

Tidewater Talk: Cross-Canada Infrastructure Corridor, the Rights of Indigenous Peoples, and “Meaningful Consultation”

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Calls for cross-country infrastructure corridors have intensified in Canada and around the world. In the North American context, this is in direct response to perceived constraints on building linear infrastructure projects that transport natural resources products to tidewater, including the recent revocation of the Keystone XL pipeline permit by the Biden Administration. However, pursuit of such corridors raises many complex legal issues, particularly with respect to the rights and interests of Indigenous peoples. These legal dimensions of the corridor concept remain not well understood by proponents yet hold the potential to significantly inhibit any corridor initiative. As the COVID-19 pandemic economic recovery gains momentum, including large infrastructure projects and resource development, these legal complexities are of heightened importance. This article sets out the diverse legal landscape across treaty and non-treaty contexts in Canada today, and then describes government consultation obligations with respect to Indigenous peoples, including “meaningful consultation,” that would be involved in pursuing the corridor concept. Overall, the analysis shows that tensions, complexities, and sensitivities that have produced friction in the contemporary legal sphere pertaining to large linear infrastructure projects and the rights of Indigenous peoples would still be present in pursuing the corridor proposal. Meanwhile, further change in the law is entirely foreseeable, particularly given the federal government’s commitment to full implementation of the United Nations Declaration on the Rights of Indigenous Peoples.

I. INTRODUCTION	108
Figure 1. Preliminary Map of the Northern Corridor	111
II. RIGHTS OF INDIGENOUS PEOPLES: THE LEGAL LANDSCAPE	112
A. Non-Treaty	116
B. Historical Treaties	118
Figure 2. Historical Treaties of Canada	119
C. Modern Treaties	122
Figure 3. Modern Treaties and Self-Government Agreements	123
III. THE DUTY TO CONSULT, “MEANINGFUL CONSULTATION” AND THE CORRIDOR	124
A. The Duty to Consult and Accommodate	124
B. “Meaningful Consultation”	129
C. Meaningful Consultation and the Corridor	138
IV. POTENTIAL FORMS AND FORUMS FOR CROWN CONSULTATION ON THE CORRIDOR	140
V. CONCLUSION	145

INTRODUCTION

Perceived constraints on getting Canadian commodities to global markets,¹ including the Biden Administration’s revocation of the Keystone XL pipeline permit,² have led to intensifying interest in a cross-country infrastructure corridor.³ Contemporary consideration of such a corridor across “Mid-Canada” flows from interest in the idea in the late 1960s and early 1970s.⁴ This concept

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¹See STANDING SENATE COMMITTEE ON BANKING, TRADE AND COMMERCE, NATIONAL CORRIDOR: ENHANCING AND FACILITATING COMMERCE AND INTERNAL TRADE (2017) [hereinafter Senate, *National Corridor*].

² Joseph R. Biden Jr., *Executive Order on Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis*, THE WHITE HOUSE § 6 (Jan. 20, 2021), <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/20/executive-order-protecting-public-health-and-environment-and-restoring-science-to-tackle-climate-crisis/>.

³ Andrei Sulzenko & G. Kent Fellows, *Planning for Infrastructure to Realize Canada’s Potential: The Corridor Concept*, 9:22 THE SCH. OF PUB. POL’Y PUBL’NS (CANADIAN NORTHERN CORRIDOR SPECIAL SERIES) 1 (2016), <https://www.policyschool.ca/wp-content/uploads/2016/06/northern-corridor-sulzenko-fellows.pdf>. See also Senate, *National Corridor*, *supra* note 1.

⁴ Senate, *National Corridor*, *supra* note 1 at 21. See also RICHARD ROHMER & NORMAN SIMPSON, MID-CANADA DEVELOPMENT CORRIDOR: A CONCEPT (1970), <https://www.acec.ca/files/>

has received renewed attention in recent years,⁵ typically referred to as a “Northern Corridor” or “Northern Corridor right-of-way”.⁶ The vision is similar to that of the past: a 7,000 kilometer corridor in Canada’s North and near-North that would establish an east-west right-of-way for road, rail, pipeline, electrical transmission and communication networks, and connect with existing networks in southern Canada” (see Figure 1).⁷ What has changed significantly, however, is the Canadian legal landscape pertaining to the rights of Indigenous peoples, particularly with respect to government obligations to consult Indigenous communities and accommodate their rights and interests.⁸

Linear infrastructure projects by their very nature hold the potential to directly and indirectly involve multiple, diverse Indigenous communities,⁹ each possessing constitutionally protected rights and interests. A single pipeline project could easily involve more than 100 Indigenous communities,¹⁰ and this would certainly be the case in relation to the proposed Northern Corridor initiative. The importance and complexities associated with large linear projects and potential impacts on Indigenous peoples has been recognized for many decades, most

Advocacy/Mid-Canada-Development-Corridor%20Acres-Rohmer.pdf; Sulzenko & Fellows, *supra* note 3 at 16.

⁵ Senate, *National Corridor*, *supra* note 1 at 6; Sulzenko & Fellows, *supra* note 3; *see also* Justin Trudeau, *Minister of Infrastructure and Communities Mandate Letter*, OFFICE OF THE PRIME MINISTER 3 (Dec. 13, 2019), <https://pm.gc.ca/en/mandate-letters/2019/12/13/minister-infrastructure-and-communities-mandate-letter>; *see also* Council of the Federation, *Premiers Committed to Economic Competitiveness and Responsible Resource Development*, THE COUNCIL OF THE FEDERATION (CANADA’S PREMIERS) (July 11, 2019), https://www.canadaspremiers.ca/wp-content/uploads/2019/07/EA_Strategic_Infrastructure_and_CFS_July11_FINAL.pdf.

⁶ Sulzenko & Fellows, *supra* note 3; *see also* Senate, *National Corridor*, *supra* note 1. For the purposes of this article, unless otherwise stated, the proposed corridor initiative will be referred to as either the “Northern Corridor” or simply “Corridor” throughout.

⁷ Senate, *National Corridor*, *supra* note 1, at 6; Sulzenko & Fellows, *supra* note 3, at 2.

⁸ *See generally* SEBASTIEN GRAMMOND, *TERMS OF COEXISTENCE: INDIGENOUS PEOPLES AND CANADIAN LAW* (2013).

⁹ The term “Indigenous communities” is used throughout this article as a deliberately broad term that encompasses the diverse types of Indigenous communities across the country, including First Nations, Inuit and Metis communities that are organized in different ways such as self-governing nations (which may include Inuit), *Indian Act* bands, Metis Locals and more. This is premised on the reality that the Crown may have a duty to consult in relation to any of these communities. However, it must be noted that there is a complex underlying issue outside the scope of this paper: how the Crown and Indigenous peoples identify what is an Indigenous community and when such communities may be potentially affected by Crown conduct. Indigenous community is also common terminology in recent case law. *See, e.g.*, *Coldwater First Nation v. Canada* (Att’y Gen.) 2020 F.C.A. 34 at 50, 62, 65.

¹⁰ For example, the Trans Mountain Pipeline Expansion Project, which consists of a total of 987 km of new buried pipeline, involved at least 120 Indigenous communities along its route. *See* NATIONAL ENERGY BOARD, *TRANS MOUNTAIN EXPANSION PROJECT 515-517* (2013), <https://apps.cer-rec.gc.ca/REGDOCS/Item/View/2969867>. Similarly, the cancelled Energy East project, perhaps a better analogue for the corridor, would have crossed the traditional territory of 180 Indigenous Communities. *See* Shawn McCarthy, *Energy companies struggle with aboriginal needs on pipelines*, THE GLOBE AND MAIL (Dec. 8, 2013), <https://www.theglobeandmail.com/report-on-business/industry-news/energy-and-resources/energy-companies-struggle-with-aboriginal-needs-on-pipelines/article15818477/>.

notably in the Mackenzie Valley Pipeline Inquiry led by Justice Thomas Berger.¹¹ More recently, the tension between the project assessment regime for linear infrastructure projects and the rights of indigenous peoples has been front center, as seen, for example, in the legal challenges to major pipeline projects such as the Northern Gateway Project¹² (“NGP”) and the Trans Mountain Expansion (“TMX”) Project.¹³

This article succinctly presents the diverse contexts of Indigenous rights and interests present in Canada today, provides clarity with respect to the concept of “meaningful consultation” in contemporary Canadian jurisprudence, and relates this body of law to the Corridor concept. A primary focus is on “meaningful consultation,” a notion that is central in judicial decisions on Indigenous rights in relation to major projects. All nuance in this vast area of law, however, cannot be captured in this short article. This is noted as appropriate throughout, and the final part of the paper identifies several questions that will drive further consideration of consultation obligations in relation to the Corridor.

¹¹ Thomas R. Berger, *The Mackenzie Valley Pipeline Inquiry*, 16.3 OSGOODE HALL L. J. 631 (1978). https://www.pwnhc.ca/extras/berger/report/BergerV1_complete_e.pdf. The process and outcomes of this inquiry are revisited in the final part of this paper.

¹² *Gitxaala Nation v. Canada*, 2016 F.C.A. 187.

¹³ *Tsleil-Waututh v. Canada (Att’y Gen.)*, 2018 F.C.A. 153.

Part II provides a brief description of the Corridor concept and then sets out the diverse legal landscape of the rights of Indigenous peoples in treaty, non-treaty, and modern treaty contexts across Canada. Part III explains Crown consultation and accommodation obligations, providing a basis for exploring “meaningful consultation” in relation to the Corridor.¹⁴ Part IV puts forward comments with respect to legal forms that the Corridor concept may take (e.g. new legislation) and formal forums in which Crown consultation may take place. This Part also includes discussion of the recently overhauled federal impact assessment regime, including preliminary observations on how the Corridor could be assessed as a “designated project” or as a “regional assessment” under the new Impact Assessment Act. Part V provides a short conclusion and identifies several questions that will drive further consideration of Crown consultation in relation to the Corridor.

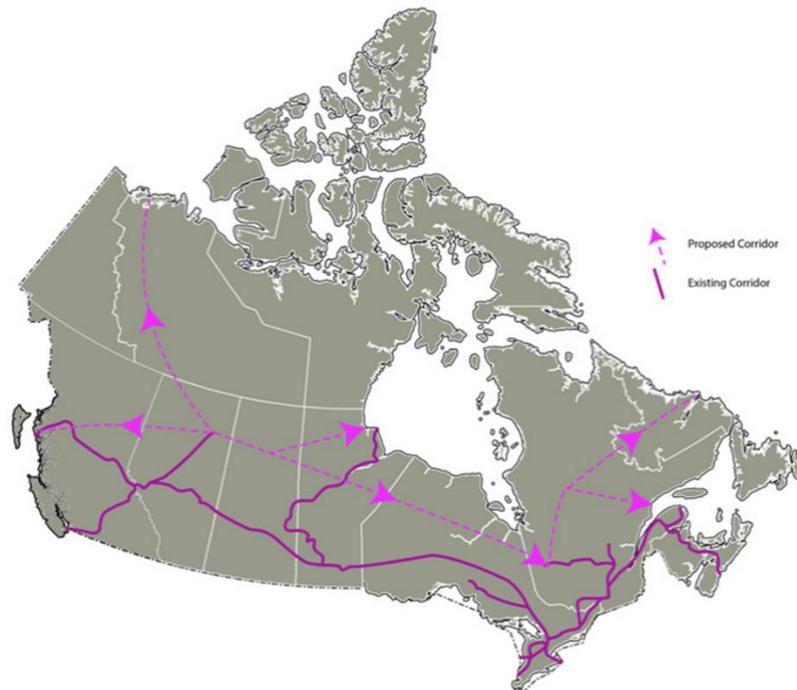


Figure 1. Preliminary Map of the Northern Corridor¹⁵

Overall, this paper presents a legal landscape that has changed substantially since the time of initial consideration of a cross-Canada infrastructure corridor. There have been particularly significant changes in how courts approach asserted and

¹⁴ See *infra*, Part III.

¹⁵ Image from Sulzenko & Fellows, *supra* note 3 at 2; see also Appendix 1 of this article for an additional map provided online.

established rights of Indigenous peoples¹⁶ and many changes to the federal assessment process for major natural resource projects.¹⁷ With the passage of the new impact assessment legislation, a highly politically charged and complicated policy context,¹⁸ and ever-evolving jurisprudence in relation to Aboriginal law and Indigenous law,¹⁹ now is an opportune time to explore these issues. Notwithstanding fluctuating commodity prices in the contemporary context, it is foreseeable that the corridor concept will receive increased attention as leaders and policymakers search for ways to generate economic activity following the COVID-19 pandemic.

II. RIGHTS OF INDIGENOUS PEOPLES: THE LEGAL LANDSCAPE

Before discussing rights and interests of Indigenous communities potentially affected by the proposed Northern Corridor initiative, including meaningful consultation, it is important to describe the Corridor proposal and associated rationale. The initial idea, put forward in the late 1960s by a private sector group led by Honorary Lieutenant-General Richard Rohmer and examined through a subsequent “Mid-Canada Development Conference” and associated report,²⁰ was to develop a corridor that would serve as a basis for construction of east-west transportation infrastructure in Canada’s northern regions.²¹ This article uses as its starting point the descriptions and rough maps set out in a 2016 article by Sulzenko and Fellows²² and the subsequent report of the Standing Senate Committee on Banking, Trade and Commerce entitled, “National Corridor: Enhancing and Facilitating Commerce and Internal Trade.”²³ Sulzenko and Fellows provide the following description:

¹⁶ See GRAMMOND, *supra* note 8.

¹⁷ Nigel Bankes et al., *Pipelines and the Constitution*, 23 REV. OF CONST. STUD. (SPECIAL ISSUE) 1 (2018) https://ualawccsprod.srv.ualberta.ca/wp-content/uploads/2021/02/01_Bankes-4.pdf.

¹⁸ See, e.g., *Climate Leaders Don’t Build Pipelines: Indigenous Advocate Tells Trudeau*, CBC NEWS, May 22, 2019, <https://www.cbc.ca/news/canada/british-columbia/trudeau-vancouver-indigenous-leader-confrontation-1.5145671>.

¹⁹ The term “Aboriginal law” and “Aboriginal and treaty rights” and “Aboriginal rights” are used throughout the paper to refer to the body of Canadian law that pertains to Indigenous peoples. In this way, these terms refer to “settler law” or “non-Indigenous law,” which stands in contrast to the past, present and future laws of Indigenous Peoples. For an in-depth discussion of Indigenous law and laws in Canada, see JOHN BORROWS, *RECOVERING CANADA: THE RESURGENCE OF INDIGENOUS LAW* (2002); Gordon Christie, *Indigenous Legal Orders, Canadian Law, and UNDRIP*, in *BRAIDING LEGAL ORDERS* 47 (John Borrows et al., ed., 2019). The terms “Indigenous rights” and “rights of Indigenous peoples” are also used throughout this paper, recognizing that this term has become preferred in Canada and internationally in accordance with usage in G.A. Res. 61/295 United Nations Declaration on the Rights of Indigenous Peoples (Sept. 13, 2007).

²⁰ Sulzenko & Fellows, *supra* note 3, at 16 and 25.

²¹ Senate, *National Corridor*, *supra* note 1, at 3.

²² Sulzenko & Fellows, *supra* note 3.

²³ See also Senate, *National Corridor*, *supra* note 1.

From west to east, the Northern Corridor would largely follow the boreal forest in the northern part of the western provinces and southern part of the territories, with a spur to the Arctic Ocean down the Mackenzie Valley, and then southeast from the Churchill area to the James Bay lowlands in northern Ontario where the substantial “Ring of Fire” mineral deposits represent a potential development opportunity. Further east, the corridor would traverse northern Quebec to Labrador, with augmented Atlantic ports. The corridor would be about 7,000 kilometers in length and up to several kilometers in breadth, with contiguous roads, rail lines, pipelines and electricity transmission lines. The corridor would interconnect at various points with the existing transportation modes network.²⁴

Citing Sulzenko and Fellows, the Standing Senate Committee describes the concept as follows:

[A] 7,000-kilometre corridor in Canada’s North and near-North that would establish an east-west right-of-way for road, rail, pipeline, electrical transmission and communication networks, and connect with existing networks in southern Canada. Once established, this right-of-way would facilitate the development of private- and/or public-sector projects. . . .²⁵

While clearly still in development, the concept is essentially a legally recognized right-of-way, held by the Crown, running from sea to sea to sea in anticipation of multiple types of privately-led infrastructure projects. As will be discussed in Parts III and IV below, Crown obligations with respect to the rights and interests of Indigenous communities will depend in part on what type of legal tools are used to formalize and implement the concept.²⁶ One key aspect clearly communicated by the Standing Senate Committee is that the “federal government must play a leadership role.”²⁷

The rationale behind the concept, as laid out by Sulzenko and Fellows (2016) and the Standing Senate Committee (2017), appears to be several fold (though it should be noted that Sulzenko and Fellows state their position to be “agnostic” with respect to the costs and benefits of the corridor²⁸). First, it is suggested that the Corridor would establish a “shared transportation right-of-way” that would allow modes of transportation to “co-locate in order to realize economies of agglomeration,” including mitigating environmental risks and reducing emissions of transportation in Canada’s north and near-north.²⁹ Second, it is seen as a way

²⁴ Sulzenko & Fellows, *supra* note 3, at 18.

²⁵ Senate, *National Corridor*, *supra* note 1, at 6.

²⁶ See *infra* Part IV for discussion of questions such as: Would it be a “project” under the new federal impact assessment regime? Would it be underpinned by a stand-alone tailored legislative initiative? Would there be any initial physical activity such as tree clearing or water crossings?

²⁷ Senate, *National Corridor*, *supra* note 1, at 1; *see also* Sulzenko & Fellows, *supra* note 3, at 28.

²⁸ Sulzenko & Fellows, *supra* note 3, at 4.

²⁹ *Id.*

for Canada to address the currently restricted ability to export commodities to world markets.³⁰ Third, it is thought to hold the potential to assist in a broader initiative to address a lack of infrastructure that is perceived to be limiting further development of mining and oil and gas commodity sectors, in anticipation of a time when “better prices will return for Canada’s commodity exports.”³¹ Fourth, a Northern Corridor could facilitate increased economic development in the north, accompanied by raised standards of living and reduced costs of living.³² The Standing Senate Committee, noting these potential benefits,³³ concluded that “[t]he federal government must seize this opportunity.”³⁴ It further concluded that the corridor proposal “should receive attention,” and recommended a research program ensue. This article is part of that research program.

Importance and complexity of the rights and interests of Indigenous peoples were noted by Sulzenko and Fellows and, to some extent, the Standing Senate Committee, which underscored that “Indigenous peoples’ participation in the development of the proposed northern corridor would be fundamental to its success.”³⁵ Sulzenko and Fellows noted similar opportunities,³⁶ but also correctly highlighted that “Indigenous communities are not just stakeholders; they are rights-holders,” and that in some cases Indigenous communities have opposed linear projects and that such projects could be at odds with the interests of Indigenous communities.³⁷

The Corridor proposal exists in a broader context of case law that is quickly evolving, largely as a product of the significant volume of litigation wherein Indigenous communities are challenging government decision-making with respect to energy projects,³⁸ and pipelines specifically.³⁹ Such litigation can be

³⁰ Sulzenko & Fellows, *supra* note 3, at 4; *see also* Senate, *National Corridor*, *supra* note 1, at 5, 7.

³¹ Sulzenko & Fellows, *supra* note 3, at 5.

³² Sulzenko & Fellows, *supra* note 3, at 5; *see also* Senate, *National Corridor*, *supra* note 1 at 7, 12.

³³ While asserted benefits are worthy of further study and scrutiny, and such research was called for by the Standing Senate Committee, it is beyond the scope of this legally-oriented article to engage in such debate. Rather, this article focuses on setting out the rights and interests of Indigenous communities that may be potentially affected by the proposed Corridor.

³⁴ Senate, *National Corridor*, *supra* note 1, at 12.

³⁵ Senate, *National Corridor*, *supra* note 1, at 11.

³⁶ *See generally* Sulzenko & Fellows, *supra* note 3, at 31.

³⁷ Sulzenko & Fellows, *supra* note 3, at 30.

³⁸ *See, e.g.*, *Nunatsiavut v. Newfoundland & Labrador* (Dep’t of Env’t & Conservation), 2015 NLTD(G) 1, 2015 CanLII 360 (NL SC); (challenging provincial authorization related to construction of the Muskrat Falls hydroelectric generating facility in Labrador); *see also* *Clyde River (Hamlet) v. Petroleum Geo-Services Inc.*, 2017 S.C.C. 40 (Can.) (challenging National Energy Board approval of seismic testing off Baffin Island); *Prophet River First Nation v. British Columbia* (Env’t), 2017 B.C.C.A. 58 (challenging approval of the Site C hydro project).

³⁹ *See, e.g.*, *Chippewas of the Thames First Nation v. Enbridge Pipelines Inc.*, 2017 S.C.C. 41 (challenging National Energy Board approval of Enbridge’s Line 3 pipeline project); *see also* *Gitxaala Nation v. Canada*, 2016 F.C.A. 187; *Bigstone Cree Nation v. Nova Gas Transmission Ltd.*, 2018 F.C.A. 89.

seen as a product of Indigenous communities' ongoing efforts to establish Aboriginal rights and title,⁴⁰ including their inherent right to self-determination, in a legal system where such rights are not assumed and must be proven on a case-by-case basis.⁴¹ So, while section 35 of the Constitution Act, 1982 states that, "The existing aboriginal and treaty rights of the Aboriginal peoples of Canada are hereby recognized and affirmed,"⁴² clarification of these rights is an ongoing process that often includes Indigenous peoples having to use the courts to prove the existence of these constitutionally protected rights.⁴³ This reality of contemporary Canadian law attracts significant criticism and calls for reform.⁴⁴ While there is a pressing need for legal analysis with a normative approach, particularly with respect to revitalization of Indigenous laws and governance,⁴⁵ this article focuses on the current content of Canadian law (sometimes referred to as "settler law"⁴⁶) as it pertains to Indigenous peoples.

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

⁴⁰ For a discussion of these concepts, see *infra* Part II, Section A.

⁴¹ See generally Janna Promislow & Naomi Metallic, *Recognizing and Implementing Aboriginal Rights*, in 109 ADMIN. L. IN CONTEXT, (Colleen Flood & Lorne Sossin eds., 3rd ed., 2017).

⁴² Constitution Act, 1982 (Can.), *being* Schedule B to the Canada Act, 1982, c 11 (U.K.).

⁴³ For detail regarding constitutional dimensions before and after the 1982 reform, see JOHN BORROWS & LEONARD ROTMAN, *ABORIGINAL LEGAL ISSUES: CASES, MATERIALS & COMMENTARY* (4th ed. 2012).

⁴⁴ See Brenda Gunn, *Bringing Together International, Indigenous and Constitutional Law*, in BRAIDING LEGAL ORDERS 135, (John Borrows et al, eds., 2019); see also Robert Hamilton & Joshua Nichols, *The Tin Ear of the Court: Ktunaxa Nation and the Foundation of the Duty to Consult*, 56:3 Alta. L. Rev. 729 (2019); see also Kent McNeil, *Extinguishment of Aboriginal Title in Canada: Treaties, Legislation, and Judicial Discretion*, 33:2 Ottawa L. Rev. 301 (2002); see also Naomi Metallic, *The Relationship Between Canada and Indigenous Peoples: Where are We?*, LAW SOCIETY OF UPPER CANADA, SPECIAL LECTURES 2017-CANADA AT 150: THE CHARTER AND THE CONSTITUTION (2017).

⁴⁵ See e.g., BORROWS, *supra* note 19. For a dedicated research unit committed to the recovery and renaissance of Indigenous laws, see *Indigenous Law Research Unit*, University of Victoria (Apr. 25, 2020), <https://www.uvic.ca/law/about/indigenous/indigenoulawresearchunit/index.php>.

⁴⁶ For a discussion of settler law in relation to Indigenous legal traditions, see Fraser Harland, *Taking the 'Aboriginal Perspective' Seriously: The (Mis)use of Indigenous Law in Tsilhqot' in Nation v. British Columbia*, 16/17:1 INDIGENOUS L. J. 21 (2018), <https://ilj.law.utoronto.ca/news/taking-aboriginal-perspective-seriously>.

A. *Non-Treaty*

While vast portions of today's Canada are subject to "Historical Treaties"⁴⁷ and "Modern Treaties,"⁴⁸ significant areas are not and never have been. This is the situation in much of British Columbia, as well as parts of Quebec, Newfoundland, Yukon and Northwest Territories. However, absence of a treaty certainly does not mean no rights.⁴⁹ As John Borrows explains:

Aboriginal rights exist because they are derived from Aboriginal laws, governance, practices, customs and traditions. They exist in Canadian law not as a result of governmental recognition, but because they were not extinguished upon British or French assertion of sovereignty or establishment of governmental authority in what is now Canada.⁵⁰

In areas not subject to a treaty, constitutionally protected Aboriginal rights and title, as opposed to treaty rights, may exist.⁵¹ The courts have been clear in explaining that at no point was there extinguishment of such Aboriginal rights through military conquest, occupation or legislative action.⁵² Rather, courts have found that Aboriginal rights survived the Crown's assertion of sovereignty, and the Crown bears the onus of proving extinguishment.⁵³

Prior to constitutional amendments in 1982, Aboriginal rights were subject to unilateral extinguishment by the federal Crown.⁵⁴ Since the 1982 constitutional reform resulting in section 35, however, extinguishment of Aboriginal rights is no longer available to the Crown.⁵⁵ Instead, courts have been engaged in an exercise of clarifying the nature and content of "existing" Aboriginal rights. A number of landmark decisions from the Supreme Court of Canada ("SCC"), while subject to ongoing criticism,⁵⁶ define the contours of this legal landscape.⁵⁷ A critical

⁴⁷ See THOMAS ISAAC, *ABORIGINAL LAW*, 110-112 (5th ed. 2016).

⁴⁸ *Id.* at 165-166.

⁴⁹ For a discussion of the basic legal nature of Aboriginal rights in Canada following the 1982 Constitutional amendments, see Brian Slattery, *Understanding Aboriginal Rights*, 66:4 CAN. B. REV. 727 (1987).

⁵⁰ BORROWS & ROTMAN, *supra* note 43, at 91

⁵¹ See Brian Slattery, *Making Sense of Aboriginal and Treaty Rights*, 79:2 CAN. B. REV. 196 (2000). For a robust discussion of Aboriginal title and Aboriginal rights in the wake of the *Van der Peet* decision, see Kent McNeil, *Aboriginal Title and Aboriginal Rights: What's the Connection?*, 36:1 ALTA. L. REV. 117 (1997).

⁵² See BORROWS & ROTMAN, *supra* note 43, at 98 (citing *R v. Mitchell*, 2003 S.C.C. 49, and *Haida Nation v. British Columbia (Minister of Forests)*, 2004 S.C.C. 73).

⁵³ See ISAAC, *supra* note 47, at 4, 25. For a deep analysis of the law pertaining to extinguishment, see also McNeil, *supra* note 44.

⁵⁴ *R v. Marshall* (sub nom *R v. Bernard*), 2005 S.C.C. 43, para 16 (Can.).

⁵⁵ *Id.* at 16.

⁵⁶ See Gunn, *supra* note 44; Hamilton & Nichols, *supra* note 44; Metallic, *supra* note 44.

⁵⁷ *R v. Sparrow* (1990), 1 S.C.R. 1075 (Can.); *R v. Badger* (1996), 1 S.C.R. 771 at 793 (Can.); *R v. Van der Peet* (1996), 2 S.C.R. 507 (Can.); *Delgamuukw v. British Columbia* (1997), 3 S.C.R. 1010 (Can.); *R v. Marshall* (1999), 3 S.C.R. 456 (Can.); *Tsilhqot'in Nation v. British Columbia*, 2014 S.C.C. 44 (Can.).

foundational point explaining the source of Aboriginal rights was articulated by Lamé C.J. in *R v. Van der Peet*:

[T]he doctrine of Aboriginal Rights exists, and is recognized and affirmed by s.35(1), because of one simple fact: when Europeans arrive in North America, aboriginal peoples were already here, living in communities on the land, and participating in distinctive cultures, as they had done for centuries. It is this fact, and this fact above all others, which separates aboriginal peoples from all other minority groups in Canadian society and which mandates their special legal and now constitutional status.⁵⁸

While never explicitly defining the term “Aboriginal rights,”⁵⁹ courts have engaged in a process of identifying types of Aboriginal rights and setting out analytical steps to be used for establishing the existence of an Aboriginal right under section 35.⁶⁰ Examples of Aboriginal rights that have been proven to date include the right to fish for food, social and ceremonial purposes, hunting rights, and the right to harvest timber.⁶¹ Commercial rights have also been recognized by the courts.⁶² These rights are typically collective in nature,⁶³ and they are not contingent on the use or occupation of the land nor on proof of Aboriginal title.⁶⁴

A unique and fundamentally important type of Aboriginal right, and one that would be of primary relevance in relation to a cross-country infrastructure corridor, is Aboriginal title. It has been fairly characterized as the “highest form of Aboriginal rights.”⁶⁵ The SCC succinctly explained the legal nature of Aboriginal title in the landmark 2014 case of *Tsilhqot’in Nation v. British Columbia*:

Aboriginal title confers ownership rights similar to those associated with fee simple, including: the right to decide how the land will be used; the right of enjoyment and occupancy of the land; the right to possess the land; the right to the economic benefits of the land; and the right to pro-actively use and manage the land.⁶⁶

Tsilhqot’in was the first time the court issued a declaration of Aboriginal title. It is entirely foreseeable that there will be declarations of this type in the future in non-treaty contexts, as well as some historical treaty contexts.⁶⁷

⁵⁸ *R v. Van der Peet* (1996), 2 S.C.R. 507, para 17 (Can.).

⁵⁹ GRAMMOND, *supra* note 8, at 226.

⁶⁰ *R v. Van der Peet*, 2 S.C.R. 507, para 29-44 (setting out the legal analytical framework).

⁶¹ *See* ISAAC, *supra* note 47, at 18, 93.

⁶² *See, e.g.,* Ahousaht Indian Band and Nation v. Canada (Att’y Gen.), [2018] B.C.S.C. 633 (Can.).

⁶³ *R v. Van der Peet* (1996), 2 S.C.R. 507, para 25 (Can.).

⁶⁴ *Delgamuukw v. British Columbia* (1997), 3 S.C.R. 1010, para 81(Can.)

⁶⁵ ISAAC, *supra* note 47.

⁶⁶ *Tsilhqot’in Nation v. British Columbia*, 2014 S.C.C. 44, para 46 (Can.)

⁶⁷ *See* Robert Hamilton, *After Tsilhqot’in Nation: The Aboriginal Title Question in Canada’s Maritime Provinces*, 67, U.N.B. L. J. 58 (2016).

Today, the process of identifying “existing” Aboriginal rights in treaty and non-treaty areas is ongoing, often involving litigation by Indigenous communities. Where communities have established Aboriginal rights and title, such rights result in certain Crown obligations, including the duty to consult and accommodate discussed further below. Under current Canadian law, courts will not treat established rights as superior to all others—the Crown may still infringe these rights so long as such infringement is justified in the circumstances under the test set out in *R v. Sparrow*.⁶⁸ In many, if not most non-treaty areas, however, such rights have not yet been proven and are viewed by the law as “asserted rights.”⁶⁹ In such contexts, the Crown still has obligations, most notably in terms of consultation. Indeed, it was from the non-treaty context that the duty to consult emerged.⁷⁰

B. Historical Treaties

In Canadian law, treaties exist as legal mechanisms that set out the rights of the parties and define Crown-Indigenous relations.⁷¹ Treaty-making activities across Canada have been ongoing for centuries. The British Crown, and now the federal government of Canada, have been engaged in treaty-making since the 1700s.⁷² Today, a patchwork of treaties covers most of Canada.⁷³ These treaties are typically described as either historical treaties or modern treaties. The former are the focus of this portion of the article (and depicted in Figure 2 below), and the latter are discussed in the next section below.

There is significant variance across historical treaties; these differences evolved as the treaty-making process unfolded across the land.⁷⁴ Generally, treaty making unfolded as follows: Treaties of Peace and Neutrality (1701-1760), Peace and Friendship Treaties (1725-1779), Upper Canada Land Surrenders and the

⁶⁸ *R v. Sparrow* (1990), 1 S.C.R. 1075, para 28-34 (Can.) (Justification Test: 1) Does the infringement serve a valid legislative objective?; 2a) If no, not justified; 2b) If yes, can the legislation be justified in light of the Crown’s responsibility to, and trust relationship with, aboriginal peoples? This can be shown through the government employing means consistent with their fiduciary duty: (i) Was the infringement as minimal as possible?; (ii) Were their claims given priority over other groups?; (iii) Was the affected aboriginal group consulted?; and (iv) If there was expropriation, was there fair compensation?). See generally ISAAC, *supra* note 47, at 85-88.

⁶⁹ *Haida Nation v. British Columbia (Minister of Forests)*, [2004] S.C.C. 73 (Can.), at 15.

⁷⁰ *Id.* See also *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, [2004] S.C.C. 74 (Can.).

⁷¹ *R v. Marshall* (1999), 3 S.C.R. 456, para 7 (Can.). See also *R. v. Soui*, [1990] 1 S.C.R. 1025 at 1035-1045. See generally, Thomas Isaac, *supra* note 47, at 109-112.

⁷² See Crown-Indigenous Relations and Northern Affairs Canada, *Treaties, Agreements, and Negotiations*, GOVERNMENT OF CANADA (2018), (Apr. 25, 2020), <https://www.rcaanc-cirnac.gc.ca/eng/1100100028574/1529354437231>.

⁷³ See GRAMMOND, *supra* note 8.

⁷⁴ For a detailed account of treaty-making activities and Crown-Indigenous relations presented in three periods, see generally GRAMMOND, *supra* note 8, at 41-166.

Williams Treaties (1781-1862/1923), Robinson Treaties and Douglas Treaties (1850-1854), and the Numbered Treaties (1871-1921).⁷⁵ Historical treaties are typically distinguished as Peace and Trade Treaties and Land Treaties,⁷⁶ or as pre-Confederation and post-Confederation treaties.⁷⁷

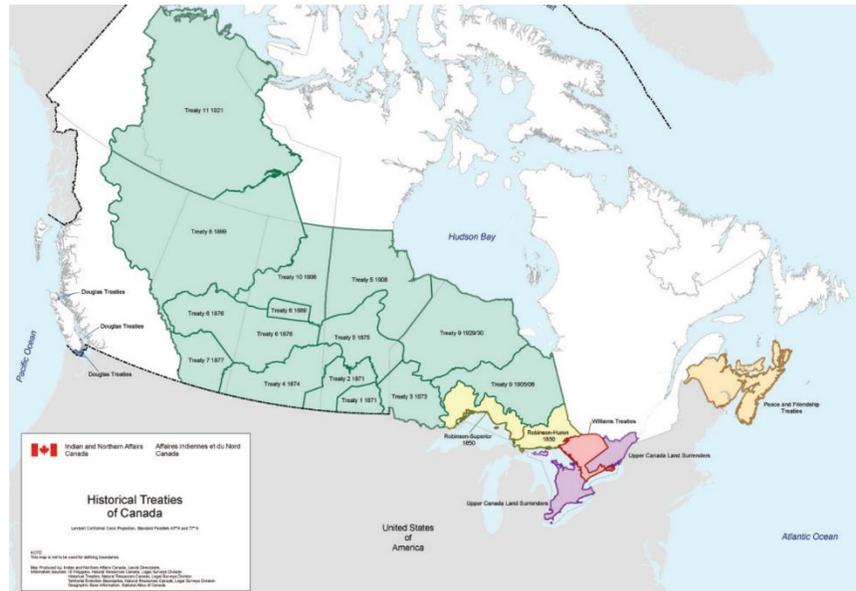


Figure 2. Historical Treaties of Canada⁷⁸

Treaty rights stemming from historical treaties may be procedural or substantive in nature.⁷⁹ For example, a treaty may recognize substantive rights to hunting and fishing.⁸⁰ This can be seen in Treaty 3, which states that “the said Indians, shall have the right to pursue their avocations of hunting and fishing throughout the tract surrendered. . . .”⁸¹ Courts have ruled that treaty rights are not

⁷⁵ For a short summary of each, see Keith Bergner, *The Crown’s Duty to Consult and the Role of the Energy Regulator*, 2 ENERGY REGULATION QUARTERLY (Winter 2014), <https://www.energyregulationquarterly.ca/articles/the-crowns-duty-to-consult-and-the-role-of-the-energy-regulator#sthash.srRzsMIH.pGqIM8zs.dpbs>.

⁷⁶ See GRAMMOND, *supra* note 8, at 289-293.

⁷⁷ See ISAAC, *supra* note 47, at 150-164.

⁷⁸ Image from Indian and Northern Affairs Canada, *Pre-1975 Treaties of Canada*, https://www.rcaanc-cimac.gc.ca/DAM/DAM-CIRNAC-RCAANC/DAM-TAG/STAGING/text-text/htoc_1100100032308_eng.pdf (last visited Apr. 25, 2020).

⁷⁹ *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, [2005] S.C.C. 69, para 27 (Can.).

⁸⁰ *Id.*

⁸¹ Treaty 3 Between Her Majesty The Queen and the Saulteaux of the Ojibbeway Indians at the Northwest Angle on the Lake of the Wood with Adhesions, Oct. 3 1873, <https://www.rcaanc-cimac.gc.ca/eng/1100100028675/1581294028469>.

frozen in time and must be interpreted in a way that provides for modern exercise of these rights.⁸² Case law also indicates that historical treaties are bound by geographic limits, either by the express terms of the treaty or by interpretation.⁸³ In the context of the three prairie provinces, the Supreme Court has held that numbered treaties protect Indigenous treaty parties' rights to hunt throughout their traditional areas, but that the Natural Resource Transfer Agreements⁸⁴ extinguished the right to hunt for commercial purposes.⁸⁵ Similar to Aboriginal rights and title discussed above, the Supreme Court has ruled that treaty rights are not absolute and are subject to justified infringements.⁸⁶

A key distinguishing feature between different historical treaties is whether the treaty contains a land-cession provision or not. Generally speaking, it is the earlier historical treaties, often referred to as the "peace treaties,"⁸⁷ that do not include land cession provisions. In such areas, courts have found that Aboriginal rights exist, either by the terms of the treaty, interpretation of the treaty or otherwise as proven Aboriginal rights.⁸⁸ Such rights, including hunting, trapping and fishing rights, were not extinguished,⁸⁹ meaning that, similar to Aboriginal rights in non-treaty areas discussed above, these rights result in certain Crown obligations,

⁸² R v. Marshall (1999), 3 S.C.R. 456, para 7 (Can.) (stating these specific points and summarizing key principles governing interpretation of historical treaties).

⁸³ R v. Marshall (1999), 3 S.C.R. 456, para 29 (Can.).

⁸⁴ Alberta Natural Resources Act, S.C. c 3 (1930); Manitoba Natural Resources Act, S.C. c 29 (1930); Saskatchewan Natural Resources Act R.S.C. c 41 (1930). For a broad discussion of the Agreements, Indigenous rights and Crown obligations, see Brian Calliou, *Natural Resources Transfer Agreements, the Transfer of Authority, and the Promise to Protect the First Nations' Right to a Traditional Livelihood: A Critical Legal History*, 12:2 REV. OF CONST. STUD. 173 (2007).

⁸⁵ R v. Horseman, [1990] 1 S.C.R. 901 (Can.).

⁸⁶ Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage), [2005] S.C.C. 69, para 14, 23 (Can.). For examples of courts applying the infringement analysis see R v. Lefthand, [2007] A.B.C.A. 206 (Can.); R v. Douglas, [2007] B.C.C.A. 265 (Can.); R v. Bombay, [1993] 1 C.N.L.R. 92, 61 O.A.C. 312 (Can.).

⁸⁷ See, e.g., R v. Marshall (1999), 3 S.C.R. 456, para 6 (Can.). But for suggestion that "the straightforward application of the Sparrow test to treaty rights is inappropriate because of the significant distinctions between Aboriginal and treaty rights," see Leonard Rotman, *Defining Parameters: Aboriginal Rights, Treaty Rights, and the Sparrow Justificatory Test*, 36:1 ALTA. L. REV. 149 (1997).

⁸⁸ See R v. Marshall (sub nom R v. Bernard), 2005 S.C.C. 43, para 16 (Can.). However, in this case the court found that the right did not extend to commercial harvesting rights, or Aboriginal title. See also, Saanichton Marina Ltd v. Claxton, 57 D.L.R. (4th) 161, [1989] 5 W.W.R. 82 (BC CA) (Can.) (regarding existing treaty rights under the Douglas Treaties).

⁸⁹ R v. Marshall (sub nom R v. Bernard), 2005 S.C.C. 43, para 16 (Can.).

including the duty to consult and accommodate.⁹⁰ Aboriginal title may also exist in these areas, though to date no such rights have been proven in court.⁹¹

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

The Plain and Wood Cree Tribes of Indians, and all other the Indians inhabiting the district hereinafter described and defined, do hereby cede, release, surrender and yield up to the Government of the Dominion of Canada, for Her Majesty the Queen and Her successors forever, all their rights, titles and privileges, whatsoever, to the lands included within the following limits. . . .

Her Majesty further agrees with Her said Indians that they, the said Indians, shall have right to pursue their avocations of hunting and fishing throughout the tract surrendered as hereinbefore described, subject to such regulations as may from time to time be made by Her Government of Her Dominion of Canada, and *saving and excepting such tracts as may from time to time be required or taken up* for settlement, mining, lumbering or other purposes by Her said Government of the Dominion of Canada, or by any of the subjects thereof duly authorized therefor by the said Government.⁹²

Courts have held that these provisions do surrender any Aboriginal title to the land to the Crown and are a legitimate basis upon which the Crown may take up lands for development (e.g. a government may authorize commercial or industrial activities such as forestry, mining, and roads).⁹³ However, the Crown's power to

⁹⁰ See e.g., NATIONAL ENERGY BOARD AND CANADA-NOVA SCOTIA OFFSHORE PETROLEUM BOARD, JOINT ENVIRONMENTAL REPORT: DEEP PANUKE OFFSHORE GAS DEVELOPMENT PROJECT, 17, 47, 20 (2007), https://www.cnsopb.ns.ca/sites/default/files/resource/deep_panuke_joint_env_report_11_april_2007.pdf. As described in the final project report, the consultations "included discussions of potential infringement of existing and claimed Mi'kmaq rights, Aboriginal title, and mitigation action taken by the Proponent" (17).

⁹¹ Though Aboriginal title in these areas is unproven in court to date, post *Tsilhqot'in*, 2014 S.C.C. 44, *supra* note 57, there is a strong legal basis for a court to find that title existed in areas covered by the peace treaties and that such title was never extinguished. While title was argued and not proven in *Marshall*, 2005 S.C.C. 43 *supra* note 54, the decision left open the possibility. See Hamilton, *supra* note 67.

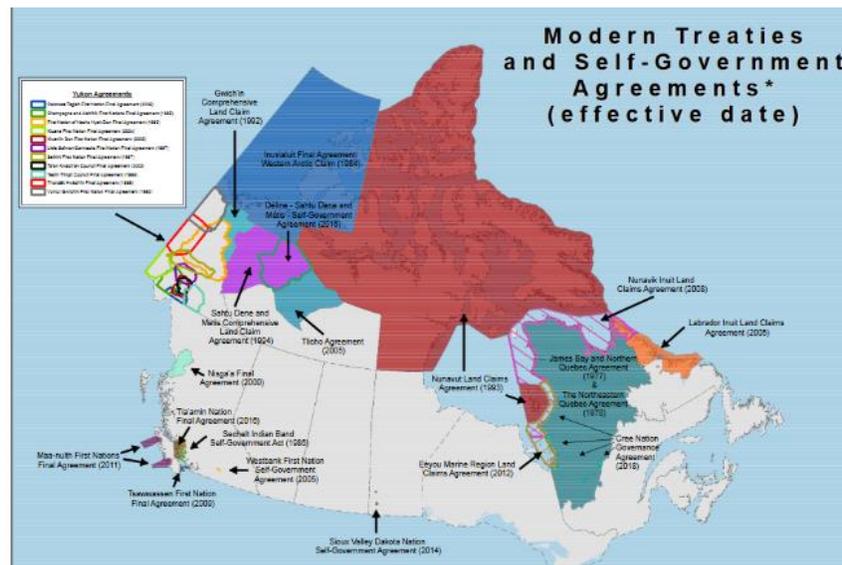
⁹² Treaty 6 Between Her Majesty The Queen and the Plain and Wood Cree Indians and Other Tribes of Indians at Fort Carlton, Fort Pitt, and Battle River with Adhesions, Government of Canada, Aug. 23 1876 (emphasis added), <https://www.rcaanc-cirnac.gc.ca/eng/1100100028710/1581292569426>.

⁹³ See e.g., *Grassy Narrows First Nation v. Ontario (Natural Resources)*, 2014 S.C.C. 48 (Can.). It should be noted, however, that open questions remain as to whether Aboriginal title may still exist in these contexts. Some commentators suggest that the treaties contemplated *sharing* of the land. See e.g., JOHN S. LONG, TREATY NO. 9: MAKING THE AGREEMENT TO SHARE THE LAND IN FAR NORTHERN ONTARIO IN 1905 (2010); see also, RENE FUMOLEAU, AS LONG AS THIS LAND SHALL LAST: A HISTORY OF TREATY 8 AND TREATY 11, 1870-1939 (2004); see also, HAROLD JOHNSON, TWO FAMILIES: TREATIES AND GOVERNMENT (2007); AIMEE CRAFT, BREATHING LIFE INTO THE STONE

take up land is subject to the duty to consult and accommodate in contexts of existing Aboriginal and treaty rights.⁹⁴ Further, if the taking up of treaty land leaves an Indigenous group with no meaningful right to hunt, fish or trap on their traditional territories, then a potential action for infringement of those rights will arise.⁹⁵

C. Modern Treaties

After a long period without treaty-making from the 1920s-1970s, Canada resumed the practice following the decision in *Calder v British Columbia (AG)*,⁹⁶ albeit in a very different manner. Beginning with the James Bay and Northern Quebec Agreement of 1975,⁹⁷ Canada has been in the process of negotiating what are typically referred to as comprehensive land claims agreements, or “modern treaties.”⁹⁸ Twenty-six such treaties are now in place, primarily in the three territories, but also in Quebec, Labrador and areas of British Columbia (see Figure 3). They include First Nations, Inuit and Metis communities.



FORT TREATY: AN ANISHNABE UNDERSTANDING OF TREATY ONE (2013) for commentary that suggests numbered treaties may not have extinguished title.

⁹⁴ *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, [2005] S.C.C. 69 (Can.).

⁹⁵ *Id.* See also, *Fort McKay First Nation v. Prosper Petroleum Ltd.*, 2020 A.B.C.A. 163 (Can.).

⁹⁶ *Calder v. Attorney-General of British Columbia*, [1973] S.C.R. 313 (Can.).

⁹⁷ *Beckman v. Little Salmon/Carmacks First Nation*, 2010 S.C.C. 53, para 2; *James Bay and Northern Québec Agreement* (1975).

⁹⁸ See, e.g., ISAAC, *supra* note 47.

*Figure 3. Modern Treaties and Self-Government Agreements*⁹⁹

In *Beckman v. Little Salmon/Carmacks First Nation* the SCC described differences between historical and modern treaties:

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

The increased detail and sophistication of modern treaties represents a quantum leap beyond the pre-Confederation historical treaties . . . and post-Confederation treaties such as Treaty No. 8 (1899). . . . The historical treaties were typically expressed in lofty terms of high generality and were often ambiguous.¹⁰⁰

Modern treaties are detailed, lengthy comprehensive legal agreements that typically include chapters on wildlife management, development assessment, heritage resources, parks and protected areas, resource royalty sharing, land management, land-use planning, economic development, expropriation, dispute resolution, and more.¹⁰¹ Like historical treaties, modern treaties and the rights contained therein are constitutionally protected.¹⁰² Crown obligations are set out explicitly by the terms of modern treaties; however, the Supreme Court has been clear in finding that a modern treaty is not a “complete code.”¹⁰³ While courts will pay deference to the treaty text,¹⁰⁴ such deference is subject to conformity with the constitutional principle of the “honour of the Crown.” This means, for example, that there may be Crown consultation obligations in beyond what is explicitly set out in the treaty. Such consultation is required because the honour of the Crown and the duty to consult exist independently of the treaty, and the duty is a continuing one in service of the broader objective of reconciliation.¹⁰⁵

Explicit treaty-based consultation requirements, as well as guidance from the courts to date, would guide Crown consultation in relation to the Corridor. Additionally, co-management boards established pursuant to modern treaties,

⁹⁹ Image from MODERN TREATIES: COMPREHENSIVE LAND CLAIMS AND SELF-GOVERNMENT AGREEMENTS, CROWN-INDIGENOUS RELATIONS AND NORTHERN AFFAIRS CANADA (2019), https://www.rcaanc-cimac.gc.ca/DAM/DAM-CIRNAC-RCAANC/DAM-TAG/STAGING/texte-text/treaties-agreements_prov-annual-report-2015-2018_1573224351034_eng.pdf, at 27.

¹⁰⁰ *Beckman v. Little Salmon/Carmacks First Nation*, 2010 S.C.C. 53, para 2 (Can.).

¹⁰¹ For an illustrative example, see INDIAN AND NORTHERN AFFAIRS CANADA AND COUNCIL FOR YUKON INDIANS, UMBRELLA FINAL AGREEMENT BETWEEN THE GOVERNMENT OF CANADA, THE COUNCIL FOR YUKON INDIANS AND THE GOVERNMENT OF THE YUKON (1993) <http://publications.gc.ca/site/eng/413102/publication.html> (last visited Apr. 25, 2020).

¹⁰² See, e.g., *Beckman v. Little Salmon/Carmacks First Nation*, 2010 S.C.C. 53, para 1 (Can.); see also, *Quebec (Attorney General) v. Moses*, 2010 S.C.C. 17 (Can.), at 25; see also *First Nation of Nacho Nyak Dun v. Yukon*, 2017 S.C.C. 58, para 23 (Can.).

¹⁰³ *Beckman v. Little Salmon/Carmacks First Nation*, 2010 S.C.C. 53, para 10, 14 (Can.).

¹⁰⁴ *First Nation of Nacho Nyak Dun v. Yukon*, 2017 S.C.C. 58, para 23 (Can.).

¹⁰⁵ *Beckman v. Little Salmon/Carmacks First Nation*, 2010 S.C.C. 53, para 27 (Can.).

which typically have jurisdiction to conduct or at least contribute to assessment of major natural resources projects, would presumably have a significant role to play assessing any proposed Corridor.¹⁰⁶ The process created for the Mackenzie Gas Project, which was jointly reviewed by federal and territorial with significant involvement from Indigenous communities and co-management boards, would offer guidance in this regard.¹⁰⁷ With approximately 100 comprehensive land claim and self-government negotiation tables underway across Canada (see CIRNAC 2015),¹⁰⁸ this is an increasingly common legal context, notwithstanding treaty implementation challenges that are common once a treaty is finalized.¹⁰⁹

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

A. *The Duty to Consult and Accommodate*

Since the landmark decisions of *Haida Nation v. British Columbia (Minister of Forests)* and *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)* in 2004, courts have been engaged in a process of clarifying the contours of the duty to consult landscape.¹¹⁰ Today, the jurisprudence offers significant clarity in many regards. For example, in *Tsleil-Waututh v. Canada (Attorney General)*, which dealt with Indigenous consultation aspects of the approval of TMX, the Federal Court of Appeal (“FCA”) did not chart any new legal territory, it simply applied existing law to the TMX context.¹¹¹ This was similarly the case in the FCA’s subsequent decision on re-approval of the TMX project in *Coldwater First Nation v. Canada (Attorney General)*, in which the court noted that “[t]he case law is replete with indicia” of what constitutes

¹⁰⁶ For a comprehensive discussion of co-management board regimes generally, see GRAHAM WHITE, *INDIGENOUS EMPOWERMENT THROUGH CO-MANAGEMENT BOARDS* (2020).

¹⁰⁷ For a succinct summary of the regime, see *Dene Tha’ First Nation v. Canada (Minister of Environment)*, 2006 F.C. 1354 (Can.), at 10.

¹⁰⁸ See GOVERNMENT OF CANADA: CROWN-INDIGENOUS RELATIONS AND NORTHERN AFFAIRS, *Comprehensive Claims* (Jul. 13, 2015), <https://www.rcaanc-cirnac.gc.ca/eng/1100100030577/1551196153650>. For a succinct visual chronology of modern treaties, see LAND CLAIMS AGREEMENTS COALITION, *What is a Modern Treaty: Modern Treaty Timeline* (2019), <http://landclaimscoalition.ca/modern-treaty/>.

¹⁰⁹ See, e.g., GOVERNMENT OF CANADA: CROWN-INDIGENOUS RELATIONS AND NORTHERN AFFAIRS, *INTERNAL AUDIT REPORT: AUDIT OF THE IMPLEMENTATION OF MODERN TREATY OBLIGATIONS, ABORIGINAL AFFAIRS AND NORTHERN DEVELOPMENT CANADA* (2013), <https://www.rcaanc-cirnac.gc.ca/eng/1390222162489/1537295228413>. See also Kirk Cameron & Alastair Campbell, *Towards a Modern Treaty Implementation Review Commission*, NORTHERN PUBLIC AFFAIRS (Jan. 14, 2020), <http://www.northernpublicaffairs.ca/index/?s=Towards+a+Modern+Treaty>; see also CHRISTOPHER ALCANTARA, *NEGOTIATING THE DEAL: A COMPREHENSIVE LAND CLAIMS AGREEMENT IN CANADA* 24 (2013).

¹¹⁰ According to CanLII.org, *Haida*, 2004 S.C.C. 73, *supra* note 69, has been cited by the courts 656 times and *Taku*, 2004 S.C.C. 74, *supra* note 70, cited 228 times.

¹¹¹ See Martin Olszynski & David V. Wright, *Case Comment: Tsleil-Waututh Nation v. Canada (Att’y Gen.) 2018 FCA 153*, 11 CAN. ENVTL. L. REP. (2019).

meaningful consultation.¹¹² As such, while some commentators suggest that there is significant uncertainty in the law,¹¹³ uncertainty primarily arises when this now relatively well-defined area of law is applied to a new factual context. Granted, given that across Canada there are more than 630 First Nation communities,¹¹⁴ twenty-six modern treaty regions,¹¹⁵ and a significant number of Metis communities,¹¹⁶ many diverse contexts exist across Canada. This portion of this article sets out the law pertaining to the duty to consult and relates it to the proposed Corridor initiative. In doing so, it references the different contexts set out in above in Part II.

Crown consultation and accommodation obligations are an extension of the legal framework applicable in contexts of potential Crown infringement of section 35 rights of Indigenous peoples.¹¹⁷ In *Sparrow*, the court set out an analytical framework for situations where rights may be infringed and the Crown seeks to justify such infringement.¹¹⁸ In doing so, the court indicated that an important part of the framework for assessing whether infringement may be justified is whether the Indigenous community in question was consulted on the impugned measure.¹¹⁹ As later expressed in *Delgamuukw*, “[w]hether the aboriginal group has been consulted is relevant to determining whether the infringement of aboriginal title is justified. . . [t]he nature and scope of the duty of consultation will vary with the circumstances.”¹²⁰ This set a foundation for the spectrum approach now used by court engaged in a duty to consult analysis.

¹¹² *Coldwater First Nation v. Canada* (Att’y Gen.), 2020 F.C.A. 34, para 15-16 (Can.).

¹¹³ Malcom Lavoie, *Assessing the Duty to Consult*, FRASER INSTITUTE (May 2, 2019), <https://www.fraserinstitute.org/studies/assessing-the-duty-to-consult>; *see also*, Ian Bickis & Dan Healing, *Trans Mountain Ruling Increases Uncertainty Among Resource Industry Groups*, THE CANADIAN PRESS (Aug. 31, 2018), <https://www.nationalnewswatch.com/2018/08/31/trans-mountain-ruling-increases-uncertainty-among-resource-industry-groups/#.W41MUehKjD4>.

¹¹⁴ GOVERNMENT OF CANADA: CROWN-INDIGENOUS RELATIONS AND NORTHERN AFFAIRS, *First Nations* (2017), <https://www.rcaanc-cimac.gc.ca/eng/1100100013791/1535470872302>.

¹¹⁵ GOVERNMENT OF CANADA: CROWN-INDIGENOUS RELATIONS AND NORTHERN AFFAIRS, *Comprehensive Claims* (2015), <https://www.rcaanc-cimac.gc.ca/eng/1100100030577/1551196153650>.

¹¹⁶ *Métis*, CROWN-INDIGENOUS RELATIONS AND NORTHERN AFFAIRS CANADA (2016), <https://www.rcaanc-cimac.gc.ca/eng/1100100014427/1535467913043>.

¹¹⁷ *See* GRAMMOND, *supra* note 8, at 314–15. For a succinct contemporary statement on the difference between the consultation process and the infringement justification process, *see Coldwater*, 2020 F.C.A. 34, *supra* note 112, at 93-94.

¹¹⁸ *R v. Sparrow* (1990), 1 S.C.R. 1075, 1078-79 (Can.).

¹¹⁹ *Haida Nation v. British Columbia (Minister of Forests)*, [2004] S.C.C. 73, para 15 (Can.) (*citing R v. Sparrow* (1990), 1 S.C.R. 1075, 1119 (Can.)). One of the factors in determining whether limits on the right were justified is “whether the aboriginal group in question has been consulted with respect to the conservation measures being implemented.” *See also Mikisew Cree First Nation v. Canada* (Governor General in Council), 2018 SCC 40, para 799 (Can.).

¹²⁰ *Delgamuukw v. British Columbia* (1997), 3 S.C.R. 1010, 1112-13 (Can.).

*Haida*¹²¹ and *Taku*,¹²² which arose in contexts of asserted Aboriginal rights,¹²³ expanded the role and prominence of consultation in Crown-Indigenous relations. As explained by the Supreme Court in *Haida*: “This case is the first of its kind to reach this Court. Our task is the modest one of establishing a general framework for the duty to consult and accommodate, where indicated, before Aboriginal title or rights claims have been decided.”¹²⁴ That framework is now relatively settled, and was succinctly restated in the *Tsleil Waututh*:¹²⁵

The duty to consult is grounded in the honour of the Crown and the protection provided for “existing aboriginal and treaty rights” in subsection 35(1) of the *Constitution Act, 1982*. The duties of consultation and, if required, accommodation form part of the process of reconciliation and fair dealing (*Haida Nation*, paragraph 32).

The duty arises when the Crown has actual or constructive knowledge of the potential existence of Indigenous rights or title and contemplates conduct that might adversely affect those rights or title (*Haida Nation*, paragraph 35). The duty reflects the need to avoid the impairment of asserted or recognized rights caused by the implementation of a specific project.

The extent or content of the duty of consultation is fact specific. The depth or richness of the required consultation increases with the strength of the *prima facie* Indigenous claim and the seriousness of the potentially adverse effect upon the claimed right or title (*Haida Nation*, paragraph 39; *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, 2010 SCC 43, [2010] 2 S.C.R. 650, paragraph 36).

When the claim to title is weak, the Indigenous interest is limited or the potential infringement is minor, the duty of consultation lies at the low end of the consultation spectrum. In such a case, the Crown may be required only to give notice of the contemplated conduct, disclose relevant information and discuss any issues raised in response to the notice (*Haida Nation*, paragraph 43). When a strong *prima facie* case for the claim is established, the right and potential infringement is of high significance to Indigenous peoples, and the risk of non-compensable damage is high, the duty of consultation lies at the high end of the spectrum. While the precise requirements will vary with the circumstances, a deep consultative process might entail: the opportunity to make submissions; formal participation in the decision-making process;

¹²¹ *Haida Nation v. British Columbia (Minister of Forests)*, [2004] S.C.C. 73, para 520 (Can.).

¹²² *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, [2004] S.C.C. 74, para 551 (Can.).

¹²³ Relating this to the above discussion, *Haida* and *Taku* were both situated in non-treaty areas in British Columbia.

¹²⁴ *Haida Nation v. British Columbia (Minister of Forests)*, [2004] S.C.C. 73, para 520 (Can.).

¹²⁵ For another succinct summary of key duty to consult principles, see *Tsleil-Waututh*, 2018 F.C.A. 153, *supra* note 167-168. See also *Ktunaxa Nation v. British Columbia (Forests, Lands and Natural Resource Operations)*, 2017 S.C.C. 54, 422-23.

and, the provision of written reasons to show that Indigenous concerns were considered and how those concerns were factored into the decision (*Haida Nation*, paragraph 44).¹²⁶

The duty to consult is judge-made law, and, as explicitly anticipated by the Supreme Court in *Haida*, courts have been engaged in an ongoing process of “filling in the details.”¹²⁷ A number of important points of clarity have been articulated by the courts in the years since *Haida* and *Taku*.

The Supreme Court has clarified, for example, that the duty to consult and accommodate exists in both historical treaty¹²⁸ and modern treaty¹²⁹ contexts. This would be highly relevant in the context of a cross-Canada corridor, which would most certainly cross historical treaties en route from the Atlantic to Pacific coasts, and modern treaties en route to the Arctic Ocean (see Figures 1 and 3). These contexts would include First Nations, Metis and Inuit communities, with the latter obviously being located across Northern Canada.

The courts have also been clear in stating that perfection is not the standard.¹³⁰ Rather, as stated in *Haida*, “[t]he government must make every reasonable effort to inform and consult, this suffices to discharge the duty.”¹³¹ What is required is “a commitment to a meaningful process of consultation.”¹³² This means that the duty to consult does not equate to a “duty to agree,”¹³³ and does not provide Indigenous groups with a veto.¹³⁴

This process does not give Aboriginal groups a veto over what can be done with land pending final proof of the claim. The Aboriginal ‘consent’ spoken of in *Delgamuukw* is appropriate only in cases of established rights, and then by no means in every case. Rather, what is required is a process of balancing interests, of give and take.”¹³⁵

¹²⁶ *Tsleil-Waututh v. Canada* (Att’y Gen.), 2018 F.C.A. 153, 166-67 (Can.).

¹²⁷ *Haida Nation v. British Columbia* (Minister of Forests), [2004] S.C.C. 73, para 520 (Can.) (“[C]ourts, in the age-old tradition of the Common Law, will be called on to fill in the details of the duty to consult and accommodate.”).

¹²⁸ *Mikisew Cree First Nation v. Canada* (Minister of Canadian Heritage), [2005] S.C.C. 69, para 802-03 (Can.).

¹²⁹ *Beckman v. Little Salmon/Carmacks First Nation*, 2010 S.C.C. 53, para 105 (Can.).

¹³⁰ *See Haida Nation v. British Columbia* (Minister of Forests), [2004] S.C.C. 73, para 541-42 (Can.). *See also Gitxaala Nation v. Canada*, 2016 F.C.A. 187, para 3-4, 78 (Can.); *Ahousaht First Nation v. Canada* (Fisheries and Oceans), 2008 F.C.A. 212, at para 15.

¹³¹ *Haida Nation v. British Columbia* (Minister of Forests), [2004] S.C.C. 73, para 541-42 (Can.).

¹³² *Gitxaala Nation v. Canada*, 2016 F.C.A. 187, para 3-4, 77 (Can.).

¹³³ *Haida Nation v. British Columbia* (Minister of Forests), [2004] S.C.C. 73, para 535 (Can.). *Yellowknives Dene First Nation v. Canada* (Aboriginal Affairs and Northern Development), 2015 F.C.A. 148 at 19.

¹³⁴ *Haida Nation v. British Columbia* (Minister of Forests), [2004] S.C.C. 73, para 535 (Can.).

¹³⁵ *Id.* at para 535, 540 (Can.). *See also Chippewas of the Thames First Nation v. Enbridge Pipelines Inc.*, 2017 S.C.C. 41, para 1125 (Can.); *Ktunaxa Nation v. British Columbia* (Forests, Lands and Natural Resource Operations), 2017 S.C.C. 54, 424-25 (Can.).

As such, consent is only required in rare situations involving “very serious issues”¹³⁶ in contexts of established rights.¹³⁷ As explained in *Ktunaxa Nation v. British Columbia (Forest, Lands and Natural Resource Operations)*:

The duty to consult and, if appropriate, accommodate Aboriginal interests may require the alteration of a proposed development. However, it does not give Aboriginal groups a veto over developments pending proof of their claims. Consent is required only for proven claims, and even then only in certain cases.¹³⁸

The focus in the duty to consult context is on *process*: “Section 35 guarantees a process, not a particular result.”¹³⁹ In assessing whether the duty has been fulfilled, courts examine the process of consultation and accommodation, not the outcome.¹⁴⁰ Put another way, Crown consultation obligations are primarily procedural in nature rather than substantive, though certainly some accommodation measures may be substantive in nature.¹⁴¹ As part of this process, the Crown must fulfill its consultation obligations *before* proceeding with actions that could affect Aboriginal or treaty rights.¹⁴²

Courts have also clearly established that the Crown’s constitutional obligations require that the consultation process is carried out in good faith.¹⁴³ This means both parties meeting, “in a balanced manner that reflects the honour of the Crown, to discuss development with a view to accommodation of conflicting interests.”¹⁴⁴ In doing so, the Crown must attempt to deal with the Indigenous community “with

¹³⁶ *Ktunaxa Nation v. British Columbia (Forests, Lands and Natural Resource Operations)*, 2017 S.C.C. 54, 422-25 (Can.) (citing *Haida Nation v. British Columbia (Minister of Forests)*, [2004] S.C.C. 73, para 525-35 (Can.)).

¹³⁷ Total clarity on the distinction between veto and consent is not observable in the case law. Some commentators have attempted to explain the difference. See Paul Joffe, *Veto and Consent-Significant Differences*, ASSEMBLY OF FIRST NATIONS, July 31, 2015, https://www.afn.ca/uploads/files/2015_usb_documents/veto-and-consent-significant-differences-joffe-final-july-31-15.pdf. It should be noted that consent is indeed the standard in First Nations reserve contexts. However, consideration of reserve contexts is beyond the scope of the paper. When or if a Corridor route is proposed, it would be important to pursue this dimension deeply in relation to specific reserves implicated.

¹³⁸ *Ktunaxa Nation v. British Columbia (Forests, Lands and Natural Resource Operations)*, 2017 S.C.C. 54, 422-23 (Can.). See also *Gitxaala Nation v. Canada*, 2016 F.C.A. 187, para 77 (Can.).

¹³⁹ *Ktunaxa Nation*, 2017 S.C.C. at para 421-22.

¹⁴⁰ *Haida*, 2004 S.C.C. at para 542; *Tsleil Waututh*, 2018 F.C.A. at 169, (citing *Haida*, 2004 S.C.C. 73, at 532-542).

¹⁴¹ See, e.g. NGP condition 27-29 of, REPORT OF THE JOINT REVIEW PANEL FOR THE ENBRIDGE NORTHERN GATEWAY PROJECT, VOL. 2: CONSIDERATIONS, NATIONAL ENERGY BOARD 371 (2013), <https://apps.neb-one.gc.ca/REGDOCS/Item/View/2396699371>. See also the related condition pertaining to detailed routing and final design (NGP conditions 53-56, at 374).

¹⁴² *Chippewas of the Thames First Nation v. Enbridge Pipelines Inc.*, 2017 S.C.C. 41, para 1116 (Can.) (citing *Tsilhqot'in*, 2018 F.C.A. 280-295).

¹⁴³ *Haida*, 2004 S.C.C. at para 532; *Chippewas of the Thames*, 2017 S.C.C. at para 1118; *Clyde River (Hamlet) v. Petroleum Geo-Services Inc.*, 2017 S.C.C. 40, para 1082 (Can.); *Ktunaxa Nation*, 2017 S.C.C. at para 422-23.

¹⁴⁴ *Rio Tinto Alcan Inc v. Carrier Sekani Tribal Council*, 2010 S.C.C. 43, para 686-87 (Can.).

the intention of substantially addressing their concerns.”¹⁴⁵ Further, good faith is required on both sides;¹⁴⁶ Indigenous communities “must not frustrate the Crown’s reasonable good faith attempts, nor should they take unreasonable positions to thwart government from making decisions or acting in cases where, despite meaningful consultation, agreement is not reached.”¹⁴⁷

Several other specific points are important to note. The Supreme Court has ruled that the Crown cannot decide that a project is in the public interest if the duty to consult has not been fulfilled.¹⁴⁸ Courts have also indicated that consultation in a project-level assessment is not the proper forum for negotiation of Aboriginal Title and governance¹⁴⁹ and is not the proper forum to address historical grievances.¹⁵⁰ In a more recent development, the Federal Court in *Ermineskin Cree Nation v. Canada (Environment and Climate Change)* held that the duty to consult is triggered in contexts where economic rights derived from Aboriginal rights may be adversely affected by Crown conduct.¹⁵¹ In terms of who actually carries out the consultation, the case law makes clear that consultation duties may be delegated to third parties, such as project proponents; however the ultimate duty belongs to the Crown.¹⁵² Depending on the context, consultation obligations may be fulfilled by different levels of government, or government agencies with explicit authority to do so.¹⁵³ Finally, in modern treaty contexts, consultation may be shaped by agreement of the parties, but the Crown cannot contract out of its duty of honourable dealing, and the duty to consult applies independently of the intention of the parties as expressed or implied in the treaty itself.¹⁵⁴

B. “Meaningful Consultation”

What constitutes “meaningful” consultation will depend heavily on the circumstances (i.e. strength of rights claim and significance of impact), given that “the extent or content of the duty of consultation is fact specific.”¹⁵⁵ In anticipating

¹⁴⁵ *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, [2005] S.C.C. 69 (Can.).

¹⁴⁶ *Haida*, 2004 S.C.C. at para 532.

¹⁴⁷ *Id.*

¹⁴⁸ *Clyde River*, 2017 S.C.C. at para 1091.

¹⁴⁹ *Gitxaala Nation v. Canada*, 2016 F.C.A. 187, para 126-27 (Can.).

¹⁵⁰ *Chippewas of the Thames First Nation v. Enbridge Pipelines Inc.*, 2017 S.C.C. 41, para 117-18. Focus is on the *current* government decision.

¹⁵¹ 2021 FC 758.

¹⁵² *Chippewas of the Thames*, 2017 S.C.C. at para 1118-19.

¹⁵³ See generally ISAAC, *supra* note 47, at 359-367; Felix Hoehn & Michael Stevens, *Local Governments and the Crown’s Duty to Consult*, 55:4 ALTA. L. REV. 971 (2018), at 972-73, 989-990 (discussion of potential roles and duties of Municipal Governments).

¹⁵⁴ *Beckman v. Little Salmon/Carmacks First Nation*, 2010 S.C.C. 53, para 138 (Can.) (*citing* *Haida Nation v. British Columbia (Minister of Forests)*, [2004] S.C.C. 73, para 15 (Can.) and *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, [2005] S.C.C. 69 (Can.)).

¹⁵⁵ *Tsleil-Waututh v. Canada (Att’y Gen.)*, 2018 F.C.A. 153, at 167 (Can.).

pursuit of the Corridor concept, several recent cases are particularly illustrative for the purpose of understanding what courts would consider to be “meaningful.”

In *Chippewas of the Thames First Nation v. Enbridge Pipelines Inc.*, the Supreme Court found that the Crown had fulfilled its duty to consult. That case dealt with legal challenges to the National Energy Board’s (“NEB”) approval of the Enbridge Line 9 pipeline flow reversal project that crosses the traditional territory of the Chippewas of the Thames First Nation.¹⁵⁶ The Court made several instructive points about meaningful consultation in relation to specific projects:

The duty to consult is rooted in the need to avoid the impairment of asserted or recognized rights that flows from the implementation of the specific project at issue; it is not about resolving broader claims that transcend the scope of the proposed project. That said, the duty to consult requires an informed and meaningful opportunity for dialogue with Indigenous groups whose rights may be impacted.¹⁵⁷

Specifically, in coming to the conclusion that the duty to consult and accommodate had been fulfilled, the court found that the NEB provided participant funding,¹⁵⁸ held an oral hearing,¹⁵⁹ provided early notice of the hearing process,¹⁶⁰ and allowed the Chippewas of the Thames to tender a traditional land use study as evidence.¹⁶¹ The court also noted that the Indigenous appellants were able to pose informational questions to the proponent, received responses, and were able to make closing oral submissions to the NEB. The NEB also, in the court’s view, considered the potential for negative impacts on the rights and interests of the Chippewas of the Thames,¹⁶² and imposed a number of accommodation measures designed to address concerns raised by Indigenous groups, including an approval condition requiring Enbridge to continue consulting with Indigenous groups and produce ongoing engagement reports.¹⁶³ In terms of potential impacts on rights, the Court relied on the fact that the project was to occur within an existing right of way on previously disturbed land.¹⁶⁴ Notably, even though the court indicated that the Crown must communicate in advance its intention to rely on a tribunal or board to fulfill the duty to consult,¹⁶⁵ and that

¹⁵⁶ Canadian Energy Regulator, *B01—Application for Line 9B Reversal and Line 9 Capacity Expansion Project*, GOVERNMENT OF CANADA, <https://apps.neb-one.gc.ca/REGDOCS/Item/Filing/A49446> (last visited Apr. 25, 2020).

¹⁵⁷ *Chippewas of the Thames First Nation v. Enbridge Pipelines Inc.*, 2017 S.C.C. 41, at para 1104-05.

¹⁵⁸ *Id.* at para 1122.

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ *Id.* at para 1124.

¹⁶⁴ *Id.* at para 1123.

¹⁶⁵ *Id.* at para 1118-19; *Clyde River (Hamlet) v. Petroleum Geo-Services Inc.*, 2017 S.C.C. 40, para 1083 (Can.).

such notice had not been provided in a timely way, it still found that consultation obligations had been met.¹⁶⁶

Meanwhile in the companion Supreme Court decision of *Clyde River (Hamlet) v. Petroleum Geo-Services Inc.*, which dealt with Inuit consultation in relation to seismic testing off Baffin Island, the Supreme Court ruled that the NEB failed to fulfil Crown consultation and accommodation obligations.¹⁶⁷ In this modern treaty context, the Inuit had established treaty rights to hunt and harvest marine mammals under the Nunavut Land Claims Agreement,¹⁶⁸ and the Crown acknowledged that “deep consultation” was required.¹⁶⁹ The court found many specific shortcomings: failing to notify Clyde River that the Crown was relying on the NEB process to fulfill the duty to consult, failing to inquire into the specific rights and impacts on rights (the NEB instead focused on possible environmental effects),¹⁷⁰ not holding an oral hearing,¹⁷¹ and not offering participant funding.¹⁷² The SCC also noted that the project proponent was unable to answer many of the information requests from community members,¹⁷³ and failed to translate a 3,926-page document into Inuktitut.¹⁷⁴ The court also found that the accommodation measures provided to the Inuit were “insignificant concessions in light of the potential impairment of the Inuit’s treaty rights.”¹⁷⁵ Ultimately, the court concluded that the consultation process was “significantly flawed,” and quashed the NEB authorization.¹⁷⁶

Recent Federal Court of Appeal cases in which Indigenous communities have challenged major pipeline project approvals also have significant instructive value in understanding what constitutes meaningful consultation in relation to linear infrastructure projects. In *Gitxaala Nation v. Canada*, the principal legal challenge to the Northern Gateway Project (“NGP”),¹⁷⁷ the 2-1 majority found that the Crown had not discharged the duty to consult. Citing a key holding in *Haida* that “[i]t is open to governments to set up regulatory schemes to address the procedural requirements appropriate to different problems at different stages, thereby

¹⁶⁶ *Chippewas of the Thames*, 2017 S.C.C. 41, *supra* note 39, at 1119-20. This could be seen as an instance of the court’s view that ‘perfection is not the standard’.

¹⁶⁷ *Clyde River*, 2017 S.C.C. at para 1097. But note in this case the court also ruled that the Crown may rely entirely on the NEB consultation activities to fulfil the duty to consult in situations where the NEB is authorized by legislation to be the final decision-maker.

¹⁶⁸ *Clyde River*, 2017 S.C.C. at para 1075.

¹⁶⁹ *Id.* at para 1092-93.

¹⁷⁰ *Id.* at para 1094.

¹⁷¹ *Id.* at para 1094-95.

¹⁷² *Id.*

¹⁷³ *Id.* at para 1077-78.

¹⁷⁴ *Id.* at para 1078.

¹⁷⁵ *Id.* at para 1097.

¹⁷⁶ *Id.*

¹⁷⁷ *Northern Gateway Pipelines Project*, NATURAL RESOURCES CANADA (Jan. 18, 2021), <https://www.nrcan.gc.ca/our-natural-resources/energy-sources-distribution/clean-fossil-fuels/pipelines/energy-pipeline-projects/northern-gateway-pipelines-project/19184>.

strengthening the reconciliation process and reducing recourse to the courts,”¹⁷⁸ the majority ruled that the Crown’s phased approach for consultation was reasonable and appropriate.¹⁷⁹ However, Crown consultation in the final phase, following the NEB recommendation report and before the Governor in Council’s final decision, fell “well short of the mark” and was “unacceptably flawed.”¹⁸⁰

In arriving at that conclusion, the majority made several instructive observations with respect to what constitutes meaningful consultation. First, in the final consultation phase the Crown failed to “engage, dialogue and grapple with the concerns expressed to it in good faith by the applicant/appellant First Nations”.¹⁸¹ “The Crown also failed to indicate an intention to amend or supplement the recommended conditions, nor did it provide meaningful feedback to the concerns raised.¹⁸² The court found that: “[m]issing was a real and sustained effort to pursue meaningful two-way dialogue. Missing was someone from Canada’s side empowered to do more than take notes, someone able to respond meaningfully at some point.”¹⁸³

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

In order to comply with the law, Canada’s officials needed to be empowered to dialogue on all subjects of genuine interest to affected First Nations, to exchange information freely and candidly, to provide explanations, and to complete their task to the level of reasonable fulfilment. Then recommendations, including any new proposed conditions, needed to be formulated and shared with Northern Gateway for input. And, finally, these recommendations and any necessary information needed to be placed before the Governor in Council for its consideration. In the end, it has not been demonstrated that any of these steps took place.¹⁸⁴

More recently, *Gitxaala* was followed by the FCA in *Tsleil Waututh*, the consolidated legal challenges to the TMX project. This case was the Crown’s opportunity to apply the lessons learned from the NGP context; however, the FCA once again quashed the project approval, in part because the Crown did not fulfill its consultation and accommodation obligations (another basis for quashing related to shortcomings in the environmental assessment process)¹⁸⁵ This

¹⁷⁸ *Haida Nation v. British Columbia (Minister of Forests)*, [2004] S.C.C. 73, para 536 (Can.).

¹⁷⁹ *Gitxaala Nation v. Canada*, 2016 F.C.A. 187, para 84-97 (Can.). Reviewed in detail by the court in relation to different claims by Indigenous groups.

¹⁸⁰ *Gitxaala*, 2016 F.C.A. at para 97-98. It should be noted that in his dissent, Ryer J.A. found that the Crown’s duty to consult had been met (pages 139-146).

¹⁸¹ *Gitxaala*, 2016 F.C.A. at para 116.

¹⁸² *Id.*

¹⁸³ *Id.*

¹⁸⁴ *Id.* at para 132-133.

¹⁸⁵ Olszynski & Wright, *supra* note 111, at 1.

unanimous decision by the FCA built on important consultation requirements set out in *Gitxaala*, clarifying that:

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

On the whole, the record does not disclose responsive, considered and meaningful dialogue coming back from Canada in response to the concerns expressed by the Indigenous applicants. While there are some examples of responsiveness to concerns, these limited examples are not sufficient to overcome the overall lack of response. The Supreme Court's jurisprudence repeatedly emphasizes that dialogue must take place and must be a two-way exchange. The Crown is required to do more than to receive and document concerns and complaints. . . . Canada's ability to consult and dialogue . . . was constrained by two further limitations: first, Canada's unwillingness to depart from the Board's findings and recommended conditions so as to genuinely understand the concerns of the Indigenous applicants and then consider and respond to those concerns in a genuine and adequate way; second, Canada's erroneous view that it was unable to impose additional conditions on Trans Mountain.¹⁸⁶

Tsleil Waututh makes clear that in a deep consultation context meaningful consultation must include someone representing Canada who could engage interactively and who had the confidence of Cabinet to discuss accommodation measures, flaws in the consultation process, flaws in the project approval recommendations and findings, and how such flaws could be addressed.¹⁸⁷ At a more general level, *Tsleil Waututh* confirmed that the Crown must engage in a genuine and sustained effort to pursue meaningful, two-way dialogue with each Indigenous community and must do so with a view to addressing the specific concerns of each group.¹⁸⁸ Put in different terms, the duty to consult imposes on

¹⁸⁶ *Tsleil-Waututh v. Canada* (Att'y Gen.), 2018 F.C.A. 153, para 189-190 (Can.).

¹⁸⁷ *Id.* at para 250.

¹⁸⁸ *Id.* at para 249. For example, from the pipelines context, but one where the FCA found the Crown consultation was adequate, see *Bigstone Cree Nation v. Nova Gas Transmission Ltd.*, 2018 F.C.A. 89, para 37. In *Bigstone*, the Crown provided early notice to Indigenous groups, provided funding, conducted two-way engagement with multiple opportunities to provide and seek information, and conducted four months of additional consultation after the NEB had issued its recommendation report. See also David V. Wright, *Duty to Consult in the Bigstone Pipeline Case: A Northern Gateway Sequel and TMX Prequel?*, ABLAWG (June 6, 2018), <https://ablawg.ca/2018/06/06/duty-to-consult-in-the-bigstone-pipeline-case-a-northern-gateway-sequel-and-tmx-prequel/>.

the Crown an obligation to ensure that the representations of the Indigenous community are seriously considered and, to the extent possible, demonstrably integrated into the process and decision-making.¹⁸⁹

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

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

- the opportunity to make submissions for consideration;
- formal participation in the decision-making process;
- provision of written reasons to show that Indigenous concerns were considered and to reveal the impact they had on the decision; and
- dispute resolution procedures like mediation or administrative regimes with impartial decision-makers.

Examples and indicia in the case law are nothing more than indicators. The Supreme Court, while providing us with many of these indicia, has made it

¹⁸⁹ *Mikisew Cree First Nation v. Canada* (Minister of Canadian Heritage), [2005] S.C.C. 69 (Can.); *Halfway River First Nation v. BC*, 1999 B.C.C.A. 470. For commentary on what constitutes demonstrable integration, see Nigel Bankes, *Little Salmon and the Juridical Nature of the Duty to Consult and Accommodate*, ABLAWG (Dec. 10, 2010), <https://ablawg.ca/2010/12/10/little-salmon-and-the-juridical-nature-of-the-duty-to-consult-and-accommodate/>. See also David V. Wright, *Tsleil-Waututh Nation v. Canada: A Case of Easier Said Than Done*, ABLAWG (Sept. 11, 2018), <https://ablawg.ca/2018/09/11/tsleil-waututh-nation-v-canada-a-case-of-easier-said-than-done/>.

clear that what will satisfy the duty will vary from case to case, depending on the circumstances (*Haida Nation*, para. 45).¹⁹⁰

While there is significant clarity in the case law regarding what constitutes meaningful consultation, before discussing Crown consultation obligations in relation to the Corridor, it is important to acknowledge two relevant areas where the law continues to evolve: consultation in relation to development of legislation, and the relationship between the duty to consult and Indigenous consent. Regarding the former, the law is currently uneven with respect to whether the duty to consult is triggered in contexts of the development and introduction of legislation. This was the focus of the Supreme Court's 2018 decision in *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*.¹⁹¹ While the Supreme Court issued four separate judgements, a majority of the court ruled that there is no duty to consult Indigenous communities during the law-making process.¹⁹² However, if such a law would infringe established section 35 rights (e.g. right-of-way infringes on Aboriginal title or a modern treaty right), then it may be struck down once enacted. Despite disagreement across the bench as to whether and how the duty to consult was triggered during the law-making process, all members of the Supreme Court agreed that consultation by the Crown is good practice in contexts where the enactment of legislation has the potential to adversely affect asserted or established Aboriginal or treaty right.¹⁹³ As such, to the extent that some form of legislative action is part of pursuing the Corridor concept (discussed below in Part IV), the government would have to contend with this area of uncertainty, but would also be wise to follow the guidance of the court in suggesting that consultation during the law-making stages is good practice. Indeed, there are examples of this approach being followed by governments across the country.¹⁹⁴ This is perhaps also owing to the courts recognizing that

¹⁹⁰ *Coldwater First Nation v. Canada (Att'y Gen.)*, 2020 F.C.A. 34, para 15-16 (Can.).

¹⁹¹ *Mikisew Cree First Nation v. Canada (Governor General in Council)*, 2018 SCC 40, para 767 (Can.).

¹⁹² *Id.* For a detailed discussion of complex nuances across the multiple judgements, see Joshua Nichols & Robert Hamilton, *In Search of Honourable Crowns and Legitimate Constitutions: Mikisew Cree First Nation v Canada and the Colonial Constitution*, 70:3 U. OF TORONTO L. J. 341 (2020), <https://utpjournals.press/doi/10.3138/utlj.2019-0115>.

¹⁹³ *Mikisew Cree First Nation v. Canada (Governor General in Council)*, 2018 SCC 40, para 769 (Can.). See also Shin Imai, *The Supreme Court of Canada Says That Courts Cannot Not Enforce a Duty to Consult While Legislation is Being Drafted, But Consultation at This Stage is Good Practice*, JUSTICE AND CORPORATE ACCOUNTABILITY PROJECT (Dec. 1, 2018), <https://justice-project.org/wp-content/uploads/2018/12/Mikisew-Cree-comment-and-summary-revised.pdf>.

¹⁹⁴ For an example of federal consultation with Indigenous peoples regarding changes to impact assessment, fisheries and navigation statutes, see *Environment and Natural Resources Canada, ENVIRONMENTAL AND REGULATORY REVIEWS* (Sept. 11, 2019), <https://www.canada.ca/en/services/environment/conservation/assessments/environmental-reviews.html>. For an example of territorial government consultation with Indigenous peoples regarding a large set of land and resources-related law reform, see *Legislative Initiatives, ENV'T & NAT. RES. GOV. OF NW. TERRITORIES*, <https://www.enr.gov.nt.ca/en/services/legislative-initiatives> (last visited Apr. 25, 2020).

high-level management decisions or structure changes to the Crown's management of natural resources may trigger consultation duties.¹⁹⁵

Regarding consent, as noted above, the Supreme Court indicated in *Haida* that consent is the standard “only in cases of established rights, and then by no means in every case.”¹⁹⁶ More recently in *Tsilhqot'in*, wherein the Supreme Court issued a declaration of Aboriginal title for the first time, the court provided further views on consent:

After Aboriginal title to land has been established by court declaration or agreement, the Crown must seek the consent of the title-holding Aboriginal group to developments on the land. Absent consent, development of title land cannot proceed unless the Crown has discharged its duty to consult and can justify the intrusion on title under s. 35 of the Constitution Act, 1982.¹⁹⁷

In practical terms, this means that the Crown is permitted to unilaterally infringe existing rights of Indigenous peoples so long as consultation duties are discharged and such infringement is justified in the circumstances.¹⁹⁸ As one might expect, this state of the law does not go without criticism.¹⁹⁹ While it is foreseeable that some communities along the route may support the project at issue, and some may reach some kind of negotiated agreement with the Crown through consultation and accommodation or put in place some type of benefits agreement with the proponent,²⁰⁰ it is entirely foreseeable that some substantive rights-holding groups would oppose the project. In such cases, consent is seldom the standard.

It is reasonable, however, to wonder how the 2016 announcement by the federal government of Canada's “full support” of the United Nations Declaration on the Rights of Indigenous Peoples²⁰¹ (“UNDRIP”) might change the law in relation to

¹⁹⁵ *Rio Tinto Alcan Inc v. Carrier Sekani Tribal Council*, 2010 S.C.C. 43, para 673-75 (Can.).

¹⁹⁶ *Haida Nation v. British Columbia (Minister of Forests)*, [2004] S.C.C. 73, para 535 (Can.).

¹⁹⁷ *Tsilhqot'in Nation v. British Columbia*, 2014 S.C.C. 44, para 299 (Can.).

¹⁹⁸ *Tsilhqot'in Nation v. British Columbia*, 2014 S.C.C. 44, para 90-91 (Can.). *See also* *R v. Nikal*, [1996] 1 SCR 1013, 1065 (Can.); *Mikisew Cree First Nation v. Canada (Governor General in Council)*, 2018 SCC 40, para 799 (Can.). An important part of the justification inquiry “is whether the Aboriginal group in question was consulted on the impugned measure.”

¹⁹⁹ Kent McNeil, *How Can Infringements of the Constitutional Rights of Aboriginal Peoples be Justified?*, 8 CONSTITUTIONAL FORUM 33, 39 (1997). *See also* Hamilton & Nichols, *supra* note 45, at 729.

²⁰⁰ Additionally, once private-led specific projects ensue, there would be a basis for project proponents to negotiate Impact-Benefit Agreements with Indigenous communities. *See* Keith Bergner, *Navigating a Changing Landscape*, in BUSINESS IMPLICATIONS OF ABORIGINAL LAW, (Dwight Newman ed., 2018). KIRK LAMBRECHT, ABORIGINAL CONSULTATION, ENVIRONMENTAL ASSESSMENT, AND REGULATORY REVIEW IN CANADA 51-52 (2013). Such agreements are common practice. *See, e.g.*, *Trans Mountain Corporation, 43 Indigenous Groups Have Signed Agreements in Support of the Trans Mountain Expansion Project*, TRANS MOUNTAIN CORPORATION (Apr. 19, 2018), <https://www.transmountain.com/news/2018/43-aboriginal-groups-have-signed-agreements-in-support-of-the-trans-mountain-expansion-project>.

²⁰¹ Carolyn Bennett, Minister, Indigenous and Northern Affairs, Can., Address at the 15th Session of the United Nations Permanent Forum on Indigenous Issues, *Announcement of Canada's Support*

Indigenous consent. Most indications are that UNDRIP will not fundamentally alter the direction taken by the courts and the federal government to date. While the Declaration's explicit reference to consent and the concept of "free, prior and informed consent" ("FPIC") in Article 32 may, to some, appear to bring that standard into Canadian law, UNDRIP is simply a Declaration and does not have the force of law in Canada. Implementing legislation could change this, however two indicators suggest this will not be the case. First, Bill C-262—An Act to ensure that the laws of Canada are in harmony with the United Nations Declaration on the Rights of Indigenous Peoples²⁰² attempted to take steps toward implementing UNDRIP domestically, but it would not have given the Declaration the force of law in Canada; rather, it would simply have become a tool to be used to interpret existing laws in Canada.²⁰³ Bill C-262, of course, did not become law—it died on order paper with the calling of the 2019 federal election. Second, while the Trudeau government has committed to legislating implementation of UNDRIP,²⁰⁴ as stated in the mandate letter to the Minister of Crown-Indigenous Relations,²⁰⁵ to date, the federal government has largely adopted the view that existing "constitutional obligations serve to fulfill all the principles of the Declaration, including 'free, prior and informed consent'."²⁰⁶ This conceptualization interprets UNDRIP as requiring only a good faith effort to obtain consent, not actually obtaining consent in every instance.²⁰⁷ This is basically consistent with the contemporary duty to consult case law set out above, indicating that consent is not required and there is no "duty to agree."²⁰⁸

for the United Nations Declaration of Indigenous Peoples, (May 10, 2016) (Transcript available at Government of Canada website). See also John Paul Tasker, "Liberal Government Backs Bill That Demands Full Implementation of UN Indigenous Rights Declaration." CBC NEWS (Nov. 21, 2017) <https://www.cbc.ca/news/politics/wilson-raybould-backs-undrip-bill-1.4412037>.

²⁰² H.C. B. C-262, 42nd Parl., (as of third reading May 30, 2018). An Act to ensure that the laws of Canada are in harmony with the United Nations Declaration on the Rights of Indigenous Peoples.

²⁰³ For commentary, see Nigel Bankes, *Implementing UNDRIP: Some Reflections on Bill C-262*, ABLAWG (Nov. 27, 2018), <https://ablawg.ca/2018/11/27/implementing-undrip-some-reflections-on-bill-c-262/>.

²⁰⁴ Bill Curry, *Liberals Promise Government Law on Indigenous Rights as High-Profile Bills Die in Senate*, THE GLOBE AND MAIL (Oct. 2, 2019), <https://www.theglobeandmail.com/politics/article-liberals-promise-government-law-on-indigenous-rights-as-high-profile/>.

²⁰⁵ Letter from Prime Minister of Can. Justin Trudeau, *Minister of Crown-Indigenous Relations Mandate Letter*, (Dec. 13, 2019) (On file at the Office of the Prime Minister of Can. website).

²⁰⁶ Bennett, *supra* note 201. See also BRAIDING LEGAL ORDERS (John Borrows et al, eds., 2019), for a comprehensive collection of essays and critical perspectives on implementation of UNDRIP in Canada.

²⁰⁷ For a collection of essays and critical perspectives on implementation of UNDRIP in Canada that contain different, but not always differing, views. See BRAIDING LEGAL ORDERS, (John Borrows et al., eds., 2019).

²⁰⁸ *Haida Nation v. British Columbia (Minister of Forests)*, [2004] S.C.C. 73, para 15 (Can.); *Clyde River (Hamlet) v. Petroleum Geo-Services Inc.*, 2017 S.C.C. 40 (Can.).

C. *Meaningful Consultation and the Corridor*

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

In terms of guidance, given the magnitude of the Corridor undertaking, government and proponents would be wise to approach Indigenous communities along the route assuming, for the most part, that deep consultation required.²⁰⁹ Under this approach, the courts have been relatively clear in indicating that this should include: good faith on the part of both parties, a focus on addressing the specific concerns raised, two-way dialogue, early notice, participation funding, substantive responses to information request (including translation in some contexts), openness to accommodation and mitigation measures, a view to accommodation of conflicting interests, demonstrable integration of Indigenous communities' concerns, and, at least at later consultation stages, consultation ought to be led by a representative of Canada empowered to respond meaningfully. All of this, of course, must take place *before* government action that could affect Aboriginal or treaty rights.²¹⁰

However, there may be some contexts along the Corridor route, such as instances of a tenuous claim to an Aboriginal right and minor risk of infringement, where the duty falls at the low end of the spectrum. If, in the context of the Corridor, the Crown wished to engage in consultation that does not deploy all that is required in a deep consultation context, then the Crown would have to diligently

²⁰⁹ This would be consistent with a point of agreement across all judges of the Supreme Court of Canada in *Mikisew*, (see note 79) that even when consultation is not constitutionally required, it may be undertaken in furtherance of good public administration (e.g. *Rowe for Moldaver, Cote, and Rowe*), in *Mikisew* (see note 119, at 854). This commentary from the court would be particularly relevant if pursuit of the Corridor includes some kind of legislative action, which it presumably would at some relatively early stage.

²¹⁰ *Chippewas of the Thames First Nation v. Enbridge Pipelines Inc.*, 2017 S.C.C. 41, para 1116 (Can.) (citing *Tsilhqot'in Nation v. British Columbia*, 2014 S.C.C. 44, para 36 (Can.)).

assess different communities' existing and asserted rights along the route (presumably with appropriate engagement with Indigenous organizations), determine what level of consultation would be required,²¹¹ and approach each individual Indigenous community accordingly.²¹² This would not be unprecedented, as the National Energy Board (now the Canadian Energy Regulator) has employed an approach of this type in recent years,²¹³ and it is essentially the approach that the new Impact Assessment Agency of Canada describes in its interim guidance under the *Impact Assessment Act*.²¹⁴

This, however, demonstrates a key barrier presented by Crown consultation and accommodation obligations in this Corridor context. A fundamentally important principle from the duty to consult jurisprudence is that the extent of Crown consultation and accommodation obligations is highly dependent on context. What is required for the Crown to fulfill the duty to consult, i.e. what constitutes "meaningful consultation," depends on the specific circumstances. In situations of a relatively weak claim to an Aboriginal right where potential infringement is minor, the duty may require as little as providing notice. In contrast, if it is an existing right and potential infringement is of high significance to the Indigenous community, "deep consultation" will be required.²¹⁵ Given the highly varied legal terrain of treaty and non-treaty territories across the country, it would be a daunting task for the Crown to inform itself of all Indigenous communities' rights and interests along the route, then set up a process to consult with each representative organization in varying depths and degrees.

This represents a significant tension generated by the conflicting natures of the Corridor concept and the duty to consult legal framework. Crown consultation obligations are highly context-dependent, driven in significant part by the nature of the proposed activity (e.g. a pipeline, a hydro dam, a road, regulatory or licensing regime changes, etc.) and potential impacts that such activities would have on each communities' specific set of asserted or existing rights. However, the Corridor concept, even if eventually proposed as a legal right-of-way that

²¹¹ It should be noted that and this may include some areas of existing rights or title where consent would be the standard as per *Tsilhqot'in*.

²¹² An increasingly common practice that flows from these activities is development of consultation protocols by or with specific Indigenous nations. See, e.g., *Consultation Protocol of the Mikisew Cree First Nation*, LANDUSE.ALBERTA.CA (Nov. 24, 2009), https://landuse.alberta.ca/Forms%20and%20Applications/RFR_MCFN%20Reply%20to%20IR2%20Response%20Attach%204_2014-10-22.pdf.

²¹³ See generally *Indigenous Engagement*, CANADIAN ENERGY REGULATOR, <https://www.cer-rec.gc.ca/bts/pblctn/prfrmncsmmr/2017-18/ndgnsnggmnt-eng.html> (last visited Oct. 21, 2019).

²¹⁴ Impact Assessment Agency of Canada, *Interim Policy Context: Indigenous Participation in Impact Assessment*, GOVERNMENT OF CANADA, <https://www.canada.ca/en/impact-assessment-agency/services/policy-guidance/practitioners-guide-impact-assessment-act/policy-indigenous-participation-ia.html> (last visited Aug. 27, 2019). See also Impact Assessment Agency of Canada, *Interim Guidance: Indigenous Participation in Impact Assessment*, GOVERNMENT OF CANADA, <https://www.canada.ca/en/impact-assessment-agency/services/policy-guidance/practitioners-guide-impact-assessment-act/guidance-indigenous-participation-ia.html> (last visited Dec. 12, 2019).

²¹⁵ See *Gitxaala Nation v. Canada*, 2016 F.C.A. 187, para 75 (Can.).

follows a specific route, is a relatively abstract undertaking. It would be very difficult, if not impossible, to anticipate all specific potential impacts and then consult on all of them.

Further, such difficulty would be exacerbated by the reality that the specific ensuing infrastructure projects would be primarily private sector driven and it would not be possible to predict which projects with which attributes private sectors actors will pursue. While it is conceivable that the Corridor consultation process, employing some kind of envelope approach,²¹⁶ significant additional consultation will almost certainly be required as each specific project is pursued. Past instances illustrate this point wherein the duty to consult was triggered in contexts of projects following existing rights of way, including much of the TMX route.²¹⁷

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

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

Providing recommendations or prescribing a path forward is outside the modest aims of this article; however, several queries and comments are warranted at this point with respect to the legal forms the Corridor may take and the forums in which Crown consultation may take place. These comments flow from one central point: Crown obligations hinge on how the Corridor concept is specifically pursued. In terms of legal forms, would it, for example, follow Sulzenko and Fellows's suggestion of new enabling legislation action and an accompanying "tailored" regulatory framework?²¹⁸ Would it be a "designated project" under the

²¹⁶ For discussion of an "envelope" approach in the environmental assessment context, also referred to as a "bounding" approach, see *Ontario Power Generation Inc. v Greenpeace Canada et al*, 2015 F.C.A. 186, at 8, 32.

²¹⁷ See, e.g., *Tsleil-Waututh v. Canada (Att'y Gen.)*, 2018 F.C.A. 153 (Can.); *Bigstone Cree Nation v. Nova Gas Transmission Ltd.*, 2018 F.C.A. 89.

²¹⁸ Sulzenko & Fellows, *supra* note 3, at 30.

new Impact Assessment Act? Would it be the focus of a “regional assessment” or “strategic assessment” under the new Impact Assessment Act? Might the final legal instrument just be an Order in Council? Might it be all of the above in a particular sequence? Perhaps proponents would pursue smaller projects and corridors along a route and then link them up?²¹⁹ Under any of these legal pathways would there be any route-clearing or preliminary infrastructure (e.g. water crossings)? What role would provinces play in a context where the federal government would clearly be leading? Only with answers to these questions (and more), along with a detailed understanding of all Indigenous rights-holders and asserted Indigenous rights along the proposed route, could one begin to specifically lay out Crown consultation and accommodation obligations with respect to the Corridor. It is questions such as these that could guide further research on this topic.

In terms of forums, it may be welcome news to Corridor proponents that Canadian history does offer at least one model: the Berger Inquiry. Ironically, the high watermark for consultation with Indigenous communities came approximately three decades *before* the Supreme Court articulated its framework for Crown consultation in *Haida*. The 1970s Mackenzie Valley Pipeline Inquiry,²²⁰ typically referred to as the Berger Inquiry, was a broad-based assessment of proposed major pipeline projects to transport oil and gas from the Western Arctic region to southern Canada.²²¹ It was commissioned by the federal government through an Order of the Privy Council,²²² which provided broad powers to hold community hearings, summon witnesses, establish procedures and to enlist the assistance of experts.²²³ The three-year consultation and participation process course included hearings across the Northwest Territories and northern Yukon, and provided Indigenous people in small communities with the opportunity to provide testimony directly to then Justice Thomas Berger of the Supreme Court of British Columbia, who led the inquiry.²²⁴ Ultimately, the Berger

²¹⁹ See, e.g., *The Grays Bay Road and Port Project*, GOVERNMENT OF NUNAVUT AND THE KITIKMEOT INUIT ASSOCIATION, http://www.miningnorth.com/_rsc/site-content/library/Infrastructure/Grays_Bay_Port_Information%20Pamphlet_English.pdf (last visited Apr. 25, 2020). See also Derek Neary, *Ottawa Gives \$21.5 Million to Kitikmeot Road and Port Project*, NUNAVUT NEWS (Aug. 13, 2019), <https://nunavutnews.com/nunavut-news/ottawa-gives-21-5-million-to-kitikmeot-road-and-port-project/> for description of the project and indication that it is funded through the Northern Transportation Corridors Fund.

²²⁰ Thomas Berger, *Northern Frontier, Northern Homeland: The Report of the Mackenzie Valley Pipeline Inquiry: Vol. I*, SUPPLY AND SERVICES CANADA (1977). https://www.pwnhc.ca/extras/berger/report/BergerV1_complete_e.pdf.

²²¹ *Id.* at 205. See also MEINHARD DOELLE, *THE FEDERAL ENVIRONMENTAL ASSESSMENT PROCESS: A GUIDE AND CRITIQUE* (2008), 8-9.

²²² Berger, *supra* note 220, at 205-208.

²²³ DOELLE, *supra* note 221.

²²⁴ For such testimony, see *Berger Inquiry Educational Resource Archive*, PRINCE OF WALES NORTHERN HERITAGE CENTRE, <https://www.pwnhc.ca/exhibitions/berger/speeches-and-interviews/> (last visited Apr. 25, 2020).

Inquiry recommended that “no pipeline be built and no energy corridor be established across the Northern Yukon,” but that it would be feasible to establish an energy corridor along the Mackenzie Valley.²²⁵ He also, however, recommended that a pipeline be postponed for ten years while Indigenous communities claims were settled.²²⁶ Words in Justice Berger’s covering letter to the Minister remain prescient today (aside from use of the dated term “Native”), including with respect to the Corridor concept:

The settlement of native claims is not a mere transaction. Intrinsic to settlement is the establishment of new institutions and programs that will form the basis for native self-determination. It would be wrong, therefore, to think that signing a piece of paper would put the whole question behind us, as if all that were involved was the removal of a legal impediment to industrial development. The native people insist that the settlement of native claims should be a beginning rather than an end of the recognition of native rights and native aspirations.²²⁷

In today’s context, the Berger Inquiry is a relevant model for proponents of the Corridor concept. It employed many features that today’s courts point to as necessary for achieving meaningful consultation, such as community hearings, opportunities to ask questions and provide evidence, and participation funding. From a substantive perspective, the Inquiry concluded that a process for recognition and settling of Indigenous communities was necessary. These conclusions from the Inquiry could be instructive to the contemporary Corridor initiative, particularly for portions of the route that would not go through areas covered by modern treaties (which would be most of the Corridor).

While the Berger Inquiry is a useful precedent, it was quite modest when compared to a cross-country 7,000 km corridor. The Berger Inquiry was primarily focused on the Mackenzie Valley and Western Arctic regions and a relatively small number of Indigenous communities. The Corridor, by comparison, could cross territories of hundreds of Indigenous communities across Canada.²²⁸ At the risk of oversimplifying, a Berger-type approach would have to be bulked up significantly if it were to serve as a primary vehicle through which the Crown engaged with Indigenous peoples. Even more, there would need to be a parallel process or first phase that focused on working with Indigenous communities to clarify rights and interests. To perhaps state the obvious, the government would be wise to have these forums carefully designed and structured—logically with

²²⁵ Berger, *supra* note 220, at xiii.

²²⁶ Berger, *supra* note 220, at xxvii.

²²⁷ Berger, *supra* note 220, at xxiv.

²²⁸ McCarthy, *supra* note 10.

close participation and cooperation of Indigenous communities—if they are to attract the confidence of Indigenous peoples across Canada.²²⁹

Before turning to conclusions, it is appropriate to also consider the new federal impact assessment regime in this context. In August 2019, the new Impact Assessment Act (“IAA”) came into force, bringing with it statutory powers and requirements for assessment of specific infrastructure projects that may eventually be placed within the Corridor.²³⁰ The architecture of the new regime is very similar to its predecessor, Canadian Environmental Assessment Act (“CEAA”) 2012,²³¹ but provides for a broader assessment of project-level impacts and a significantly expanded set of legislative authorities and duties to require and facilitate Crown engagement and consultation with Indigenous communities.²³²

The new IAA is relevant to the Corridor in a number of ways. First, while a legal right-of-way without a specific infrastructure project is not contained in the regulations designating physical activities,²³³ the Act provides discretionary power to the Minister to designate a physical activity not prescribed in the regulations if it may cause adverse effects within federal jurisdiction or if “public concerns related to those effects warrant the designation.”²³⁴ This means, depending on the form that the Corridor takes, the Minister could subject it to assessment under the IAA. In making such a determination, the Minister may “consider adverse impacts that a physical activity may have on the rights of the Indigenous peoples of Canada — including Indigenous women.”²³⁵ If a Minister

²²⁹ Such a forum could, for example, resemble the Aboriginal Lands and Treaties Tribunal recommended by the Royal Commission on Aboriginal Peoples, *Report of the Royal Commission on Aboriginal Peoples, 5 Renewal: A Twenty-Year Commitment*, CANADA COMMUNICATIONS GROUP, 5-6 (1996). See generally Royal Commission on Aboriginal Peoples, *Guide to the Principal Findings and Recommendations of the Final Report of the Royal Commission on Aboriginal Peoples*, GOVERNMENT OF CANADA, http://publications.gc.ca/collections/collection_2017/bcp-pco/Z1-1991-1-51-1-eng.pdf, (last visited Apr. 25, 2020).

²³⁰ Impact Assessment Act, S.C. 2019, C 28, § 1 (Can.).

²³¹ Canadian Environmental Assessment Act, 2012, S.C. 2012 c 19, § 52 (Can.). See Martin Olszynski, *In Search of #BetterRules: An Overview of Federal Environmental Bills C-68 and C-69*, ABLAWG (Feb. 15, 2018), <https://ablawg.ca/2018/02/15/in-search-of-betterrules-an-overview-of-federal-environmental-bills-c-68-and-c-69/> (describing the new regime as a “bulked up” version of the CEAA 2012 regime).

²³² See David V. Wright, *Indigenous Engagement and Consideration in the Newly Proposed Impact Assessment Act: The Fog Persists*, ABLAWG (Feb. 27, 2018), <https://ablawg.ca/2018/02/27/indigenous-engagement-and-consideration-in-the-newly-proposed-impact-assessment-act-the-fog-persists/>. See also David Laidlaw, *Bill C-69, the Impact Assessment Act, and Indigenous Process Considerations*, ABLAWG (Mar. 15, 2018), <https://ablawg.ca/2018/03/15/bill-c-69-the-impact-assessment-act-and-indigenous-process-considerations/>.

²³³ Physical Activities Regulations, SOR/2019-285 (Can.). Rights-of-way are explicitly included in the project list; however, only in relation to specific projects such as a new railway line, inter-provincial pipelines or international electrical transmission lines.

²³⁴ S.C. 2019, c. 28, § 9(1) (Can.).

²³⁵ S.C. 2019, c. 28, § 9(2) (Can.).

makes this designation, then the project would proceed as a designated project under the Act.²³⁶

The Corridor could also be the focus of a regional assessment under the new Act.²³⁷ Such regional assessments are “are studies conducted in areas of existing projects or anticipated development to inform planning and management of cumulative effects and inform project impact assessments.”²³⁸ As noted in Agency guidance, “Indigenous peoples and the public would be engaged throughout the regional assessment process to ensure meaningful participation and the integration of scientific information and Indigenous knowledge during the conduct of regional assessments.”²³⁹ In setting up a regional assessment process, the Minister may enter into agreements with other jurisdictions, including provincial governments and Indigenous governments and representative organizations.²⁴⁰ Such regional assessments would then mandatorily feed into future project-level assessments to the extent that they are “relevant,”²⁴¹ potentially leading to efficiencies in assessments of specific projects.²⁴² However, as noted above, further consultation with Indigenous communities would most certainly be required.

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

²³⁶ Given the very large scale of the Corridor, this would presumably be an impact assessment led by a review panel, though that would require explicit referral by the Minister if he or she is “of the opinion that it is in the public interest” to do so, pursuant to Section 36(1).

²³⁷ S.C. 2019, c. 28, § 93(1) (Can.).

²³⁸ Impact Assessment Agency of Canada, *Regional Assessment under the Impact Assessment Act*, GOVERNMENT OF CANADA (Sept. 10, 2019), <https://www.canada.ca/en/impact-assessment-agency/services/policy-guidance/regional-assessment-impact-assessment-act.html>. (hereinafter IAAC, *Regional Assessment*.)

²³⁹ *Id.*

²⁴⁰ S.C. 2019, c. 28, § 93(1)(a)(i) (Can.).

²⁴¹ S.C. 2019, c. 28, § 22(1)(p) (Can.).

²⁴² IAAC, *Regional Assessment*, *supra* note 238. This is noted in the Agency guidance: “[a] key driver for regional assessments under the IAA is to inform future project impact assessments. Using regional assessment to address issues that are best considered at a regional level will improve both the effectiveness and efficiency of the impact assessment process.”

commission of this type to be established under an Order in Council,²⁴³ though it could be created through a new statute devoted to implementing the project.²⁴⁴

V. CONCLUSION

On first impression, the revived Corridor concept may appeal to some as an elegant solution to the complex mix of challenges facing linear infrastructure projects in Canada today. From fluctuating global energy market conditions,²⁴⁵ to concerns about greenhouse gas emissions and climate change,²⁴⁶ to risks associated with loss of habitat and biodiversity loss,²⁴⁷ to impacts on the rights and interests of Indigenous peoples,²⁴⁸ such projects—especially oil and gas commodity pipelines—face significant headwinds.²⁴⁹ Politically charged as these dimensions may be, looking beyond the politics reveals legitimate concerns on all these fronts and perhaps more.²⁵⁰ Unfortunately, however, complex problems are

²⁴³ See, e.g., Berger, *supra* note 220, at 205-208 (providing an illustrative example of what this would look like). DOELLE, *supra* note 221, 8n9.

²⁴⁴ Perhaps called the *National Unity Corridor Act*, or something to that effect. Name aside, this statute could establish a commission, similar to how any other tribunal or board, including the National Energy Board, is set up under statute.

²⁴⁵ See Jen Gerson, *What happens when the demand for Alberta oil goes away?*, MACLEAN'S (Mar. 12, 2019) <https://www.macleans.ca/politics/what-happens-when-the-demand-for-alberta-oil-goes-away/>.

²⁴⁶ Tracy Sherlock, *IPCC Authors Urge NEB to Consider Climate Impacts of Trans Mountain Pipeline Expansion*, NATIONAL OBSERVER (Jan. 21, 2019) <https://www.nationalobserver.com/2019/01/21/news/ipcc-authors-urge-neb-consider-climate-impacts-trans-mountain-pipeline-expansion>.

²⁴⁷ See Zoe Todd, *'Very dire situation: 'Disappearance of Alberta's Caribou Threatens Centuries-Old Way of Life*, CBC NEWS (Nov. 20, 2017) cbc.ca/news/canada/edmonton/cold-lake-caribou-protection-first-nation-land-preserve-1.4401994.

²⁴⁸ Wilfrid Greaves & Whitney Lackenbauer, *First Nations, LNG Canada, and the Politics of Anti-Pipeline Protests*, CANADIAN GLOBAL AFFAIRS INSTITUTE (June 2019), https://www.cgai.ca/first_nations_lng_canada_and_the_politics_of_anti_pipeline_protests.

²⁴⁹ See generally Peter Tertzakian, *There's More Than Lack of Pipelines and Bill C-69 That Ails the Oilpatch. Let Me Count the Ways*, FINANCIAL POST (Mar. 6, 2019), <https://business.financialpost.com/commodities/energy/theres-more-than-lack-of-pipelines-and-bill-c-69-that-ails-the-oilpatch-let-me-count-the-ways>.

²⁵⁰ This article has presented a detailed account of the legal dimensions related to the rights of Indigenous peoples and the proposed Corridor and ensuing large linear projects. For a detailed account of global climate concerns, see Valeria Masson-Delmotte et al., *Summary for Policymakers in: Global warming of 1.5°C An IPCC Special Report on the impacts of global warming of 1.5°C above pre-industrial levels and related global greenhouse gas emission pathways, in the context of strengthening the global response to the threat of climate change, sustainable development, and efforts to eradicate poverty*, WORLD METEOROLOGICAL ORGANIZATION (2018), https://www.ipcc.ch/site/assets/uploads/sites/2/2018/07/SR15_SPM_High_Res.pdf. For a summary of biodiversity concerns in Canada and associated responses, see Environment and Climate Change Canada, *Summary of Canada's 6th National Report to the Convention on Biological Diversity*, GOVERNMENT OF CANADA (2019), https://biodivcanada.chm-cbd.net/sites/biodivcanada/files/inline-files/EN_Summary%20of%20Canada%27s%206th%20National%20Report_Final_2.pdf. For an overview of energy market conditions, including volatility in domestic and global markets, see *Canada's Energy Future 2016: Update—Energy Supply and Demand Projections to 2040*, NATIONAL ENERGY BOARD (2019), <https://www.cer-rec.gc.ca/nrg/ntgrtd/ft/2016updt/2016updt-eng.pdf>.

seldom addressed through simple responses. A closer look at the relationship between the proposed Corridor and the rights of Indigenous peoples serves as a case in point.

This article has focused on Crown consultation obligations with respect to the Corridor and rights of Indigenous peoples. It has set out the diverse landscape of Indigenous rights, interests, and contexts under Canadian law today,²⁵¹ and explained associated Crown obligations. In doing so, it has presented a relatively mature body of case law that provides a basis for understanding what constitutes “meaningful consultation.” A key observation for those pursuing the Corridor concept is that, while the jurisprudence provides relatively comprehensive guidance on “meaningful consultation,” the contextual nature of the duty to consult legal framework will make it hard to achieve in the practical Corridor context. A difficult challenge for governments pursuing this project is the disconnect that arises when overlaying an inherently abstract Corridor concept with very diverse Indigenous rights and interests and a highly context-dependent duty to consult framework. Further, Crown obligations arising in contexts of infringement of the rights of Indigenous peoples present additional complexities. Trends in Canadian and international law toward requiring consent of Indigenous peoples, including potential legislative action at federal and provincial levels,²⁵² suggest that the legal landscape will continue to shift. More change in the law is entirely foreseeable.

While this article has put forward a number of queries and comments with respect to further research, including in relation to what forms and forums pursuit of the Corridor may take, such points are by no means exhaustive. It is hoped, however, that this article provides a helpful foundation for any further consideration of the Corridor concept, and that it will contribute to an informed approach that is respectful of the challenges, complexities and sensitivities associated with such a significant undertaking. While the well-known quote, “for every complex problem, there’s a solution that is simple, neat, and wrong,”²⁵³ may not be perfectly on point in this context, it is fair to characterize the proposed Corridor as a concept that appears simple and neat on the surface, but would be tremendously complex to implement.

²⁵¹ Recalling that this article has focused on the current content of Canadian law (sometimes referred to as “settler law”) as it pertains to Indigenous people, while acknowledging the need for legal analysis with a normative approach, particularly with respect to revitalization of Indigenous laws and governance. For an example of such work, see BORROWS, *supra* note 19.

²⁵² For an example of this at the provincial level, see *Bill 51-2018: Environmental Assessment Act*, 3rd Sess, 41st Leg, British Columbia, 2018 (codifying a requirement of consent in some contexts such as on treaty lands). *See also*, Declaration on the Rights of Indigenous Peoples Act, S.B.C 2019, c. 44 (British Columbia, Can.).

²⁵³ Typically attributed to H. L. Menken. *See, e.g.* Mario Polese, *Why Regional Development Policies Are (Mostly) Ineffective and Why It Does Not Matter*, in GOVERNING: ESSAYS IN HONOUR OF DONALD J. SAVOIE, (James Bickerton & B. Guy Peters eds., 2013).