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

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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 report considers, at a high level, a number of constitutional issues associated with the development of the proposed Northern Corridor, seeking to flag areas for further examination. It seeks to show how the Canadian Constitution offers mechanisms for such a multimodal corridor, but also poses barriers. In some ways, the challenge the Northern Corridor seeks to overcome is the presence of too many decision-makers on each individual transportation infrastructure project. The Canadian Constitution both offers ways past this problem and also replicates it. The first part of the paper examines constitutional rules relating to interdelegation between the federal and provincial governments and suggests that co-operation and interdelegation, drawing on models of past infrastructure projects, may offer a constitutional mechanism toward development of the Northern Corridor, but that they require leadership and a lot of support from different actors.

The second part considers what powers the federal government has on its own in relation to transportation infrastructure and concludes that these are very significant in the context of interprovincial/international transportation infrastructure, but that unilateral federal action may still be undesirable for other reasons and that this power may just signal the role of federal leadership on the file. The third part considers the implications of constitutionalized Indigenous rights and suggests that there will be a need for close examination of various contexts and early engagement of Indigenous peoples in a project that could be beneficial for northern Indigenous communities, with many legal complexities otherwise present, including implications from Canada's

new legislation on the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP). A concluding section draws together key implications and suggests that the constitutional landscape calls for federal leadership, but also extensive engagement and co-operation with other actors, even while there remain many constitutional and legal issues that would warrant closer examination

All publications can be found at https://www.canadiancorridor.ca/the-research-program/research-publications/.

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Program Director, Canadian Northern Corridor Research Program

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

Dwight Newman

KEY MESSAGES

- This report considers, at a high level, some of the key constitutional considerations associated with the development of the Northern Corridor. It considers both the ways in which the Canadian Constitution may facilitate such a development and ways in which it may offer barriers to such a project.
- The aim is to consider these issues at a high level that flags a number of areas for more detailed examination and to consider them in the light of both existing legal doctrine and potential trends that may be pertinent to a project that could be developed in a staged way.
- The Northern Corridor concept attempts, in some ways, to overcome a jurisdictional anti-commons made up of a large number of decision-makers who can affect each individual project and to bundle into a multimodal corridor the ability for future projects to get rights-of-way in a more predictable manner under a chosen governance structure.
- The Constitution allows for co-operation and negotiation, and even elements of intergovernmental delegation subject to some constraints, that could facilitate the development of such a multimodal corridor with its own governance structure. The key challenge in that respect would not be a constitutional bar but that of attaining sufficient agreement among the necessary constitutional actors.
- The Constitution provides significant jurisdictional authority to the federal government on matters of interprovincial and international transportation and communications that could be deployed in support of a project like the Northern Corridor. On the surface, these powers would look like they could be deployed unilaterally if it came to it, but there are various reasons that path might be undesirable and subject to challenges. A federal leadership role may be more appropriate.

- A complex evolving landscape on Indigenous rights raises an array of issues needing further examination, but they tend to push toward the need to engage with, involve and draw support from Indigenous communities for the Northern Corridor concept.
- The development of the Northern Corridor will require further legal research on various constitutional issues and will ultimately depend upon strong federal leadership in collaboration with other governments.

SUMMARY

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

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

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

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

Thus, there is a significant federal constitutional power that is pertinent to the Northern Corridor. This power could be deployed co-ordinately and even co-operatively. This power could also be deployed more authoritatively and unilaterally. More authoritative and unilateral approaches would be constitutionally permissible in respect of division of powers, but would run against many aspects of Canadian tradition. It would also risk

raising constitutional tensions in ways that might be undesirable, particularly if they were unnecessary, because it would alternatively have been possible to achieve co-ordination and co-operation with provincial actors.

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

These issues require careful examination of the Northern Corridor's potential routes since it crosses geographic areas under fundamentally different legal structures — those areas with historic treaties, those areas with modern treaties and those areas without treaties. Treaty rights issues come into play in those areas with treaties and have been in recent flux in court decisions. Aboriginal rights issues come into play especially in those areas without treaties and include Aboriginal title claims that could affect the Northern Corridor's route. In each of these different legal contexts, Indigenous governmental actors have been increasingly recognized as having a more fundamental role at the table than in the past, and the Northern Corridor project thus faces the prospect of engagement with a very substantial set of different decision-makers. The engagement with and involvement of Indigenous governmental actors raises many issues going beyond the duty to consult and beyond simply Canadian constitutional law. In certain ways, recognition of Indigenous governmental authority expands the possibility of Indigenous law becoming relevant to parts of the route. Moreover, recent federal statutory adoption of a set of legislative commitments concerning the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) also raises a number of questions concerning the implications of that legislation for future federal exercise of legislative authority in areas including interprovincial transportation where there could be implications for Indigenous rights norms as present in international instruments. Additional areas of law that become relevant, then, also include international law.

The Northern Corridor project faces some meaningful challenges from the Canadian Constitution and related areas of law that it evokes. At the same time, the Constitution also has facilitative provisions. Some of these establish some areas of authority and potential unilateralism, but perhaps more significantly, the Constitution contains mechanisms to facilitate, encourage and support co-ordination and co-operation. Achieving those aspirations in the context of the Northern Corridor will require both further legal research to frame the context and options and, ultimately, meaningful federal leadership to advance the project.

INTRODUCTION

Revived attention to the idea of a northern cross-country infrastructure corridor (Standing Senate Committee 2017; Sulzenko and Fellows 2016; Coates and Crowley 2013), which has been increasingly contemplated in terms of a Northern Corridor or Northern Corridor right-of-way (Standing Senate Committee 2017), raises various questions that bear on the development of such a pan-Canadian, multimodal infrastructure corridor. Among these questions are which elements of the Canadian Constitution are relevant to this concept, either in facilitating and enabling such a corridor or in posing possible barriers. This paper seeks to engage with some of these questions at a high level so as to facilitate further discussion on the legal questions involved with the Northern Corridor's development.

These constitutional questions arise in the context of many pertinent aspects of Canadian constitutional law being in flux, with significant contending views about potentially shifting law on matters ranging from Indigenous rights to aspects of the Canadian division of powers (Newman 2013, 4–8; Robitaille 2015; Newman 2018, 1–6; Newman 2020; Frate and Robitaille 2021). While it is possible to identify various established norms of constitutional law that bear upon the contemplated corridor, it is also necessary to be attentive to ways in which these norms might yet shift during any period of development of the Northern Corridor. This is particularly important in light of the likelihood of a staged development and implementation of the Northern Corridor. The aspirations associated with the Northern Corridor are far-reaching and visionary. The idea of the Northern Corridor has arisen partly in the context of challenges for particular linear infrastructure projects, such as large pipeline projects that have faced legal challenges, and the difficulties of approval processes that have then stretched across the terms of different governments with different viewpoints on some issues (Coates and Crowley 2013; Newman 2017; Roth 2018). However, the Corridor is more of a vision of a multimodal right-of-way that could encompass possibilities for roads, railway lines, pipelines, telecommunication facilities, electric transmission lines and more (Sulzenko and Fellows 2016; Standing Senate Committee 2017).

The visionary dimension of the Northern Corridor means that it 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. Those who have certain types of environmental-related concerns about pipelines as infrastructure related to fossil fuels would presumably not have these concerns about electric transmission lines transporting green energy. However, both are subject to many of the same constitutional challenges that affect any linear infrastructure project (Blue 2009). Both might see a different governance framework in the Northern Corridor, a multimodal right-of-way whose existence would address some of the challenges faced in developing linear infrastructure projects while permitting a governance framework to then be applied in respect of a particular development along the right-of-way.

This report seeks to analyze the major constitutional dimensions associated with the development of such a multimodal right-of-way, attempting to describe those elements of the Canadian Constitution that could facilitate the Northern Corridor and those that

could pose possible barriers for it. In light of there already being much to discuss and this report being subject to necessary space constraints, there are some limits on what this report covers.

First, the report seeks to describe these issues at a high level, fully acknowledging that a complete constitutional analysis of each claim could itself generate an extended discussion, and it thus seeks to set the groundwork for further research more than to answer all of the questions raised. In doing so, it also seeks to separate issues in ways that facilitate analysis and identify future research avenues, distinguishing issues that also must be understood as interacting in complex ways that pose a challenge for how that research proceeds.

Second, it operates within a presumption of the existing constitutional arrangements continuing in at least their broad outlines. Due to the difficulties of constitutional amendment in Canada, it does not consider options like pursuing the Northern Corridor through the adoption of constitutional amendments.[1] It also assumes there being no major constitutional reconfiguration that would change the constitutional premises of the discussion.

Third, the report does not discuss the federal government's peace, order and good government (POGG) power. While this power has been in flux of late, notably in the Supreme Court of Canada's apparent adjustments of the legal test for the power in the context of the recent carbon tax reference,[2] any consideration of POGG is unnecessary in the context of topics that fall within clear federal powers in relation to interprovincial transportation. It has also been excluded since governments and courts usually only turn to it as a backstop in the absence of other constitutional authority on a matter. That said, the aspect of the carbon tax reference permitting the adoption of national standards on some issues will occasion ongoing discussion as to its scope, and research could possibly be done on whether it could offer a pertinent federal authority that could be used for aspects of a project like the Northern Corridor, which is simply flagged here.

Fourth, the report, while considering some constitutional trend lines that suggest future positions that may differ from present ones, does not consider undeveloped constitutional claims that are considered too speculative. For example, there have been attempts in some quarters to argue that portions of the *Canadian Charter of Rights and Freedoms* have implications for environmental rights (Boyd 2012; Collins 2015), and some could imagine invoking such environmental rights to challenge a corridor development. Claims as to the existence of such *Charter* rights are no doubt creative and well-

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1 Some megaprojects have in fact required constitutional amendments for one reason or another. For example, for the federal government to commit to the Confederation Bridge project in Prince Edward Island, it needed to know that the development of the bridge would be recognized as a substitute for constitutionally entrenched requirements to maintain a ferry service to P.E.I. Thus, there was an amendment to specify this (Constitution Amendment Proclamation, 1993 (Prince Edward Island), SI/94-50), which could be adopted through the bilateral amending formula involving just Parliament and the legislature of the one province affected by the amendment. However, the Northern Corridor does not concern just one province, or even a limited number of provinces, so any constitutional amendment in support of it would need to meet the requirements for a full-scale constitutional amendment, something not easy to achieve unless there were a very strong consensus on it and readiness to deal with it as a separate constitutional item.

2 Reference re *Greenhouse Gas Pollution Pricing Act*, 2021 SCC 11 (Carbon Tax reference).

intentioned, but they are also largely analogous to claims that have not succeeded in the past and would appear to be mainly speculative for analyzing legal doctrines applicable now or in the foreseeable future,[3] so they are not a focus here. Operating within these parameters, there is nonetheless much to discuss.

The report's underlying methodology consists of standard legal analysis that identifies legal issues and then analyzes the pertinent legal sources bearing on these issues. To some degree, it is possible to extrapolate from issues raised with respect to linear infrastructure projects generally in debates of recent years, although it is important to consider what might be different with respect to a multimodal corridor. The paper takes an approach of explaining the application of key Canadian legal doctrines to these issues, drawing upon leading secondary sources on Canadian constitutional law — or pertinent subtopics within it — and leading case law. The analysis proceeds to some implications of these applications for options related to developing the Corridor.

This methodology can operate without being geographically situated insofar as this report was commissioned only for the purpose of describing at a high level some of the Northern Corridor's constitutional dimensions. The Corridor's route does, of course, ultimately matter. While the constitutional powers of federal and provincial governments are uniform for different provinces, the ways in which different provinces along a route might choose to use their powers could well differ. If there is a northern branch of the Northern Corridor that goes through the Northwest Territories, then the powers of that territorial government are also pertinent and will need close study in light of developments stemming from the process which changes full federal power in a territorial context into devolved power of a territorial government. In the yet more complex context of constitutional Indigenous rights issues, the Indigenous rights held in different places will differ. At a high level, and speaking somewhat approximately, historic treaties cover much of the route in Ontario and the Prairie Provinces, modern treaties cover northern Quebec and the Northwest Territories and substantial parts of the route (notably in British Columbia) are in areas without treaties. These geographical differences call for more specific studies of the high-level questions raised, but the report needs to function on the basis of raising the high-level questions.

In considering the major constitutional dimensions arising for the Northern Corridor, the report makes its way through three main sections before turning to a set of conclusions. First, it considers the possibility of co-operation and the use of powers of interdelegation, continuing on to explain why that constitutionally permitted possibility may simply restate some of the problems faced in the first place.

Second, it considers various aspects of Canadian federalism, engaging particularly with those powers that relate to transportation; these other powers may or may not affect those transportation powers and pertinent trends associated with those powers and what solutions, other than interdelegation, there may be that allow governments to overcome these federalism challenges.

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3 It is challenging even to develop a justiciable claim on some such matters. For a recent appellate rejection of a climate change lawsuit, see *Environnement Jeunesse c. Procureur général du Canada*, 2021 QCCA 1871.

Third, it considers some constitutional issues associated with Indigenous rights, building upon the recent report in this series on the duty to consult (Wright 2020), but raising a number of further issues associated with Indigenous rights as recognized by Canadian constitutional law, how they intersect with a development like the Northern Corridor and possible legal options related to the issues raised here. Since the report was commissioned in the context of other work in this series having focused on Indigenous rights questions, this report focuses primarily on constitutional issues outside the context of Indigenous issues — with that scoping necessary to focus sufficiently on other aspects of the Canadian Constitution that are pertinent to the Corridor. Nonetheless, this section will briefly flag constitutional issues connected with Canada's relationships with Indigenous peoples, noting not only ongoing flux in Canadian constitutional law on these topics but also in the relationship of constitutional law to other systems of law that are also relevant to the Corridor.

The final section of the report turns to conclusions resulting from the constitutional situation, which emphasize the need for a strong federal leadership role on the Northern Corridor, but also suggest that the federal government cannot easily go it alone and needs to build a broad coalition in support of the Northern Corridor if it is to go from concept to reality. At the same time, the conclusion flags the need for further legal research on many issues as part of the process associated with the Northern Corridor.

THE CHALLENGE OF MULTIPLE DECISION-MAKERS AND THE PROSPECTS OF A SOLUTION IN CO-OPERATION AND INTERDELEGATION

A key underlying decision-making challenge any linear infrastructure project faces is the jurisdictional anti-commons. As James Coleman (2021, 7) describes it, the problem exists because: "When multiple stakeholders have the right to veto use of a resource, it may go to waste and none of them will benefit." This problem becomes worse as the number of decision-makers involved increases, essentially because there are increased chances of one or more decision-makers having mistaken views of the costs and benefits for other parties in ways that end up stymieing negotiations (Coleman 2021, 10).

Apart from expropriation by a single decision-maker overcoming the jurisdictional anti-commons, solutions can include options like commitments through forward-looking agreements to allow for certain types of construction and assembly of land into a different governance structure where individual decision-makers give up their later ability to make individual decisions and join in a collective decision-making structure about that bundle of land for future issues (Coleman 2021, 10–11). The Northern Corridor concept has characteristics of both of these options, seeking to break logjams about approval of individual projects through the advance development of a multimodal corridor under its own governance structure. A key question, then, is by what constitutional mechanism it might be possible to establish a distinctive governance structure for the Northern Corridor that replaces the structures that would normally make decisions about projects along that route. The question from the outset is whether there is a constitutional mechanism to enable co-operation.

While the report will turn to some fuller details later, at a basic level Canadian constitutional law has traditionally operated on the basis of jurisdictional powers being held at both the national (usually called federal) and subnational (provincial) levels.[4] While it will be necessary to add more parties later, for the moment, considering simply the federal and provincial governments enables an understanding of one major area of Canadian constitutional law that may be important in enabling the Northern Corridor. Where powers held by both the federal and provincial governments are pertinent to a particular program or development, one option is to seek agreement among all decision-makers and then to enable the necessary legal arrangements through co-operative structures and/or negotiated interdelegations of powers for the program or project.

In recent decades, Canadian constitutional doctrine has seen ongoing rhetorical invocations of the concept of co-operative federalism, although often without complete precision on what this concept means (Brouillet 2018; Cyr 2014; Gaudreault-Desbiens 2014). Some case law has seen the Supreme Court of Canada split over whether the concept of co-operative federalism has constitutional status that affects the outcomes in specific cases.[5] In any event, it is clear that the courts see benefits in issues that can be resolved by negotiated arrangements between the federal and provincial governments.

Canadian constitutional doctrine on delegation of powers has focused on such arrangements between the federal and provincial governments — even while some issues today would involve not only powers of federal and provincial governments but also powers devolved to territorial governments and powers held by constitutionally recognized Indigenous governments.

However, this expanded concept of constitutional actors will not lead to separate discussions for the moment. The devolution process in the territories is an important constitutional development that does not get the attention it deserves (Alcantara, Cameron and Kennedy 2012). At its most extensive development, it involves a federal statutory allocation of authority to territorial governments with similarities to the full, or part, jurisdictional authority held by the provinces (Newman 2013). While some distinctive considerations come into play for the territories that warrant their own analyses, for the purposes of this report they can be understood as encompassed within the discussion of the federal and provincial governments. The powers held by constitutionally recognized Indigenous governments do require their own separate discussion and appear in the last section of this report.

Considering momentarily the case law without the further complexities of entities beyond the federal government and the provinces, it is possible to identify some key propositions that are both longstanding and have also been recently reaffirmed in case law in the 2018

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4 These powers were set out in sections 91 through 95 of the *Constitution Act, 1867*, which thus enshrined a set of powers negotiated at the time of Confederation, with several amendments made over time, such as the addition of federal jurisdiction over old age pensions through an amendment originally developed in 1951 and extended in 1964 — this was recognized as an area in which most of the provinces wanted the federal government involved, so they were amenable to a constitutional amendment to achieve that.

5 See e.g., *Quebec (Attorney General) v. Canada (Attorney General),* 2015 SCC 14 (CanLII), [2015] 1 SCR 693.

decision of the Supreme Court of Canada in the Pan-Canadian Securities Reference,[6] which is the leading case in this area of law.

A government entering into any sort of arrangement related to delegation cannot fetter its sovereignty and thus cannot give up its fundamental powers. It cannot delegate its primary legislative authority to another government, or there would effectively be an illicit constitutional amendment. It is possible, though, to confer regulatory law-making powers on an administrative body and even on an administrative body with representatives from other governments.[7] It is also potentially possible to find other forms of intergovernmental co-operation so long as they do not violate the two key propositions concerning limits on interdelegation.

Moving beyond the high-level analysis that this report offers, determining precisely what can be achieved through interdelegation will be a necessary research project in relation to the prospects for and development of the Northern Corridor. One major constitutional law text by Peter Hogg (2007) suggests that the courts have been too restrictive on interdelegation of powers. However, the 2018 Pan-Canadian Securities Reference tends not to accept those critiques and instead reinforces key constraints on interdelegation.

The 2018 decision relates to a potentially instructive recent illustration of attempts to achieve a policy through federal-provincial co-operation in the context of a matter having both federal and provincial aspects. This was the attempt to develop a national securities regulation system. This attempt got underway after the earlier 2011 Securities Reference, in which the Supreme Court of Canada struck down a unilateral federal attempt to create a national securities regulator, in light of increased concerns about such matters as systemic risk as beyond the powers of the federal government.[8]

In its concluding paragraphs of that decision, the Court hinted at the option of a negotiated approach: "We may appropriately note the growing practice of resolving the complex governance problems that arise in federations, not by the bare logic of either/or, but by seeking cooperative solutions that meet the needs of the country as a whole as well as its constituent parts."[9]

Following on the 2011 decision, a number of provinces sought to co-operate in such a negotiation. The 2018 decision came as a result of Quebec's challenge against this co-operative approach being permitted. While the Supreme Court of Canada upheld the constitutionality of what the co-operating governments were doing, support for the process waned in some of the co-operating provinces. In March 2021, it became apparent that the Capital Markets Authority Implementation Organization that had been co-ordinating efforts would be shut down, with five years of attempted negotiations ultimately failing.

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6 Reference re PanCanadian Securities Regulation, 2018 SCC 48, [2018] 3 S.C.R. 189. A previous leading authority had been *Attorney General of Nova Scotia v. Attorney General of Canada*, [1951] S.C.R. 31, but it is now possible to read these cases together.

7 These are all holdings in the Reference re PanCanadian Securities Regulation, 2018 SCC 48, [2018] 3 S.C.R. 189, which offers a recent decision of the Supreme Court of Canada on delegation.

8 *Reference re Securities Act*, 2011 SCC 66, [2011] 3 S.C.R. 837.

9 Ibid., para 132.

If there were sufficient agreement between the federal government and the provinces on the Northern Corridor, there would be a constitutional option available in the right forms of co-operation and interdelegation. The precise parameters would require more specific legal research geared to the specific context of the Northern Corridor, which obviously differs from any specific past case-law context. But the constitutionality of an option for overcoming jurisdictional divisions does not guarantee that option's success. While the example of interprovincial co-operation on securities regulation has dimensions going beyond constitutional law, it is nonetheless an important cautionary tale.

At the same time, there have been important, successful developments of Canadian policies, programs and projects using various forms of intergovernmental co-operation. One example, with closer analogies to the Northern Corridor, is the development of the Trans-Canada Highway system. The federal government's original 1949 Trans-Canada Highway Act provided a structure under which the federal government would enter into agreements with provinces and provide funding in support of a national highway as long as it met certain standards.[10] Provinces developed corresponding legislation to permit them to enter into agreements with the federal government. These structures continued over the decades and facilitated the completion of the original Trans-Canada Highway, as well as the Yellowhead Highway as a northern route in the West. In the right circumstances, with sufficient agreement, such a national project can be facilitated through the permitted mechanisms of intergovernmental agreements and permitted forms of interdelegation.

Reaching the necessary agreements involves overcoming the same jurisdictional anti-commons that affects any project. The Northern Corridor concept assumes that bundling different possibilities within a multimodal corridor will make it easier to reach the necessary agreements. With sufficient federal leadership and funding, perhaps something like the Trans-Canada Highway can be replicated. But the various writings on its history may have further perspectives to offer on what made that project possible at that time, again going beyond purely legal questions.

IMPLICATIONS OF CANADIAN FEDERALISM FOR DECISION-MAKING OVER TRANSPORTATION INFRASTRUCTURE

To understand whether there are constitutional mechanisms to develop something like the Northern Corridor that do not necessarily involve the need for unanimity among all constitutional actors, it is necessary to better understand the main doctrines of Canadian federalism and how they impact which governments will have decision-making power related to such a project. Even if the aim is to achieve co-operation, it is important to understand these doctrines to better understand possible barriers that arise if some are more reticent about co-operation than others.

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10 *Trans-Canada Highway Act,* 13 Geo. VI / S.C. 1949, c. 40. National standards are possible under clear areas of federal authority, such as the transportation and communication power, without resorting to the recent decision on national standards possibly being something that can be enacted in certain contexts under the federal peace, order and good government power (POGG), which is itself subject to a significant set of further constraints: *References re Greenhouse Gas Pollution Pricing* Act, 2021 SCC 11.

Three key doctrines in Canadian constitutional law on the division of powers between the federal government and the provinces form the basis for discussing the respective roles of the federal and provincial governments. After setting those out, it will be possible to turn to how they apply in the context of powers over transportation. After that discussion, it will also be important to consider how these are being applied in the context of new types of claims for roles by entities other than the federal and provincial governments.

Canada's Constitution establishes a federal system of government, in which the Constitution Act, 1867 distributed legislative power between the federal government and the provincial governments.[11] A government is constitutionally able to pass only legislation that is within its powers. Legislation that is outside its powers due to being in the powers of the other order of government is called ultra vires (outside the powers) and is invalid.

In determining whether specific legislation is valid or invalid, courts have a process of characterizing and classifying legislation. In doing so, they consider its dominant character, which is sometimes called its pith and substance. While a law may have some limited effects on powers of the other order of government, the technically determined pith and substance of the law may still fit properly within the powers of the government that is enacting the law (Régimbald and Newman 2017, 194).

Sometimes, a similar law or a regulation might be passed by either level of government, operating from its own aspect. This possibility is often called a situation with a double aspect, and some tendencies in recent decades to read powers in ways that overlap more than in the past mean that such situations have become increasingly common (Régimbald and Newman 2017, 191–94). In the case of a double aspect, if both levels of government act, there is the possibility of their legislation conflicting in some way.

This possibility brings into play the second key constitutional doctrine, federal paramountcy. If legislation of the federal and provincial governments conflict in certain ways — either in ways in which they operate or in provincial legislation fundamentally interfering with the purpose of valid federal legislation[12] — then the doctrine of federal paramountcy applies. This means that the federal legislation prevails and the provincial legislation becomes inoperable to the extent of the conflict. It is inoperable rather than invalid insofar as it would operate again if there ceased to be a conflict with federal legislation (such as if the federal government repealed its legislation). But the practical effect has important similarities as the provincial legislation is no longer effective.

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11 This division of powers is in sections 91 through 95 of the *Constitution Act, 1867*, and principally in sections 91 and 92, which contain lengthy lists of powers of each of the federal government and the provincial governments and are most commonly referenced as listing these powers. However, a few further powers are present in other parts of 91 through 95.

12 The precise standard for interjurisdictional immunity has been stated slightly variably in recent years, following the attempt to reform the doctrine in *Canadian Western Bank v. Alberta*, 2007 SCC 22, [2007] 2 S.C.R. 3. But the standard was put slightly differently in each of a series of later cases on the doctrine, with the chosen formulation here attempting to encompass the essence of what these cases are suggesting.

One result of this doctrine is that if there is a disagreement on some issue between the federal government and the provinces, so long as the federal government passes legislation that is clearly valid within its areas of jurisdictional power, it appears to have the option of stating that its legislation is meant to displace provincial legislation and thus achieve assurance that federal paramountcy will mean that its legislation prevails.

A third key constitutional doctrine consists of a complex set of rules called interjurisdictional immunity. In simple terms, these rules protect the core of the powers of each level of government from interference by the other government, maintaining areas of exclusive jurisdiction (Régimbald and Newman 2017, 209–210). Historically, this doctrine has mainly protected federal projects and federally regulated entities from provincial interference, although some later developments have suggested it has broader applications. Because it perpetuates areas of exclusive control rather than opportunities for overlapping powers, interjurisdictional immunity has been criticized by some leading scholars (Hogg 2007) and saw some efforts by the Supreme Court of Canada to limit its role in an important decision in 2007.[13] However, the Supreme Court of Canada seems to have backed away from that 2007 decision in later decisions and interjurisdictional immunity appears to be alive and well (Régimbald and Newman 2017, 221). In simple terms, it says that provinces cannot legally interfere in fundamental ways with the core of a federal power or the core of a project developed under federal jurisdiction.

These three doctrines are all relevant in decisions about transportation infrastructure, which involves a fairly distinctive jurisdictional power within the list of jurisdictional powers. The power appears in the list of provincial powers in section 92 of the *Constitution Act, 1867,* but is largely carving out exceptions to the provincial power that are thus in federal jurisdiction, with the initial clause indicating the provincial power and then subsections (a), (b) and (c) identifying federal powers:

> **10.** Local Works and Undertakings other than such as are of the following Classes:
>
> **(a)** Lines of Steam or other Ships, Railways, Canals, Telegraphs, and other Works and Undertakings connecting the Province with any other or others of the Provinces, or extending beyond the Limits of the Province:
>
> **(b)** Lines of Steam Ships between the Province and any British or Foreign Country:
>
> **(c)** Such Works as, although wholly situate within the Province, are before or after their Execution declared by the Parliament of Canada to be for the general Advantage of Canada or for the Advantage of Two or more of the Provinces.[14]

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13 *Canadian Western Bank v. Alberta*, 2007 SCC 22, [2007] 2 S.C.R. 3.

14 *Constitution Act*, 1867, s. 92(10)(c).

The language has been read in contemporary ways so that section 92(10)(a) means that the federal government has jurisdiction over all matters of interprovincial and international communications and transportation, including in modern forms.[15] While the province has jurisdiction over a pipeline or telephone system that operates solely within the province — which probably means not being connected beyond the province — the federal government has jurisdiction over these matters as soon as they are part of an interprovincial or international system.[16] As held in pipelines-related cases, vis-à-vis the provinces, the federal government also has the constitutional authority to establish rights-of-way for such a system, including through expropriation if necessary.[17]

Obviously, these statements face further complexities and nuances in relation to Indigenous rights and Indigenous governmental authority, but those questions need to be considered separately insofar as sections 91 and 92 describe a division of powers between the federal and provincial governments. While the issues ultimately intersect, it is necessary for analytical clarity to consider each separately.

The implications of the contents of section 92(10)(a) are significant and warrant attention before this report turns to the particularly distinctive contents of section 92(10)(c). Section 92(10)(a) establishes federal jurisdiction in relation to interprovincial and international transportation, and the federal government can thus legislate and act on these matters. So far, that statement does not mean that provinces could not also have something to say about activities in a multimodal transportation corridor.

The provinces have legislative jurisdiction on matters within provincial jurisdiction, including local matters, private law matters within the province and some aspects of environmental regulation within the province.[18] A multimodal transportation corridor would be subject to effects through the double aspect concept referenced earlier — federal jurisdiction over the project as a whole does not remove all provincial jurisdiction that might affect it.

However, the other doctrines referenced earlier also come into play. From a legal perspective, the doctrine of federal paramountcy means that federal legislation on a multimodal transportation corridor that was intended as comprehensive legislation on that corridor could effectively oust provincial authority related to it. Similarly, the doctrine of interjurisdictional immunity means that provincial legislation fundamentally interfering with core aspects of the federal transportation power or projects developed under it ends up being a legal barrier against that interference.

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15 Its range is catalogued at length in the decisions of Binnie J. and Rothstein J. in *Consolidated Fastfrate Inc. v. Western Canada Council of Teamsters*, 2009 SCC 53, [2009] 3 S.C.R. 407.

16 Some pipelines cases have been focused on trying to determine the boundaries of when something is interprovincial and when it is not interprovincial. See especially *Westcoast Energy Inc. v. Canada (National Energy Board),* [1998] 1 S.C.R. 322.

17 See generally *Campbell-Bennett v. Comstock Midwestern Ltd.*, [1954] S.C.R. 207.

18 Many of these powers are inherent in *Constitution Act, 1867*, s. 92(16) and 92(13), with environmental regulation also drawing upon other provincial powers. Provincial and federal authority both become engaged by environmental matters: *Friends of the Oldman River Society v. Canada (Minister of Transport),* [1992] 1 S.C.R. 3.

Both of these doctrines have been part of discussions about pipeline projects in recent years. Various provincial and municipal attempts to interfere with a federal pipeline were rejected in courts, sometimes as resoundingly as in the Supreme Court of Canada's immediate dismissal of British Columbia's arguments on behalf of its legislation that seemed to be aimed at regulating what contents could flow through an interprovincial pipeline passing through British Columbia.[19] Provinces cannot interfere in such ways, and both interjurisdictional immunity and paramountcy have roles in safeguarding the federal transportation power.

There has been vibrant scholarly literature on pipelines in recent years that has seen discussion around analogous matters. While pipelines jurisdiction used to be the subject of more technical analyses concerning precise approaches to land regulation in the context of a federally authorized pipeline (Roy 1982), the more recent discussions have opened large questions about a role for the provinces, or even municipalities, in regulating pipelines (Bankes et al. 2018; Robitaille 2015; Frate and Robitaille 2021). Some of the arguments include an implicitly suggested need, in light of principles of holistic constitutional interpretation, to understand the federal power as to be read in different ways due to the significance of corresponding provincial jurisdiction over local transportation (Robitaille 2015). However, these sorts of arguments have not found favour in the courts in recent bouts of litigation.[20]

It is difficult to assess definitively whether these scholarly arguments suggest a future trend for Canadian constitutional law. The federal transportation power is a unique carve-out from the listed provincial powers, and there is a very real prospect the courts will continue to understand it in light of its specifically negotiated position and the ongoing need for an exclusive interprovincial and international transportation infrastructure power that can overcome local interests for the common good. Those contemplating the Northern Corridor will need to be attentive to ongoing discussions in this space that affect the degree to which the federal transportation power continues to operate relatively free of interference by the provinces.

Because it came up in the pipelines discussions from which some of this overview of issues has extrapolated, section 92(10)(c) also warrants some attention. Like section 92(10)(a), it is a carve-out from the list of provincial powers and establishes an area of federal jurisdiction on certain types of projects. Distinctively, section 92(10)(c) allows the federal government to extend its own jurisdiction to different projects, referring to: "Such Works as, although wholly situate within the Province, are before or after their Execution declared by the Parliament of Canada to be for the general Advantage of Canada or for the Advantage of Two or more of the Provinces."[21]

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19 *Reference re Environmental Management Act*, 2020 SCC 1.

20 Apart from the significant implications of *Reference re Environmental Management Act*, 2020 SCC 1 for the Supreme Court of Canada's suggestion of a significant lack of merit in the position as put by British Columbia, one could list a dozen other cases Trans Mountain won against attempts to assert jurisdiction other than federal jurisdiction over its interprovincial pipeline.

21 *Constitution Act, 1867*, s. 92(10)(c)

The full meaning of section 92(10)(c) is complicated and would warrant a longer analysis (Hanssen 1968). In some ways, the specific terms of its text have not been the barrier some might have expected to its use in the context of transportation projects beyond a province. Its specific text refers to works "wholly situate within the Province." However, there are actually numerous historical instances of the federal declaratory power having been used for projects where it would not appear to have been necessary, such as with various international and interprovincial bridges or railways.[22] It can thus serve as a symbolic bolster, and perhaps an additional legal clarification, in such instances.

Another part of the specific text of section 92(10)(c) has tended to be taken as potentially more constraining on its use. While other parts of section 92(10) refer to "Works and Undertakings," section 92(10)(c) authorizes use only for "Works," with no mention of "Undertakings," and that may be significant (Newman 2013, 116). Here, a work is a physical project, whereas an undertaking is a more conceptual project, having been described as "an arrangement under which … physical things are used."[23]

The result of this distinction might be that section 92(10)(c) could be invoked for a project consisting of one specific transportation development that constitutes a work but that it may not be possible to invoke it on behalf of the Northern Corridor as a whole, which would arguably be an undertaking rather than a work. However, this section has not received enormous amounts of attention and there could be further legal work pursued on whether it has a role to play. At least one dissenting judgment at the Supreme Court of Canada suggested otherwise on the point at issue, while the other judges did not comment otherwise.[24] From some standpoints, it would seem entirely unnecessary given the federal transportation and communications power in section 92(10)(a). However, there might be some reasons for invoking section 92(10)(c) as well. It is uncertain whether it could be invoked, although there could be more analysis on the point.

There is a significant federal constitutional power that is pertinent to the Northern Corridor. This power could be deployed co-ordinately and even co-operatively, building on examples like the Trans-Canada Highway. This power could also be deployed more authoritatively and unilaterally. While such an approach might be constitutionally permissible, factors beyond legal authority will also affect the desirability of a particular course of action.

Discussing the constitutional powers here provides helpful background in understanding constitutional mechanisms and barriers as the background circumstance for discussions

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22 Some examples include (but are not limited to) the following: *Niagara Lower Arch Bridge Act*, S.C. 1956, c. 64; *Canadian National Railways Act*, S.C. 1955, c. 29; *Prescott and Ogdensburg Bridge Co. Act*, S.C. 1946, c. 77; *Sarnia-Port Huron Vehicular Tunnel Co. Act*, S.C. 1932-33, c. 59; *Lake of the Woods International Bridge Co. Act*, S.C. 1932, c. 59; *Cornwall Bridge Co. Act*, S.C. 1930, c. 55; *Canadian Transit Co. Act*, S.C. 1921, c. 57; *Lake of the Woods and Other Waters Act*, S.C. 1921, c. 38; *Montreal Ottawa and Georgian Bay Canal Co. Act*, S.C. 1894, c. 103; *Great Northern Railway Co. Act*, S.C. 1892, c. 40; *Niagara Falls Bridge Co. Act*, S.C. 1887 (50-51 Vict.), c. 96; *St. Lawrence International Bridge Act*, 1892, S.C. 1892 (35 Vict.), c. 90.

23 *Westcoast Energy Inc. v. Canada (National Energy Board),* [1998] 1 S.C.R. 322 at para. 41.

24 *Ontario Hydro v. Ontario Labour Relations Board*, [1993] 3 S.C.R. 327 at 399–400, dissenting judgment of Iacobucci and Major JJ. but with other judges not expressing anything else on the point.

and negotiations. There is significant federal authority in this domain. There is some scholarly discussion about whether provincial authority has more implications than previously realized (Robitaille 2015), although those views have not tended to be accepted by courts in their decisions at this point — and the Supreme Court of Canada's 2020 decision from the bench on British Columbia's pipelines legislation suggests that this position may not be about to change.[25] Nonetheless, thinking of a project developed in a staged way over the coming decades, it is necessary to think about these powers prospectively in light of trend lines, and there would be room for further analysis on how the different constitutional mechanisms between the federal and provincial governments come into play.

IMPLICATIONS OF INDIGENOUS RIGHTS AND INDIGENOUS GOVERNMENTAL POWERS FOR THE NORTHERN CORRIDOR

Canada's recent experiences with pipelines, an analogous linear infrastructure project, have starkly illustrated the expanding significance of Indigenous issues in relation to natural resource infrastructure developments. Section 35 of Canada's Constitution Act, 1982 recognizes and affirms Aboriginal and treaty rights, thus attaching a constitutional status to these rights and making them part of the landscape of how the Canadian Constitution facilitates or raises barriers to the development of the Northern Corridor.

Many of the recent experiences with natural resource infrastructure have highlighted the significance of the duty to consult, and the duty to consult does have a profound significance, being triggered already hundreds of thousands of times per year so as to generate proactive government obligations to consult with Indigenous peoples in advance of government decisions that might affect their rights (Newman 2017). The Northern Corridor project has already seen detailed research on the duty to consult (Wright 2020). However, Canada's constitutional framework on Indigenous rights has implications reaching beyond the duty to consult.

There are issues, as well, related to potential rights infringements through the development of a project, even if legally required consultation has occurred. The exact scope of Aboriginal and treaty rights along any proposed Northern Corridor thus requires extended attention. Notably, recent years have seen new legal action outside the duty-to-consult context, focused more on underlying Aboriginal and treaty rights, including noteworthy cases on modern interpretation of historic treaties and interpretations of how cumulative impacts on historic treaty rights may give rise to infringement.[26]

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25 *Reference re Environmental Management Act*, 2020 SCC 1.

26 Apart from some attempts to litigate on Aboriginal rights more generally, *Tsilhqot'in Nation v. British Columbia*, 2014 SCC 44, [2014] 2 SCR 257 is now supporting a wave of further Aboriginal title cases in progress. Modern treaty rights have been the subject of some important cases, such as *First Nation of Nacho Nyak Dun v. Yukon*, 2017 SCC 58, [2017] 2 SCR 576. Historic treaty rights have also seen important recent decisions on cumulative impacts (Yahey v. British Columbia, 2021 BCSC 1287) and on interpretation *(Restoule v. Canada (Attorney General)*, 2021 ONCA 779).

On different parts of the route, what is at stake involves Aboriginal rights and title issues in areas without treaties, areas within historic treaties and areas within modern treaties — the latter being a very significant development in Canada in recent decades that effectively recognizes Indigenous governmental authority over significant parts of northern Canada in particular (Alcantara 2013; Isaac 2016).

These questions need more attention and speak to the potential need to have more governments at the table. Indigenous governments have a complex variety of forms in Canada, partly due to Canada being a large geographic area with Indigenous peoples with a wide cultural diversity and partly due to the complex overlays of law. In the context of many historic treaty areas, First Nations governments, previously thought of in terms of band councils, may be most pertinent for First Nations, although with the same areas often also involving Métis locals or Métis regional structures that may assert some Métis rights in overlapping ways. In the context of modern treaties, negotiated self-government leads to broad recognized Indigenous governmental jurisdiction, sometimes with agreed authority over lists of powers with analogies with the division of powers between federal and provincial governments. In non-treaty areas with outstanding land claims, Supreme Court of Canada authority has recognized Indigenous self-government less than many assume,[27] but Canadian governments have nonetheless been open to recognizing an inherent right of self-government. Canadian constitutional law recognizes various rights held by the rights-bearing communities that these governments represent, and they must have roles in the discussions around the Northern Corridor,

At the same time, the issues at stake involve the delineation of rights stemming from sources prior to Canada's constitutional order or negotiated through treaties preceding or existing alongside the main constitutional instruments in the country. That is to say, while Indigenous rights have been constitutionally recognized in certain respects, they arise from sources from outside the Constitution. There is thus, from the outset, a complex interplay of Canadian constitutional law and law arising from outside Canadian constitutional law, making Indigenous rights topics only partly within the scope of the paper.

Moreover, further extending beyond Canadian constitutional law, there is now an important new overlay on this whole area of law insofar as Parliament has enacted the *United Nations Declaration on the Rights of Indigenous Peoples Act (UNDRIPA)*,[28] which commits the federal government to a process of seeking to ensure that federal law is harmonized with the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP). This international instrument is from outside the Canadian constitutional order, and the statute committing to its implementation is not a constitutional one, but this law may have many significant implications as well.

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27 See *R. v. Pamajewon*, [1996] 2 SCR 821.

28 *United Nations Declaration on the Rights of Indigenous Peoples Act*, S.C. 2021, c. 14.

Much more extended analysis is needed of the implications of Indigenous rights (including both Aboriginal and treaty rights as described in the Constitution Act, 1982 and international Indigenous rights that have status in Canada) for the Northern Corridor. This section of the paper operates at a very high level in simply flagging some issues for future analysis.

This series has already featured an important paper on the implications of the duty to consult for the Northern Corridor (Wright 2020). To explain the duty to consult, that paper naturally had to explain the underlying Aboriginal and treaty rights claims that can give rise to consultation obligations. The present paper does not seek to rehash discussion that has already appeared within the series and refers the reader to that paper (Wright 2020) for a number of important discussions. That paper offers a sketch of the underlying Aboriginal and treaty rights framework and applies it to what implications there are for meaningful consultation on the Northern Corridor project.

Meaningful consultation has received increasingly clarified definitions through case law (Newman 2014; Wright 2020), even while there have also been major decisions based on the duty to consult that some scholars have seen as reflecting some limitations on the clarity of this area of case law (Lavoie 2019). The previous paper (Wright 2020) emphasized the more certain aspects, and there has certainly been some important clarifying case law, notably the Coldwater decision concluding challenges to the Trans Mountain Pipeline, which included a well-developed definition of meaningful consultation.[29] There needs to be very careful thought in what amounts to meaningful consultation in particular circumstances.

It is fair to say, as the prior paper did, that there is some tension between achieving certainty through the initial establishment of a corridor and the need for contextually specific consultation that could arise in various circumstances thereafter in respect of each particular project (Wright 2020, 39–40). Three additional points may be worth further attention here. First, consultation needs to be not just with those Indigenous communities along the route in the narrow sense of being immediately on the Corridor. Pipelines companies that attempted to engage with Indigenous communities rightly identified a wider band adjacent to the route and sought to engage with Indigenous communities with treaty areas or traditional territories within that wider band, which was appropriate since potential rights impacts reach beyond the narrow route itself. Second, even if early consultation on the Corridor itself will not be sufficient and leaves the need for later consultation, that early consultation may still be legally necessary in light of expectations of consultation on early higher level strategic decisions that may affect later permitting decisions.[30] Third, there might be value in further discussion on appropriate impact benefit agreements or other similar arrangements,[31] which could be developed at an early stage and could give certainty on the route into the future. It could potentially reshape consultation obligations into arrangements within the governance structures of

29 *Coldwater v. Canada (Attorney General)*, 2020 FCA 34 at paras. 41–42.

30 *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, 2010 SCC 43, [2010] 2 S.C.R. 650 at para. 44.

31 On the range of such agreements, see generally (Odumosu-Ayanu and Newman 2020).

the Northern Corridor — although there is some case law that could raise possibilities that the duty to consult may still remain, to some degree, outside of those arrangements.[32]

The adoption of the federal UNDRIPA legislation in June 2021 adds a further layer of complexity to these discussions, albeit one which may weigh in favour of attempting something like the last suggestion of seeing consensually negotiated impact benefit agreements as a necessary dimension of the Northern Corridor. In particular, depending upon how the UNDRIPA is applied, consultation approaches previously geared to analyzing impacts on rights (and thus not necessarily the views of communities, at least directly) will increasingly be expected to be geared toward the concept found repeatedly in the UNDRIP itself, which is the requirement to "consult and cooperate [...] in order to obtain consent."[33] There are significant international legal debates about to what degree that expectation within a number of articles of the UNDRIP requires the actual obtaining of consent, as opposed to a process genuinely aimed at attempting to obtain it (with some of the debate summarized in works like Newman 2020; Barelli 2018; Doyle 2015), but it is clear that the aim of obtaining consent was already taking on a significant role and now has an additional further push through a federal statute.

To the extent that the UNDRIPA is applied, there will be a need in the coming years to consider how that requirement applies to new federal legislation itself, since the UNDRIP applies this requirement of consultation and co-operation in order to obtain consent not only to administrative action but also to legislation that affects Indigenous peoples.[34] The UNDRIPA makes a commitment to the consistency of future federal legislation with the UNDRIP. At the same time, it is also true that if future legislation were adopted in a manner not following this commitment, there might be limited ways of challenging that process. It is a basic proposition of Canadian constitutional law that: "Parliament remains sovereign at every moment; it cannot bind itself for the future. If a later enactment contradicts an earlier one, the later enactment takes precedent. This preserves democratic accountability. If citizens vote out one government and vote in another, the new parliament is not bound by the actions of its predecessor" (Webber 2015:61). The UNDRIPA is not constitutional but might be observed by future governments through some mechanism facilitating consultation and co-operation with Indigenous peoples on legislation.

What that mechanism will look like in the federal sphere remains to be seen, but the UNDRIPA may have future effects on the shape of other legislation making use of federal constitutional authority in the transportation context or legislation attached to entering into intergovernmental arrangements. The implications of the new UNDRIPA for the Northern Corridor warrant their own extended analysis.

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32 There may effectively be a limitation on other consultation arrangements displacing the formal duty to consult: *Beckman v. Little Salmon/Carmacks First Nation*, 2010 SCC 53, [2010] 3 S.C.R. 103.

33 United Nations Declaration on the Rights of Indigenous Peoples, articles 19 and 32 are most pertinent, but similar language appears in a number of other articles as well (and contrasts with articles that do require obtaining consent).

34 United Nations Declaration on the Rights of Indigenous Peoples, article 19.

The achievement of rights-of-way in a form sufficient to enable development, notably with respect to obtaining financing, requires close attention to what that necessary form is, especially in parts of the country with ongoing Aboriginal title claims or established Aboriginal title (the latter being in just one location thus far, but with the potential for more such cases to lead to title determinations in the decades ahead). Whether finance can be obtained in the context of a right-of-way that is on Aboriginal title land or on land subject to a title claim without further legal clarification requires examination.

The Indigenous rights dimensions of the questions at issue present a rapidly evolving landscape that appears to expand the range of actors with whom it would be desirable to have agreements. The sheer number of actors involved could create some challenges. At the same time, if the Northern Corridor presents significant opportunities to Indigenous communities in parts of the country presently underserved by transportation infrastructure, there may be a vision that can draw together the necessary actors.

CONCLUSIONS

When Canada's Constitution was originally designed in 1867, there was a clear intention to enable large national infrastructure projects, with the national railway in particular on the immediate horizon. Canada's Constitution has sustained meaningful forms of intergovernmental co-operation and even interdelegation within certain bounds in the context of major projects. A certain era of those megaprojects is to some degree in the past now, however, and it is necessary to think about how to revive those possibilities in an altered era and in the context of new dimensions of diversity now recognized in the constitutional order that had been neglected in 1867.

If there can be a national vision that draws together the necessary actors from the federal government, the provinces and Indigenous communities in support of a Northern Corridor, the Constitution provides for possibilities of negotiated arrangements that could facilitate it. If there is a failure to engage and generate a national vision, the Constitution also provides mechanisms by which some might seek to obstruct the Corridor. First, while there are reasonable bases for saying that the federal transportation power can trump provincial powers when legitimately employed on behalf of a major transportation infrastructure project, and that claim continues to have support in case law, there have been some shifts in the context in which the law operates on these issues. Those advocating the National Corridor need to watch this space carefully. If support is not achieved for the National Corridor, there may be attempts to re-argue these issues. Second, a complex changing landscape on Indigenous rights opens various possibilities for challenges to a National Corridor lacking sufficient support. Apart from the need for consultation under the established duty-to-consult doctrine, these could involve various section 35 rights claims, whose potential contents need further analysis in relation to potential National Corridor routes. They could involve new expectations associated with shifts from consultation to consent-oriented processes. They could also involve new expectations under the recently enacted federal legislation on the UNDRIP or making use of new mechanisms developed in light of that legislation.

All of these considerations press toward the value of federal leadership, appropriate in light of federal jurisdictional powers, federal relationships with Indigenous communities and federal financial capacity relative to that of the provinces. At the same time, that leadership needs to be in a form that engages seriously with the provinces and with Indigenous communities. In the absence of that engagement and the drawing together of different communities around a vision, the Constitution contains sufficient mechanisms to raise real challenges for the development of a Northern Corridor despite the surface appearances of the potential for unilateral federal action. Negotiated agreements on the Northern Corridor could connect with a unified set of federal standards, following a model like the Trans-Canada Highway, and achieve appropriate rights-of-way. But the present is a more complex era for these projects than 1949 was. Canada is a complex place, but the right leadership can achieve much in bringing Canadians together in visionary ways in support of a project that could do a lot for our shared lives.

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