

Book Review
Compte rendu

The Duty to Consult: New Relationships with Aboriginal Peoples

By Dwight G. Newman
Saskatoon: Purich Publishing, 2009, 128 pages

Reviewed by **Richard Ogden***

The duty to consult Aboriginal peoples requires the Crown to speak with First Nations, Inuit peoples, and Métis communities before undertaking action which may adversely impact those groups' constitutional rights. The Crown must take account of Aboriginal concerns and, where it anticipates an adverse impact, accommodate Aboriginal interests to the extent reasonably possible. So far so good. This is, however, about as much as the Supreme Court has said on the application of the duty, leaving many unanswered questions, and many anxious Aboriginal people, resource developers, lawyers, and government decision-makers. Dwight Newman's *The Duty to Consult: New Relationships with Aboriginal Peoples* is an accessible, comprehensive, and thoughtful effort to calm the waters.¹

The doctrine of the duty to consult is fundamental to the structure of the Canadian state and I was pleased to see Newman refer to it in his preface as a "constitutional duty." It is more than a subset of administrative law. Its source is the honour of the Crown, which cannot be delegated. This honour is engaged by the Crown's assertion of sovereignty over Aboriginal peoples or by the conclusion with them of treaties, both of which are clearly constitutional moments. Further, the duty describes a central feature of the relationship between the Crown and the only groups within Canada – aside from French and English linguistic minorities – which receive special constitutional treatment. Moreover, it describes a necessary step in a process of justifying infringements of rights guaranteed by section 35 of the *Constitution Act, 1982*.² It is, as Newman implicitly acknowledges in not expanding the point, hardly possible to argue that it is not a constitutional duty, when its non-satisfaction may invalidate an executive act or legislation.

* **Weir Foulds LLP, Toronto; Barrister and Solicitor, Ontario and New Zealand.**

¹ Saskatoon: Purich Publishing, 2009.

² Being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

The main bulk of *Duty to Consult* commences with a sketch of what Newman identifies as theoretical bases for the duty: the honour of the Crown; promotion of negotiated resolutions; promotion of reconciliation; and an ethic of ongoing relationships. I would have liked, at this stage, for Newman to flesh out the location of the duty to consult within Canada's constitution. Worth more attention was his comment that the rights and interests recognized and affirmed in section 35 of the *Constitution Act, 1982* "now include the duty to consult." This statement likely rests in part on the Supreme Court's conclusion in *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)* that Treaty 8 signatories possess procedural as well as substantive treaty rights, and that section 35 protects both.³

Mikisew Cree also indicates that section 35 is the likely constitutional location of non-treaty procedural rights arising from the duty to consult, even though such rights do not meet the test for Aboriginal rights outlined in *R. v. Van der Peet*.⁴ Binnie J., speaking for the Court, held that Treaty 8 did not create the procedural right which matches the duty to consult, but rather "rededicated it."⁵ It is likely, therefore, that there are procedural as well as substantive Aboriginal (non-treaty) rights, that section 35 protects both, and that *Van der Peet* simply provides the test for substantive Aboriginal rights.⁶ *Mikisew Cree* also notes that the Crown must justify against the test in *R. v. Sparrow*⁷ any infringements of treaty-affirmed consultation rights.⁸ This justification requirement would logically also apply to those "non-treaty" consultation rights which arise simply at common law. Through an uncomfortable circularity this may, perhaps, lead to a requirement for consultation on whether and in what circumstances not to consult.

While Newman could have further developed his statements on the constitutional nature and location of the duty to consult, such omissions are consistent with the book's stated aim of reaching a broad audience.⁹

³ 2005 SCC 69, [2005] 3 S.C.R. 388 at 417-18 [*Mikisew Cree*]; see also *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, 2004 SCC 74, [2004] 3 S.C.R. 550 at 564 [*Taku River Tlingit*].

⁴ [1996] 2 S.C.R. 507 [*Van der Peet*].

⁵ *Mikisew Cree*, supra note 3 at 408.

⁶ It might follow that, like "extinguishment," any Aboriginal "right to be consulted" is located within the word "existing," as part of "existing aboriginal rights" in section 35. At common law the duty to consult is better seen as part of rather than the subject of recognition.

⁷ [1990] 1 S.C.R. 1075 [*Sparrow*].

⁸ *Mikisew Cree*, supra note 3 at 418.

⁹ Compare J. Timothy S. McCabe, *The Honour of the Crown and its Fiduciary*

Duty to Consult is short but satisfying, its compactness arising not only from the relative paucity of lower court case law, but from an admirable desire to avoid the theoretical musings which turn off non-lawyers. There will remain much room in the doctrine for judges, academics, and book reviewers to tease out their own theories.

In the book's central two chapters Newman ably addresses what, for practitioners, are the core questions: When does the duty arise? And what is its content? His summary of the law is clear, logical and, insofar as possible, complete, canvassing possible answers to outstanding questions without wasting the reader's time attempting to cover all arguments. None of this is an easy task – the Supreme Court has directly addressed the duty in only three cases in 2004 and 2005,¹⁰ although it will likely provide further guidance in the appeals in *David Beckman in his capacity as Director, Agriculture Branch, Department of Energy Mines and Resources et al v. Little Salmon / Carmacks*¹¹ and *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*.¹²

Readers should, however, be careful not to invest too much in hope that the development of the law will increase certainty about the existence or content of the duty to consult. In the absence of a full historical record to inform decisions on existence or content, governments may prefer to err well on the side of caution and choose a path which favours ongoing relationships. Proper treaty interpretation, in particular, is ripe for government misstep as the Supreme Court has held that the Crown, being a party to the treaty, “will always have notice of its contents.”¹³ This is a tough standard to meet – as Newman points out, claims to the correct interpretation of a treaty can be subject to complex historical determinations.¹⁴ Recall, as a ready example, the *Marshall* cases where the correct interpretation of commercial fishing rights under the Mi'kmaq treaties of 1760-1761 was determined only by the Supreme

Duties to Aboriginal Peoples (Toronto: LexisNexis Canada, 2008), which tracks the development of the fiduciary principle and the principle of the honour of the Crown, takes a more theoretical approach, and delves deeply into and quotes extensively from case law.

¹⁰ *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 S.C.R. 511 [*Haida Nation*]; *Taku River Tlingit*, *supra* note 3; *Mikisew Cree*, *supra* note 3. These judgments were not entirely out of the blue: see *Sparrow*, *supra* note 7 at 1114 and *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, at 1108-14.

¹¹ (Y.T.) (Civil) (By Leave) (32850) (appeal heard November 12, 2009).

¹² (B.C.) (Civil) (By Leave) (33132) (appeal heard May 21, 2010).

¹³ *Mikisew Cree*, *supra* note 3 at 408.

¹⁴ Newman, *supra* note 1 at 27.

Court in 1999, and even then the Court needed a second shot.¹⁵ There will be occasions where the safest advice is to adopt where possible an interim interpretation of the treaty that acknowledges the fact that on signing the treaty the parties were entering into a relationship.

There is, as Newman notes briefly in his chapter on the duty's content, no necessary correlation between "legally acceptable consultation" and "good consultation." In his view good consultation is a process which is consistent with "the longer-term prospects for trust and reconciliation."¹⁶ This is an important point. While *Duty to Consult* correctly gives the sense, which may provide some comfort to counsel, of principles on the cusp of being a body of law, of equal value to them will be case studies of successful consultations and negotiations. Unfortunately such discussions are often confidential and rarely reported, and so require broader study than the book permitted. Newman, an Associate Professor in the University of Saskatchewan College of Law, is to be credited for informing his analysis with interviews of those directly engaged with the duty to consult.

This section might be a suitable place in future editions to provide some practical principles for good consultation, including those identified by the federal government: mutual respect; accessibility and inclusiveness; openness and transparency; efficiency; and timeliness.¹⁷ Some additional examples of good practice would also be useful for the newcomer, including, for example, communicating decisions in person rather than by letter, where possible; ensuring materials contain maps and diagrams; and using Aboriginal communication tools such as community newspapers and radio stations.

This leads to what I believe is presently the most interesting chapter – an examination of "The Law in Action of the Duty to Consult," so titled after Roscoe Pound's exhortation to lawyers to consider how the law works beyond the books which record it.¹⁸ In this part Newman examines the proliferating consultation policies of government, Aboriginal communities, and corporations. The existence and successful

¹⁵ *R. v. Marshall*, [1999] 3 S.C.R. 456; *R. v. Marshall*, [1999] 3 S.C.R. 533.

¹⁶ Newman, *supra* note 1 at 64.

¹⁷ Indian and Northern Affairs Canada *Aboriginal Consultation and Accommodation: Interim Guidelines for Federal Officials to Fulfill the Legal Duty to Consult* (February 2008), online: www.ainc-inac.gc.ca/ai/mr/is/arp/cnl/intgui-eng.asp — last accessed October 11, 2010.

¹⁸ Roscoe Pound, "Law in Books and Law in Action: Historical Causes of Divergence Between the Nominal and Actual Law" (1910) 44 *Am. Law Rev.* 12.

use of such documents will likely, as he notes, create a normative order which will contribute to the development of case law.¹⁹ But that is for the future since, returning to the theme, there is presently no judicial consensus on when, if at all, one party must respect the other's consultation policy and, as it were, consult on how to consult.

The penultimate chapter, where Newman turns to "International and Comparative Perspectives for the Future," is also helpful and worth updating for later editions. Litigation counsel and judges should pay attention to international perspectives in order to ensure consistency with (slowly) evolving norms of international law. Judges and policymakers seeking to streamline the consultation process would do well to examine the "Right to Negotiate" provisions in Australia's *Native Title Act 1993* (Cth) which similarly aim at reconciliation but place greater emphasis on certainty in resource development.²⁰ Those more committed to seeing the duty to consult as a means to help manage the relationship between the Crown and Indigenous peoples might spend time examining New Zealand *Treaty of Waitangi* jurisprudence and government practice;²¹ the latter was quoted approvingly in the landmark *Haida Nation v. British Columbia (Minister of Forests)* case.²²

Newman concludes briefly with a return to the theoretical foundations for the duty that he listed in opening and states that the duty to consult is based primarily (as the book's title suggests) in the ethic of ongoing relationships. He then suggests that nevertheless the law should develop pragmatically, emphasising and adopting whichever principles best resolve each dispute. My preference, if it is not already clear, is that the law focus on the ethic of ongoing relationships – as I believe this incorporates the other three theoretical bases.

The honour of the Crown, which is the primary source of the duty to consult, is engaged by the Crown's colonial assertion of sovereignty or the conclusion of a treaty, and so acknowledges that the Crown has entered into a relationship with Aboriginal peoples. Courts presume that by entering this relationship the Crown has undertaken to act in a way that is consistent with the maintenance of a healthy relationship; a

¹⁹ Newman, *supra* note 1 at 78-80.

²⁰ See Daniel Guttman, "Australian and Canadian Approaches to Native Title Pre-Proof" [2005] A.I.L.R. 39.

²¹ Matthew S. R. Palmer, *The Treaty of Waitangi in New Zealand's Law and Constitution* (Wellington: Victoria University Press, 2009) 130-47, 215-26; see also Rt. Hon. Sir Robin Cooke, "Introduction" (1990) 14 N.Z. Univ. L. Rev. 1, 5.

²² *Haida Nation*, *supra* note 10 at 534.

healthy relationship requires honourable action.²³ Courts will rely on this presumption to hold the Crown to a standard that is respectful of the relationship with Aboriginal peoples. Hence the duty to consult. Similarly, as Newman notes, reconciliation is not a fixed outcome in which a loss to one party is a gain to the other, but rather it characterises how two parties can live together despite having sometimes conflicting interests. Reconciliation, therefore, similarly describes the fact of a relationship. Reconciliation is the corollary of the honour of the Crown; reconciliation is possible only where the Crown has acted honourably, and honourable action is that which leads to reconciliation.

Nor, I believe, is a relationship focus inconsistent with the remaining theoretical basis – the promotion of negotiated solutions. The notion of a spectrum of consultation where the duty can be met without intensive discussions or agreement is the best evidence of this theoretical basis. The Crown’s ultimate sovereignty, which underpins the duty to consult, means that generally it can act without the agreement of the Aboriginal group whose rights are potentially impacted. Acknowledging the fact of this ultimate sovereignty does not require the denial of a relationship or a partnership, or even of an Aboriginal people’s residual sovereignty; it simply requires the acceptance that there is a “junior” partner and a “senior” partner and that there will be instances when the “senior” partner gets its way. This is the characterisation that the New Zealand Court of Appeal has given to the relationship between the Crown and Māori,²⁴ and as noted above it is this jurisprudence which gave rise to the government policies quoted in *Haida Nation*.²⁵ Requiring more or less consultation depending on the strength of the claim is the best way to manage the fact that one party is more “senior.”

Duty to Consult is well referenced, with endnotes and an ample and precise index. And kudos goes again to Purich Publishing for printing on “100 per cent post-consumer, recycled, ancient-forest-friendly paper.” Harder decisions lie ahead, for at some point both the publisher and Newman will have to determine on which path to take the book. Will it be a comprehensive academic reference text – “Newman’s *Duty to*

²³ *Taku River Tlingit*, *supra* note 3 at 564: “In all its dealings with Aboriginal peoples, the Crown must act honourably, in accordance with its historical and future relationship with the Aboriginal peoples in question.”

²⁴ *New Zealand Maori Council v. Attorney-General (Lands Case)* [1987] 1 NZLR 641 (NZCA), *per* Cooke P. at 664, Richardson J. at 673, Somers J. at 693, Casey J. at 702-03, Bisson J. at 715; *New Zealand Maori Council v. Attorney-General (Forests Case)* [1989] 2 NZLR 142 (NZCA), at 152.

²⁵ *Haida Nation*, *supra* note 10 at 534.

Consult” would be welcome in years to come – or an accessible guide introducing the non-expert to a wide-ranging fetter on governmental authority? Newman has committed to maintain on the publisher’s website a succinct summary of significant developments.²⁶ As the case law will surely bloom, let us hope he has the time.

²⁶ Happily now online at www.thedutytoconsult.com (last accessed October 11, 2010).