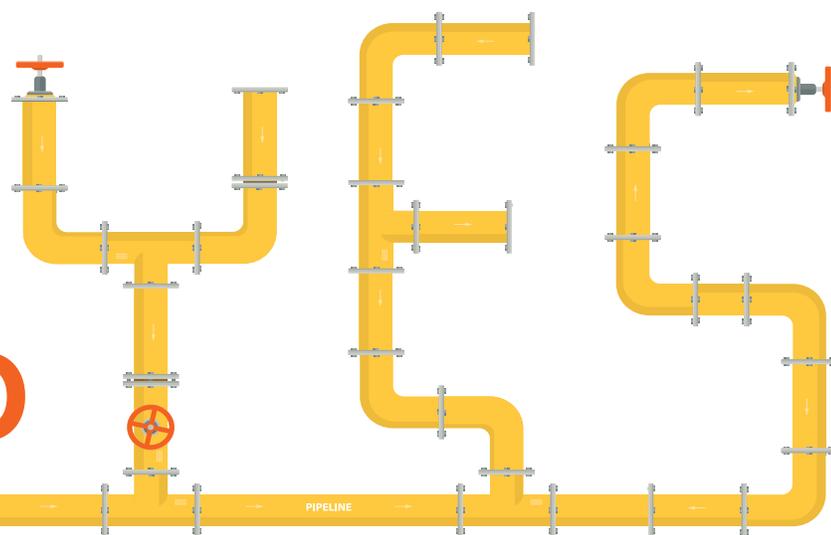


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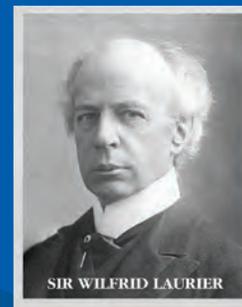
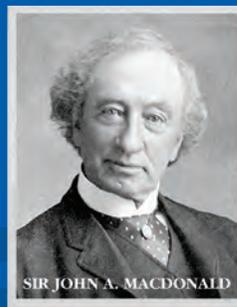


January
2021

GETTING TO



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Preface¹

Dwight Newman

The set of short papers being published together here engage with a challenge that Canada faces in developing various forms of linear infrastructure. Increasingly, non-unanimity has become an obstacle to infrastructure development. We have seen this phenomenon with a number of situations involving pipelines, but the problem also bears on other future development, such as electric lines for renewable power projects. In Canada, it is also often the case that major infrastructure projects with broad support among affected Indigenous communities, such as the Trans Mountain Pipeline expansion, are strongly opposed by a few. These papers seek to understand these problems and to offer some possible paths forward.

James Coleman's paper opens the collection with the concept of a “jurisdictional anticommons” that describes many of the underlying challenges in linear infrastructure development, offering a helpful theoretical lens. **Ken Coates** and **Steven Saddleback** offer a paper discussing effective engagement oriented toward seeking approval from Indigenous communities. **Malcolm Lavoie**'s paper describes some particular challenges associated with jurisprudence in Canada's Federal Court system in recent years. **Dwight Newman**'s paper closes out with some comments on the duty to consult doctrine and possible options for seeking greater clarity on lingering legal uncertainties in this space.

The authors in this collection provide some helpful options that could be applied to resolve some of the challenges facing linear projects. These include (but are not limited to):

- Establish forward-looking agreements to allow construction when it is in the common interest;
- Allow parties in a project's path to have certain forms of collective participation in the decision on whether to approve a proposed project and

level of compensation;

- Develop the law of judicial remedies in a way that respects the rights of Indigenous communities opposed to a project while also balancing the rights of Indigenous communities seeking to derive economic benefits from their traditional territories;
- Enforce the Government of Canada's decisions to approve projects, after the legal and political requirements for consultation have been addressed;
- Maximize Indigenous participation in all aspects of the proposed project;
- Adopt case-by-case use of parliamentary approvals of specific projects;
- Develop preapproved corridors with some differently negotiated consultation process; and
- Proceed with a reference case to the Supreme Court in order to achieve greater certainty on the duty to consult doctrine.

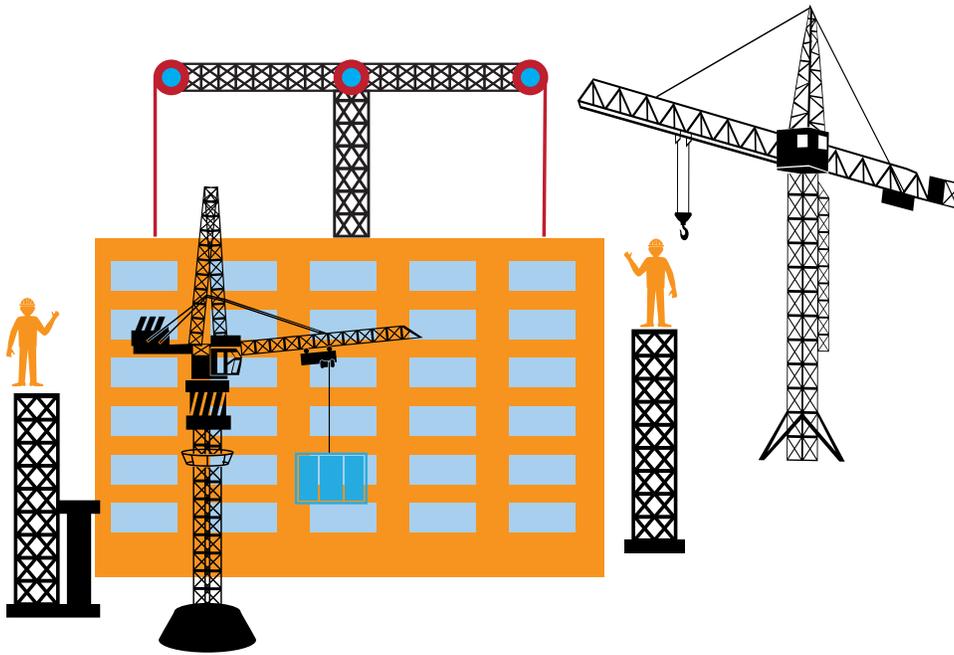
These papers are meant to foster discussion as opposed to purporting to offer definitive answers. But that discussion is vital in Canada today. The same set of issues that have stymied pipeline development in recent years pose potential future challenges to electric lines for renewable power projects and, indeed, all future linear infrastructure projects. Such projects are part of developing the country in support of prosperity for Indigenous and non-Indigenous Canadians alike. The authors here attempt to think constructively in understanding a problem and in tentatively offering some paths forward. But they hope that many others will take up these discussions further.

Canadian development of appropriate infrastructure has many potential benefits for both Indigenous and non-Indigenous communities. We thank you as readers for engaging with these issues and hope to encourage more discussion that reaches tangible paths forward.

Dwight Newman, QC, is a Professor of Law at the University of Saskatchewan and a Munk Senior Fellow at MLI. He has published a number of books and numerous articles on constitutional law, international law, and Indigenous rights issues.

Endnotes

- 1 The present collection of short papers was first presented at a lunchtime event at the University of Alberta's facilities in downtown Calgary in fall 2019, after which the authors had a chance to rework the papers. The event was a public event of the Legal Reforms for Indigenous Economic Growth (LRIEG) network, which has financial support from the Lotte and John Hecht Memorial Foundation. The LRIEG network, from which further work will appear in the time ahead, involves academics from multiple countries thinking about ways of removing legal barriers that may stand in the way of Indigenous economic growth and publishing on such issues in a variety of contexts and venues. Those within the network do not all agree on all issues, and respectful academic disagreement is a key value of the network, but all involved are hoping to see a future flourishing of Indigenous economies. The Calgary event also saw the presence of David Percy of the University of Alberta Faculty of Law as well as Trevor McLeod and others from Enbridge and the Energy Futures Lab, all of whom offered comments that were helpful as we reworked the papers, as well as Martin Ignasiak from Osler, Hoskin & Harcourt LLP who also gave some remarks on the panel. We thank these entities for their participation, as well as the broad group of fifty Calgary audience members from a diverse set of backgrounds and endeavours. The papers are stronger for the various queries and challenges put to them. We also thank the Macdonald-Laurier Institute and its staff for their patient efforts to get these papers into a published form.



The jurisdictional anticommmons

James W. Coleman

New technology has unlocked cleaner energy sources – natural gas, solar, and wind power – at lower and lower prices. But at the same time, more and more groups are looking to exercise a veto over the pipelines and power lines that could bring them to the consumers that need them. The environmental and economic benefits of these new sources of energy will be squandered if we cannot get them to people who need them to replace higher-cost, dirtier energy sources.

When multiple stakeholders have the right to veto use of a resource, it may go to waste and none of them will benefit. This is known as the problem of the “anticommmons” (Heller 1998). Policy-makers must re-discover the literature on the anticommmons, which diagnoses many of the current dysfunctions in energy transport policy and suggests where we must seek solutions.

When the stakeholders with veto rights are regulators, it may be called a “regulatory anticommons.” When the multiple regulators come from different jurisdictions, we may call this the “jurisdictional anticommons.” This jurisdictional anticommons is a common roadblock to linear energy transport infrastructure: Oil, gas, and renewable power may be locked in if the pipelines and power lines that would bring them to market may be vetoed by the jurisdictions they must cross.

The jurisdictional anticommons is a growing problem for resource development around the world – pipelines and power lines are being held up waiting for approvals from one or two of the jurisdictions they need to sign off. These delays are becoming more common for three reasons. First, as the world uses ever more energy, it increasingly depends on long-distance transport of both oil and natural gas by pipelines that often necessarily cross multiple jurisdictions (Coleman 2020). Second, as we move to cleaner sources of electricity, we will become more dependent on linear energy transport infrastructure: Coal and oil may be easily shipped by relatively flexible truck and tanker routes, but gas and renewable power generally must be shipped by pipelines and power lines (Coleman 2019, 267). Third, increasing concern about the environmental cost of energy sources is causing jurisdictions to flex their regulatory muscles, asserting previously dormant veto rights over linear projects (Coleman 2018, 122).



Gas and renewable power generally must be shipped by pipelines and power lines.

To illustrate the problem of the jurisdictional anticommons, imagine a single sovereign, Upperland, with public natural gas development near its eastern border and competitive markets for gas on its eastern and western borders. Imagine that, during the next 20 years, it plans to extract 10 billion MMBTU (one million British thermal units) of gas from its eastern deposits. Now imagine that gas prices are estimated to average \$2 per MMBTU on its eastern border and \$8 per MMBTU on its western border, so that its gas will be worth \$20 billion in the east and \$80 billion in the west. Finally, imagine that a new natural gas pipeline to carry the gas from east to west would cost \$10 billion, counting all expenditures plus the monetized cost of any environmental harm from the pipeline.

In this extremely simplified illustration, Upperland would likely build or approve the natural gas pipeline: It would get \$60 billion more for its gas at a

cost of \$10 billion. Now, let's change the scenario: Imagine that there is no competitive market for gas at Upperland's western border. Instead, the high-price, \$8 per MMBTU market is on the western border of Upperland's western neighbour, the sovereign state of Lowland. So the pipeline would need approvals from both Upperland and Lowland. Let us imagine that Upperland plans to build the pipeline and will pay for all the environmental harms it causes, so the pipeline's total cost to Upperland is \$10 billion and it costs Lowland nothing.

How much could Lowland charge Upperland to approve the pipeline? One answer is it could charge Upperland up to \$50 billion. For example, if it charged \$45 billion, Upperland could pay that fee, and pay \$10 billion to build the pipeline itself, and still end up with \$5 billion extra because the pipeline would increase its gas profits by \$60 billion. Of course, Upperland would likely walk away from such a pipeline, despite the significant surplus. For one thing, the remaining \$5 billion surplus might not justify the \$55 billion financial outlay. Second, it might be thought unfair or unwise to reward Lowland's stratagem of taking 90 percent of the economic surplus from the pipeline project. So even if both sovereigns had perfect information and no uncertainty about the costs and benefits of a project that promised \$50 billion of net benefit to them, that benefit would only be realized if they could successfully navigate a high-stakes negotiation about how to split that massive benefit.

In reality, these negotiations between Upperland and Lowland would be far more difficult and fraught with ignorance and uncertainty. Neither party would have full information about the cost of the pipeline or its economic benefits. If Lowland estimated the pipeline would provide more profit than Upperland estimated, Lowland might insist on a larger approval fee than Upperland would be willing to offer. Neither Lowland nor Upperland would know whether the other side was bluffing or simply using different estimates. So, in the real world, even with only two parties negotiating, parties often walk away from projects that would have created significant mutual benefits.

Now imagine a natural gas pipeline that requires approval from many sovereigns, each of whom could, in theory, hold out for up to the full value of the pipeline. So imagine that the pipeline must also cross another sovereign's territory – the state of Midland. Midland could also demand \$45 billion, reasoning that that would still leave a tidy \$5 billion profit for Lowland and Upperland to split after paying for the \$10 billion pipeline. The pipeline would, after all, raise the price of Upperland's gas by \$60 billion. Three-way negotiations among Upperland, Lowland, and Midland might well fail due to stubbornness or varied estimations of the pipeline's profitability.

This jurisdictional anticommons is increasingly the reality across North America. In Canada, both provinces and Indigenous communities have increasing-

ly sought to stop federally approved projects. In the United States, states have begun exercising veto power over federally regulated gas pipelines, and some are demanding large payments from pipeline companies seeking approval (Coleman 2019; Coleman and Klass 2019, 727-728 and n.302). So pipeline companies must get approvals from both the federal government and each of the states that their pipelines cross. The same challenges are increasing around the world. And local governments are increasingly seeking to exercise veto power as well. Even when local governments may not have a formal veto, pipeline and powerline companies often offer to pay to limit legal disputes.

As the number of parties increases, the spread in estimates of each pipeline's profitability will also increase – if any one of the many parties with vetoes has an unrealistic view of the pipeline's profits, it may insist on an unrealistic pay-off that will shut down negotiations and prevent construction of the pipeline (cf. Thiel 1988, 894; Kagel and Levin 1986, 917). It is no wonder that these multi-sided negotiations frequently break down.

What can be done about the jurisdictional anticommons? There are no easy solutions. Sovereignty, like private property, admits few exceptions. If the costs of the anticommons are unacceptable, the solutions generally require collective action that undercuts cherished intuitions about the meaning of private property and sovereignty.

*Provinces and Indigenous communities
have increasingly sought to stop
federally approved projects.*

For private property, the most common solution is “eminent domain” or “expropriation” – the state's extraordinary power to take private property for public use so long as it pays just compensation (Merrill 1986; Epstein 1985, 161-181; Michelman 1967).¹ Of course, coequal sovereigns do not have the right to take each other's property in return for compensation. If an eminent domain-like solution could be found for the jurisdictional anticommons, it would be in the context of a superior sovereign: a nation that could insist on construction through provinces or states. But federal systems with a supreme sovereign, such as the United States, sometimes hesitate even to apply eminent domain to their subnational sovereigns.²

A less coercive option would be forward-looking agreements to allow construction when it is in the common interest. The European Energy Charter Treaty could be thought of as one model. When these agreements are made be-

tween subnational sovereigns, they could invoke national authority to ensure that all parties followed through. So if Upperland and Lowland were provinces, they could agree to let the nation make final decisions on interprovincial projects. When these agreements are made between national sovereigns, they could rely on the same enforcement mechanisms used in multilateral investment treaties or other international compacts. That is, nations would be able to use arbitration or sanctions if one of its neighbours reneged on an agreement to allow a project that was found to be in the common interest.

Finally, some scholars have suggested voluntary land assembly as a solution to the anticommons – allowing parties in a project’s path to take a collective vote on whether to approve a proposed project and level of compensation (Heller and Hills 2008, 1469). A land-assembly district would vote in a procedure similar to those used in condominium associations. Land-assembly districts might provide a more helpful analogue for sovereign jurisdictions concerned about the anticommons: The idea would be that sovereigns along a proposed route would collectively decide on whether a project should go forward, but, as in a condominium, no one sovereign would have the right to veto the project.

The jurisdictional anticommons remains understudied but grows increasingly pivotal to our energy future. As nations try to keep pace with a changing energy sector, the need for solutions will become increasingly acute.

James Coleman *is an Associate Professor at Southern Methodist University’s Dedman School of Law and has taught on the faculty of the University of Calgary and Harvard Law School. He publishes the Energy Law Professor blog and can be found on Twitter @EnergyLawProf.*

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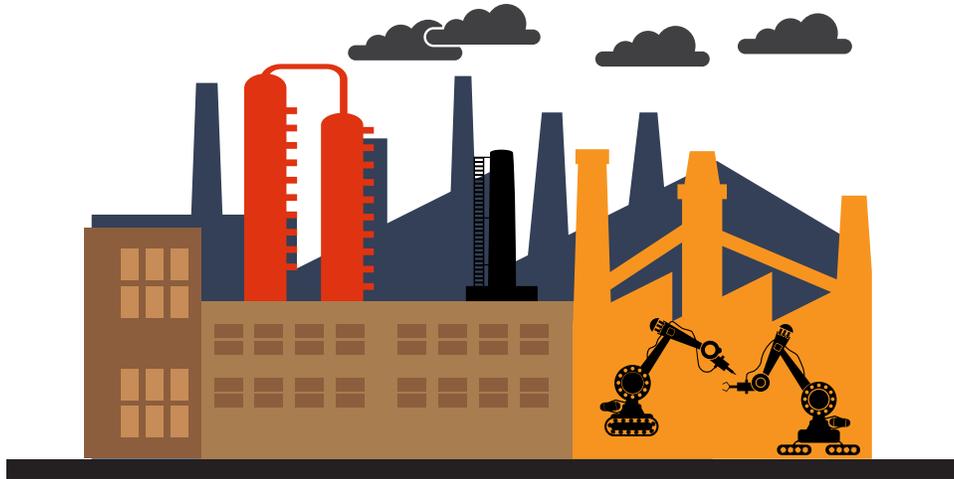
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Endnotes

- 1 US Const. amend. V (“nor shall private property be taken for public use, without just compensation”).
- 2 See *In re PennEast Pipeline Co., LLC*, 938 F.3d 96, 99–100 (3d Cir. 2019), holding that natural gas pipeline companies may not use eminent domain to acquire state property interests because the *Natural Gas Act* did not abrogate state sovereign immunity nor did the *Natural Gas Act* delegate to private parties the federal government’s exemption from state sovereign immunity.



Linear projects and the challenges of community approval in Canada

Ken Coates and Steven Saddleback

Major infrastructure projects in Canada, including such linear initiatives as pipelines, railways, transmission lines, and roads, share the common challenges of securing uniform support or, at a minimum, tolerance at the community level. There is little that is new to this issue. Indigenous peoples blocked railways in the 19th century, protested road and bridge projects over the generations, and, more recently, challenged pipeline projects like the Mackenzie Valley pipeline in the 1970s. Their concerns range from the local, such as the potential impact on harvesting activities, to global issues

like climate change.

In most Indigenous communities, there are passionate supporters of and equally passionate opponents to almost any project, some drawn by the employment- business, and wealth-producing opportunities, and others deterred by the potentially negative socio-economic and ecological impacts and the disruptive potential of large-scale initiatives. What has changed, dramatically, is the extent to which external agents believe that it is their right and even obligation to intervene in these intensely localized debates.

This is not a uniquely Indigenous issue. Non-Indigenous communities have actively engaged in civil protests against – and in favour of – linear and non-linear projects, both in anticipation of the direct impact on their communities and because of broader environmental, social, and cultural consequences. For governments and companies involved with such projects, the fungible and uncertain community requirements for project approval have added to uncertainty and complicated investment decisions and development timelines. This is highlighted by the global emphasis on “free, prior and informed consent,” a major element in the *United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIP), which passed in 2007 and gave new profile to the aspirations of Indigenous communities. But the rising authority of Indigenous peoples, truly welcome and overdue, has actually been overridden or matched by the actions of external agents, increasingly connected with the environmental movement.

Linear projects, however, are categorically different than site-specific initiatives. Indigenous communities and mining companies in Canada (including the oil sands firms) have done an excellent job – among the best in the world – at working together. There are literally hundreds of impact and benefit agreements between mining firms and Indigenous communities and a high rate of engagement as employees and business collaborators. Linear projects, however, transit numerous communities, sometimes a dozen or more, between the terminal points. Each community along the route has to be consulted and accommodated, a political and administrative process that is costly and time-consuming. The peculiar economic geography of linear projects means that one single community along the route can delay, but rarely stop, the entire initiative.

As of fall 2020, the courts have ruled that communities do not have a veto over resource projects, provided that there has been sufficient consultation. Work was underway on the Trans Mountain pipeline in summer 2020 when Indigenous groups at the southern end of the corridor and several First Nations mid-corridor raised serious concerns, illustrating the limitations of Indigenous control over linear projects. At the same, the multi-year construction delays, expensive court proceedings, and ongoing political debates demonstrate the continuing power of formal and informal resistance, par-

ticularly when coordinated between Indigenous activists and environmental organizations.

A similar process unfolded in the early 21st century against the proposed Mackenzie Valley natural gas pipeline, an initiative that had strong support among many of the Indigenous groups in the region and solid backing from the government of the Northwest Territories. Opponents, including some Indigenous groups and numerous outside and regional environmentalist organizations, fought against the approval, extending the lengthy environmental approval process and prolonging the discussion to the point that the project collapsed.

As the experience of the Trans Mountain Expansion Project (TMX) demonstrates, the combination of a linear project over 1000 kilometres long and loud and sustained Indigenous and non-Indigenous opposition can stall and even potentially kill a project. This can happen, as with the Coastal GasLink natural gas pipeline, despite the approval of all of the elected Indigenous governments along the pipeline route and with strong criticism from only a single subgroup of one First Nation. This happens, in large measure, because of the coordinated activism of environmentalists and Indigenous rights supporters across the country and internationally. Equally, opposition of this type occurs despite governments' establishing extensive and expansive approval processes and then authorizing the projects to proceed. This typically comes after the proponent companies have spent hundreds of millions of dollars on project development, consultation, and environmental assessments.



The courts have ruled that communities do not have a veto over resource projects.

These protests also occurred even with extensive impact and benefit agreements in place with Indigenous communities, including employment and business guarantees, substantial community benefits, and other assurances of Indigenous involvement in project development, completion, and remediation. The scale is notable. In the 1970s and 1980s, major projects proceeded with few direct benefits to the traditional owners of the lands involved. That has now changed. Company–Indigenous agreements now routinely provide millions, if not several hundreds of millions of dollars, in direct and indirect benefits to the Indigenous partners. In some jurisdictions, particularly those where modern treaties establish requirements for resource revenue sharing, the arrangements call for Indigenous communities to receive annual payments based on the productivity of the resource project.

Linear projects, of course, are not the same in the eyes of regional residents or external advocates. Pipelines attract the greatest amount of hostile attention, largely because of their direct connection to the fossil fuel industry, carbon emissions, and climate change. Not surprisingly, pipelines designed to deliver oil sands products to markets attract the greatest amount of critical attention, followed by natural gas projects.

Electrical transmission lines, even when connected to controversial hydroelectric projects like British Columbia's Site C dam, are less controversial in large measure because they cause minimal disruptions and pose limited risks along the transmission route. Roads, with attending infrastructure elements like bridges and tunnels, are viewed in more complex terms, for they provide access to previously wilderness areas, disrupt the environment, often cause overhunting of harvestable animals, and open these regions for development. But for isolated communities, including Indigenous settlements, roads offer a vital opportunity to join the market economy, create jobs, and bring wealth to local residents.

Fibre-optic lines, which are often buried, attract even less commentary; they are seen widely as a "good thing" that offers connectivity and digital engagement to previously cut off territories while occupying a very limited ecological footprint. Fibre-optic lines, like telegraph and land-based telephone networks of earlier times, have a near mythical standing, offering access to the "new economy" to people cut off from 21st century opportunities.

Making the situation even more complicated is the emergence of Indigenous participants and activists on both sides of the linear project debates. Many off-the-grid Indigenous communities fight for access to electrical transmission lines and the Internet. While there are well-coordinated opposition movements contesting the Trans Mountain, TMX, and Coastal GasLink pipelines, Indigenous proponents for natural gas and oil pipelines can be found from Alberta to Hudson Bay and northeastern British Columbia to the northern British Columbia coast.

An Indigenous group is promoting the construction of a railway to connect the Alberta oil fields and the North American rail networks with Valdez, Alaska. An Inuit regional economic development corporation is willing to invest heavily to see a transportation and communications corridor opened in western Nunavut, and Indigenous groups in the Keewatin District are pushing hard for a road connection to Churchill, Manitoba. The development of an extensive hydroelectric network in northwest Ontario has substantial Indigenous investment; the construction of roads to gain access to the Ring of Fire mineral properties in northern Ontario, a matter of intense debate for years, appears to be proceeding with the cautious backing of several Indigenous communities.

It helps to understand the historical context of Indigenous responses to major infrastructure projects. Several of the largest such initiatives in Canadian history – the construction of the Canadian Pacific Railway, the Canadian Northern Railway, and the Grand Trunk Pacific Railway – proceeded with absolutely no discussions with Indigenous peoples along the route and resulted in massive disruptions in harvesting and lifestyles. The disruptions caused directly by construction and indirectly by the waves of settlement and development that followed in their wake traumatized Indigenous communities along the corridors for years to come. The construction of the Alaska Highway during the Second World War relied heavily on First Nations guides with route selection, but without warnings or engagement with Indigenous communities.

In the 1950s and 1960s, the federal government (under the Roads to Resources program) and provincial and territorial authorities built thousands of miles of roads, railways, electrical transmission lines, natural gas and oil pipelines into hitherto hard to reach areas, sparking the development of resource towns, rapid non-Indigenous population growth, major disruptions of regional harvesting, and considerable environmental disruption, all without consulting with Indigenous peoples about the desirability, timing, location, or design of the highways. The construction of major hydroelectric projects and attending transmission lines, particularly in northern Manitoba and British Columbia, were not reviewed with Indigenous communities before they were launched.

“ Indigenous engagement is baked into the foundations of linear project design, approval, and implementation.”

And so it was with hundreds of projects across the country before the 1970s. Indigenous memories are long and, in the case of major projects, dominated by unhappy experiences with major resource developments and linear projects. Communities suffered from the disruption of local ecosystems, non-Indigenous activities on their territories, significant social and cultural dislocations associated with the arrival of newcomers, and the attendant authority of the Government of Canada that accompanied these linear projects. A few residents found temporary work, typically as short-term wage labourers, on the construction projects, but little of the wealth associated with the project stayed with the Indigenous peoples.

On the heels of decades of growing agitation and protest, particularly relating to land claims in the territorial North and the desire for protection from unchecked resource and linear project development, the situation changed

significantly in the 1970s. Two major initiatives – the development of hydroelectric projects in northern Quebec and the proposed construction of the Mackenzie pipeline project in the Northwest Territories – mobilized Indigenous peoples and their allies to intervene.

The agitation of the James Bay Cree and the Inuit of northern Quebec resulted in major land claims settlements that assure Indigenous peoples of a significant return from the developments. In the Northwest Territories, protests led by the Indigenous peoples of the Mackenzie River valley and delta were joined by Indigenous rights support groups, such as Project North (an ecumenical coalition), and environmental groups. Their engagement convinced Prime Minister Pierre Elliott Trudeau to establish a Royal Commission, headed by former Justice Thomas Berger, on the pipeline project and a second one, led by Justice Ken Lysyk, on a proposed Alaska Highway natural gas pipeline.

Both inquiries recommended that the projects proceed – the Mackenzie Valley report called for an extended delay – but both provided ample opportunity for Indigenous peoples to voice their concerns and for governments and project proponents to learn about Indigenous expectations. The northern pipeline inquiries changed the national debate about resource development. Never again would Canadians seriously question whether Indigenous peoples had a role to play in project approval or the right to benefit financially from major infrastructure projects. In these and a growing number of instances, Indigenous peoples pushed back against proposed developments, demanding input into the project and benefits from the investments that proceeded. Some companies provided some compensation or commitments to Indigenous communities, but such arrangements were not legally required or consistent across the country.

Indigenous peoples continued to push back on resource developments, seeking a more permanent role in the sector. Supreme Court judgments in the cases of *Haida* and *Taku* in 2004 changed this dynamic further, requiring consultations and accommodation with affected Indigenous communities. The phrase “duty to consult and accommodate” that framed the Supreme Court decision became part of the Canadian lexicon of reconciliation. The court provided little guidance as to the nature of either the consultations or the required accommodations, but corporate and government practices changed dramatically.

The legal and regulatory environment changed further in 2019, with the federal government’s passage of Bill C-69, which extended the reach of consultative processes and environmental assessments. This bill, which the oil and gas industry saw as being specifically directed at their sector, extended the cost, time, and intensity of negotiations, empowering critics of major projects and adding to the regulatory burden for proponents. The Government of Canada is, as of June 2020, contemplating the re-introduction of Bill C-262, which is

being co-produced with Indigenous groups and which would integrate UN-DRIP with Canadian law (Barrera 2019).

Some resource organizations, particularly the Mining Association of Canada (MAC), are less concerned about Bill C-262. Pierre Gratton, the president of MAC, said of the proposed law, which the minerals industry, accounting for a large majority of the environmental assessment, supported: “This promises to be a better system than what we’ve had for the last seven years” (CBC 2019). The Canadian Association of Petroleum Producers was less sanguine:

A 2016 WorleyParsons Canada study of environmental assessment (EA) practices worldwide observed that, while Canada has an EA process that is one of the most thorough and comprehensive, it also “...currently has one of most expensive, time and resource consuming EA processes in the world.” The proposed legislation has actually expanded the scope of the assessment process to include broader societal or policy matters that may or may not be relevant to a proposed project but provides no clarity or direction on how to weigh such factors in the decision making. (CAPP 2018)¹

Most First Nations saw merit in both Bill C-69 and Bill C-262. National Chief Perry Bellegarde said during the 2018 debate on Bill C-262:

Reconciliation is a non-partisan issue. The United Nations Declaration on the Rights of Indigenous Peoples is a central part of reconciliation. First Nations and Canadians support legislation to implement the UN Declaration. All parliamentarians should be part of this act of reconciliation as a matter of human rights.

Bill C-262 would require the federal government to take concrete action with First Nations to co-develop a national action plan and work together to ensure the laws of Canada are consistent with the Declaration.

Bill C-262 is about working together to build a stronger country for all of us. We look forward to ongoing dialogue with First Nations and Canadians as we work towards the adoption of this Bill. (AFN 2018)

But as Chief Roy Fox (n.d.), the chair of the Indian Resource Council, said of Bill C-69:

Many Indigenous people want a strong resource industry so that we can continue to expand our investments in, and benefits from, development – as employees, as partners and as owners. We are not against development; but we will no longer be bystanders to it. Our goal is to defeat poverty and generate our own revenues in order to actually exercise self-determination. By crippling the energy industry, Bills C-48 & C-69

are a tremendous threat to our continued ability to improve the well-being, health prosperity of our people.

Stephen Buffalo (2020), the president of the Indian Resource Council, said of the Government of Canada's plans regarding UNDRIP:

The 150 First Nations of the Indian Resource Council from across Western Canada have a different view. We are passionate about the environment and will defend our traditional territories to our last breath. But we have worked with the oil and gas industry for generations and know how to cooperate with companies and governments to protect our lands.

The reason First Nations fought so hard for autonomy and for a role in the resource economy is so that we could make decisions about development in our territories. We do not want Ottawa denying us the first chance at real and sustainable prosperity in more than a century. In the current environment, non-Indigenous protesters and environmentalists have been given more of a say in Indigenous economic futures than Indigenous communities themselves.

Canada now finds itself with an extensive set of requirements and regulations governing resource developments, with little in the way of clear guidance. There is no requirement for unanimity and no definition of an acceptable consensus in any of the project approval processes, including those involving Indigenous peoples. But there is also no precise definition of "consultation" under the terms of UNDRIP and the "duty to consult and accommodate" rules of the Supreme Court. Conversely, the Government of Canada has stated repeatedly that Indigenous peoples do not have a formal veto over resource developments, either under Canadian law or through the UNDRIP.

This view is not shared by many First Nations and their supporters, particularly environmentalists who partner with Indigenous groups in opposition to the Trans Mountain pipeline. The debate about the Coastal GasLink pipeline is replete with statements from opponents that the Wet'suwet'en have not "consented" to the project (even though, by any national or international standard or legal requirement, the company has likely exceeded expectations).

Companies are distressed. Projects have been slowed or cancelled, as with the Northern Gateway pipeline and Energy East pipeline. Communities that favour major linear projects, including many First Nations, worry that other First Nations can stop economic developments that carry substantial local benefits.

Yet, linear projects have not all been stopped in their tracks. The Coastal

GasLink project is on track to proceed, with substantial Indigenous support. There are at least four major linear projects under development by Indigenous groups in Western Canada. Indigenous communities are strong supporters – and, in some instances, partial owners – of hydroelectric transmission and renewable energy projects. The Inuit of the Arctic are proposing an ambitious all-weather road project in western Nunavut. Taken collectively, it seems clear that it is the unique circumstances of the Trans Mountain pipeline expansion more than fundamental problems with approval and review processes that are at issue, although the full impact of Bill C-69 is yet to be determined.

The Government of Canada, project proponents, and supportive communities have a limited number of options before them as they pursue linear projects. Projects cannot proceed without extensive community engagement and a clearly demonstrated level of consent. Unanimity is not a core requirement, but a clearly demonstrated agreement at the community level is important, if not legally required. Under Canadian law, as laid out in the *Tsilhqot'in* decision (2014), there are guidelines for how governments can override Indigenous opposition to projects on traditional territories if the initiative is deemed to be in the public interest. In short, community support is highly desirable but not legally essential.

There are several options at hand. Participants, particularly governments and private sector proponents, can consider several possible approaches:

- **Continue to pursue unanimity in terms of First Nations and non-Indigenous community support.** This approach will not succeed, if only because there is almost always some level of local opposition, reinforced by external activists. Unanimity is an impossible target, and it is not the legal standard.
- **Enforce the Government of Canada's decisions to approve projects, after the legal and political requirements for consultation have been addressed.** Given that the bar on consultations is somewhat fungible, uncertainty remains, although this approach is both possible and feasible. The prospect also exists for large-scale civil disobedience associated with this option. Corporate interests, Indigenous proponents, and non-Indigenous supporters will push Canada hard to proceed with these projects; some non-Indigenous activists and some Indigenous communities and people will object to the projects. But if the consultations have been completed and community engagement appropriate, proponents and supporters should expect these initiatives to proceed.

But the lessons of the past two decades are clear: Projects that encounter substantial opposition from the Indigenous peoples whose territories are affected by the development activity have limited chance of being

successful. This is certainly the lesson to take away from Northern Gateway, although that project may have been shut down anyway by the Government of Canada's opposition to West Coast tanker traffic.

- **Abandon all publicly opposed linear projects, even while recognizing the now-Government of Canada owned pipeline and significant economic and employment implications for supportive First Nations.** Should this occur routinely, the consequences for Canada could be dire. The flight of capital from Canada would accelerate and the economic impact on participating Indigenous peoples and non-Indigenous communities would be dramatic. For many, if not most, Indigenous communities, participation in major projects is the only realistic pathway out of generations of economic marginalization and despair. But in a risk-averse nation like Canada, the abandonment process has occurred with Energy East and many other projects and remains the centrepiece of environmentalist demands for government action.
- **Maximize Indigenous participation in all aspects of the proposed project.** This is the new approach, one that often begins with Indigenous groups as proponents or partners in the linear project development. The new model – indeed, the only viable long-term approach for Canada – builds in Indigenous engagement at every step of the process. In these times, this often includes community equity investment, the co-management of the review and environmental assessment processes, and shared commitments and outcomes. There are dozens of linear projects currently under development or being proposed in Canada. Companies have learned that they must embrace collaboration and partnership with Indigenous communities as a foundation for strong, sustainable, and mutually beneficial businesses.

Canada finds itself in an extremely difficult situation, facing a problem that is complicated by multiple perspectives and interests, internal and external pressures, high financial and employment stakes, political and constitutional conflicts, and exceptionally strong emotions. There is no simple solution here. There have been comparable issues in the past, with the 1995 cancellation of Alcan's Kemano Completion Project facing similar public opposition and a mid-project change by the government in British Columbia, but with much less legal contestation. The project was stopped in mid-construction, with a substantial payout to Alcan at the end of protracted negotiations.

Conversely, the fact that the Coastal GasLink and LNG Canada mega-project has been able to secure widespread support across northern British Columbia shows that the barriers to development remain somewhat permeable – although the project has not been completed as of fall 2020. Recent developments reinforce this collaborative model. TC Energy, majority owners in Coastal GasLink, just sold 65 percent of the company – for \$600 million – to

the Alberta Investment Management Company (AIMCo) and KKR, a public sector pension fund in South Korea. TC Energy held on to one-third of the firm but has offered to sell 10 percent of the company to First Nations with agreements in the company. The AIMCo and KKR decision will, in turn, trigger over \$6.5 billion in investments in the project by a consortium of Canada and international financial institutions (Yunker 2020).

Left to the standard triumvirate of major linear project development – Indigenous, government, and business – these would be impressive and exciting days. But in a strange inversion of external influences, the three partners are not able to proceed in a stepwise fashion. Today, Indigenous engagement is baked into the foundations of linear project design, approval, and implementation. But external actors, including project supporters, industry associations, chambers of commerce, and others, now put themselves in opposition to Indigenous and corporate plans.

“ *Indigenous proponents for natural gas and oil pipelines can be found from Alberta to Hudson Bay.* ”

These external organizations, particularly Canadian and international environmental groups and Indigenous support groups (some of them Indigenous in nature), have intervened in many projects. There is a serious determination behind these organizations, which are driven by particular perspectives on climate change and environmental protection of Indigenous rights. On occasion, the external groups enter the discussions at the request of the Indigenous community, a subset of the Indigenous population, or without an invitation. In the latter case, it is not unusual for the Indigenous people to resent the intrusion of the self-styled “helpers.” It is ironic that, after spending years fighting to gain the ability to shape development projects, Indigenous groups find themselves struggling with interventions by external organizers that have the potential to undermine projects and undercut local economic development plans.

Despite a general impression that Indigenous peoples oppose major natural resource projects, the contrary is much closer to the truth. Indigenous concern and protests are significant, but they tend to be centred outside the traditional territories of the affected First Nations and Métis people. Major steps have been taken to empower Indigenous peoples through project review processes, the growing activism of the environmental movement (at times in concert with Indigenous communities), increasing regulation of resource

development projects, and growing global concerns about climate change. There was the added complication of a change of the federal government in 2015 and the Justin Trudeau government's search for a way of gaining "social licence" to build major energy projects by adopting strong climate change measures.

Canada clearly needs a way forward, but it is trying to do so without three critical elements:

Clarity: At present, the various positions as to what is required for project approval are not well understood or publicly explained. Despite all of the rhetoric and commentary on Indigenous engagement and linear project development, the official positions of First Nations, Métis associations, communities, business and industry associations, and governments in the affected territories are often not fully understood. Individual communities or organizations support and oppose specific projects for a wide variety of reasons, and with greater or less intensity. Debates about linear projects often proceed with considerable uncertainty about the positions of the many key actors along the route.

Understanding the Consequences of Cancelling Projects: While the environmental and social consequences of building specific projects have been thoroughly explored, the implications of the full cancellation of an initiative remain much less certain. There are obvious losses to project advocates associated with the decision. But many other groups, including existing oil and gas operators, Indigenous partners, downstream developers, workers, regional businesses, and affected communities, have a great deal at stake. Questions should also be addressed about the associated impact on tax revenues – federal, provincial, and territorial – and the subsequent impact on government services at the regional and national level if the project is delayed or cancelled.

The Legal-Political Parameters for Approving Linear Projects: The law is quite clear on interprovincial linear projects. The Government of Canada has the legal authority to proceed. But law and politics are intertwined on development projects, a connection that empowers interest groups to work both through and outside the legal processes to pursue their agendas. While debates about linear projects are commonplace, the conjunction of legally assertive opponents, civil disobedience, and provincial/territorial engagement on both sides of the issue complicates already difficult situations.

While various legal strategies are under discussion, it is likely that extralegal interventions will become more commonplace. Indeed, the successful cancellation of any major project would likely empower and embolden resource development opponents in the future, just as the completion of a contentious project would strengthen the hand of future corridor proponents. At

this juncture, politics is the wildcard in the process. The election of the Rachel Notley NDP government in Alberta in 2015 and Justin Trudeau-led Liberals in the federal election of the same year transformed the regional and national landscape, complicating approval processes and delaying progress on several major projects.

If Canada is to have an effective corridor development process in the future, it is vital that there be stability and a substantial level of certainty going forward. Without political guidance, attracting the needed multi-billion-dollar investments and convincing companies to commit to the long and arduous processes of project development, appraisal, and decision-making will be extremely difficult.

Lessons from recent pipeline projects

The national and regional debates over the contemporary linear project development raise important questions about the future of resource development in Canada. Surveys – and here have been many – demonstrate considerable national support, and even strong backing in British Columbia, for the oil and natural gas pipelines, the most controversial of the linear initiatives. A vocal, well-organized, and highly motivated minority, capitalizing on the combination of advances in Indigenous and environmental law and political uncertainty, has managed to slow the project during times when a favourably disposed Conservative government was in Ottawa and when a much more skeptical Liberal government took over. Importantly, even the stark evidence of job losses in the energy sector, the flight of investment capital, and sharp declines in government revenues did not change the opinions of the strongest opponents of the project, whose concerns rest primarily on questions of climate change and carbon emissions.

It is clear that the country does not yet have a clear consensus on how to adjudicate major resource projects and, even less, on how to deal with the sustained opposition, within and outside the legal system, to linear projects. The challenge of securing support falls squarely on the project proponents – to date largely successful in the case of Coastal GasLink and unsuccessful with the Northern Gateway and Energy East projects. Proponents do not have assurances that well-developed, fully assessed, and properly consulted projects will not be stalled through repeated court challenges, with the threat of civil disobedience hanging over initiatives that have secured all the necessary government approvals.

Legal issues are obviously of fundamental importance and have been changing dramatically in recent years. But broader political and social concerns can and do occasionally overrule legally approved projects. Resource development in Canada will not stop in its tracks, and Indigenous participation in mineral and energy projects shows that many communities have found

effective ways to engage with the sector. Linear projects, crossing many Indigenous territories and often provincial and territorial jurisdictions, by definition involve different communities, complicating an already difficult process. One of the greatest ironies is that Indigenous communities likely hold the key to the successful implementation of future linear developments.

A core message from the past 20 years, however, is that most linear projects in Canada proceed, even with the substantial costs and time commitments associated with securing both environmental approvals and Indigenous engagement. While the experience of recent pipelines is fresh in mind, the country appears to have the idea that both linear projects and resource developments are unreasonably delayed and are impossible to undertake. While the pipelines remain highly contentious, most other linear projects are proceeding without undue delay and with substantial community support and participation. Canada's approach to resource activity and corridor development has been recast in recent years, producing effective models of community engagement and Indigenous participation.

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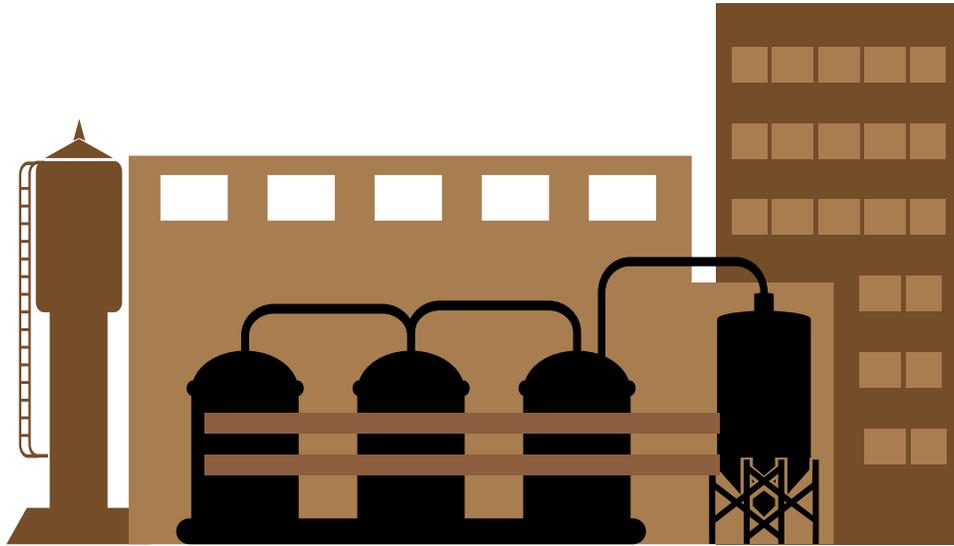
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Endnotes

- 1 CAPP was citing the 2016 report by WorleyParsons 2016, “International Review of Environmental Assessment Processes.”



The duty to consult in the Federal Court of Appeal

Malcolm Lavoie¹

The Federal Court of Appeal has come to play a major role on contentious pipeline projects in recent years. In 2016, a divided three-judge panel quashed the regulatory approval of the already-imperiled Northern Gateway pipeline on the grounds of inadequate consultation with Indigenous communities (*Gitxaala Nation v. Canada* 2016). Then in 2018, a unanimous three-judge panel overturned the approval of the Trans Mountain pipeline expansion, this time partly on grounds of inadequate consultation with Indigenous groups and partly on separate administrative law grounds (*Tsleil-Wautub Nation v. Canada* 2018). Neither decision was appealed to the Supreme Court of Canada. While the Trans Mountain Expansion was later re-approved by the federal cabinet in a decision that was subject to a separate round of

consultation-based legal challenges, the court's original decision to quash the approval caused construction of the Trans Mountain Expansion to cease for a period of almost 10 months (*Coldwater First Nation v. Canada* 2020).²

It seems likely that these two Federal Court of Appeal decisions (especially the Trans Mountain decision) have prolonged the ongoing pipeline capacity shortage in Western Canada. If that is the case, then the cost to the Canadian economy could potentially be measured in tens of billions of dollars (Aliakbari and Stedman 2019). From a purely economic perspective, these have potentially been among the most consequential judicial decisions in Canadian history. Notably, that claim holds true based on the cost of project delay alone, even if the Trans Mountain Expansion is eventually completed.³

The Indigenous consultation jurisprudence of a small number of judges of the Federal Court of Appeal has therefore had major public policy implications for Canada.⁴ Of course, the mere fact that a judicial decision has a major economic impact does not necessarily tell us anything about the correctness of the decision. Yet these policy implications, together with the ongoing significance of Indigenous consultation on linear projects such as pipelines, mean that we should closely study the reasoning that led to these outcomes. This is particularly so given the potential for these issues to be reconsidered at some point by the Supreme Court of Canada. This essay sets out a preliminary assessment of the Federal Court of Appeal's Indigenous consultation jurisprudence, building on some of my past work (see Lavoie 2016, 2019a, 2019b; Lavoie and Lavoie 2018).

Special problems with the duty to consult on linear projects

There was a time in Canada when decisions about land and resource use were made with little regard to the rights of Indigenous nations. The approach was often to build first and address Indigenous concerns later (if ever). Famed projects such as the Canadian Pacific Railway sometimes proceeded by building through Indigenous lands, including established reserve land, and only attempting to resolve the legalities afterwards (Berton 1971, 235-237).⁵

The 1982 recognition of Aboriginal rights in the Constitution provided an opportunity for the legal system to do better. The duty to consult is part of a range of doctrines developed by Canadian courts aiming to recognize and affirm Indigenous rights. Unlike "substantive" Aboriginal and treaty rights, which in many cases protect the use and possession of resources, the duty to consult is a procedural guarantee (*Haida Nation v. British Columbia* 2004, paras 39-51). A Crown duty of consultation and possible accommodation is owed in cases where the Crown contemplates a decision that could affect asserted or established Aboriginal or treaty rights (ibid., para 35).

Because the duty to consult is structured as an open-ended spectrum of potential obligations, the precise requirements of consultation in a given situation are often uncertain (*ibid.*, paras 43-45). Despite this uncertainty, the duty to consult has likely played a significant role in encouraging Indigenous groups, governments, and project proponents to agree on mutually beneficial terms for resource projects (Newman 2014a, 82-84; Lavoie 2019a, 12). The proliferation of impact-benefit agreements recognizing Indigenous communities as partners in resource development is thus a duty-to-consult success story. However, these agreements tend to be reached most easily for projects with primarily localized effects, such as a forestry project or a mine (Lavoie 2019a, 12). Crucially, since these kinds of projects involve a small number of affected parties, the challenges involved in reaching agreement are often manageable.

“ *Linear projects such as pipelines raise a distinct set of challenges for consultation processes.* ”

Linear projects such as pipelines raise a distinct set of challenges for consultation processes. Because these projects may need to follow a route that cuts across the territories of many different Indigenous communities, there can be many affected parties. And since a linear project typically must be built along its entire route or not at all, it may not be possible to build only in areas where parties reach agreement (Newman 2014b; Flanagan 2018). A pipeline (or electrical transmission line or railway) with gaps in the middle is not likely to be very useful. Moreover, it can be practically challenging to engage in consultation with many groups simultaneously, particularly where issues raised by different groups overlap in complex ways. Accordingly, there are at least two special challenges that arise in consulting on large-scale linear projects: 1) Unanimous agreement of all affected parties is less likely than in the case of projects with primarily localized effects, meaning litigation is more likely to ensue; and 2) consultation processes involving many parties are more complex, which can make it more practically difficult to meet required standards for the adequacy of consultation (Lavoie 2019a, 12-13).

Courts have been clear that the duty to consult does not formally amount to a power to veto projects (*Haida v. British Columbia* 2004, para 49; *Chippewas v. Enbridge* 2017, para 59). However, uncertainty and delay due to consultation and associated litigation can raise the cost of capital for a project. Indeed, legal challenges brought by those opposed to a project can potentially raise the cost of capital to the point where the project is no longer

economically feasible, even if many other affected Indigenous communities support the project (Lavoie 2019a, 31). In these cases, the threat of a legal challenge can amount to a *de facto* veto power (Lavoie 2019a, 13-14). This is especially likely to occur on large-scale linear projects, where unanimous agreement is unlikely and where the practical challenges involved in meeting required consultation requirements are greatest.

Consultation on linear projects can lead to arguably undesirable results if these special challenges are not addressed. Firstly, consultation requirements may result in economically inefficient outcomes, since the costs involved in consultation may stymie a project even if there is a hypothetical allocation of the benefits that would make all parties better off (see Shavell 2014, 124-125). Secondly, in cases where the threat of litigation over consultation gives rise to a *de facto* veto power for communities opposed to a project, a kind of legal incoherence can arise, since the legal framework creates an effective veto power even as courts insist that no veto power exists (Lavoie 2019a, 13-14).

Finally, an effective veto power for communities opposed to a project is potentially unfair to those Indigenous communities who support the project, privileging anti-development over pro-development views (Lavoie 2019a, 15, 31). This result is particularly troubling given that Indigenous communities supporting development may also have constitutionally protected rights at stake, including a right to derive economic benefits from Aboriginal title lands (Newman 2018, 16; *Tsilhqot'in Nation v. British Columbia*, 2014, paras 70, 73).

Because the Supreme Court of Canada's leading consultation cases have primarily dealt with consultation on projects affecting relatively small numbers of Indigenous communities, these special challenges have not yet been addressed by that court.⁶ However, the Federal Court of Appeal has had to apply the duty to consult in cases involving large-scale linear projects on several occasions. As argued in the next section, the results have been notable primarily for the failure of that court to engage with or take account of the special challenges associated with consultation in these contexts.

The duty to consult in the Federal Court of Appeal

In recent years, the Federal Court of Appeal has heard consultation-based challenges to the regulatory approvals of a number of pipeline projects (*Chippewas v. Enbridge* 2015 [affirmed by 2017 SCC 41]; *Gitxaala v. Canada* 2016; *Tsleil-Waututh v. Canada* 2018; *Bigstone Cree Nation v. Nova Gas Transmission* 2018; *Coldwater v. Canada* 2020). Two of these projects gave rise to consultation efforts on a particularly large scale. The Northern Gateway project involved consultation with more than 80 Indigenous communities, while Trans Mountain involved consultation with roughly 130 Indigenous communities (*Gitxaala v. Canada* 2016, para 58; *Tsleil-Waututh v. Canada* 2018,

para 72). In both cases, significant numbers of Indigenous communities signed on to support the project, while others remained opposed (*Gitxaala v. Canada* 2016, para 16; *Trans Mountain* 2018). Accordingly, these cases exemplify the special challenges associated with consultation on large-scale linear projects identified above.

In both cases, the federal government’s consultation efforts were initially found to have fallen “well short of the mark,” despite the significant incentives the government had to get the consultation right (*Gitxaala v. Canada* 2016, para 230; *Tsleil-Waututh v. Canada* 2018, para 762). The fact that a well-resourced party like the federal government has been repeatedly unable to meet required consultation standards, even with so much on the line, is at least suggestive of legal uncertainty and of the special challenges associated with consultation on linear projects involving many parties (Lavoie 2019a, 9).

The Federal Court of Appeal has in fact exacerbated some of these challenges in important ways. Most significantly, the court has insisted on a rigid vision of what “meaningful two-way dialogue” looks like, applying a model that is suitable to smaller-scale consultation processes but difficult to implement for large-scale linear projects (Lavoie 2019a, 13; *Tsleil-Waututh v. Canada* 2018, paras 558, 753-763).

“ *The Northern Gateway project involved consultation with more than 80 Indigenous communities.* ”

In the court’s 2018 decision in *Tsleil-Waututh*, addressing the first round of challenges to the Trans Mountain approval, the court seemed to fault the government for adopting a kind of two-stage adjudicative decision-making process, focusing on collecting information about Indigenous concerns at one stage and then later releasing a cabinet decision with extensive written reasons addressing those concerns (ibid.). Such a process does involve a kind of dialogue, in that there is an articulated institutional response to concerns expressed by affected parties. However, the court appeared to take the position that this form of dialogue is necessarily inadequate. Instead, the court held that the government should have been prepared to engage in a real-time back-and-forth between decision-makers and affected communities prior to releasing a final decision with reasons (*Tsleil-Waututh v. Canada* 2018, paras 558, 753-763). It may have been necessary, for instance, to offer potential accommodation measures to communities as part of the consultation process

prior to the final decision.

The court appears to have overlooked some important practical challenges associated with this approach to consultation on large-scale linear projects. For one thing, a large-scale consultation process has many moving parts, and an accommodation measure offered to one community could have impacts on another community. It may be that the best way to manage this kind of complexity is to defer the determination of accommodation measures until all information has been collected and can be considered together as part of a decision (Lavoie and Lavoie 2018).

Moreover, where the decision-maker is a collective body, such as the federal cabinet, there may be limits on that body's willingness to delegate the power to offer accommodation measures prior to the final decision (ibid.). The Federal Court of Appeal's rigid insistence on a vision of dialogue more suited to projects with localized effects is not obviously mandated by the Supreme Court of Canada's jurisprudence, which is in principle consistent with a two-stage adjudicative model of consultation, even in cases requiring "deep" consultation (*Haida v. British Columbia* 2004, para 44; *Chippewas v. Enbridge* 2017).

The Federal Court of Appeal's pipeline consultation jurisprudence has also exacerbated problems in other ways. It has at times extended the scope of consultation to include issues, such as the strength of the Indigenous claim, that may not be directly relevant to the impact of the proposed project on asserted rights. The strength of the Indigenous claim is of particularly limited relevance in cases where the Crown concedes that "deep" consultation is owed (Lavoie 2019a, 8). For instance, one of the main grounds on which the court faulted the government's consultation efforts regarding Northern Gateway was its failure to share its own strength of claim assessments, despite the government's concession that deep consultation was owed (*Gitxaala v. Canada* 2016, paras 218-225, 288-309). On this issue, the Federal Court of Appeal's approach appears to have been inconsistent with more recent authority from the Supreme Court of Canada (Lavoie 2019a, 8; *Chippewas v. Enbridge* 2017, paras 43, 47, 63).

Finally, the Federal Court of Appeal has not yet engaged with the issue of how consultation-based challenges brought by Indigenous groups opposed to a project may affect the constitutionally protected economic rights of Indigenous groups supportive of development. On large-scale linear projects with Indigenous groups on both sides of the issue, a question of balancing rights arises. An approach that can in practice give rise to a *de facto* veto by those opposed to development may not achieve an appropriate balancing of the competing rights at stake. At the very least, this is an issue that ought to be addressed in these cases.

In its recent decisions dealing with the latest round of consultation-based challenges to Trans Mountain, the Federal Court of Appeal appears to have begun to recognize the significance of some of the problems identified above. In the decision granting leave to seek judicial review of the re-approval of the Trans Mountain project, Justice Stratas subjected the leave applications to an unexpectedly stringent level of review (*Raincoast Conservation Foundation v. Canada* 2019; see also Bankes, Olszynski, and Wright 2019). This approach may have been motivated by the recognition that multiple rounds of judicial review can reinforce the risk of a *de facto* veto.

Similarly, the Federal Court of Appeal decision dismissing the challenge to the re-approval of the project based on inadequate consultation contains language that appears to acknowledge some of these problems, though without necessarily providing lasting solutions. The court does take seriously the deference owed to the federal cabinet's determination of the adequacy of consultation, something that was arguably missing from past decisions (*Coldwater v. Canada* 2020, paras 24-36). Yet while the court emphasizes that the duty to consult does not amount to a veto, and notes that many Indigenous communities support the project, it does not provide a framework for balancing the rights of pro-development communities going forward, nor does it clarify issues going to the proper scope or nature of consultation (*ibid.*, paras 54-55, 78, 86). That may be unsurprising given the narrow grounds for the judicial review, but the fact remains that many of the same issues that imperiled the Trans Mountain Expansion would arise in a future consultation-based challenge to a linear project.

Conclusion

The issues described above may have to await resolution by decision of the Supreme Court of Canada. Indeed, it is in the public interest for an appeal to go to that court in the near future in a case involving consultation obligations owed on a project involving a large number of affected Indigenous communities.

There are a number of ways the Supreme Court could address the special issues associated with these projects. Firstly, the court could clearly establish an approach to consultation dialogue that can be met through comprehensive reasons accompanying a decision that addresses Indigenous concerns. Such an approach would be consistent with the description of “deep consultation” in past Supreme Court jurisprudence, and would help address the practical challenges that arise in consultation processes with many affected parties (*Haida v. British Columbia* 2004, para 44). Secondly, the court could further clarify the necessary scope of consultation efforts, particularly as to the strength of Indigenous claims but also more broadly.

Finally, it may be possible to develop the law of judicial remedies in a way that

respects the rights of Indigenous communities opposed to a project while also balancing the rights of Indigenous communities seeking to derive economic benefits from their traditional territories. For instance, it is not clear that inadequate consultation with some of the communities along the route of the project necessarily requires that the regulatory approval be quashed.⁷ Monetary compensation for the breach of consultation obligations may be an appropriate alternative remedy in cases where quashing the approval would create undue economic impacts, including impacts on the rights of other Indigenous communities.⁷

Regardless of the specific approaches adopted, though, courts and governments must strive to develop the law of consultation in a manner that reconciles the interests of all affected parties, including Indigenous communities, the Crown, and the general public. I hope the ideas in this essay will contribute to that process.

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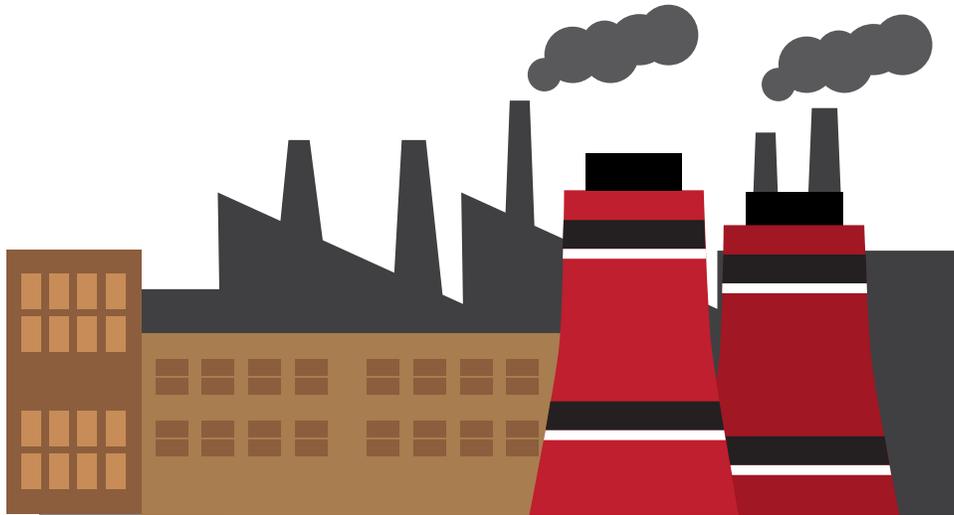
Tsleil-Waututh Nation v. Canada (Attorney General), 2018 FCA 153.

Endnotes

- 1 My thanks to Connor Vaandering for research support on this essay.
- 2 See *Coldwater First Nation v. Canada*, 2020 FCA 34 (leave to appeal to the Supreme Court of Canada refused, 2020 CanLII 43130). Construction work on the Trans Mountain pipeline ceased following the decision in *Tsleil-Waututh*, released on August 30, 2018. Construction of the pipeline did not begin again until it was reapproved by the Governor-in-Council on June 18, 2019.
- 3 Aliakbari and Stedman (2019) estimate the annual cost of the pipeline

shortage to be roughly 1 percent of Canada's GDP. The increased capacity of the Trans Mountain Expansion alone would be sufficient to address the capacity shortage identified by Aliakbari and Stedman. If the *Tsleil-Waututh* decision extended the pipeline shortage by the length of the construction shutdown, then the cost to the economy could have been equivalent to 1 percent of GDP over a period of nine and a half months, which would be more than \$13 billion. Few other judicial decisions in Canadian history could plausibly have had an economic impact on this scale.

- 4 For instance, Justice Eleanor Dawson was an author of both decisions.
- 5 Describing the building of the Canadian Pacific Railway through the Blackfoot reserve.
- 6 *Chippewas v. Enbridge* (2017) dealt with changes to the use of an existing pipeline but only one First Nation challenged the adequacy of the consultation.
- 7 Justice Stratas raised this issue in the decision granting leave to seek judicial review of the re-approval of the Trans Mountain Expansion. See *Raincoast v. Canada* (2019, para 67).
- 7 My thanks to Martin Ignasiak for identifying this as a possibility in our discussions.



Options to achieve greater legal certainty on linear infrastructure projects

Dwight Newman

Linear infrastructure projects in Canada face significant legal uncertainty. This challenge has been prominent in recent years with interprovincial pipeline projects. But many of the same issues apply to potential future linear infrastructure projects of all kinds. Notably, failure to resolve these questions could pose problems for future electrical transmission lines associated with renewable energy projects.

For those projects situated solely within Canada,¹ the largest source of this

legal uncertainty has arisen from Indigenous rights issues connected to the duty to consult doctrine. Some examples have dominated the headlines in recent years.

Unexpected Federal Court of Appeal decisions related to consultation requirements in 2016 and 2018 caused major issues for pipelines and significant uncertainty for future investment.² The 2016 decision effectively brought down the Northern Gateway project after the company pursuing it had invested hundreds of millions of dollars seeking regulatory approval.³ The 2018 decision caused a major delay for the Trans Mountain project, with the ultimate effects of those delays probably still not definitively known.

Both of these decisions involved situations where the Federal Court of Appeal determined that consultation had been sufficient throughout most phases of the regulatory process. Both found problems in the last phase, between a recommended approval from the regulatory process and a final decision by the cabinet. They thus concerned a phase in which project proponents had effectively no opportunity whatsoever to contribute through ongoing engagement.



Linear infrastructure projects in Canada face significant legal uncertainty.

A late 2019 court decision about procedural issues on the Coastal GasLink pipeline is another example of a case in the headlines. The judgment involved could not avoid having implications for whether consultation was to be with elected or hereditary leaders of the Wet'suwet'en Nation in northern British Columbia. The decision helped trigger waves of blockades across the country in early 2020. Again, the duty to consult case law has major implications for linear infrastructure projects.

Unexpected decisions on consultation and public reactions to consultation issues have both generated a climate of a great deal of uncertainty for linear infrastructure projects. That sort of uncertainty severely hampers investment in such projects, whether in pipeline projects today or electrical lines for renewable energy in future. That sort of investment is essential for Canadian prosperity – for Indigenous and non-Indigenous Canadians alike – as well as for Canada's pursuit of various energy options.

The aim of this short paper is to speak to potential options for reducing uncertainties related to the duty to consult on linear infrastructure projects. It is thinking especially of the frequent context in which a project has support from many Indigenous communities but faces ongoing opposition from some

Indigenous communities. In the context of linear infrastructure projects extending across dozens of traditional territories, such situations are challenging to avoid. Lack of clarity on how they are to be addressed is negative for future investment prospects, the Canadian public interest, and the interests of Indigenous communities supportive of projects as a vehicle of economic prosperity. To engage with options, it is necessary to delve slightly deeper into the sources of the uncertainty and then to consider how some options might or might not help to address it.

Uncertainties in the duty to consult doctrine up to 2020

The duty to consult doctrine is widely discussed and has been described at length elsewhere (Newman 2014a, 2014b, 2017b). In simple terms, though, it is a legal requirement developed by the courts since the Supreme Court of Canada's *Haida Nation* decision in 2004 that mandates that governments making decisions about permits or licences that might conceivably have negative effects on Aboriginal rights or treaty rights must consult potentially affected Aboriginal rights-bearing communities prior to making the decision.

In a sense, it was developed by the Supreme Court of Canada in 2004 as a means of managing uncertainty in relation to asserted Indigenous rights claims (whether Aboriginal rights or treaty rights) on which there was not yet consensus as between the Crown and the rights claimants. This consultation is to be meaningful, and it is meant to help minimize negative impacts on Aboriginal rights or treaty rights. As a result, it might call for alterations of projects.

While some aspects of the duty to consult doctrine have become much clearer through a gradual cumulation of court decisions (Newman 2014b, 2017b), both legal scholars and those working in the resource sector have identified ongoing uncertainties. Some of these relate to the precise scope of what is to be done in terms of consultation in specific circumstances (e.g., Lavoie 2019). Others relate to what is to happen when there is agreement to – and even enthusiasm for – a project by most Indigenous communities along the route of a linear infrastructure project but one community holds out against it (e.g., McConaghy 2019).

The case law on the duty to consult doctrine has answered both questions to some degree. On the first uncertainty, while the general duty to consult test cannot be read easily onto just what is required in specific circumstances, two developments help. First, the courts have tried to offer more specific guidance about the components of meaningful consultation, with many of the specific components having analogies to well-known concepts in the field of administrative law. Second, the accumulation of case law where consultation has been challenged gives a set of comparison cases where particular

approaches to consultation have been accepted or not, which should allow for some legal guidance on a particular situation.

On the second uncertainty, the case law does not actually require agreement with a project. It requires that the Crown meet the expectations of the duty to consult doctrine prior to making a decision. Thus, in principle, the Crown could go ahead and approve a project in the context of a community along the route continuing to oppose it, so long as it does what is required under the duty to consult doctrine. The discussion of non-unanimity as a challenge actually stems more from the adoption of Indigenous-industry agreements as a significant way in which project proponents avoid consultation-based uncertainties (Newman and Graham 2021) as well as from some reluctance by governments to make hard decisions in the scenarios that arise.

“ *The case law does not actually require agreement with a project.* ”

That said, there is also an increasing tendency to be thinking about Indigenous consent as the goal or even the norm that applies in such scenarios, and that makes non-unanimity a much larger challenge. The duty to consult case law from the courts has been very clear over the years that it is not meant to generate a consent requirement. But meeting a standard of consent avoids controversy, and it is also increasingly discussed as an international norm, even while the international norms are more complex than usually portrayed by those speaking in this way (Newman 2020).

In terms of what has contributed to some of the uncertainty, the duty to consult jurisprudence has been additionally complicated insofar as a number of decisions that bear on major questions in this particular space were not appealed. The two Federal Court of Appeal decisions referenced, neither of which was appealed to the Supreme Court of Canada, have a notably different tone than some related Supreme Court of Canada decisions, such as the *Chippewas of the Thames v. Enbridge Pipelines*, 2017 SCC 41 (see discussion in Newman 2017a). Another decision from the Federal Court Trial Division, *Coastal First Nations v. British Columbia* (Environment), 2016 BCSC 34, which introduced new challenges for interprovincial pipeline projects related to simultaneous provincial consultation, was arguably a rogue decision from the get-go and was not appealed, but it has finally been judicially questioned in some other cases.

In addition, while judicial decisions in the Indigenous rights space have consistently referenced the possibility of the public interest taking priority over

Indigenous rights based on a test for what they have called “justified infringement,” the application of that test has remained very unclear. There have been very few cases considered on it, as governments have obviously increasingly worked to avoid being in situations where they are infringing rights. Thus, while courts have pronounced on the possibility of public interest priority in quite theoretical terms, they have seldom considered applications to real-world circumstances. One judgment from 2018, *Abousabt Indian Band and Nation v. Canada* (Attorney General), 2018 BCSC 633, did see a British Columbia court carry out a very lengthy examination of the justified infringement test in the context of some constraints on fishing rights, but that application was highly fact-contingent. It would remain challenging to foresee how the test would be applied in other real-world circumstances.

Various uncertainties on key legal factors thus make it immensely challenging to determine the effects of some communities’ taking a position in opposition to a linear infrastructure project supported by many of the communities along the route. The absence of clarity on these points has now effectively generated a situation in which such a project is subject to extensive, unpredictable delay and a meaningful risk of cancellation after the expenditure of extensive resources in the regulatory process.⁴ Such a situation raises real questions about the ability of Canada to take up meaningful economic opportunities that could benefit all (McConaghy 2019).

Does the 2020 court decision on Trans Mountain offer solutions?

The recent decision of the Federal Court of Appeal concerning consultation-based challenges to the recompleted duty to consult process on the Trans Mountain project saw the court speak to both of these uncertainties. This decision, *Coldwater v. Canada* (Attorney General), 2020 FCA 34, is a very significant judgment on the duty to consult doctrine and challenges arising from it, and some might think it offers some solutions to the uncertainties at issue.

First, in the decision, the Federal Court of Appeal applies new administrative law jurisprudence from the Supreme Court of Canada to determine that it should show a great deal of deference to reasonable government decisions on how to apply the duty to consult in particular circumstances. Second, the court also emphasizes that the duty to consult is not a legal veto and is not to be allowed to amount to a practical veto either. As a result, the court had dealt with the case on an expedited basis and had carefully scoped the issues that it would consider, but it more generally emphasized the need for the courts to continue to adapt procedures to ensure that duty to consult cases cannot be used simply to generate delay and practical obstacles. While the courts stand ready to expect that the duty to consult be fulfilled, the Federal Court of Appeal suggests that they should be careful not to allow the doctrine to be

distorted or misused.

This decision is significant. The tone of the decision shows a real impatience with delay tactics. The substance of the decision indicates that the courts are to attempt to find practical paths forward. However, at the same time, it is only a decision of the Federal Court of Appeal rather than that of the Supreme Court of Canada. It is only one decision of this type thus far. Its practical application in various situations is not certain. And those thinking of investing significantly in resource projects are unlikely to take it as having reintroduced any full level of certainty on the duty to consult doctrine, even while it takes some important steps forward in doing so.

Options to reduce uncertainty

Any option for reducing uncertainty in this space should meet a number of baseline criteria: (i) It should reduce uncertainty; (ii) it should be legal and in accord with values of the rule of law; (iii) both as a result of the rule of law and on basic moral considerations, it must be appropriately respectful of Indigenous rights considerations; (iv) it must be perceived as legitimate; and (v) it must be practical insofar as it has meaningful prospects of success as an option.

Some options do not exist in ways that they could have previously. For example, pursuit of appeals of some of the major Federal Court of Appeal cases to the Supreme Court of Canada might have afforded more definitive legal consideration of the issues. But, for a variety of reasons, the project proponents and governments chose not to appeal them.

To meet criteria iii and iv, any pursuit of specific alternative options will need to involve constructive conversations with Indigenous partners. However, given that uncertainty has negative effects for both Indigenous and non-Indigenous communities, there is every reason to think that constructive, forward-looking leadership can facilitate such discussions. Within the parameters of the criteria, several options would seem to be worth serious consideration:

- i. A reference case to the Supreme Court of Canada** – the federal government can send legal issues to the court for determination by way of its reference power. A key challenge is that the main uncertainties are not easily expressible as pure questions of law divorced from facts – the issue is not so much the kind of abstract theoretical statements about the duty to consult and justified infringement that the Supreme Court of Canada has been quite able to engage in, but more so the intermediate-level legal rules on how the more abstract statements are applied to specific facts. A slow route could see a provincial government send a more fact-intensive reference case through a Court of Appeal or even a trial court (as British Columbia somewhat distinctively did with a ref-

erence concerning the constitutionality of prohibitions on polygamy in 2009-11) and then have that move up to the Supreme Court of Canada, but the timeline for that would be lengthy indeed. A more promising route might be the articulation of a policy document stating principles on the intermediate-level rules as they would be applied by government and then a reference to the Supreme Court of Canada on the legal implications of applying that framework. This option opens up the possibility of a significant decision before the courts, but the resolution of legal disputes is a major function for the courts, and the bigger issue is just how quickly this route would offer clarity. It will do so more quickly if commenced than merely contemplated.

ii. The case-by-case use of parliamentary approvals of specific projects

– another option would be to use legislation on specific major projects on a case-by-case basis. The adoption of legislation could follow upon an appropriate course of consultation in each instance but then a decision by the parliament on whether the public interest ultimately was in favour of the project. This would then be a determination in a legislative context rather than the executive context of the governor-in-council. It has messier aspects, but it puts everything in the open. Because the duty to consult doctrine does not apply to the legislation itself, except insofar as part of the justification test, then so long as the development of legislation followed upon an honourable course of prior consultation, such legislation should not be subject to duty to consult problems. Moreover, it should be able to meet the legal justification test, perhaps particularly where a project does have meaningful support from a number of Indigenous communities and the legislative decision is effectively a balancing of different claims. This option requires the dedication of significant parliamentary agenda space and perhaps complex stickhandling through committees. It also has a significant dependence on the government in power at any given time, which gives rise to timeline challenges for projects that do not always easily fit the democratic cycle periods. However, the same is true to a degree of shifts in executive committees, notably the cabinet.

iii. General legislation on the duty to consult – the idea of some overarching piece of legislation has appealed to some commenting on that space (e.g., McConaghy 2019), particularly insofar as it would potentially offer real prospects of predictability in advance. However, the development of such legislation would be massively complex, and it may be a less attractive option as a result. That said, it also warrants ongoing consideration.

iv. The development of preapproved corridors with some differently negotiated consultation process – there is also some thinking about the idea of an energy corridor that would have predesigned arrange-

ments in place for it. These arrangements would provide for consultation on a specific project according to some agreed means. If such corridors could be developed through appropriate means, they would offer the prospect of predictable legal regimes for the development of specific projects. There would be significant effort needed to develop them, but this sort of visionary effort could re-establish some level of certainty for potential projects.

These are not necessarily a complete set of options. But they illustrate that there are a number of options to consider seriously that are potentially capable of meeting the criteria and that can face up to some of the uncertainties generated by the current state of the law.

Current developments may not be going in this direction. At this writing, the more immediate policy development is to be the introduction of new federal legislation committing Canada to an implementation process on the *United Nations Declaration on the Rights of Indigenous Peoples*. It will be important to consider carefully the text of such legislation for what effects it has on certainty. Those concerned for Canada's economic future need to keep legal certainty considerations paramount along with the appropriate protection of Indigenous rights. Indigenous rights and economic prosperity for all need not be at odds, but failure to exercise effective leadership may end up putting them at odds and seizing national tragedy out of national opportunity. Canada's future can still be one of opportunity for all, and we must all keep pursuing the steps to get there.

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Endnotes

- 1 The vagaries of American politics have obviously played havoc with some other projects, including the Keystone XL project, originally to be completed in 2012 or 2013, and mired in political difficulties within the

American process ever since. For some of the history of that project, see McConaghy (2017).

- 2 The decisions referenced here were *Gitxaala Nation v. Canada (Attorney General)*, 2016 FCA 187 and *Tsleil-Waututh Nation v. Canada (Attorney General)*, 2018 FCA 153.
- 3 For discussion of this example, see Newman (2017a).
- 4 A charitable reading of Bill C-69 would see its impact assessment process as focused on seeing an earlier determination of the national interest on a project, with the possibility of earlier determination of some challenges. While a full discussion of Bill C-69 would necessitate a separate paper, Bill C-69 contained many murky aspects, and it does not resolve all the uncertainties on consultation. There thus remains a highly challenging situation, and the question is whether there are any options to reduce the uncertainties as outlined.



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