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REGULATORY ALIGNMENT FOR MULTI-MODAL INFRASTRUCTURE CORRIDORS

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FOREWORD

THE CANADIAN NORTHERN CORRIDOR RESEARCH PROGRAM PAPER SERIES

This paper is part of a special series in *The School of Public Policy Publications*, investigating a concept that would connect the nation's southern infrastructure to a new series of corridors across middle and northern Canada. This paper is an output of the Canadian Northern Corridor Research Program.

The Canadian Northern Corridor Research Program at The School of Public Policy, University of Calgary, is the leading platform for information and analysis on the feasibility, desirability, and acceptability of a connected series of infrastructure corridors throughout Canada. Endorsed by the Senate of Canada, this work responds to the Council of the Federation's July 2019 call for informed discussion of pan-Canadian economic corridors as a key input to strengthening growth across Canada and "a strong, sustainable and environmentally responsible economy." This Research Program will benefit all Canadians, providing recommendations to advance the infrastructure planning and development process in Canada.

This paper, "Regulatory Alignment for Multi-Modal Infrastructure Corridors", falls under theme *Legal and Regulatory Dimensions* of the program's eight research themes:

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REGULATORY ALIGNMENT FOR MULTI-MODAL INFRASTRUCTURE CORRIDORS

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SUMMARY

This paper discusses “Regulatory Alignment for Multi-Modal Infrastructure Corridors” in the context of the Canadian Northern Corridor Concept (CNC). In particular, the paper reviews whether there are any existing models “for regulatory oversight and approval for multi-modal corridors and the subsequent placement of infrastructure within” that might be appropriate in developing the CNC. The paper concludes that existing models do not include certain of the elements of the CNC Concept as it has evolved to date, nor could any of the models be applied within the framework of Canada’s jurisdictional realities that would govern the CNC. The paper identifies several questions that need to be addressed in order to advance the CNC Concept to a more fully-formed proposal, which would form the basis for further examination of the need for regulatory oversight and approval and the form that such oversight and approval might take. The paper also suggests a forum that might oversee this further work.

The CNC Concept is a visionary and anticipatory concept that is not yet fully formed. It is evolving largely in the absence of identified, specific infrastructure proposals, which presents foundational challenges, not only in identifying the geographic location of corridors or pathways but also in identifying appropriate legal and regulatory frameworks. It is noted that most (if not all) existing infrastructure corridors, and associated planning and oversight regimes, have originated with specific projects and that some have been established *ex post facto* to oversee infrastructure that is already in place. It is also noted that some existing corridors that are described as “multimodal” are not, on closer examination, multi-modal in the sense in which the term is used in the CNC Concept.

The paper identifies as a foundational question: “What exactly is the ‘Corridor’ and what is its legal status or nature?” Several terms are used in the CNC Concept, sometimes interchangeably and some inconsistently with others. Fundamentally, is the Corridor a legal entity and, if so, what is the nature of that entity, or is the Corridor an identified geographic area in which administrative arrangements promote cooperation and coordination among existing actors with established responsibilities for planning, approving and overseeing infrastructure projects? Is it a broader “new approach to infrastructure planning” that goes beyond establishing a corridor? It is noted in this context that Canada’s existing trade and transportation corridors are not distinct legal entities. Rather, they are described by Transport Canada as “systems” that exist and function primarily as a series of cooperative and coordinated arrangements among the relevant jurisdictions and their established regulatory agencies.

It is an underlying fact that developing, implementing and overseeing the CNC will invoke the established authority of Canada's constituent entities. The federal government, represented by Transport Canada, is on record that...

[N]o single jurisdiction or firm can unilaterally address all of the interconnected issues that determine success of a gateway or trade corridor.

This constitutional reality will have to be respected in developing a model for regulatory oversight and approval of the CNC. Constitutionally-guaranteed Indigenous rights may also come into play, depending on the nature and location of the Corridor.

The paper briefly reviews several case studies. It identifies aspects of these cases that distinguish each from the CNC. Canada's "Transportation 2030: A Strategic Plan for the Future of Transportation in Canada" is based on federal recognition that the transportation system is a "shared" federal-provincial responsibility. It is not a model for "regulatory oversight and approval of multi-modal corridors" as such. However, the plan encompasses matters that are both multi-jurisdictional and multi-modal and is helpful in illustrating how Canadian governments currently approach their responsibilities with respect to Canada's existing trade and transportation corridors.

Under the approach of "shared" federal-provincial responsibility, the provinces/territories continue to exercise primary jurisdiction with respect to infrastructure corridor matters (particularly the identification and establishment of such corridors), except for those forms of transportation that are explicitly under federal authority (specifically interprovincial works and undertakings, such as interprovincial and international pipelines). The federal government continues to exercise its exclusive jurisdiction with respect to interprovincial works and undertakings (such as interprovincial pipelines), including with respect to siting.

The overall conclusion in the paper is that several of the characteristics of the CNC Concept are unique, particularly when compared to existing models. The paper therefore turns to the question of how a Canadian model might be developed. It recommends that the questions of establishing and overseeing the corridor, on the one hand, and, on the other hand, the subsequent approval of infrastructure within the corridor should be approached as being separate from, although related to, each other. It suggests the Council of Ministers Responsible for Transportation and Highway Safety may be an appropriate forum for advancing the CNC Concept towards a more fully-formed proposal.

With respect to environmental assessment, the paper notes that initial responsibility for environmental assessment of infrastructure projects in Canada rests with the level of government that has the primary authority with respect to any specific project. However, many linear projects trigger aspects of both federal and provincial jurisdiction. The relevant legislation of both levels of government typically provides for the potential establishment of joint environmental assessments in such situations and could be invoked in appropriate cases with respect to projects located in the proposed CNC.

Environmental assessment of the CNC itself, in the absence of any specific proposed project, might not be required under either current federal or provincial regimes (depending on the ultimate nature of the Corridor). The federal *Impact Assessment Act*, however, authorizes the Minister to appoint a committee to conduct a regional assessment of "the effects of existing **or future** physical activities..." The Minister may also appoint a

committee to undertake a strategic assessment of any Government of Canada policy, plan or program – proposed or existing – that is relevant to conducting impact assessments or any issue that is relevant to conducting impact assessments of designated projects or of a class of designated projects. These processes may provide vehicles for undertaking environmental assessments of the establishment of the CNC in the absence of identified infrastructure projects proposed for the Corridor.

The paper’s overall conclusion is that the CNC Concept needs to be advanced from concept to proposal before it is possible to design an appropriate model for regulatory oversight and approval of the Corridor and the subsequent placement of infrastructure within. Canada has a well-established cooperative and coordinated approach to the oversight of its existing trade and transportation corridors that, at the same time, respects established federal and provincial authority. It may be that a similar approach to establishing the CNC would be appropriate, based on administrative cooperation and coordination.

KEY MESSAGES

- This report addresses “Regulatory Alignment for Multi-Modal Infrastructure Corridors”, in the context of the Canadian Northern Corridor Concept (CNC). The report discusses what models exist for regulatory oversight and approval for multi-modal corridors and the subsequent placement of infrastructure within.
- The report has not identified any established model for regulatory oversight of multi-modal corridors that would accommodate the multi-jurisdictional framework in Canada and that could be applied to both establishing the Corridor and to the approval of the placement of infrastructure within.
- As an ambitious concept, the CNC is not yet fully formed. It presents several foundational questions that need to be answered in order to advance the concept to a more fully-formed proposal before an appropriate regulatory model can be developed.
- In particular, what is the “Corridor” and what is its legal status or nature? Fundamentally, is the Corridor a legal entity and, if so, what is the nature of that entity, or is the Corridor an identified geographic area in which administrative arrangements promote cooperation and coordination among existing actors with established responsibilities for planning, approving and overseeing infrastructure projects? Is it a broader “new approach to infrastructure planning” that goes beyond establishing a “corridor”?
- In advancing the concept to a proposal, the questions of establishing and overseeing the corridor, on the one hand, and, on the other hand, the subsequent approval of infrastructure within the corridor should be approached as being separate from, although related to, each other.
- Federal and provincial environmental assessment legislation provides for joint reviews where projects invoke aspects of the authority of more than one jurisdiction. This approach could be applied to individual infrastructure projects.

- Depending upon its ultimate nature, establishing the CNC itself as such would not likely trigger review requirements under existing environmental assessment legislation. However, provisions under the federal *Impact Assessment Act* could potentially be applied to undertake regional or strategic assessments, in the absence of specific infrastructure proposals.
- Canada’s existing trade and transportation corridors function now within the reality of a multi-jurisdictional framework that respects existing constitutional responsibilities, including constitutionally-protected Indigenous rights, and proceeds on the basis of well-established approaches of cooperation and coordination.
- The Council of Ministers Responsible for Transportation and Highway Safety, the principal intergovernmental forum in Canada for discussion and joint action on matters related to, or affecting, transportation within Canada or internationally, plays a central role in promoting this cooperation and coordination. The Council has published studies that appear to be directly relevant to the development of a northern corridor and may be an appropriate forum for advancing the CNC Concept towards a more fully-formed proposal that would provide the basis for developing an appropriate regulatory model.

INTRODUCTION

The Canadian Northern Corridor Concept (CNC Concept) is an ambitious concept that envisions “a connected series of pathways linking Canada’s northern communities and development projects to three coasts and the southern trade and transportation corridor” (CNC Website, 2022). These pathways would set aside space “for the coordinated development of infrastructure such as road, rail, transmission, pipeline and communication” (CNC Website, 2022).

This report addresses regulatory alignment for multi-modal infrastructure corridors, in the context of the CNC Concept. The following questions were posed in the terms of reference for the report:

1. What models exist for regulatory oversight and approval for multi-modal corridors and the subsequent placement of infrastructure therein?
2. What model(s) of regulatory (including environmental) alignment would be most appropriate in Canada?
3. What changes would be required to operationalize/implement such a solution?
4. What are the likely impacts in terms of time, cost and uncertainty for regulatory approvals, and would this significantly affect infrastructure investment attractiveness?

In order to address these questions, several issues that arise from the CNC Concept first need to be identified and addressed.

THE CNC CONCEPT

The CNC Concept is just that: a visionary and anticipatory concept that is best described as inchoate—something that is not yet fully formed.

LOCATING CORRIDORS

The CNC concept is evolving in the absence of identified, specific infrastructure proposals. In these circumstances, discussion of the concept is necessarily infused with a large degree of speculation. This presents foundational challenges, not only in identifying the potential location of specific corridors or pathways, but, more importantly for purposes of this discussion, also in identifying appropriate legal and regulatory frameworks.

The broad need for some essential infrastructure such as roads, communications and electricity transmission lines (and perhaps railways) connecting established or emerging centres is self-evident. In some circumstances, it may be assumed that individual projects, although not yet proposed, will emerge, and their likely general locations can be broadly identified. Such projects may be regarded as “anticipated,” rather than merely “speculative,” and it may be appropriate to implement anticipatory regulatory measures, such as establishing identified corridors for the placement of future infrastructure. Transportation/utility corridors in and around major cities are an example.

However, the future need for other forms of infrastructure, particularly hydrocarbon transmission pipelines, will be a function of physically linking sources of supply (largely determined by geology or the location of existing gathering and processing centres) to markets (whether domestic or international). Geographic realities (as well as engineering considerations) for transmission pipelines (and, to a large extent, also electricity transmission lines) may not always fit within the boundaries of a corridor that has been planned for and is intended to accommodate other types of infrastructure (such as roads, communication and railways). It is not apparent how “rights-of-way negotiations” for a pipeline could begin, nor how land could be “set aside” for a pipeline in the absence of at least a preliminary proposal for a specific project (CNC Website, 2022).

It is worth noting here that most, if not all, of the infrastructure corridor cases discussed in the various CNC concept papers published to date appear to have been triggered by or deal with specific projects (or at least anticipated, rather than speculative, projects), located in identified geographic areas.

“MULTI-MODAL” CORRIDORS

The CNC Concept envisages the development of “multi-modal” projects, “such as road, rail, transmission, pipeline and communication.” Some of these forms of infrastructure, particularly pipelines and transmission lines, are functionally different from others and raise distinct regulatory issues (in addition to siting, as discussed above). Pipelines, for example, are functionally different from surface forms of transportation and raise their own safety, environmental and economic regulatory issues. It will, therefore, be necessary to examine carefully exactly what modes of infrastructure would be included in the CNC, both for purposes of locating the CNC geographically and for the subsequent approval and oversight of infrastructure to be located therein.

It is to be noted in this context that, on closer examination, many corridors that are described as “multi-modal” are not functionally multi-modal in the sense in which the term is used in discussion of the CNC concept. For example, in the National Academies’ 2011 Report “Reinventing the Urban Interstate: A New Paradigm for **Multimodal** Corridors,” (National Academies of Sciences, Engineering, and Medicine, 2011) (emphasis added) the term “multimodal” is restricted to “freeways and high-capacity transit lines running parallel in the same travel corridors”—that is to say, various modes of surface transportation that are functionally similar, in that their purpose is to move people and goods. The meaning of “multi-modal” in the context of the CNC Concept is much broader than its meaning in the National Academies Report.

In the School of Public Policy (SPP) research paper “An Overview and Assessment of Key Constitutional Issues Relevant to the Canadian Northern Corridor,” the author observes that the Northern Corridor “is not a concept associated with particular types of infrastructure. Issues that some would raise concerning certain types of infrastructure do not apply in the same way to other types of infrastructure” (Newman 2022).

A “CORRIDOR”

A foundational question must be answered in order to pursue the establishment of the CNC and to design appropriate legal and regulatory oversight: What exactly is the “corridor,” and what is its legal status or nature? More specifically, is the corridor an identified geographical area for the siting of physical infrastructure, or is it more broadly a “trade and transportation” corridor? Fundamentally, is the corridor a legal entity, and, if so, what is the nature of that entity? On the other hand, is it simply an area in which administrative arrangements promote cooperation and coordination among existing actors with established responsibilities for planning, approving and overseeing infrastructure projects?

Several terms appear in the description of the CNC Concept, sometimes seemingly used interchangeably:

- “pathways”
- “corridors”
- “corridor network”
- “corridor segment”
- “rights-of-way”
- “land [would be] set aside”
- “network”
- “coordinated development”

The meanings of these terms vary, with widely divergent implications for the steps that would be required to establish the CNC, and for ongoing oversight and the regulation of activities located therein.

Some of the terms (such as “rights-of-way” and the suggestion that “land would be set aside”) seem to envisage the CNC as a legal entity or as having direct legal effects, which is also implied by the statement that there would be “accompanying policy, regulatory and governance structures” (CNC Website, 2022). Generally speaking, responsibility for designating land for particular uses (that is to say, as a land-use planning exercise) is a matter of exclusive provincial authority. Therefore, attaching legal consequences to the designation of a northern corridor (at least in the absence of a specific infrastructure proposal) would likely require coordinated legislative initiatives on the part of each affected

province or territory.¹ Depending on the location of the corridor, it might also be necessary for the federal government to participate. Where Indigenous rights could potentially be affected, those rights would have to be respected (Sidorova and Virla. 2022).

Other terms above (such as “network”) imply that the corridor might be established through purely administrative mechanisms for “coordinated development,” which might require nothing more than cooperation arrangements among existing entities.²

It is noted here that Canada has an existing network of “Strategic Gateways and Trade Corridors.” Indeed, the CNC Concept envisages the Northern Corridor as “linking Canada’s northern communities and development projects to three coasts **and the southern trade and transportation corridor**” (CNC Website, 2022)(emphasis added). These existing southern trade and transportation corridors exist and function principally as a series of cooperative and coordinated arrangements among the various relevant jurisdictions and their established regulatory agencies. As appears from the following description by Transport Canada, the existing southern corridor(s) is/are not a distinct legal entity: “Gateways and trade corridors are major **systems** of marine, road, rail and transportation infrastructure of national significance for international commerce, **within a defined geographic zone.**” (Transportation Canada, 2009). The phrase “a defined geographic zone” in this context does not of itself have any legal significance but merely identifies an area in which various **systems** function.

“CORRIDOR” OR “INFRASTRUCTURE PLANNING”?

In addition to the several descriptive terms identified above, the CNC Concept states that it “envisions a new approach to infrastructure planning...” (CNC Website, 2022). The scope of this new approach is outlined in only broad terms:

First, through consultation, communities, Indigenous rights-holders and other stakeholders would identify the infrastructure they need and desire for a nearby corridor segment. This work would be followed by feasibility and environmental studies and rights-of-way negotiations. Once completed, the land would be set aside for that corridor segment, and developers would apply to establish the approved infrastructure. (CNC Website, 2022)

General as this description is, it appears to envisage much more than the establishment of a corridor as such.

The threshold issue of whether any particular infrastructure was or was not required would, of course, still have to be addressed—the above description invites the question of when and by whom. Would the “new approach” replace established processes for determining the “public interest,” such as the current process for reviewing interprovincial and international pipelines and transmission lines administered by the Canada Energy Regulator?

¹ See the further discussion below under the heading “The Multi-Jurisdiction Challenge.” Throughout this paper, “province” or “provincial” includes “territory” or “territorial” unless the context requires otherwise.

² Cooperative administrative mechanisms could be formalized by non-legislative or regulatory means such as memoranda of understanding.

Several other questions arise with respect to the contemplated “new approach to infrastructure planning.” For example, the description contemplates “right-of-way negotiations” being “completed” prior to land being “set aside for that corridor segment...” It is stated elsewhere in a CNC Concept publication that the “CNC involves a set of **pre-approved** and administered rights-of-way...”(Fellows et. al. 2022). In the context of most infrastructure projects, rights-of-way are bilateral agreements between a project proponent and affected individual landowners, the need for which only arises after a specific project has been proposed. It is not clear how a right-of-way could be “pre-approved” or negotiated in advance of a proposal for a specific infrastructure project.

SUMMARY

What emerges from this discussion is that a fuller proposal for the CNC must be developed before an appropriate model for regulatory oversight and approval can be designed. Indeed, depending on the ultimate scope and nature of the CNC, there may be no need for **regulatory** oversight and approval over and above what could be implemented through policy coordination, cooperative initiatives and administrative arrangements within existing institutional, legislative and regulatory frameworks.³

THE MULTI-JURISDICTION CHALLENGE

Canada’s federal structure divides legislative authority both geographically (between Canada as a single geographic nation and its constituent regional provinces) and functionally (Newman 2022). Interprovincial pipelines come within federal jurisdiction; local pipelines wholly situated within a province do not. Indigenous rights that are constitutionally guaranteed must also be respected (Wright 2020). Whatever form it might take, establishing and overseeing the CNC will therefore invoke the authority of both the federal government and affected provinces and territories, as well as certain Indigenous rights. Any exercise in identifying models for the CNC must recognize, and accept, the constraints imposed by this constitutional reality.

Potential mechanisms for addressing that challenge by applying recognized “cooperative federalism” techniques are thoroughly examined in Newman’s SPP research paper “An Overview and Assessment of Key Constitutional Issues Relevant to the Canadian Northern Corridor.” (Newman 2022). The availability of these mechanisms, however, does not alter the underlying constitutional fact that developing, implementing and overseeing the CNC will invoke the established authority of Canada’s constituent entities. As will be elaborated upon, depending on the nature and legal status of the CNC, it may be not only possible but desirable to establish and oversee the corridor by adapting established federal-provincial processes for cooperation and coordination with respect to existing trade and transportation corridors. As Newman observes: “The Constitution is not a barrier to negotiated arrangements between federal and provincial governments that would permit the development of the Northern Corridor. The challenges would arise from the basic structure of trying to reach the pertinent agreements” (Newman 2022).

³ It is noted in this context that Canada’s Trade and Transportation Corridors Initiative has been established and operates as a program within the Department of Transport, without structured regulatory oversight of the Initiative as such. <https://tc.canada.ca/en/corporate-services/trade-transportation-corridors-initiative>. Accessed August 22, 2022.

Several Transport Canada publications recognize this constitutional reality and describe transportation as a “shared” federal-provincial responsibility. The National Policy Framework for Strategic Gateways and Trade Corridors, for example, states:

[K]ey elements of the transportation system are owned or operated by both public and private sector players and are regulated and taxed by all levels of government. Therefore, **no single jurisdiction or firm can unilaterally address all of the interconnected issues that determine success of a gateway or trade corridor.**

Coherent action requires a systems-based approach, and real partnerships with provincial governments and the private sector. Success will depend upon how well the key players—public and private—coalesce around a coherent vision.

...

Federal involvement will be to foster a “systems” approach to investment, planning and policy development. Gateway councils and other stakeholder-driven forums for consensus-building, planning, sound governance and accountability are also key to advancing regional strategies with national benefits. Provinces will also have leadership roles, rooted in their jurisdictional responsibilities (Transport Canada 2009).

THE CASE STUDIES

Various models exist for the establishment of infrastructure corridors, both in Canada and internationally. However, no model has been identified that reflects or incorporates certain of the fundamental characteristics of the CNC Concept as it has been developed to this point—in particular a physically identified corridor (or specific infrastructure), the project’s proposed (truly) multi-modal character and the surrounding multi-jurisdictional realities. This suggests that a unique model for the CNC will need to be developed *ab initio*.⁴

However, while none of the existing models for infrastructure corridors appears directly transferable to the further development and establishment of the CNC Concept, elements of some of the models may provide helpful background in designing the CNC. It is also important to understand the characteristics of those models that distinguish them from, and would make them inappropriate as a model for, the CNC. The following observations (in this and following sections of the paper) on some existing models are presented for these limited, background purposes. None of these models is proposed as an appropriate model for the design and establishment of the CNC.

The Annex to the SPP research paper “Governance Options for a Canadian Northern Corridor” provides an overview of eight case studies (Sulzenko and Koch, 2020). Nearly all of these cases involve specific, identified, single-mode infrastructure projects (the Mackenzie Gas Project, St. Lawrence Seaway) or clearly defined, specific mandates (Mackenzie Valley Land and Water Board, International Joint Commission, St. Lawrence Seaway Commission). Furthermore, the Gray’s Bay Road and Port Project and the

⁴ See the further discussion under the heading “Designing a Canadian Model,”

St. Lawrence Seaway each appear to fall squarely within a single, largely exclusive constitutional authority and do not present the challenges that would arise with the multi-jurisdictional, multi-modal features of the CNC. The Mackenzie Gas Project invoked exclusively federal regulatory authorities and certain authorities under Indigenous land claims settlement agreements, but did not directly trigger any provincial (including territorial) regulatory authorities. Each of these cases involved a specific, identified infrastructure project with limited interjurisdictional implications.

One of the case studies pertains to the Pilbara Corridor in the mining region in the state of Western Australia (Sulzenko and Koch, 2020 pp 48-49). The corridor deals primarily with issues around access to existing infrastructure. Primary responsibility appears to rest with the state government, while the federal government's 1995 National Access Regime, introduced in 1995 for the purpose of promoting economically efficient use of and investment in infrastructure, operates as "an umbrella framework" (Sulzenko and Koch, 2020). The Pilbara Corridor addresses particular issues in the mining industry in Western Australia and is likely to be of only limited use as a model for the CNC.

Another of the case studies, of the ScanMed Corridor in the European Union, examines a multi-modal corridor that crosses several national jurisdictions. However, ScanMed's value as a model is limited by a number of significant differences from the CNC Concept. Firstly, the structure of the European Union is not comparable to Canada's federal structure. Furthermore, the ScanMed Corridor appears to deal principally with infrastructure that "was already in place" (Koch and Sulzenko, 2020). Further research on the structure and oversight of the ScanMed Corridor might nevertheless be helpful in advancing the CNC Concept.

NORTHERN PIPELINE AGENCY

Some aspects of Canada's Northern Pipeline Agency (NPA) may be instructive in further development of the CNC Concept. The NPA was established by federal legislation in 1978 "to facilitate the planning and construction of a pipeline for the transmission of natural gas from Alaska and Northern Canada and to give effect to the agreement between Canada and the United States of America on principles applicable to a northern natural gas pipeline" (Northern Pipeline Agency, 1985).

The NPA acts as a "single-window" regulator that "facilitates efficient and expeditious planning and construction for the Alaska Highway Gas Pipeline Project (AHGPP)" (Northern Policy Agency, 1985) The *Northern Pipeline Act* establishes the "pipeline route"—in effect a corridor, although the word is not used—from the Yukon-Alaska border through Yukon and parts of British Columbia and Alberta to identified interconnection points with existing pipeline systems. The "pipeline route" is not a right-of-way.

The NPA's explicit responsibilities are to take into account local, regional and Aboriginal interests, to consult and coordinate with the provinces, Yukon and the Northwest Territories, to maximize social and economic benefits from construction and operation, including employment, and to advance national economic and energy interests and maximize industrial benefits with Canadian participation. The agency is also mandated to coordinate with the U.S. government. (Northern Pipeline Agency, 1985) Some of these specific responsibilities are similar to what might be identified as the goals of the proposed CNC.

However, the NPA's value as a model for regulatory oversight and approval is significantly limited when applied to the CNC. Firstly, the NPA was established to oversee the construction and operation of a specific project proposed for an identified geographic corridor, the AHGPP. Secondly, the purpose of that project is to transport a single product.

Thirdly, and perhaps most significantly for present purposes, the AHGPP is under the exclusive jurisdiction of the federal government and did not trigger the authorities of any other jurisdiction. However, it is worth noting that, even so, the *Northern Pipeline Act* expressly mandates the NPA to consult and coordinate with the affected provinces and territories, thus recognizing the multiple interests that are at play in the context of large, linear infrastructure projects, including where the jurisdictional authority of some of those interests may not be triggered directly.

MUNICIPAL TRANSPORTATION/UTILITY CORRIDORS

Multi-modal transportation/utility corridors in and around large Canadian cities are commonplace. Edmonton and Calgary, for example, are each surrounded by such corridors, established by the provincial government in accordance with the "Transportation/Utility Corridor (TUC) Program Policy" (Alberta Infrastructure, 2004). Some particular features of these corridors are to be noted.

Most importantly, establishment of the Alberta TUCs did not necessitate action by multiple jurisdictions, but was wholly within the constitutional authority of a single provincial government.

Beginning in the mid-1970s, the Government of Alberta introduced Restricted Development Areas (RDAs) (Alberta Infrastructure, 2004) around each city and designated the lands within these areas for transportation/utility corridor uses, including ring roads, major utilities and linear municipal utilities. Any operation or activity within the corridors that will likely cause a surface disturbance requires a Ministerial Consent from the Minister of Alberta Infrastructure. The scheme defines different categories of TUC uses and provides for different types of authorizations, ranging from a lease to a utility right-of-way. The TUC program is administered by Alberta Infrastructure (INFRAS), which has the mandate to purchase lands required for the program.

Most significantly in the present context, primary regulatory agencies retain responsibility for approval and ongoing oversight of specific infrastructure projects within the corridors. The TUC program ensures that the activities of other government departments and government agencies are coordinated and consistent with the program. Other departments and agencies require the consent of the minister before exercising certain powers that would affect TUC lands or before authorizing any operation or activity that would cause surface disturbance of TUC lands.

The Edmonton and Calgary TUCs originated with the specific, identified need for an "effective means of providing long-term alignments for future ring roads and major linear utilities needed to serve these expanding urban areas" (Alberta Infrastructure, 2004). In addition to including some existing infrastructure, the TUCs were established in anticipation of further projects, to be proposed in the future. While not specifically identified, the likely emergence of such projects was anticipated and was more than speculative.

It is noted that the TUC program does not “pre-approve” rights-of-way. Indeed, the grantee of a utility right-of-way on, over or under provincial Crown lands must present a plan of survey and register the Utility Right of Way agreement and the plan with the provincial Land Titles Office (Alberta Infrastructure, 2004).

UNIQUENESS OF THE CNC CONCEPT

Research for this paper has not identified any regulatory precedent for establishing a truly multi-modal corridor within a federal constitutional framework that would invoke the authority of both levels of the federal system as well as potentially raising issues with respect to constitutionally protected Indigenous rights (Newman, 2022). Furthermore, it appears that most, if not all, existing frameworks for corridors have evolved to deal with anticipated, identifiable infrastructure projects. The impetus for developing some corridors has been to oversee existing infrastructure and coordinate further developments within an established corridor, rather than proposing the establishment of what might be described as a “greenfield” corridor.

These findings emphasize the uniqueness of the CNC Concept and serve to highlight the need to address several fundamental questions before developing an appropriate Canadian model for regulatory oversight and the subsequent placement of infrastructure within.

CANADA’S TRANSPORTATION 2030 PLAN

Canada’s “Transportation 2030: A Strategic Plan for the Future of Transportation in Canada” (Transport Canada, 2019) is noteworthy for present purposes, particularly as it encompasses matters that are both multi-jurisdictional and multi-modal. The plan recognizes the transportation system as a “shared” federal-provincial responsibility.

While it is not directly a model for “regulatory oversight and approval for multi-modal corridors and the subsequent placement of infrastructure within,” Transportation 30 and its various programs nevertheless provide valuable guidance on how the CNC Concept might be further advanced. In particular, the development and implementation of Transportation 30 illustrate the important leadership and coordination role of the federal government.

The approach is explicitly emphasized in Transportation 2030:

Federal and provincial/territorial ministers responsible for the shared transportation system must continue to work together. We also want to:

- build and strengthen our relationship with Indigenous groups
- find better ways to work and communicate with private sector organizations and individual Canadians (Transport Canada, 2019)

Transport Canada’s descriptions of specific gateways and trade corridors emphasize that they have been developed “in partnership with [the provinces] and other public and private sector partners.” (Transport Canada, 2009)

Under this approach, the provinces/territories continue to exercise primary jurisdiction with respect to infrastructure corridor matters (particularly the identification and establishment of such corridors), except for those forms of transportation that are explicitly under federal authority (specifically interprovincial works and undertakings, such as interprovincial and international pipelines). The federal role (apart from exercising its direct authority with respect to interprovincial works and undertakings) is, therefore, primarily one of leadership and coordination.

It must be emphasized that the practical significance of this leadership and coordination role is greatly strengthened by the ability of the federal government to fund projects (including projects within the primary authority of the provinces), in support of both planning and physical construction. For example, Transport Canada's Trade and Transportation Corridors Initiative (Transport Canada 2019a) elaborates on the government's Budget 2017 commitment to invest \$10.1 billion over eleven years to, among other things, "build stronger, more efficient transportation corridors to international markets." This commitment is described as contributing to the goals of Transportation 2030, "which include modernizing transportation infrastructure—our roads, bridges, airports, rail lines, port facilities and trade corridors" (Transport Canada 2019a) (notwithstanding that roads and bridges, for example, generally fall within provincial authority).

"Transportation in Canada 2011: Comprehensive Review" included discussion of "The Future Development Potential of the North and Transportation" (Transport Canada 2011). More recently, the National Trade Corridors Fund that is established within the TPCI includes funding to "[a]ddress the unique transportation needs in Canada's territorial North to improve safety and foster economic and social development" (Transport Canada 2019a).

In summary, the cooperative model that is followed by Transport Canada, the provinces and other interested parties with respect to overseeing Canada's existing trade and transportation corridors could also be applied to the further development of the CNC concept, as is discussed further below.

SUMMARY

Given the pioneering nature of the CNC concept and the uniqueness of Canada's multi-jurisdictional governance challenges, it is not surprising that an examination of other experiences has not identified an existing comprehensive model that could be applied to further developing and implementing the concept. Further, the inchoate nature of the concept raises several foundational questions that need to be addressed before it is possible to develop an appropriate Canadian model for regulatory oversight and approval of the corridor and the subsequent placement of infrastructure within it. As the authors of the SPP research paper on "Governance Options for a Canadian Northern Corridor" conclude:

"Conceptual" is the operative word, since there is virtually no real-world guidance on government parameters for a CNC from key stakeholders in Canada, be they governments, industry, Indigenous communities or advocacy groups. (Sulzenko and Koch, 2020)

DESIGNING A CANADIAN MODEL

How then might developing a Canadian model be approached?

ESTABLISHING THE CNC

The first challenge in developing an appropriate model for Canada is to further refine the **concept** and advance it towards a **proposal**. Is the corridor to be a legal entity or an administrative arrangement that promotes cooperation and coordination among existing actors? Given the different geographic considerations that are likely to arise with respect to siting different modes of infrastructure (pipelines versus highways, for example), is the CNC to be truly multi-modal, encompassing “infrastructure such as road, rail, transmission, pipeline and communication”?

These foundational questions are fundamentally different from the questions presented by applications to approve (and oversee on an ongoing basis) individual infrastructure proposals (whether sited within an established corridor or not). Public responsibilities that arise with respect to individual infrastructure projects (whether under federal or provincial authority) differ widely, both with respect to the threshold issue of whether an individual project should be approved and with respect to the extent of ongoing oversight that may be required. Highways, for example, do not raise the same issues as pipelines, either with respect to need or the regulation of their ongoing operation from an economic, technical, safety and environmental perspective.

Establishing the CNC itself raises threshold, framework questions. Overall, is it necessary or desirable (or even possible considering political and constitutional constraints) to superimpose a new model on existing arrangements for cooperation and coordination with respect to national trade and transportation corridors? That overarching question must be addressed before developing a regulatory model for the establishment and oversight of the CNC. The answer could suggest that such a model need only adjust existing arrangements for coordination and cooperation to the particular circumstances of the CNC.

Question 1 of the terms of reference for this paper has two parts:

- (a) what models exist, firstly, for the regulatory oversight and approval of multi-modal corridors; and
- (b) what models exist for **the subsequent placement of infrastructure within such corridors?**

The two parts of the question may be related, but it is suggested that the further development of the CNC concept should be guided by the distinction between the two.

In the School of Public Policy research paper “Governance Options for a Canadian Northern Corridor,” (Sulzenko and Koch, 2020) cited above the authors propose a four-stage approach to CNC development and implementation: (1) develop the policy framework; (2) decide on a corridor route; (3) review and implement project proposals; and (4) manage ongoing operations and oversight. The suggestion above is intended to be consistent with that proposal. It would place sub-question (a) in stage 1 (developing the policy framework) and sub-question (b) in stage 3 (reviewing and implementing project proposals).

A FORUM

As noted above, extensive coordination and cooperation occur between Canada and the provinces/territories with respect to Canada's existing trade and transportation corridors, with specific projects being planned and executed within existing federal or provincial regulatory frameworks. An established forum for pursuing this approach is the Council of Ministers Responsible for Transportation and Highway Safety (CMRTHS), which is "the principal intergovernmental forum in Canada for discussion and joint action on matters related to, or affecting, transportation within Canada or internationally" (COMT, 2022)

Several of the published reports and studies by CMRTHS are directly relevant to the further development of the CNC Concept, including "Integrating Rural, Northern and Remote Regions with Core Transportation Networks" (COMT, 2014) and "Harmonization of Transportation Policies and Regulations." (COMT 2008)

CMRTHS comprises the relevant ministers of the federal government and all provinces and territories. It includes a council of deputy ministers of each of those jurisdictions and thereby links the political/policy level of government to the bureaucracy responsible for the implementation and oversight of specific initiatives. It appears to be a forum ideally suited to lead the challenge of advancing the CNC from concept to proposal.

ENVIRONMENTAL ASSESSMENT

Initial responsibility for environmental impact assessment of infrastructure projects in Canada rests with the level of government that has the primary authority with respect to any specific project. Interprovincial pipelines, for example, are subject to federal environmental assessment requirements. Similarly, environmental assessment of local projects wholly located within a province is covered by provincial legislation.

This general assignment of initial responsibility for environmental assessment to one or other level of government, however, often overlaps. A highway project located wholly within a province, for example, may cross a river and thereby invoke a federal interest under the *Fisheries Act*.⁵

Both federal and provincial environmental assessment regimes and practices reflect this reality of overlapping responsibilities. The federal *Impact Assessment Act* (IAA),⁶ for example, authorizes the federal minister to enter into an agreement respecting "the joint establishment [with another jurisdiction] of a review panel and the manner in which the impact of the designated project is to be conducted by that panel."⁷ Such agreements may be made with a wide range of jurisdictions, including provinces, provincial agencies or bodies, certain co-management bodies and certain Indigenous governing bodies.⁸ Similarly, the Alberta *Environmental Protection and Enhancement Act*,⁹ for example,

⁵ R.S.C., 1985, c. F-14.

⁶ S.C. 2019, c. 28, s. 1. The Alberta Court of Appeal has ruled, in a non-binding reference opinion, that the Act is unconstitutional and the federal government has appealed that decision to the Supreme Court of Canada. See further "Alberta Court of Appeal finds federal impact assessment regime unconstitutional", <https://www.osler.com/en/resources/regulations/2022/alberta-court-of-appeal-finds-federal-impact-assessment-regime-unconstitutional>. Accessed August 22, 2022.

⁷ Section 39.

⁸ See the definition of "jurisdiction" in section 2.

⁹ R.S.A., 2000, c E-12.

authorizes the provincial minister, where a proposed activity is governed by the laws of Alberta, and in part by the laws of Canada or another province or territory, to enter into an agreement or arrangement for a joint assessment or to adopt the environmental assessment or review process of the other jurisdiction.

These established mechanisms are effective in enabling cooperation and coordination in undertaking environmental assessments of projects that trigger requirements imposed by multiple jurisdictions. There appears to be no reason that they would not be as effective when applied to multi-jurisdictional infrastructure projects in the CNC. The need for an alternative approach, such as a unitary, umbrella regime specific to environmental assessment of such projects, is not apparent. Furthermore, given the multi-jurisdiction nature of the CNC concept, implementing such an alternative would be constitutionally challenging.

What of the establishment of the CNC itself? Merely establishing the corridor, independently of the individual infrastructure projects that may be located therein, is unlikely to trigger the federal *Impact Assessment Act*, which is generally concerned with the assessment of changes caused by physical activities to the environment or to health, social or economic conditions, and the positive and negative consequences of these changes.¹⁰ In the absence of any physical activity associated with establishing the corridor, it is not apparent such changes would occur. Again, the nature of the CNC would be critical in making this determination.

However, environmental factors are obviously relevant to identifying the location of the corridor and should therefore be a central consideration in advancing the CNC Concept to a more specific proposal. Certain provisions of the IAA could potentially be invoked as a vehicle for addressing the matter. In particular, the IAA authorizes the minister to appoint a committee to conduct a regional assessment of “the effects of existing **or future** physical activities...”¹¹ Where lands other than exclusively federal lands come within a region, the minister may enter into an agreement or arrangement with other jurisdictions respecting the joint establishment of a committee to conduct the assessment. The minister may also appoint a committee to undertake a strategic assessment of any Government of Canada policy, plan or program—proposed or existing—that is relevant to conducting impact assessments or any issue that is relevant to conducting impact assessments of designated projects or of a class of designated projects.¹²

THE FOUR QUESTIONS

1. **What models exist for regulatory oversight and approval for multi-modal corridors and the subsequent placement of infrastructure therein?**

A model that combines in a single authority oversight and approval for multi-modal corridors and the subsequent placement of infrastructure therein has not been identified. Existing models lack one or more of the characteristics of the proposed CNC or could not be applied in Canada’s multi-jurisdictional framework.

¹⁰ S.C. 2019, c. 28, See the definition of “effects” in section 2.

¹¹ S.C. 2019, c. 28, , section 93. Emphasis added.

¹² S.C. 2019, c. 28, , section 95.

However, a model process for further development of the CNC Concept and advancing it to a more specific proposal, and for the subsequent implementation of any specific proposal, is proposed in answer to question 2 below.

2. What model(s) of regulatory (including environmental) alignment would be most appropriate in Canada?

Firstly, it is not clear what is meant by “regulatory (including environmental) **alignment**” in this context. Furthermore, it is difficult to address the question without a more fully developed understanding of the nature of the corridor. Is the corridor to have legal status or is it merely a geographic area in which there is a cooperative and coordinated approach towards reviewing infrastructure projects? If the CNC is established by each of the several affected jurisdictions, regulatory “alignment” would only require consultation and coordination among the various jurisdictions, with a view to ensuring that their respective regulatory requirements were consistent (that is to say, aligned) with each other (although not necessarily identical). Secondly, where an infrastructure project sited in the corridor came within federal jurisdiction (for example, an interprovincial pipeline), federal authority would extend to the full physical scope of the project, and there would be no need for regulatory “alignment.” Question 2 has therefore been interpreted for the purposes of this report as asking: What model(s) for regulatory oversight and approval for multi-modal corridors and the subsequent placement of infrastructure within would be most appropriate for Canada?

Canada has well-established consultative and cooperation processes in the specific context of developing and overseeing trade and transportation corridors, with implementation of shared policies and with the approval and oversight of projects continuing to be vested in established federal and provincial agencies. It is not apparent that anything different is needed or would be appropriate in order to advance the CNC concept. Indeed, it may be that alternative approaches would not be politically or constitutionally feasible.

This cooperative approach is the basis upon which the federal and provincial governments currently oversee Canada’s existing trade and transportation corridors, as reflected in the federal government’s “Transportation 2030: Canada’s Strategic Plan for the Future of Transportation in Canada” (Transport Canada, 2019) That joint approach accepts and respects the realities of Canada’s multiple jurisdictions and is capable of accommodating multi-modal forms of transportation.

Under this model, the CNC concept would first be advanced towards a CNC proposal through widespread consultation of all interested parties. The proposal would then be implemented sequentially by existing agencies coordinating the exercise of their current authorities within their respective geographic and functional areas of responsibility, as is done now with Canada’s established trade and transportation corridors.

This approach would draw on the resources and expertise of existing government departments and agencies. The alternative approach of establishing separate agencies to oversee projects to be sited within the CNC does not appear to be warranted, particularly as specific infrastructure projects are likely to be sporadic and to be spread over many years. Furthermore, other approaches would require a large degree of duplication of the expertise that would be essential to overseeing some types of infrastructure (pipelines, for example) and that currently exists in established agencies.

The approach would initially be led by the Council of Ministers Responsible for Transportation and Highway Safety, perhaps with the appointment of a dedicated task force comprising representatives of interested parties and working groups tasked with identifying specific aspects of the CNC concept.

Question 2 makes specific reference to “environmental” alignment. Environmental oversight with respect to the CNC Concept has two aspects. The first pertains to environmental considerations relating to the geographic location of the CNC. As discussed, the federal *Impact Assessment Act* authorizes the minister to appoint a committee to conduct a “regional assessment” of the effects of existing **or future** physical activities...” (Transport Canada, 2019)(emphasis added).

The second aspect of environmental oversight relates to environmental assessment of specific infrastructure projects to be sited within the CNC. Under the model proposed here, environmental assessments of individual infrastructure projects would be undertaken in accordance with established federal, provincial or joint assessment processes. There is no apparent case for establishing a separate environmental process solely because a project is located within the boundaries of the CNC.

3. What changes would be required to operationalize/implement such a solution?

The only change that would be required would be for the Council of Ministers Responsible for Transportation and Highway Safety to initiate a specific consultation process, in collaboration with the provinces and other interested parties, to further develop the CNC concept and advance it towards a proposal to establish the corridor.

4. What are the likely impacts in terms of time, cost and uncertainty for regulatory approvals, and would this significantly affect infrastructure investment attractiveness?

The CNC concept states that “Canada’s current infrastructure approval process is lengthy, expensive and perceived as risky, and many project developers and investors have become reluctant to establish operations in Canada” (CNC Website, 2022) The implication is that “a new approach to Canadian infrastructure planning and development” (CNC Website, 2022) has at least the potential to alleviate this perceived impediment to infrastructure development. As Newman observes: “The Northern Corridor concept assumes that bundling different possibilities within a multimodal corridor will make it easier to reach the necessary agreement.” (Newman, 2022) Intuitively, an “easier” regulatory process would be a cheaper process.

In the absence of empirical data on the extent to which Canada’s current infrastructure approval process may discourage investment, it is not possible to offer any quantitative assessment of the savings that could result from an improved regulatory process. However, some general observations are offered.

Firstly, the “infrastructure approval process” involves much more than approving the siting of a proposed infrastructure project. The location of a project may be highly controversial and face serious challenges (potentially leading to delays and increased regulatory costs). In other cases, however, the location of a project may be the least controversial issue in the overall regulatory process. The fundamental challenge in many cases is presented not by routing issues as such, but by the threshold question of whether the project should be

allowed to proceed at all. This is obviously true of some pipeline projects. The existence of an identified corridor in which infrastructure **could be sited** does little if anything to address the question of whether that infrastructure proposal **should be approved** at all. In such cases, it is not apparent that the establishment of a corridor would, of itself, contribute to a new approach to infrastructure planning and development that would address the perceived length, expense and risk of the current process.

Secondly, the exact nature of the proposed CNC is relevant to this question. If the corridor is essentially an administrative arrangement that identifies an area in which infrastructure could be sited, with overall approvals to be granted subsequently for each individual infrastructure project, improvements in the efficiency of the overall regulatory process are likely to be minimal.

It is also worth noting in this context that proponents of projects located within RDAs under the Alberta TUC Policy must obtain a Ministerial Consent **in addition to** approvals required from their primary regulator (Alberta Infrastructure, 2004). The existence of an established TUC therefore does not reduce the regulatory burden (although this particular additional requirement probably does not itself add significantly to that burden).

CONCLUSIONS

The CNC concept presents a number of foundational questions that need to be answered before an appropriate model can be developed for regulatory oversight and approval of the corridor and the subsequent placement of infrastructure within it. Fundamentally, is the CNC a legal entity, and, if so, what is the nature of that entity? On the other hand, is the corridor an identified geographic area in which administrative arrangements promote cooperation and coordination among existing actors with established responsibilities for planning, approving and overseeing infrastructure projects?

Canada's federal structure divides legislative authority both geographically and functionally. Some Indigenous rights are also constitutionally protected and must be respected. Whatever form it might take, establishing and overseeing the CNC will invoke the authority of both the federal government and affected provinces and territories, as well as in some cases the rights of Indigenous governments. Any exercise in identifying models for the CNC must recognize, and accept, the constraints imposed by this constitutional reality.

In addition to the multi-jurisdictional framework within which the corridor would be established and function, other elements of the CNC concept appear to be unique. Firstly, it is being proposed largely in the absence of specific proposals for infrastructure. This presents foundational challenges, not only in identifying the potential location of corridors or pathways, but also in identifying appropriate legal and regulatory frameworks. Secondly, the CNC is proposed to be "multi-modal," including functionally different forms of infrastructure, some of which would raise different regulatory considerations than others.

These three considerations—the multi-jurisdictional framework, the challenge of identifying potential geographic corridors in the absence of specific infrastructure projects and the functionally different types of projects that would be included in the corridor—make the CNC concept unique. It is not surprising, therefore, that this paper does not identify any existing model for regulatory oversight and approval of multi-modal corridors that would be transferable to, and appropriate for, the CNC as the concept has emerged to this point.

Canada has a well-established cooperative and coordinated approach to managing and developing its existing trade and transportation corridors that, at the same time, respects established federal and provincial authority. The approach does not constitute “regulatory oversight and approval for multi-modal corridors” as such, but, rather, proceeds on the basis that each regulatory authority continues to have responsibility for corridor-related matters within its jurisdiction. It may be that a similar approach to establishing the CNC would be appropriate, based on administrative cooperation and coordination.

With respect to aligning environmental regulation, the paper notes that existing federal and provincial environmental assessment regimes include mechanisms for joint assessments to be undertaken where a proposed project raises issues that come within the jurisdiction of both levels of government. It appears that these mechanisms could be applied to specific infrastructure projects that had both federal and provincial aspects.

Environmental assessment of the CNC itself (in the absence of any specific proposed projects) would not likely trigger review requirements under existing legislation (although, again, that could depend on the nature of the corridor). However, provisions under the federal *Impact Assessment Act* could potentially be applied to undertake regional or strategic assessments, in the absence of specific infrastructure proposals.

The paper concludes that, before a model for oversight of the CNC (whether that oversight is by way of regulation or cooperation) can be designed, the CNC concept needs to be advanced to a more fully formed proposal. The Council of Ministers Responsible for Transportation and Highway Safety, comprising ministers from the federal government and all provinces and territories, is “the principal intergovernmental forum in Canada for discussion and joint action on matters related to, or affecting, transportation within Canada or internationally” (COMT 2022) The paper proposes that the Council may be an appropriate forum to oversee this work.

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