PLANNING FOR THE FRASER-THOMPSON CORRIDOR - A CLASH OF PERSPECTIVES

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INTRODUCTION: THE TWIN-TRACKING DISPUTE

This is a chronical - a story of personal impressions and reactions to the twin-tracking dispute in the spring and summer of 1985. My role at that time was as a "facilitator" appointed by the federal Minister of Transport to attempt to find means of reconciling the differences between CN Rail and the Alliance of Tribal Nations.

I need say little about the twin-tracking project itself, for it is described in the paper by Paul Scott. But I'll remind you that the government of Prime Minister Trudeau had given the project an imprimateur of national interest, decreeing by cabinet order that the twin-tracking should proceed. Thereafter, the project became a management problem for CN Rail and government agencies. This was the first stage of government response to the twin-tracking project.

THE FIRST STAGE

Historically, railways would proceed with construction of a rail line as masters of their own destiny brooking no opposition to their progress. But this was 1979. There were cautionary voices and rising concerns about construction impacts in the canyons and valleys of the Thompson and Fraser Rivers.

Obviously the project fell within the EARP program for screening federal projects having significant environmental impacts. So it was agreed that while the twin-tracking project would go ahead, there would be environmental and social impact review under the mandate of the Federal Environmental Assessment Review Offices (FEARO). Mr. Scott has explained the initiation and conduct of this review. Its purpose was to define impacts and to contribute to CN Rail's planning for their avoidance and mitigation.

Meanwhile, the federal and provincial governments had marshalled their regulatory forces. First, for construction planning, a Steering Committee (SC) had been established to oversee the assessment of environmental impacts and their implementation of design changes that would avoid or mitigate them. Next, a Technical Working Group (TWG) had been formed under the umbrella of the SC to provide expertise of a scientific and technical nature to this design review process. It was this process that would receive and implement the recommendations of an environmental impact nature that would emerge from the EARP panel review.

Let me define the characteristics of these first stage regulatory mechanisms as I perceived them to be.

The Design Review Process

CN Rail contended that it had autonomous power to design and

construct the second track without submitting to any regulatory authority, either federal or provincial, other than the federal Railway Act, and the Canadian Transport Commission (CTC).

However, CN Rail was prepared to cooperate with federal and provincial environmental authorities and take part on a voluntary basis in the EARP process. In particular this cooperation would require a close working relationship with the federal Department of Fisheries and Oceans (DFO) which has responsibility for protecting the famous salmon runs of the Fraser and Thompson Rivers. Moreover, the CTC had decided to link its statutory approvals of construction to the Design Review Process by requiring CN Rail to file construction plans which incorporated the results of the design review.

To discharge its function of overseeing the design review, the SC was comprised of a senior representative of DFO of the federal Department of Environment (DOE) and of the provincial Ministry of Environment (MOE). As well, CN Rail was represented by a senior official. The committee was chaired by the representative of DOE.

Characteristics of this Steering Committee was that it had no formal status. There was no statutory mandate - there were not even written terms of reference in any official sense. The assumption was that the TWG would reach consensus decisions about environmental impacts and that these decisions would be acceptable to CN Rail and the government agencies. CN Rail would then implement them through design changes. Should consensus be lacking, there would be reference to the Steering Committee to decide on an appropriate course of action to resolve the difficulty, but the Steering Committee was not in any sense an appeal body. It could not make decisions binding on CN Rail.

In the end, CN Rail had the final say about what changes would be incorporated into the design plans. It had only to satisfy the CTC that it had consulted with the government agencies through the Design Review Process.

Underlying this assumption about cooperation were certain fundamental issues and contentions that could not be assumed away. Federally, while DFO would cooperate in the process of design review, it could not surrender its powers under the Fisheries Act to protect fish habitat from construction impacts, and to use criminal prosecution of CN Rail as a means of enforcement, if that were necessary. Moreover, the mandate of DFO was to protect the fish and their habitat - not to protect the rights or interests of fishermen, be they native Indians or non-Indians.

Provincially, there was a basic dilemma. Under the B.C. Water Act, water resources are declared to be the property of the Province. Under the B.C. Land Act, the beds of lakes, rivers and streams are declared to be provincially-owned. Private interests in water or in the beds of lakes, rivers or streams can be acquired, but only by the issue of a provincial water licence or a provincial land grant. MOE had tried to persuade CN Rail to apply for water licences with respect to interferences with the Fraser

and Thompson Rivers caused by the twin-tracking project, but CN Rail had refused, claiming that it already had all the land and water rights it needed by virtue of its railway rights-of-way and the provision of the federal Railway Act. Were the province to have pressed its claim, it would have been necessary to confront Ottawa with basic jurisdictional issues respecting federal and provincial powers and responsibilities. The province chose not to do so, contenting itself with the consultative role offered by participation in the SC and the TWG.

That CN Rail was in the driver's seat was exemplified by the fact that the chairman of the TWG was CN Rail's own consultant.

Summing-up

To sum up, the government's regulatory mechanism for the twin-tracking project:

- was based on an assumption of consensus decisions;
- put aside basic jurisdictional and mandate issues; and
- placed CN Rail firmly in charge of impact assessment and management.

The EARP Panel

With an increasing, if unfocussed expression of public concerns over the impacts of railway construction in the Fraser/Thompson corridor, the EARP panel was intended to provide a means for these concerns to be publicly voiced. There was no question about the project going ahead - that decision had already been made by the federal cabinet. But it was assumed that the recommendations which the EARP panel could make to lessen impacts would be implemented through the Design Review Process and that this response would satisfy public concerns.

It soon became apparent that there was gross miscalculation. The concerns which dominated the panel's public hearings could not be answered by referring them to mere technical review by government and railway specialists. The issues focussed almost entirely on the salmon resource. Over 80% of the official transcripts dealt with submissions on behalf of Indian bands owning reserves along the rivers. Their measures being considered for salmon by DFO. In particular, they questioned what DFO's "no net loss" policy could mean, and their concerns were only heightened by learning that the "no net loss" policy would be implemented on a "river system basis". As the understanding of this qualification emerged (it meant that a loss of fish or habitat at point A on the Fraser/Thompson Rivers could be offset by an enhancement project at any other point on this vast system), it became apparent that the protection DFO offered was protection of the salmon resource and its habitat in a general sense, but not protection of the fishing rights of the Indians.

Moreover, when CN Rail obtained TWG and SC approval of its design plan for the critical 10-mile Ashcroft section of the Thompson River after the EARP panel had completed its hearings but before its report and recommendations had been made, the Indians

concluded that the EARP process was without substance so far as their interests were concerned.

Summing-up

The contribution of the EARP process to the twin-tracking dispute can be summed-up as follows:

- it heightened the knowledge and awareness of the Indian people of the Fraser/Thompson Rivers concerning impacts on the salmon resource and what government agencies might do about them;
- it politicized the Indians, enabling the formation of a new Alliance of Tribal Councils motivated by their common river corridor concerns;
- it made apparent the dominant role of CN Rail in the government regulatory processess for design review;
- it revealed the weakness of the EARP panel in that its report and recommendations would come too late to be effective.

The imminent construction of the Ashcroft section in the Thompson River was the event that brought Indian cooperation with the EARP process to an end. They then turned their efforts to political and legal action, initiating a second stage of government response to the twin-tracking project.

THE SECOND STAGE

The Indians Intervene

The complaint of the Alliance was that the placing of rip rap on the bed and banks of the river to construct the second track would both interfere with fish and their habitat and impede Indian methods of fishing. They claimed legal rights both to the bed and banks of the river and to the right to fish in customary ways at established places along the river, basing these claims on their Indian reserves. For example, the documents which had created the Oregon Jack Reserve in the 10 mile Ashcroft section of the river included language expressly giving the band members the right to fish on both sides of the Thompson River for a distance of two miles downstream from the mouth of Oregon Jack Creek. They also asserted aboriginal rights to fish.

When it appeared that construction would begin in January, 1985, this band and others commenced an action in the Supreme Court of British Columbia for an injunction against CN Rail preventing it from proceeding with construction until Indian rights were determined or Indian agreement was reached.

The Alliance then took their case to Ottawa, appearing before the Standing Committee of the House of Commons on Indian Affairs, Fisheries and Forests to ask for a year's delay of the twin-tracking project. This intervention succeeded in getting the Minister of Transport, with the support of the Minister of Indian Affairs and Northern Development, the Minister of Fisheries and Oceans and the Minister of Environment, to send a letter to Dr.

J.M. Le Clair, President of CN Rail requesting that a process be established "to allow the (twin-tracking) program to go ahead subject to the concerns of the Indian people being met, specifically that they be directly involved in the decision process relating to project construction". Attached to the letter was a Statement of Requirements. For the Ashcroft section, it asked CN Rail to "examine specific design options" and "to incorporate design changes wherever possible to mitigate Indian peoples' concerns with specific heritage sites, fishing sites and access trails." In general, it called for Indian representatives on the SC and the TWG, implementation of SC and TWG recommendations by CN Rail, and arbitration if the parties could not agree. It recommended that the parties choose a facilitator to assist them in resolving their differences. That is the role to which I was appointed by Transport Minister Mazankowski with the agreement of CN Rail and the Alliance.

Intense negotiations, spurred on by court appearances and confrontations between Indians and rock-dumping trains, failed to resolve issues over the following six months. The parties had agreed to clear about one-third of the 10 mile section for construction when the spring run-off brought a halt to operations. There remained basic differences over the scope of the overall design review and the options which CN Rail would be obliged to consider for the remaining portions of the Ashcroft section.

The Court Decides

The Indians pressed their court case forward. On August 19, 1985, Mr. Justice Macdonald issued an interim injunction restraining CN Rail from proceeding with further work on the Ashcroft section pending a full trial of the Indians' claims to ownership of the banks and bed of the river and of the right to fish. This trial is now scheduled for the spring of 1987. Meantime, no twin-tracking construction work is proceeding in any section of the Thompson and Fraser Rivers downstream from Ashcroft. (On October 21, 1986, it was announced that CN Rail has shelved its twin-tracking project indefinitely.)

A Difference in Perceptions

What stood between the parties and an agreement was their different perceptions about their rights and responsibilities. CN Rail perceived its project to be in the national interest, with a full legal mandate to proceed with construction according to efficient economic and engineering standards. It would meet environmental impact design requirements within reason, and it recognized a responsibility, specially endorsed by the federal cabinet ministers, to try to accommodate Indian concerns, but it acknowledged no legal rights on the part of the Indians, and would not agree to design changes requested by the Indians if these changes would result in substantially increased costs. For example, it would not agree to side cuts into the mountains to enable the second track to be located on the up side of the existing main line because these side cuts would cost in the order of ten times the costs of dumping rip rap into the river.

Alliance members believed fundamentally in their ownership of the bed and banks of the river and of the right to fish at customary times and places. They owed it to future generations of Indians to preserve the rights which their fisheries and engineering consultants said were threatened if the second track was to be built by filling in the river bank. They also had in mind that CP Rail would be twin-tracking its mainline on the other bank of the rivers, and that highway straightening and widening, pipelines and transmission lines would place future demands on the corridor.

In their minds, it was CN Rail that was proceeding illegally, for CN Rail had not followed the procedures laid down in the Indian Act for expropriating Indian lands.

Meantime, the SC and the TWG, complying with the ministerial requests, had invited Indian representatives to join their ranks, and Indians began to participate in the design review process on other sections of the corridor with the assistance of their fisheries and engineering consultants. This process might ultimately have proved of benefit in resolving differences between CN Rail and the Alliance. But, basically, the functioning of the SC and the TWG has been of only peripheral relevance during this period of time when mediation efforts and court proceedings have dominated the stage.

Summing-up

Summing up this second stage, the following points can be made:

- the first stage efforts - the Design Review Process and the EARP panel - proved to be totally incapable of dealing with the issues between CN Rail and the Indians;
- forceful political intervention created a situation in which the parties extended their efforts to reach a compromise as far as possible;
- the perceptions of the parties' legal rights were so totally different that compromise was not possible;
- submission of the issues to the Court brought the regulatory process to a virtual standstill; and
- the parties now expect that the court's decision will decisively shape the ultimate outcome - either allowing CN Rail to proceed or requiring CN Rail to meet the Indian's terms and conditions.

THE THIRD STAGE

The Indian Vision of the Future

There are two visions of the future. If the Alliance wins its court case, with a legal affirmation of its ownership of the banks and beds of the rivers and of the right to fish where their 70 - odd reserves abut the Thompson and Fraser Rivers, CN Rail will have either to reach agreement on the terms and conditions that are acceptable to the Indians or initiate expropriation proceedings. Under s.35 of the Indian Act, such expropriation

requires federal cabinet approval, elevating decision-making to the highest political level. If expropriation is authorized, the process requires that Indian interests be recognized so far as possible, with compensation in money only as a last resort. Certainly, CN Rail would have to come "cap in hand" to the Indians.

Other developers would, of course, be affected in the same way as CN Rail. In some cases the alternative of expropriation would not even be available - provincially granted expropriation powers cannot be enforced against Indian reserve lands.

Now that the bands and tribal councils of the corridor have come together to form an Alliance, there is potential for an integrated development planning process implemented by the enactment of 70 complementary reserve by-laws. Taken together, these by-laws could effectively control corridor developments, establishing a joint planning council, requiring the submission of development plans, conducting public hearings and developing principles and criteria for approving or modifying development proposals. This corridor planning and decision-making process could operate cooperatively with the regulatory mechanisms of the federal and provincial governments or independently of them. Conjoined with the fisheries management by-laws of the type recently approved by the Minister of Indian Affairs and Northern Development for the Indian bands of the Skeena River, such development planning and approval by-laws could go a long way toward realizing the kind of future for the Fraser/Thompson corridor that the Indians envisage.

Governments' Vision of the Future

Seldom are alternatives presented so clearly as in this twin-tracking dispute. Alongside this very explicit Indian view of the future, we have the reasoned conclusions of the Fraser-Thompson Corridor Review outlining a government vision of the future.

This government vision is basically an extension of the regulatory mechanisms utilized in the first stage of the twin-tracking project. That is, to quote the Review, "The Panel advocates building upon existing environmental management authority or increasing responsibilities for particular agencies". A "two-tiered" system is advocated - an Executive Committee as an overseer (substitute "Steering Committee"), and a Corridor Management Committee as a planner and coordinator (substitute "Technical Working Group". The essential elements are:

- no alteration of existing mandates of federal and provincial agencies;
- no attempt to identify and resolve basic conflicts among the parties; and
- reliance on "coordination" and "cooperation" as the catalysts for sound corridor management.

It's not unfair to label this vision of the future as the bureaucrats' ideal. British Columbians will recognize its progenitor in the Fraser River Estuary Management Program (FREMP)

recently initiated as the product of a 10-year study of the problems of the Fraser River Estuary. Its essence is coordination and cooperation, and no interference with the existing bureaucratic mandates.

What seems remarkable to me is that, while the Fraser-Thompson Corridor Review gives substantial attention to Indian food fishing (page 11) and to the impact of corridor developments on Indian reserves (page 20), it nowhere acknowledges the existence of the twin-tracking dispute between CN Rail and the Alliance or the court proceedings that may have so decisive an effect on corridor management.

It's as if there were one world for bureaucrats and another world for those who have interests that will be affected by corridor developments.

That's not necessarily an unusual dichotomy. Government agencies exist to serve the interests of citizens, including those whose interests are directly affected. If dissatisfied, the public can resort to the political process. Additionally, the Fraser-Thompson Corridor Review recommends that "transportation developers, Indian organizations, public groups and local representatives" be included in the Corridor Management Committee. Therefore, this government regulatory program can be held forth as representing the universe of environmental management, though proceeding with little regard for the world of private interests and conflicts that surrounds it. Central to this paradigm is the idea that coordination and cooperation can solve all management problems. It is the rational-scientific model of governance. "Coordination" requires that all necessary data and information be made available to all responsible and affected parts in a usable and timely fashion and that all such parties have full opportunity to document and record their interests and the positions they take with respect to them. "Cooperation" assumes that all such parties will then be governed by principles of fairness and reason to reach consensus decisions on the issues dividing them. Such consensus will include a just recognition of individual rights and entitlements that are afforded by the legal system.

For all its assumptions and conceits, it is this rational model we must live by, having rejected naked power, divine revelation and authority without reason. But an increasing understanding of the workings of this rational-scientific model is leading us to an equally increasing awareness of its limitations and constraints.

A principal example of these limitations and constraints lies in the matter of "rights". Individually and collectively we have perceptions about our "rights". To the extent possible we seek to have these expressed in our formal laws, and even constitutionally entrenched so that they will not lie in peril of change. We expect these rights to be honoured in our governing system. Neither reason nor fairness is a substitute for recognition of these rights. When rights clash we expect "justice" - that is, a sanctioned system of adjudicating and pronouncing how the clash is to be resolved.

The bureaucratic model of government assumes that the "rights" of rational people can always be satisfied through coordination and cooperation resulting in consensus decision of government. Fortunately, this result is usually true. But it is also true that in many cases people's perceptions of "rights" cannot be so readily accommodated. When these perceptions are ignored or suppressed, they are more likely to fester than to be forsaken. The consequences may be political lobbying, court actions or even defiances of the law. We know all of these reactions in Canada. Sometimes, they lead to change. In other cases they are stored to be retrieved as a legacy of bitterness and conflict in the future.

The question I ask is whether the bureaucratic model of governance should ignore this "irrational" force for change. Is it always better to mask conflict under the cover of coordination and cooperation? Would environmental management in the Fraser-Thompson corridor be enhanced by coming to grips with the dispute between the British Columbia government and CN Rail over who controls the water resources of the rivers? Would it be more in tune with the future were governments to recognize that Indians are claiming legal rights to the banks and beds of the rivers and the right to fish such that, if these rights are affirmed by the courts, Indians must be afforded a major role in environmental management of the corridor?

My own belief is that we lose ground when we fail to confront wide differences of perceptions about basic rights. Coordination and cooperation cannot always carry the day. In the twin-tracking case negotiations merely revealed how far the parties are apart. In my view, it was a fitting service to the rational-scientific model of governance to submit the basic question of entitlement between CN Rail and the Alliance of Tribal Councils to the courts. When the courts have decided, it will then be possible to design an abiding system of environmental management for the corridor - not before!

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FOREWORD

The British Columbia Chapter of the Canadian Land Reclamation Association was formed in 1985 to provide a local public forum for the exchange of information and experience in land rehabilitation. Comprised of professionals from a wide range of backgrounds and interests, this organization pulled together quickly to host the 1986 Annual Meeting. The diverse membership in the B.C. Chapter was realized in a program that expanded the scope of the conference to include many fields that have not been represented in past programs. The quality of presentations and range of topics kept audience participation at a spirited level. It is our hope that we have initiated a trend to widen the scope of the annual meetings so as to not focus on traditional mining or energy development issues.

I wish to thank all speakers and attendees for making this first formal function of the B.C. Chapter a success. The enthusiastic support of chapter members in the planning and administration of the conference demonstrated a strong desire for a quality meeting. This drive bodes well for the future of our chapter.

A great deal of effort went into the publication of the proceedings of the 1986 Annual Meeting. Care was taken to accurately reproducce all papers, however minor errors may have escaped the review process. We hope that this will not detract from the information presented by the authors.

May the CLRA and all local chapters continue to grow and function as a focal point for land rehabilitation.