930, c. 29; *Saskatchewan Natural Resources Act* RSC 1930, c. 41. For a broad discussion of the agreements, Indigenous rights and Crown obligations, see Calliou (2007).

<sup>35</sup> *R v. Horseman* [1990] 1 S.C.R. 901.

<sup>36</sup> *Mikisew*, paras. 32, 48 (see note 78). For examples of courts applying the infringement analysis, see *R v. Lefthand* 2007 ABCA 206; *R v. Douglas* 2007 BCCA 265; *R v. Bombay* [1993] 1 CNLR 92, 61 OAC 312 [ONCA].

<sup>37</sup> See e.g., *Marshall*, para. 74 (see note 56). But for suggestion that the straightforward application of the Sparrow test to treaty rights is inappropriate because of the significant distinctions between Aboriginal and treaty rights, see Rotman (1997).

<sup>38</sup> *Marshall/Bernard*, para. 38 (see note 53). However, in this case, the court found that the right did not extend to commercial harvesting rights, nor Aboriginal title. See also *Saanichton Marina Ltd v. Claxton*, 57 DLR (4th) 161, [1989] 5 WWR 82 (BC CA) (regarding existing treaty rights under the Douglas Treaties).

<sup>39</sup> *Marshall/Bernard*, para. 38 (see note 53). For an example of such consultation, see NEB and CNSOPB (2007).

<sup>40</sup> As described in the final project report, the consultations "included discussions of potential infringement of existing and claimed Mi'kmaq rights, Aboriginal title, and mitigation action taken by the Proponent" (17).

<sup>41</sup> Though Aboriginal title in these areas is unproven in court to date, post *Tsilhqot'in* (see note 56) there is a strong legal basis for a court to find that title existed in areas covered by the peace treaties and that such title was never extinguished. While title was argued and not proven in *Marshall/Bernard* (see note 53), the decision left open the possibility.

release, surrender and yield up to the Government of the Dominion of Canada, for Her Majesty the Queen and Her successors forever, all their rights, titles and privileges, whatsoever, to the lands included within the following limits

...

Her Majesty further agrees with Her said Indians that they, the said Indians, shall have right to pursue their avocations of hunting and fishing throughout the tract surrendered as hereinbefore described, subject to such regulations as may from time to time be made by Her Government of Her Dominion of Canada, and saving and excepting such tracts as may from time to time be required or taken up for settlement, mining, lumbering or other purposes by Her said Government of the Dominion of Canada, or by any of the subjects thereof duly authorized therefor by the said Government.<sup>42</sup>

Courts have held that these provisions do surrender any Aboriginal title to the land to the Crown and are a legitimate basis upon which the Crown may take up lands (Fumoleau 2004; Johnson 2007; Long 2010; Craft 2013).<sup>43</sup> However, the Crown's power to take up land is subject to the duty to consult and accommodate in contexts of existing Aboriginal and treaty rights.<sup>44</sup> Further, if the taking up of treaty land leaves an Indigenous group with no meaningful right to hunt, fish or trap on their traditional territories, then a potential action for infringement of those rights will arise.<sup>45</sup>

## 2.3 MODERN TREATIES

After a long period without treaty-making from the 1920s to the 1970s, Canada resumed the practice following the decision in *Calder v. British Columbia (AG)*,<sup>46</sup> albeit in a very different manner. Beginning with the James Bay and Northern Quebec Agreement of 1975,<sup>47</sup> Canada has been in the process of negotiating what are typically referred to as comprehensive land claims agreements, or “modern treaties” (Isaac 2016, 165). Twenty-six such treaties are now in place, primarily in the

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<sup>42</sup> *Treaty 6 between Her Majesty the Queen and the Plain and Wood Cree Indians and other Tribes of Indians at Fort Carlton, Fort Pitt, and Battle River with Adhesions*, 23 August 1876, <https://www.aadnc-aandc.gc.ca/eng/1100100028710/1100100028783>.

<sup>43</sup> See e.g., *Grassy Narrows First Nation v. Ontario (Natural Resources)*, 2014 SCC 48, paras. 41-42. However, open questions remain as to whether Aboriginal title may still exist in these contexts. Some commentators suggest that the treaties contemplated sharing of the land.

<sup>44</sup> *Mikisew*, para. 56 (see note 78).

<sup>45</sup> *Ibid.*, para. 48. See also *Fort McKay First Nation v. Prosper Petroleum Ltd*, 2020 ABCA 163.

<sup>46</sup> *Calder et al. v. Attorney-General of British Columbia*, [1973] SCR 313.

<sup>47</sup> *Beckman v. Little Salmon/Carmacks First Nation*, 2010 SCC 53, para. 12.



### Figure 3. Modern Treaties and Self-Government Agreements



Unlike their historical counterparts, the modern comprehensive treaty is the product of lengthy negotiations between well-resourced and sophisticated parties.

• • •

The increased detail and sophistication of modern treaties represents a quantum leap beyond the pre-Confederation historical treaties ... and post-Confederation treaties such as Treaty No. 8 (1899) ... The historical treaties were typically expressed in lofty terms of high generality and were often ambiguous.<sup>48</sup>

<sup>48</sup> *Little Salmon*, paras. 9-10, 12 (see note 96).

Modern treaties are detailed, lengthy, comprehensive legal agreements that typically include chapters on wildlife management, development assessment, heritage resources, parks and protected areas, resource royalty sharing, land management, land-use planning, economic development, expropriation, dispute resolution and more (INAC and Council 1993). Like historical treaties, modern treaties and the rights contained therein are constitutionally protected.<sup>49</sup> The terms of modern treaties explicitly set out Crown obligations; however, the Supreme Court has been clear in finding that a modern treaty is not a “complete code.”<sup>50</sup> While courts will pay deference to the treaty text,<sup>51</sup> such deference is subject to conformity with the constitutional principle of the honour of the Crown. This means, for example, that there may be Crown consultation obligations beyond what is explicitly set out in the treaty. Such consultation is required because the honour of the Crown and the duty to consult exist independently of the treaty, and the duty is a continuing one in service of the broader objective of reconciliation.<sup>52</sup>

Explicit treaty-based consultation requirements, as well as guidance from the courts to date, would guide Crown consultation in relation to the corridor. Also, co-management boards established pursuant to modern treaties, which typically have jurisdiction to conduct or at least contribute to assessment of major natural resources projects, would presumably have a significant role to play assessing any proposed corridor (White 2020). The process created for the Mackenzie Gas Project, which was jointly reviewed by federal and territorial governments with significant involvement from Indigenous communities and co-management boards, would offer guidance in this regard.<sup>53</sup> With approximately 100 comprehensive land claim and self-government negotiation tables underway across Canada (CIRNAC 2015; INAC 2015; Land Claims Agreement Coalition 2019), this is an increasingly common legal context, notwithstanding treaty implementation challenges that are common once a treaty is finalized (AANDC 2013; Alcantara 2013; Cameron and Campbell 2019).

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<sup>49</sup> See e.g., *Ibid.*, para. 2 (see note 96); see also *Quebec (Attorney General) v. Moses*, 2010 SCC 17, para. 15; see also *First Nation of Nacho Nyak Dun v. Yukon*, 2017 SCC 58, para. 34.

<sup>50</sup> *Little Salmon*, paras. 38, 52.

<sup>51</sup> *Nacho Nyak Dun*, para. 36.

<sup>52</sup> *Little Salmon*, para. 119.

<sup>53</sup> For a succinct summary of the regime, see *Dene Tha' First Nation v. Canada (Minister of Environment)*, 2006 FC 1354, para. 19.

## PART III. THE DUTY TO CONSULT, “MEANINGFUL CONSULTATION” AND THE CORRIDOR

### 3.1 THE DUTY TO CONSULT AND ACCOMMODATE

Since the landmark decisions of *Haida Nation v. British Columbia (Minister of Forests)* and *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)* in 2004, courts have been engaged in a process of clarifying the contours of the duty to consult landscape.<sup>54</sup> Today, the jurisprudence offers significant clarity in many regards. For example, in *Tsleil-Waututh v. Canada (Attorney General)*, which dealt with Indigenous consultation aspects of the approval of TMX, the Federal Court of Appeal (FCA) did not chart any new legal territory; it simply applied existing law to the TMX context (Olszynski and Wright 2019). This was similarly the case in the FCA’s subsequent decision on re-approval of the TMX project in *Coldwater First Nation v. Canada (Attorney General)*, in which the court noted that “[t]he case law is replete with indicia” of what constitutes meaningful consultation.<sup>55</sup> While some commentators suggest that there is significant uncertainty in the law (Bickis and Healing 2018; Lavoie 2019), uncertainty primarily arises when this now relatively well-defined area of law is applied to a new factual context. Granted, given that across Canada there are more than 630 First Nation communities (CIRNAC 2017a), 26 modern treaty regions (INAC 2015) and a significant number of Métis communities (CIRNAC 2017b), many diverse contexts exist across Canada (see Figure 4). This portion of this article sets out the law pertaining to the duty to consult and relates it to the proposed corridor initiative. In doing so, it references the different contexts set out in above in Part II.

<sup>54</sup>

According to CanLII.org, *Haida* (see note 68), has been cited by the courts 656 times and *Taku* (see note 69) 228 times (accessed September 11, 2019).

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*Coldwater First Nation v. Canada (Attorney General)*, 2020 FCA 34, para. 41.

[illegible]

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Crown consultation and accommodation obligations are an extension of the legal framework applicable in contexts of potential Crown infringement of s. 35 rights of Indigenous peoples (Grammond 2013, 314-5).<sup>56</sup> In *Sparrow*, the court set out an analytical framework for situations where rights may be infringed and the Crown seeks to justify such infringement.<sup>57</sup> In doing so, the court indicated that an important part of the framework for assessing whether infringement may be justified is whether the Indigenous community in question was consulted on the impugned measure.<sup>58</sup> As later expressed in *Delgamuukw*, “[w]hether the aboriginal group has been consulted is relevant to determining whether the infringement of aboriginal title is justified ... [t]he nature and scope of the duty of consultation will vary with the circumstances.”<sup>59</sup> This set a foundation for the spectrum approach now used by courts engaged in a duty-to-consult analysis.

*Haida*<sup>60</sup> and *Taku*,<sup>61</sup> which arose in contexts of asserted Aboriginal rights,<sup>62</sup> expanded the role and prominence of consultation in Crown-Indigenous relations. As the Supreme Court explained in *Haida*: “This case is the first of its kind to reach this Court. Our task is the modest one of establishing a general framework for the duty to consult and accommodate, where indicated, before Aboriginal title or rights claims have been decided.”<sup>63</sup> That framework is now relatively settled, and was succinctly restated in the *Tsleil Waututh*.<sup>64</sup>

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).

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<sup>56</sup> For a succinct contemporary statement on the difference between the consultation process and the infringement justification process, see *Coldwater*, para. 251 (see note 112).

<sup>57</sup> *Sparrow* (see note 56).

<sup>58</sup> *Ibid.*, para. 1119 (as cited in *Haida*, para. 21 [see note 68]). One of the factors in determining whether limits on the right were justified is “whether the aboriginal group in question has been consulted with respect to the conservation measures being implemented.” See also *Mikisew*, para. 48 (see note 78).

<sup>59</sup> *Delgamuukw*, para. 168 (see note 56).

<sup>60</sup> *Haida* (see note 68).

<sup>61</sup> *Taku* (see note 69).

<sup>62</sup> Relating this to the above discussion, *Haida* and *Taku* were both situated in non-treaty areas in British Columbia.

<sup>63</sup> *Haida*, para. 11.

<sup>64</sup> For another succinct summary of key duty to consult principles, see *Tsleil Waututh* (see note 12). See also *Ktunaxa Nation v. British Columbia (Forests, Lands and Natural Resource Operations)*, 2017 SCC 54, para. 80.

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).<sup>65</sup>

The duty to consult is judge-made law, and, as the Supreme Court explicitly anticipated in *Haida*, courts have been engaged in an ongoing process of “filling in the details.”<sup>66</sup> The courts have articulated a number of important points in the years since *Haida* and *Taku*.

The Supreme Court has clarified, for example, that the duty to consult and accommodate exists in both historical treaty<sup>67</sup> and modern treaty<sup>68</sup> contexts. This would be highly relevant in the context of a cross-Canada corridor, which would most certainly cross historical treaties en route from the Atlantic to Pacific coasts, and modern treaties en route to the Arctic Ocean (see Figures 1 and 3). These contexts would include First Nations, Métis and Inuit communities, with the latter obviously being located across northern Canada.

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<sup>65</sup> *Tsleil-Waututh*, paras. 486-489 (see note 12).

<sup>66</sup> *Haida*, para. 11 (see note 68). “[C]ourts, in the age-old tradition of the Common Law, will be called on to fill in the details of the duty to consult and accommodate.”

<sup>67</sup> *Mikisew* (see note 78).

<sup>68</sup> *Little Salmon* (see note 96).

The courts have also been clear in stating that perfection is not the standard.<sup>69</sup> Rather, as stated in *Haida*, “[t]he government must make every reasonable effort to inform and consult, this suffices to discharge the duty.”<sup>70</sup> What is required is “a commitment to a meaningful process of consultation.”<sup>71</sup> This means that the duty to consult does not equate to a “duty to agree”<sup>72</sup> and does not provide Indigenous groups with a veto.<sup>73</sup>

This process does not give Aboriginal groups a veto over what can be done with land pending final proof of the claim. The Aboriginal ‘consent’ spoken of in *Delgamuukw* is appropriate only in cases of established rights, and then by no means in every case. Rather, what is required is a process of balancing interests, of give and take.”<sup>74</sup>

As such, consent is only required in rare situations involving “very serious issues”<sup>75</sup> in contexts of established rights.<sup>76</sup> As explained in *Ktunaxa Nation v. British Columbia (Forest, Lands and Natural Resource Operations)*:

The duty to consult and, if appropriate, accommodate Aboriginal interests may require the alteration of a proposed development. However, it does not give Aboriginal groups a veto over developments pending proof of their claims. Consent is required only for proven claims, and even then only in certain cases.<sup>77</sup>

The focus in the duty to consult context is on process: “Section 35 guarantees a process, not a particular result.”<sup>78</sup> In assessing whether the duty has been fulfilled, courts examine the process of consultation and accommodation, not the outcome.<sup>79</sup>

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<sup>69</sup> See *Haida*, para. 62. See also *Gitxaala*, paras. 8, 182 (see note 11). See also *Ahousaht First Nation v. Canada (Fisheries and Oceans)*, 2008 FCA 212, para. 33.

<sup>70</sup> *Haida*, para. 62.

<sup>71</sup> *Gitxaala*, para. 179.

<sup>72</sup> *Haida*, para. 49. *Yellowknives Dene First Nation v. Canada (Aboriginal Affairs and Northern Development)*, 2015 FCA 148, para. 56.

<sup>73</sup> *Haida*, para. 48. *Clyde River*, para. 59 (see note 37).

<sup>74</sup> *Haida*, para. 59. See also *Chippewas of the Thames* (see note 38); *Ktunaxa Nation*, para. 83 (see note 124).

<sup>75</sup> *Haida*, paras. 24, 48. Cited and applied in *Ktunaxa Nation*, para. 80.

<sup>76</sup> Total clarity on the distinction between veto and consent is not observable in the case law. Some commentators have attempted to explain the difference (Joffe 2015). It should be noted that consent is indeed the standard in First Nations reserve contexts. However, consideration of reserve contexts is beyond the scope of the paper. When or if a corridor route is proposed, it would be important to pursue this dimension deeply in relation to specific reserves implicated.

<sup>77</sup> *Ktunaxa Nation*, para. 80 (see note 124). See also *Gitxaala* (see note 11).

<sup>78</sup> *Ktunaxa Nation*, para. 79.

<sup>79</sup> *Haida*, para. 63. *Tsileil Waututh*, para. 494 (see note 12), citing *Haida*, paras. 42, 48, 62.

Put another way, Crown consultation obligations are primarily procedural in nature rather than substantive, though certainly some accommodation measures may be substantive in nature (NEB 2013). As part of this process, the Crown must fulfil its consultation obligations before proceeding with actions that could affect Aboriginal or treaty rights.<sup>80</sup>

Courts have also clearly established that the Crown's constitutional obligations require that the consultation process is carried out in good faith.<sup>81</sup> This means both parties meeting "in a balanced manner that reflects the honour of the Crown, to discuss development with a view to accommodation of conflicting interests."<sup>82</sup> In doing so, the Crown must attempt to deal with the Indigenous community "with the intention of substantially addressing their concerns."<sup>83</sup> Further, good faith is required on both sides;<sup>84</sup> Indigenous communities "must not frustrate the Crown's reasonable good faith attempts, nor should they take unreasonable positions to thwart government from making decisions or acting in cases where, despite meaningful consultation, agreement is not reached."<sup>85</sup>

Several other specific points are important to note. The Supreme Court has ruled that the Crown cannot decide that a project is in the public interest if the duty to consult has not been fulfilled.<sup>86</sup> Courts have also indicated that consultation in a project-level assessment is not the proper forum for negotiation of Aboriginal title and governance<sup>87</sup> and is not the proper forum to address historical grievances.<sup>88</sup> In terms of who actually carries out the consultation, the case law makes clear that consultation duties may be delegated to third parties, such as project proponents; however the ultimate duty belongs to the Crown.<sup>89</sup> Depending on the context, consultation obligations may be fulfilled by different levels of government, or government agencies with explicit authority to do so (Isaac 2016; Hoehn and Stevens 2018). Finally, in modern treaty contexts, consultation may be shaped by agreement of the parties, but the Crown cannot contract out of its duty of

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<sup>80</sup> *Chippewas of the Thames* (see note 38). Citing *Tsilhqot'in*, paras. 78, 36.

<sup>81</sup> *Haida*, para. 42. *Chippewas of the Thames*, para. 44 (see note 38). *Clyde River*, para. 23 (see note 37). *Ktunaxa Nation*, para. 80.

<sup>82</sup> *Rio Tinto Alcan Inc v. Carrier Sekani Tribal Council*, 2010 SCC 43, para. 83.

<sup>83</sup> *Mikisew*, para. 55 (see note 78).

<sup>84</sup> *Haida*, para. 42 (see note 68).

<sup>85</sup> *Ibid.*, para. 42.

<sup>86</sup> *Clyde River*, para. 40 (see note 37).

<sup>87</sup> *Gitxaala*, para. 309 (see note 11).

<sup>88</sup> *Chippewas of the Thames*, para. 41 (see note 38). See also *Carrier Sekani*, para. (see note 144). 53. Focus is on the current government decision.

<sup>89</sup> *Chippewas of the Thames*, para. 41.



honourable dealing, and the duty to consult applies independently of the intention of the parties as expressed or implied in the treaty itself.<sup>90</sup>

### 3.2 “MEANINGFUL CONSULTATION”

What constitutes “meaningful” consultation will depend heavily on the circumstances (i.e., strength of rights claim and significance of impact), given that “the extent or content of the duty of consultation is fact specific.”<sup>91</sup> In anticipating pursuit of the corridor concept, several recent cases are particularly illustrative for the purpose of understanding what courts would consider to be “meaningful.”

In *Chippewas of the Thames First Nation v. Enbridge Pipelines Inc.*, the Supreme Court found that the Crown had fulfilled its duty to consult. That case dealt with legal challenges to the National Energy Board’s approval of the Enbridge Line 9 pipeline flow-reversal project that crosses the traditional territory of the Chippewas of the Thames First Nation (CER 2012). The Court made several instructive points about meaningful consultation in relation to specific projects:

The duty to consult is rooted in the need to avoid the impairment of asserted or recognized rights that flows from the implementation of the specific project at issue; it is not about resolving broader claims that transcend the scope of the proposed project. That said, the duty to consult requires an informed and meaningful opportunity for dialogue with Indigenous groups whose rights may be impacted.<sup>92</sup>

[emphasis added]

Specifically, in coming to the conclusion that the duty to consult and accommodate had been fulfilled, the Court found that the NEB provided participant funding,<sup>93</sup> held an oral hearing,<sup>94</sup> provided early notice of the hearing process<sup>95</sup> and allowed the Chippewas of the Thames to tender a traditional land-use study as evidence.<sup>96</sup> The Court also noted that the Indigenous appellants were able to pose informational questions to the proponent, received responses and were able to make closing oral submissions to the NEB. The NEB also, in the Court’s view, considered the potential for negative impacts on the rights and interests of the

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<sup>90</sup> *Little Salmon*, para. 62 (see note 96). Citing *Haida* and *Mikisew* (see note 78).

<sup>91</sup> *Tsleil-Waututh*, para. 488 (see note 12).

<sup>92</sup> *Chippewas of the Thames*, para. 2.

<sup>93</sup> *Ibid.*, para. 52.

<sup>94</sup> *Ibid.*

<sup>95</sup> *Ibid.*

<sup>96</sup> *Ibid.*

Chippewas of the Thames,<sup>97</sup> and imposed a number of accommodation measures designed to address concerns raised by Indigenous groups, including an approval condition requiring Enbridge to continue consulting with Indigenous groups and produce ongoing engagement reports.<sup>98</sup> In terms of potential impacts on rights, the Court relied on the fact that the project was to occur within an existing right-of-way on previously disturbed land.<sup>99</sup> Notably, even though the Court indicated that the Crown must communicate in advance its intention to rely on a tribunal or board to fulfil the duty to consult,<sup>100</sup> and that such notice had not been provided in a timely way, it still found that consultation obligations had been met.<sup>101</sup>

Meanwhile, in the companion Supreme Court decision of *Clyde River (Hamlet) v. Petroleum GeoServices Inc.*, which dealt with Inuit consultation in relation to seismic testing off Baffin Island, the Supreme Court ruled that the NEB failed to fulfil Crown consultation and accommodation obligations.<sup>102</sup> In this modern treaty context, the Inuit had established treaty rights to hunt and harvest marine mammals under the Nunavut Land Claims Agreement,<sup>103</sup> and the Crown acknowledged that “deep consultation” was required.<sup>104</sup> The Court found many specific shortcomings: failing to notify Clyde River that the Crown was relying on the NEB process to fulfil the duty to consult, failing to inquire into the specific rights and impacts on rights (the NEB instead focused on possible environmental effects),<sup>105</sup> not holding an oral hearing<sup>106</sup> and not offering participant funding.<sup>107</sup> The SCC also noted that the project proponent was unable to answer many of the information requests from community members,<sup>108</sup> and failed to translate a 3,926-page document into Inuktitut.<sup>109</sup> The Court also found that the accommodation measures provided to the Inuit were “insignificant concessions in light of the potential impairment of the

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<sup>97</sup> Ibid., paras. 51-52.

<sup>98</sup> Ibid., para. 57.

<sup>99</sup> Ibid., para. 53.

<sup>100</sup> Ibid., para. 44; *Clyde River*, para. 23 (see note 37).

<sup>101</sup> *Chippewas of the Thames*, para. 46. This could be seen as an instance of the court’s view that “perfection is not the standard.”

<sup>102</sup> *Clyde River*, para. 53. But note in this case the court also ruled that the Crown may rely entirely on the NEB consultation activities to fulfil the duty to consult in situations where the NEB is authorized by legislation to be the final decision-maker.

<sup>103</sup> Ibid., para. 2.

<sup>104</sup> Ibid., para. 43.

<sup>105</sup> Ibid., para. 45.

<sup>106</sup> Ibid., para. 47.

<sup>107</sup> Ibid.

<sup>108</sup> Ibid., para. 10.

<sup>109</sup> Ibid., para. 11.

Inuit's treaty rights.”<sup>110</sup> Ultimately, the Court concluded that the consultation process was “significantly flawed” and quashed the NEB authorization.<sup>111</sup>

Recent Federal Court of Appeal cases in which Indigenous communities have challenged major pipeline project approvals also have significant instructive value in understanding what constitutes meaningful consultation in relation to linear infrastructure projects. In *Gitxaala Nation v. Canada*, the principal legal challenge to the Northern Gateway project (NGP) (NRCAN 2017), the 2-1 majority found that the Crown had not discharged the duty to consult. Citing a key holding in *Haida* that “[i]t is open to governments to set up regulatory schemes to address the procedural requirements appropriate to different problems at different stages, thereby strengthening the reconciliation process and reducing recourse to the courts,”<sup>112</sup> the majority ruled that the Crown’s phased approach for consultation was reasonable and appropriate.<sup>113</sup> However, Crown consultation in the final phase, following the NEB recommendation report and before the Governor in Council’s final decision, fell “well short of the mark” and was “unacceptably flawed.”<sup>114</sup>

In arriving at that conclusion, the majority made several instructive observations with respect to what constitutes meaningful consultation. First, in the final consultation phase the Crown failed to engage, dialogue and grapple with the concerns expressed to it in good faith by the appellant First Nations.<sup>115</sup> The Crown also failed to indicate an intention to amend or supplement the recommended conditions, nor did it provide meaningful feedback to the concerns raised.<sup>116</sup> The court found that: “[m]issing was a real and sustained effort to pursue meaningful two-way dialogue. Missing was someone from Canada’s side empowered to do more than take notes, someone able to respond meaningfully at some point.”<sup>117</sup>

The majority decision in *Gitxaala* moved beyond identifying shortcomings, putting forward its view on what meaningful consultation should entail during that phase of consultation:

In order to comply with the law, Canada’s officials needed to be empowered to dialogue on all subjects of genuine interest to affected First Nations,

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<sup>110</sup> Ibid., para. 51.

<sup>111</sup> Ibid., 52-53.

<sup>112</sup> *Haida*, para. 51 (see note 68).

<sup>113</sup> *Gitxaala*, paras. 192 -228 (see note 11). Reviewed in detail by the court in relation to different claims by Indigenous groups. But for criticism of the general approach of the federal government, see Janes (2018).

<sup>114</sup> *Gitxaala*, para. 230. It should be noted that in his dissent, Ryer J.A. found that the Crown’s duty to consult had been met (paras. 347-363).

<sup>115</sup> Ibid., para. 279.

<sup>116</sup> Ibid.

<sup>117</sup> Ibid.

to exchange information freely and candidly, to provide explanations, and to complete their task to the level of reasonable fulfilment. Then recommendations, including any new proposed conditions, needed to be formulated and shared with Northern Gateway for input. And, finally, these recommendations and any necessary information needed to be placed before the Governor in Council for its consideration. In the end, it has not been demonstrated that any of these steps took place.<sup>118</sup>

More recently, *Gitxaala* was followed by the FCA in *Tsleil Waututh*, the consolidated legal challenges to the TMX project. This case was the Crown's opportunity to apply the lessons learned from the NGP context; however, the FCA once again quashed the project approval, in part because the Crown did not fulfil its consultation and accommodation obligations (another basis for quashing related to shortcomings in the environmental assessment process (Olszynski and Wright 2019)). The FCA's unanimous decision built on important consultation requirements set out in *Gitxaala*, clarifying that:

Canada was required to do more than receive and understand the concerns of the Indigenous applicants. Canada was required to engage in a considered, meaningful two-way dialogue. Canada's ability to do so was constrained by the manner in which its representatives on the Crown consultation team implemented their mandate. For the most part, Canada's representatives limited their mandate to listening to and recording the concerns of the Indigenous applicants and then transmitting those concerns to the decision-makers.

On the whole, the record does not disclose responsive, considered and meaningful dialogue coming back from Canada in response to the concerns expressed by the Indigenous applicants. While there are some examples of responsiveness to concerns, these limited examples are not sufficient to overcome the overall lack of response. The Supreme Court's jurisprudence repeatedly emphasizes that dialogue must take place and must be a two-way exchange. The Crown is required to do more than to receive and document concerns and complaints.

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Canada's ability to consult and dialogue ... was constrained by two further limitations: first, Canada's unwillingness to depart from the Board's findings and recommended conditions so as to genuinely understand the concerns of the Indigenous applicants and then consider and respond to those concerns in a genuine and adequate way; second, Canada's erroneous view that it was unable to impose additional conditions on Trans Mountain.<sup>119</sup>  
[emphasis added]

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<sup>118</sup> Ibid., paras. 327-329 (see note 11).

<sup>119</sup> *Tsleil-Waututh*, paras. 558-560 (see note 12).

*Tsleil Waututh* makes clear that in a deep consultation context meaningful consultation must include someone representing Canada who could engage interactively and who had the confidence of Cabinet to discuss accommodation measures, flaws in the consultation process, flaws in the project approval recommendations and findings, and how such flaws could be addressed.<sup>120</sup> At a more general level, *Tsleil Waututh* confirmed that the Crown must engage in a genuine and sustained effort to pursue meaningful, two-way dialogue with each Indigenous community and must do so with a view to addressing each group's specific concerns (Wright 2018b).<sup>121</sup> Put in different terms, the duty to consult imposes on the Crown an obligation to ensure that an Indigenous community's representations are seriously considered and, to the extent possible, demonstrably integrated into the process and decision-making (Bankes 2012; Wright 2018c).<sup>122</sup>

Finally, and most recently, the FCA in *Coldwater*, examining consultation in relation to the federal re-approval of TMX, took the opportunity to explicitly set out its view on what "reasonable" and "meaningful" consultation mean:

So what do the words "reasonable" and "meaningful" mean in this context? The case law is replete with indicia, such as consultation being more than "blowing off steam" (*Mikisew Cree First Nation v. Canada* (Minister of Canadian Heritage), 2005 SCC 69, [2005] 3 S.C.R. 388, para. 54 [Mikisew 2005]), the Crown possessing a state of open-mindedness about accommodation (*Gitxaala Nation*, para. 233), the Crown exercising "good faith" (*Haida Nation*, para. 41; *Clyde River*, paras. 23-24; *Chippewas of the Thames*, para. 44), the existence of two-way dialogue (*Gitxaala Nation*, para. 279), the process being more than "a process for exchanging and discussing information" (*TWN 2018*, paras. 500-502), the conducting of "dialogue [...] that leads to a demonstrably serious consideration of accommodation" (*TWN 2018*, para. 501) and the Crown "grappl[ing] with the real concerns of the Indigenous applicants so as to explore possible accommodation of those concerns" (*TWN 2018*, para. 6). In cases like this where deep consultation is required, the Supreme Court has suggested the following non-binding indicia (*Chippewas of the Thames*, para. 47; *Haida Nation*, para. 44; *Squamish First Nation*, para. 36; see also *Yellowknives Dene First Nation*, para. 66):

- the opportunity to make submissions for consideration;
- formal participation in the decision-making process;

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<sup>120</sup> Ibid., para. 759.

<sup>121</sup> Ibid., paras. 755-756. For another example from the pipelines context, but one where the FCA found the Crown consultation was adequate, see *Bigstone Cree Nation* (see note 38). In *Bigstone*, the Crown provided early notice to Indigenous groups, provided funding, conducted two-way engagement with multiple opportunities to provide and seek information, and conducted four months of additional consultation after the NEB had issued its recommendation report.

<sup>122</sup> *Mikisew* (see note 78); *Halfway River First Nation v. BC*, 1999 BCCA 470, para. 160.

- provision of written reasons to show that Indigenous concerns were considered and to reveal the impact they had on the decision; and
- dispute resolution procedures like mediation or administrative regimes with impartial decision-makers.

Examples and indicia in the case law are nothing more than indicators. The Supreme Court, while providing us with many of these indicia, has made it clear that what will satisfy the duty will vary from case to case, depending on the circumstances (*Haida Nation*, para. 45).<sup>123</sup>

While there is significant clarity in the case law regarding what constitutes meaningful consultation, before discussing Crown consultation obligations in relation to the corridor, it is important to acknowledge two relevant areas where the law is evolving: consultation in relation to development of legislation, and the relationship between the duty to consult and Indigenous consent. Regarding the former, the law is currently uneven with respect to whether the duty to consult is triggered in contexts of the development and introduction of legislation. This was the focus of the Supreme Court's 2018 decision in *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*.<sup>124</sup> While the Supreme Court issued four separate judgments, a majority of the Court ruled that there is no duty to consult Indigenous communities during the law-making process.<sup>125</sup> However, if such a law would infringe established s. 35 rights (e.g., right-of-way infringes on Aboriginal title or a modern treaty right), then it may be struck down once enacted. Despite disagreement across the bench as to whether and how the duty to consult was triggered during the law-making process, all members of the Supreme Court agreed that consultation by the Crown is good practice in contexts where the enactment of legislation has the potential to adversely affect asserted or established Aboriginal or treaty rights (Imai 2018).<sup>126</sup> As such, to the extent that some form of legislative action is part of pursuing the corridor concept (discussed below in Part IV), the government would have to contend with this area of uncertainty, but would also be wise to follow the Court's guidance in suggesting that consultation during the law-making stages is good practice. Indeed, there are examples of this approach being followed by governments across the country (ENRC 2019; ENRNWT n.d.). This is perhaps also owing to the courts recognizing that high-level management decisions or structure changes to the Crown's management of natural resources may trigger consultation duties.<sup>127</sup>

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<sup>123</sup> *Coldwater*, paras. 41-42 (see note 112).

<sup>124</sup> *Mikisew Cree First Nation v. Canada (Governor General in Council)*, 2018 SCC 40.

<sup>125</sup> *Mikisew* 2018. For a detailed discussion of complex nuances across the multiple judgments, see Nichols and Hamilton (2020).

<sup>126</sup> *Mikisew* 2018.

<sup>127</sup> *Carrier Sekani*, paras. 44, 47 (see note 143).



Regarding consent, as noted above, the Supreme Court indicated in *Haida* that consent is the standard “only in cases of established rights, and then by no means in every case.”<sup>128</sup> More recently in *Tsilhqot’in*, wherein the Supreme Court issued a declaration of Aboriginal title for the first time, the Court provided further views on consent:

After Aboriginal title to land has been established by court declaration or agreement, the Crown must seek the consent of the title-holding Aboriginal group to developments on the land. Absent consent, development of title land cannot proceed unless the Crown has discharged its duty to consult and can justify the intrusion on title under s. 35 of the Constitution Act, 1982.<sup>129</sup>

In practical terms, this means that the Crown is permitted to unilaterally infringe existing rights of Indigenous peoples so long as consultation duties are discharged and such infringement is justified in the circumstances.<sup>130</sup> As one might expect, this state of the law does not go without criticism (McNeil 1997b; Hamilton and Nichols 2019). While it is foreseeable that some communities along the route may support the project at issue, and some may reach some kind of negotiated agreement with the Crown through consultation and accommodation or put in place some type of benefits agreement with the proponent (Lambrecht 2013, 51-52; Bergner 2018), it is entirely foreseeable that some substantive rights-holding groups would oppose the project. In such cases, consent is seldom the standard.

It is reasonable, however, to wonder how the 2016 announcement for the federal government of Canada’s “full support” of the United Nations Declaration on the Rights of Indigenous Peoples (Bennett 2016; Tasker 2017) might change the law in relation to Indigenous consent. Most indications are that UNDRIP will not fundamentally alter the direction taken by the courts and the federal government to date. While the declaration’s explicit reference to consent and the concept of “free, prior and informed consent” (FPIC) in Article 32 may, to some, appear to bring that standard into Canadian law, UNDRIP is simply a declaration and does not have the force of law in Canada. Implementing legislation could change this; however, two indicators suggest this will not be the case. First, Bill C-262, *An Act to Ensure that the Laws of Canada are in Harmony with the United Nations Declaration on the Rights of Indigenous Peoples*<sup>131</sup> attempted to take steps toward implementing UNDRIP domestically, but it would not have given the declaration the force of law in Canada; rather, it would simply have become a tool to be used to interpret

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<sup>128</sup> *Haida*, para. 48 (see note 68).

<sup>129</sup> *Tsilhqot’in*, para. 90 (see note 56). See also para. 91.

<sup>130</sup> *Ibid.*, paras. 90, 91. See also *Nikal*, para. 110. See also Mikisew 2018, para. 48 (see note 189). An important part of the justification inquiry “is whether the Aboriginal group in question was consulted on the impugned measure.”

<sup>131</sup> Bill C-262, *An Act to Ensure that the Laws of Canada are in Harmony with the United Nations Declaration on the Rights of Indigenous Peoples*, 1st Sess., 42nd Parl., 2018 (third reading May 30, 2018). Note that this bill did not become law before the 2019 federal election was called.

existing laws in Canada (Bankes 2018). Bill C-262, of course, did not become law — it died on order paper with the calling of the 2019 federal election. Second, while the Trudeau government has committed to legislating implementation of UNDRIP (Curry 2019), as stated in the mandate letter to the Minister of Crown-Indigenous Relations (Trudeau 2019a), to date, the federal government has largely adopted the view that existing “constitutional obligations serve to fulfill all the principles of the Declaration, including ‘free, prior and informed consent’” (Bennett 2019). This conceptualization interprets UNDRIP as requiring only a good faith effort to obtain consent, not actually obtaining consent in every instance (Borrows et al. 2019). This is basically consistent with contemporary duty to consult case law set out above, indicating that consent is not required and there is no “duty to agree.”<sup>132</sup>

### 3.3 MEANINGFUL CONSULTATION AND THE CORRIDOR

Based on duty to consult case law to date, there is a substantial amount of guidance governments could follow to meet the meaningful consultation standard if pursuing the corridor concept. However, there are also a number of barriers. Overall, government and proponents would need to appreciate the great diversity of Indigenous communities, in particular with respect to the various legal contexts set out above in Part II. For example, in a modern treaty context, the text of the treaty, particularly any explicit consultation or collaboration requirements (including those with respect to co-management boards) would be an important starting point. In a non-treaty context, there would have to be an understanding of the nature of the rights asserted, and this could be particularly consequential if there is a strong claim to Aboriginal title. In a historical treaty context, there would have to be an understanding of the relevant treaty rights, as well as an appreciation that treaty rights may themselves be unclear or disputed and that the territory in which the rights can be exercised may be disputed. The indicia of meaningful consultation provided in the case law would need to be adapted to each of these unique situations.

In terms of guidance, given the magnitude of the corridor undertaking, government and proponents would be wise to approach Indigenous communities along the route assuming, for the most part, that deep consultation is required.<sup>133</sup> Under this approach, the courts have been relatively clear in indicating that this should include: good faith on the part of both parties, a focus on addressing the specific concerns raised, two-way dialogue, early notice, participation funding, substantive responses to information request (including translation in some contexts), openness to accommodation and mitigation measures, a view to accommodation of conflicting interests and demonstrable integration of Indigenous communities’ concerns. Also,

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<sup>132</sup> *Haida*, para. 49 (see note 68); *Clyde River*, para. 59 (see note 37).

<sup>133</sup> This would be consistent with a point of agreement across all judges of the Supreme Court of Canada in *Mikisew* (see note 78) that even when consultation is not constitutionally required, it may be undertaken in furtherance of good public administration (e.g., Rowe for Moldaver, Cote and Rowe, para. 166). This commentary from the court would be particularly relevant if pursuit of the corridor includes some kind of legislative action, which it presumably would at some relatively early stage.

at least in later consultation stages, consultation ought to be led by a representative of Canada empowered to respond meaningfully. All of this, of course, must take place before government action that could affect Aboriginal or treaty rights.<sup>134</sup>

However, there may be some contexts along the corridor route, such as instances of a tenuous claim to an Aboriginal right and minor risk of infringement, where the duty falls at the low end of the spectrum. If, in the context of the corridor, the Crown wished to engage in consultation that does not deploy all that is required in a deep consultation context, then the Crown would have to diligently assess different communities' existing and asserted rights along the route (presumably with appropriate engagement with Indigenous organizations), determine what level of consultation would be required<sup>135</sup> and approach each individual Indigenous community accordingly.<sup>136</sup> This would not be unprecedented, as the NEB (now the Canada Energy Regulator) has employed an approach of this type in recent years (CER 2019), and it is essentially the approach that the new Impact Assessment Agency of Canada describes in its interim guidance under the *Impact Assessment Act* (IAAC 2019a, 2019c).

This, however, demonstrates a key barrier presented by Crown consultation and accommodation obligations in this context. In considering consultation in relation to the corridor concept, a fundamentally important principle from the duty to consult jurisprudence is that the extent of Crown consultation and accommodation obligations is highly dependent on context. What is required for the Crown to fulfil the duty to consult, i.e., what constitutes “meaningful consultation,” depends on the specific circumstances. In situations of a relatively weak claim to an Aboriginal right where potential infringement is minor, the duty may require as little as providing notice. In contrast, if it is an existing right and potential infringement is of high significance to the Indigenous community, “deep consultation” will be required.<sup>137</sup> Given the highly varied legal terrain of treaty and non-treaty territories across the country, it would be a daunting task for the Crown to inform itself of all Indigenous communities' rights and interests along the route, then set up a process to consult with each representative organization in varying depths and degrees.

This represents a significant tension generated by the conflicting natures of the corridor concept and the duty to consult legal framework. 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. However, the corridor

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<sup>134</sup> *Chippewas of the Thames* (see note 38). Citing *Tsilhqot'in*, paras. 78, 36 (see note 56).

<sup>135</sup> This may include some areas of existing rights or title where consent would be the standard as per *Tsilhqot'in*.

<sup>136</sup> An increasingly common practice that flows from these activities is development of consultation protocols by or with specific Indigenous nations. See e.g., Mikisew (2009).

<sup>137</sup> See *Gitxaala*, para. 174 (see note 11). Comment on what a “deep consultative process” might entail.

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 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 ensuing infrastructure projects would be primarily private-sector driven and it would not be possible to predict which projects with which attributes private-sector actors will pursue. While it is conceivable that the Corridor consultation process may use some kind of envelope approach,<sup>138</sup> significant additional consultation will almost certainly be required as each specific project is pursued. Past instances illustrate this point wherein the duty to consult was triggered in contexts of projects following existing rights-of-way, including much of the TMX route.<sup>139</sup>

To summarize, Crown action to legally formalize the corridor concept would trigger the duty to consult. Associated Crown obligations would fall along a spectrum depending on the nature of Indigenous communities' existing or asserted rights along or near the route and expected adverse impacts on such rights. While what is required to fulfil a meaningful consultation standard may be possible with respect to the corridor as a legally recognized multi-modal right-of-way, consultation in relation to the corridor would likely not satisfy the highly context-dependent consultation obligations for each specific infrastructure project to follow. Without specifics of particular infrastructure projects, consultation during the corridor approval process would at most only satisfy the duty to consult in a preliminary way, with significant further consultation required as specific projects are proposed.

## **PART IV. POTENTIAL FORMS AND FORUMS FOR CROWN CONSULTATION ON THE CORRIDOR**

Providing recommendations or prescribing a path forward is outside the modest aims of this article; however, several queries and comments are warranted at this point with respect to the legal forms the corridor may take and the forums in which Crown consultation may take place. These comments flow from one central point: Crown obligations hinge on how the corridor concept is specifically pursued. In terms of legal forms, would it, for example, follow Sulzenko and Fellows's (2016, 28) suggestion of new enabling legislation action and an accompanying "tailored" regulatory framework? Would it be a "designated project" under the new *Impact Assessment Act*? Would it be the focus of a "regional assessment" or "strategic assessment" under the new *Impact Assessment Act*? Might the final legal instrument just be an Order-in-Council? Might it be all of the above in a particular sequence? Perhaps proponents would pursue smaller projects and corridors along

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<sup>138</sup> For discussion of an "envelope" approach in the environmental assessment context, also referred to as a "bounding" approach, see *Ontario Power Generation Inc. v. Greenpeace Canada et al.*, 2015 FCA 186, paras. 17, 93.

<sup>139</sup> See e.g., *Tsleil-Waututh* (see note 12); *Bigstone* (see note 38).

a route and then link them up (Government of Nunavut and KIA n.d.; Neary 2019)? Under any of these legal pathways would there be any route-clearing or preliminary infrastructure (e.g., water crossings)? What role would provinces play in a context where the federal government would clearly be leading? Only with answers to these questions (and more), along with a detailed understanding of all Indigenous rights-holders and asserted Indigenous rights along the proposed route, could one begin to specifically lay out the Crown's consultation and accommodation obligations. Questions such as these could guide further research on this topic.

In terms of forums, it may be welcome news to corridor proponents that Canadian history does offer at least one model: the Berger Inquiry. Ironically, the high-water mark for consultation with Indigenous communities came approximately three decades before the Supreme Court articulated its framework for Crown consultation in *Haida*. The 1970s Mackenzie Valley Pipeline Inquiry (Berger 1977), 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 (Berger 1977, 205; Doelle 2008). The federal government commissioned it through an Order of the Privy Council (Berger 1977, 205-208), which provided broad powers to hold community hearings, summon witnesses, establish procedures and to enlist the assistance of experts (Doelle 2008). The three-year consultation and participation process course included hearings across the Northwest Territories and northern Yukon, and provided Indigenous people in small communities with the opportunity to provide testimony directly to then-Justice Thomas Berger of the Supreme Court of British Columbia, who led the inquiry (Prince of Wales n.d.). Ultimately, the Berger inquiry recommended that “no pipeline be built and no energy corridor be established across the Northern Yukon,” but that it would be feasible to establish an energy corridor along the Mackenzie Valley (Berger 1977, xvi). However, Berger (1977, xxvii) also recommended that a pipeline be postponed for 10 years while Indigenous communities' claims were settled. Words in Berger's covering letter to the minister remain prescient today (aside from the use of the dated term “native”), including with respect to the corridor concept:

The settlement of native claims is not a mere transaction. Intrinsic to settlement is the establishment of new institutions and programs that will form the basis for native self-determination. It would be wrong, therefore, to think that signing a piece of paper would put the whole question behind us, as if all that were involved was the removal of a legal impediment to industrial development. The native people insist that the settlement of native claims should be a beginning rather than an end of the recognition of native rights and native aspirations (Berger 1977, xxiv).

In today's context, the Berger Inquiry is a relevant model for proponents of the corridor concept. 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.

From a substantive perspective, the inquiry concluded that a process for recognition and settling of Indigenous communities' claims was necessary. These conclusions could be instructive to the contemporary corridor initiative, particularly for portions of the route that would not go through areas covered by modern treaties (which would be most of the corridor).

While the Berger Inquiry is a useful precedent, it was quite modest when compared to a cross-country 7,000-kilometre corridor. The Berger Inquiry was primarily focused on the Mackenzie Valley and western Arctic regions and a relatively small number of Indigenous communities. The corridor, by comparison, could cross the territories of hundreds of Indigenous communities across Canada (NEB 2016; McCarthy 2017). 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 engaged with Indigenous peoples. What's more, there would need to be a parallel process or first phase that focused on working with Indigenous communities to clarify rights and interests. To perhaps state the obvious, the government would be wise to have these forums carefully designed and structured — logically, with the close participation and co-operation of Indigenous communities — if they are to attract the confidence of Indigenous peoples across Canada.<sup>140</sup>

Before turning to conclusions, it is appropriate to also consider the new federal impact assessment regime in this context. In August 2019, the new *Impact Assessment Act* came into force, bringing with it statutory powers and requirements for assessment of specific infrastructure projects that may eventually be placed within the corridor.<sup>141</sup> The architecture of the new regime is very similar to its predecessor, CEAA 2012 (Olszynski 2018),<sup>142</sup> but provides for a broader assessment of project-level impacts and a significantly expanded set of legislative authorities and duties to require and facilitate Crown engagement and consultation with Indigenous communities (Laidlaw 2018; Wright 2018a).

The new IAA is relevant to the corridor in a number of ways. First, while a legal right-of-way without a specific infrastructure project is not contained in the regulations designating physical activities,<sup>143</sup> the act provides the Minister with discretionary power to designate a physical activity not prescribed in the regulations if it may cause adverse effects within federal jurisdiction or if

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<sup>140</sup> Such a forum could, for example, resemble the Aboriginal Lands and Treaties Tribunal recommended by the Royal Commission on Aboriginal Peoples (1996).

<sup>141</sup> *Impact Assessment Act*, SC 2019, c. 28.

<sup>142</sup> *Canadian Environmental Assessment Act, 2012*, SC 2012 c. 19, s. 52.

<sup>143</sup> Physical Activities Regulations, SOR/2019-285. Rights-of-way are explicitly included in the project list; however, only in relation to specific projects such as a new railway line, inter-provincial pipelines or international electrical transmission lines.



“public concerns related to those effects warrant the designation.”<sup>144</sup> This means, depending on the form that the corridor takes, the minister could subject it to assessment under the IAA. In making such a determination, the minister may “consider adverse impacts that a physical activity may have on the rights of the Indigenous peoples of Canada — including Indigenous women.”<sup>145</sup> If a minister makes this designation, then the project would proceed as a designated project under the act.<sup>146</sup>

The corridor could also be the focus of a regional assessment under the new act.<sup>147</sup> Such regional assessments are “are studies conducted in areas of existing projects or anticipated development to inform planning and management of cumulative effects and inform project impact assessments”(IAAC 2019b). As noted in agency guidance, “Indigenous peoples and the public would be engaged throughout the regional assessment process to ensure meaningful participation and the integration of scientific information and Indigenous knowledge during the conduct of regional assessments” (IAAC 2019b). In setting up a regional assessment process, the minister may enter into agreements with other jurisdictions, including provincial governments and Indigenous governments and representative organizations.<sup>148</sup> Such regional assessments would then mandatorily feed into future project-level assessments to the extent that they are “relevant,”<sup>149</sup> potentially leading to efficiencies in assessments of specific projects (IAAC 2019b).<sup>150</sup> However, as noted above, further consultation with Indigenous communities would most certainly be required.

Finally, if pursuing the corridor concept takes the form of a regional assessment or an impact assessment under the act, and the forum is a Berger-type commission, then that commission could be granted authority to fulfil the functions of a committee (if a regional assessment) or review panel (if impact assessment) under the *Impact Assessment Act*. In either case, this would likely be part of the broader co-operative arrangements with other jurisdictions contemplated in s. 93(a) and (b) for regional assessments and s. 39 for a joint review panel. Similar to the Berger Inquiry, one would expect a commission of this type to be established under an

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<sup>144</sup> IAA, s. 9(1).

<sup>145</sup> Ibid. s. 9(2).

<sup>146</sup> Given the corridor’s very large scale, this would presumably be an impact assessment led by a review panel, though that would require explicit referral by the minister if he or she is “of the opinion that it is in the public interest” to do so, pursuant to s. 36(1).

<sup>147</sup> IAA, s.73.

<sup>148</sup> Ibid., s. 93(1)(a)(i).

<sup>149</sup> Ibid., s. 22(1)(p).

<sup>150</sup> This is noted in the agency guidance: “[a] key driver for regional assessments under the IAA is to inform future project impact assessments. Using regional assessment to address issues that are best considered at a regional level will improve both the effectiveness and efficiency of the impact assessment process.”

Order-in-Council (Berger 1977; Doelle 2008), though it could be created through a new statute devoted to implementing the project.<sup>151</sup>

## PART V. CONCLUSIONS

On first impression, the revived corridor concept may appeal to some as an elegant solution to the complex mix of challenges facing linear infrastructure projects in Canada today. From fluctuating global energy market conditions (Gerson 2019), to concerns about greenhouse gas emissions and climate change (Sherlock 2019), to risks associated with loss of habitat and biodiversity loss (Todd 2017), to impacts on the rights and interests of Indigenous peoples (Greaves and Lackenbauer 2019), such projects — especially oil and gas commodity pipelines — face significant headwinds (Tertzakian 2019). Politically charged as these dimensions may be, looking beyond the politics reveals legitimate concerns on all these fronts and perhaps more.<sup>152</sup> Unfortunately, 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 serves as a case in point.

This article has focused on Crown consultation obligations with respect to the corridor and rights of Indigenous peoples. It has set out the diverse landscape of Indigenous rights, interests and contexts under Canadian law today,<sup>153</sup> and explained associated Crown obligations. In doing so, it has presented a relatively mature body of case law that provides a basis for understanding what constitutes “meaningful consultation.” A key observation for those pursuing the corridor concept is that, while the jurisprudence provides relatively comprehensive guidance on “meaningful consultation,” the contextual nature of the duty to consult legal framework will make it hard to achieve in the practical corridor context. A difficult 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. Further, Crown obligations arising in contexts of infringement of the rights of Indigenous peoples present additional complexities. Trends in Canadian and international law toward requiring consent of Indigenous peoples, including

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Perhaps called the *National Unity Corridor Act*, or something to that effect. Name aside, this statute could establish a commission, similar to how any other tribunal or board, including the National Energy Board, is set up under statute.

<sup>152</sup>

This article has presented a detailed account of the legal dimensions related to the rights of Indigenous peoples and the proposed corridor and ensuing large linear projects. For a detailed account of global climate concerns, see IPCC (2018). For a summary of bio-diversity concerns in Canada and associated responses, see Environment and Climate Change Canada (2019). For an overview of energy market conditions, including volatility in domestic and global markets, see NEB (2016).

<sup>153</sup>

Recalling that this article has focused on the current content of Canadian law (sometimes referred to as “settler law”) as it pertains to Indigenous people, while acknowledging the need for legal analysis with a normative approach, particularly with respect to revitalization of Indigenous laws and governance. For an example of such work, see Borrows (2002).

potential legislative action at federal and provincial levels,<sup>154</sup> suggest that the legal landscape will continue to shift. More change in the law is entirely foreseeable.

While this article has put forward a number of queries and comments with respect to further research, including in relation to what forms and forums pursuit of the corridor may take, such points are by no means exhaustive. It is hoped, however, that this article provides a helpful foundation for any further consideration of the corridor concept, and that it will contribute to an informed approach that is respectful of the challenges, complexities and sensitivities associated with such a significant undertaking. While the well-known quote, “for every complex problem, there’s a solution that is simple, neat, and wrong”<sup>155</sup> may not be perfectly on point in this context, it is fair to characterize the proposed corridor as a concept that appears simple and neat on the surface, but would be tremendously complex to implement.

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For an example of this at the provincial level, see Bill 51-2018: *Environmental Assessment Act*, 3rd Sess., 41st Leg., British Columbia, 2018 (codifying a requirement of consent in some contexts such as on treaty lands). See also *Declaration on the Rights of Indigenous Peoples Act*, SBC 2019, c. 44.

<sup>155</sup>

Typically attributed to H. L. Mencken (Polese 2013).

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## APPENDIX 1

Figure 1. Preliminary Map of the Northern Corridor<sup>156</sup>

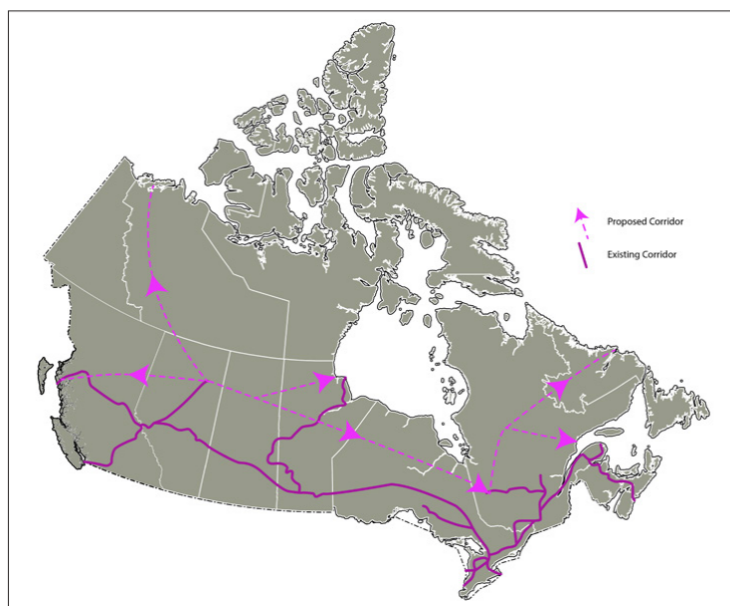
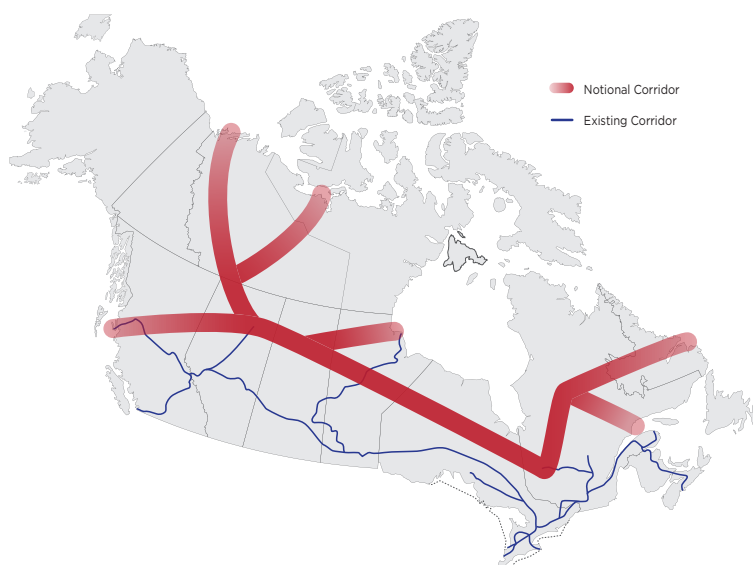


Image of the corridor concept as it appears on the webpage of the School of Public Policy, University of Calgary.<sup>157</sup>



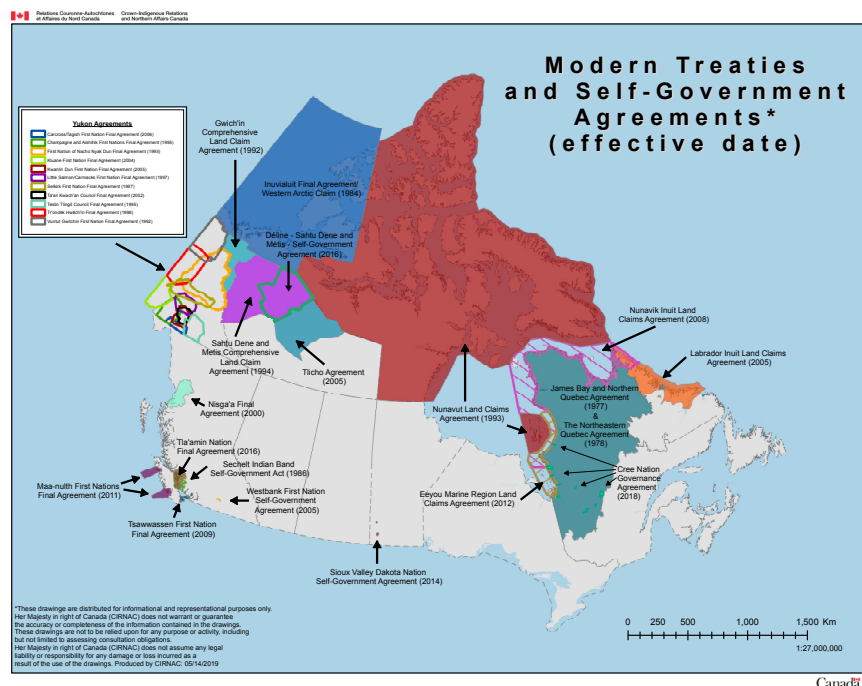
<sup>156</sup> Image from Andrew Sulzenko and Kent Fellows, "Planning for Infrastructure to Realize Canada's Potential: The Corridor Concept," *School of Public Policy Research Papers* (University of Calgary) 9, no. 22 (2016), <https://www.policyschool.ca/wp-content/uploads/2016/06/northern-corridor-sulzenko-fellows.pdf>, p. 15.

<sup>157</sup> Image from School of Public Policy, "Canadian Northern Corridor," University of Calgary, accessed April 25, 2020, <https://www.policyschool.ca/research-teaching/energy-and-environment/canadiannortherncorridor/>.

Figure 2. Historical Treaties of Canada<sup>158</sup>



Figure 3. Modern Treaties and Self-Government Agreements<sup>159</sup>



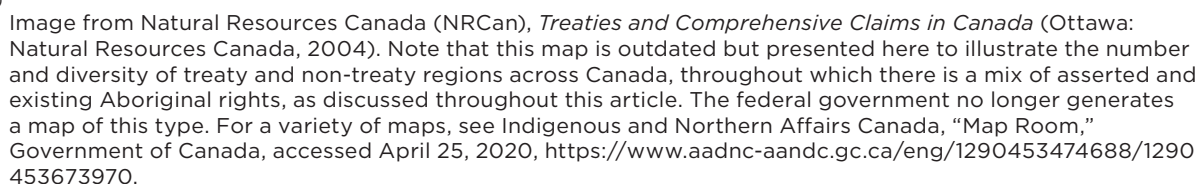
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Image from Indian and Northern Affairs Canada (INAC), *Historical Treaties of Canada*, (Ottawa: INAC, 2006), accessed April 25, 2020, [https://www.rcaanc-cirnac.gc.ca/DAM/DAM-CIRNAC-RCAANC/DAM-TAG/STAGING/texte-text/htoc\\_t100100032308\\_eng.pdf](https://www.rcaanc-cirnac.gc.ca/DAM/DAM-CIRNAC-RCAANC/DAM-TAG/STAGING/texte-text/htoc_t100100032308_eng.pdf).

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Image from Crown-Indigenous Relations and Northern Affairs Canada (CIRNAC), *Modern Treaties: Comprehensive Land Claims and Self-Government Agreements* (Ottawa: CIRNAC, 2019), [http://www.aadnc-aandc.gc.ca/DAM/DAM-INTER-HQ-AI/STAGING/texte-text/mprm\\_pdf\\_modrn-treaty\\_1383144351646\\_eng.pdf](http://www.aadnc-aandc.gc.ca/DAM/DAM-INTER-HQ-AI/STAGING/texte-text/mprm_pdf_modrn-treaty_1383144351646_eng.pdf).

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### About the Author

**David Wright** is an Assistant Professor at the University of Calgary's Faculty of Law and a member of the Natural Resources, Energy and Environmental Law Research group at the Canadian Institute of Resources Law. Prior to his faculty appointment, David held positions with Canada's Commissioner of the Environment and Sustainable Development, the Gwich'in Tribal Council, the United Nations Development Programme, the Government of Nunavut, the law firm of Stewart McKelvey, and the Marine and Environmental Law Institute at Dalhousie University. He holds an MA and JD from Dalhousie University and an LLM from Stanford University. David's research focuses on natural resources and environmental law with a particular emphasis on impact assessment and the rights of Indigenous peoples.

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