

# Book Review: The Duty To Consult: New Relationships With Aboriginal Peoples, by Dwight G. Newman

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## Book Review

### THE DUTY TO CONSULT: NEW RELATIONSHIPS WITH ABORIGINAL PEOPLES, by Dwight G. Newman<sup>1</sup>

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DWIGHT G. NEWMAN'S *THE DUTY TO CONSULT*<sup>3</sup> is a handbook on a part of Canadian Aboriginal law that is in need of further explication. Echoing the nascent character of the doctrine in question, the Associate Professor at the University of Saskatchewan College of Law has approached this project as one that will evolve over time.<sup>4</sup> Newman is known for his strong, theoretically oriented work,<sup>5</sup> but in this compact volume he undertakes to reach a broader audience, beyond law and academe, on a topic he considers to be of "fundamental importance" for all Canadians.<sup>6</sup> In *The Duty to Consult*, Newman strikes a balance between highlighting key issues from the mass of context-specific material that this field has rapidly spawned and shedding light on the big picture. As such, the book is a valuable resource for both consultation practitioners and big picture thinkers alike.

The layout of the book demonstrates how the constitutional duty to consult involves many actors and pushes Aboriginal relations into the daily practice of government, especially in the areas of land use and resource development.

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1. (Saskatoon: Purich Publishing, 2009) 127 pages [Newman, *Duty to Consult*].
  2. Ph.D. Candidate and Adjunct Professor, Osgoode Hall Law School, York University; Senior Advisor, Ministry of Aboriginal Affairs, Government of Ontario. The views expressed in this review are the author's own and do not reflect those of the Ministry.
  3. Newman, *Duty to Consult*, *supra* note 1 at 10.
  4. See Dwight G. Newman, "Duty to Consult Resource Page," online: <<http://www.thedutytoconsult.com>>.
  5. See e.g. "You Still Know Nothin' 'Bout Me: Toward Cross-Cultural Theorizing of Aboriginal Rights" (2007) 52 McGill L.J. 725; "Prior Occupation and Schismatic Principles: Toward a Normative Theorization of Aboriginal Title" (2007) 44 Alta. L. Rev. 779.
  6. Newman, *Duty to Consult*, *supra* note 1 at 10.

The early chapters set out the doctrine, with the focus shifting to non-judicial actors mid-way through the book. This layout reflects Newman's argument for a balance between judicial and non-judicial contributions in the development of this area of Aboriginal law, an argument that is grounded in a realist-inspired "law in action" frame of analysis. The influence of this frame of analysis is apparent in two key arguments. First, Newman is optimistic about the intersection of the competing approaches to consultation taken by Aboriginal communities and organizations, governments, and corporate participants. He suggests that courts should hold back to allow these players to creatively work out context-appropriate approaches that rapid doctrinal development might cut off. Second, he points out that "good" consultation often encompasses concerns that are important for reconciliation but which may not be addressed within the legal parameters of the duty to consult. Beyond these arguments, however, Newman refrains from articulating a clear theory of the duty to consult or offering any overarching arguments regarding the direction of either the law or policy.

The lack of a big picture argument is surprising when chapter one starts the book on such a strong theoretical note. There, Newman outlines the Supreme Court of Canada's articulation of the duty to consult in *Haida Nation v. British Columbia (Minister of Forests)*,<sup>7</sup> *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*,<sup>8</sup> and *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*,<sup>9</sup> and then sets out four theoretical approaches that he suggests will allow for a deeper understanding of the doctrine and an anticipation of its future development: maintaining the Crown's honour; promoting negotiated settlements of Aboriginal claims; promoting reconciliation; and supporting ongoing, dynamic relationships in a "generative constitutional order."<sup>10</sup> Newman occasionally brings these theoretical approaches back into the discussion in later chapters—most notably, the reconciliation and relationship approaches—and demonstrates how an emphasis on a particular theoretical lens can push the development of the doctrine in one direction or another. But he does not argue for the application of any particular lens over the others.

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7. [2004] 3 S.C.R. 511 [*Haida*].

8. (2003), [2004] 3 S.C.R. 550 [*Taku River Tlingit*].

9. [2005] S.C.R. 388 [*Mikisew Cree*].

10. Newman, *Duty to Consult*, *supra* note 1 at 16-20. Newman's fourth approach—that which results in a "generative constitutional order"—directly cites Brian Slattery's argument from "Aboriginal Rights and the Honour of the Crown" (2005) 29 Sup. Ct. L. Rev. 433.

Instead, he avoids such an argument by advancing the four approaches as overlapping principles and concluding that the duty to consult is a “complex doctrine” that needs room to grow in both “principled” and “localized” ways.<sup>11</sup>

Chapters two and three review the parameters and content of the duty to consult, surveying lower court and some quasi-judicial agency decisions. Chapter two deals with the legal issues around when the duty arises—namely, the knowledge threshold and actions that trigger the duty. It also highlights emerging doctrinal issues, such as identifying appropriate consultation partners, as well as the standards of review and the remedies that are available when courts or quasi-judicial tribunals review the adequacy of consultations. This chapter provides an astute review of the parameters of the duty, but falls short in its brief treatment of the complex nature of the Crown. Although Newman states that the “constitutional duty to consult is one owed in a certain sense by an undivided Crown,”<sup>12</sup> his exploration of this issue is limited to information-sharing problems within government. He misses the issues created by the divisibility and indivisibility of the federal and provincial Crowns and does not address questions about how creatures of statute, such as municipalities, are understood for the purposes of this doctrine. Given that these complex issues potentially affect both the knowledge trigger and the identification of consultation partners, they deserve some attention here.

The third chapter maintains the focus on case law, fleshing out the content of the duty across the spectrum that the Supreme Court set out in *Haida*, while also bringing non-judicial actors into the picture by flagging that “good consultation” may not be defined by, or may differ from, the legal minimums defined by the courts.<sup>13</sup> The “law in action” analysis is put to good use when Newman reviews Saskatchewan’s draft *First Nations and Métis Consultation Policy Framework*.<sup>14</sup> By comparing the consultation obligations that result from a decision matrix contained in the *Framework* to the obligations stipulated by the *Haida* spectrum, Newman illustrates that the implementation of the duty may involve content choices that depart from the doctrine. A discussion of accommodation is also part of this chapter, and—like the case law on the subject—it is brief.

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11. *Ibid.* at 94.

12. *Ibid.* at 36.

13. *Ibid.* at 46-47.

14. Government of Saskatchewan, “First Nation and Métis Draft Consultation Policy Framework” (December 2008), online: <<http://www.fnmr.gov.sk.ca/Consultation-Draft-Framework/>>.

Newman notes that the few cases that have explored this aspect of the duty to consult to date have done so only in terms of avoiding irreparable effects and minimizing harm to Aboriginal interests, thereby leaving the question of what constitutes appropriate accommodation open and uncertain. In the hard cases, where accommodation measures may involve high costs with the potential to effectively shut down a project, Newman suggests that parties can—and must—act without court guidance, observing that “[n]o doctrine can make for easy choices.”<sup>15</sup>

Chapter three also includes a discussion of “economic accommodation,” referring to various resource revenue-sharing arrangements that are generally considered to be beyond the requirements of any particular instance of the duty. Newman indicates that although judges have approached economic accommodation with hesitation, compensation for past breaches of consultation obligations might be a claim that gains some traction in courts. Newman highlights the reconciliation theme when he expresses his preference for the language of economic accommodation over compensation, seeing the former as more flexible and encompassing a wider range of revenue-sharing arrangements that are better suited to the forward-looking orientation of reconciliation. This theme is also present in the chapter’s conclusion, where Newman argues that consultation conducted to satisfy legal minimums under the duty to consult may miss the longer-term solutions and negotiations required for reconciliation and for successful ongoing relationships. It is a discussion that highlights the limitations of the duty, in its present doctrinal construction, to foster the processes through which these aims might be satisfied.

Non-judicial contributors to the development of the duty to consult take centre stage in chapters four and five, which survey the consultation policies of the main players—governments, First Nations and Métis communities, and corporations and other industry participants (chapter four)—as well as comparative approaches from international law and Australia (chapter five). These chapters provide a useful synopsis of key issues and developments through a selective survey of materials. One section that could benefit from further elaboration is the section on government policies, particularly in relation to legislative proposals. The section mentions British Columbia’s now defunct

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15. Newman, *Duty to Consult*, *supra* note 1 at 60.

*Recognition and Reconciliation Act*<sup>16</sup> and the recent amendments to Ontario's *Mining Act*,<sup>17</sup> but further exploration of legislative models—and in particular, the vast differences between British Columbia's attempt and the sector-specific approach in the Ontario context—would be welcome. This gap is filled, to some extent, by the discussion around Australia's *Native Title Act, 1993* in chapter five. There, Newman suggests that the distribution of powers in Canada—and specifically, the federal power over Aboriginal title and rights<sup>18</sup> and provincial jurisdiction over natural resources<sup>19</sup>—renders it more probable that further guidance around the duty to consult will be pursued through provincial policies rather than legislation.<sup>20</sup> While Newman's prediction may be right, this comment begs for further analysis and consideration. What evidence (particularly under a “law in action” frame of analysis) suggests that the division of powers inhibits or leads Canadian jurisdictions away from legislative solutions? What other factors might contribute to the lack of legislative proposals to guide the implementation of the duty to consult? More importantly, are provinces, which are constitutionally obligated to respect Aboriginal and treaty rights and carry out the bulk of consultations, better served by policies than by legislatively protected frameworks for working with First Nations and other Aboriginal communities?

The analysis in chapter four, and more generally, also falls short in its treatment of how the policies of the various players might interact when (again, under a “law in action” approach) the law fails to cast a heavy enough shadow. It is a problem that appears to stem, at least in part, from the lack of integration of doctrinal concerns with the discussion in the policy chapter. This tendency is apparent in Newman's interpretation of *Labrador Métis Nation v. Newfoundland*

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16. A discussion paper was circulated by the B.C. government and B.C. First Nations Council that outlines the scope of the legislative proposal. See “Discussion Paper for Implementing the New Relationship,” online: <[http://www.gov.bc.ca/art/newrelationship/download/implementing\\_the\\_new\\_relationship\\_0309.pdf](http://www.gov.bc.ca/art/newrelationship/download/implementing_the_new_relationship_0309.pdf)>.

17. *An Act to Amend the Mining Act*, S.O. 2009, c. 21.

18. *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3, s. 91(24), reprinted in R.S.C. 198, App. II, No. 5.

19. *Ibid.* at s. 92A.

20. Newman, *Duty to Consult*, *supra* note 1 at 89.

and Labrador (*Minister of Transportation and Works*),<sup>21</sup> which he suggests opens the door for organizations such as the Congress of Aboriginal Peoples (CAP) to represent non-status and Métis communities in consultations.<sup>22</sup> While this may be true in terms of the decision's confirmation that Aboriginal communities with credible rights claims may choose their agents for consultation purposes,<sup>23</sup> Newman does his audience a disservice by divorcing the agency issues in the decision from the significant evidence of Aboriginal rights that grounds the court's decision in this case.<sup>24</sup> Indeed, Newman's own discussion of the issue in chapter two is more to the point, where, based on *Labrador Métis Nation* and other decisions, he argues that representative bodies will be accepted by the court when "the particular body either represents directly the interests of the relevant Aboriginal communities or is specifically authorized to do so."<sup>25</sup> The "relevance" of Aboriginal communities is the critical point that he over-looks in the analysis in chapter four: CAP's or any other organization's relevance as a participant in any *Haida* consultation is dependent on the credibility of the section 35 rights claims of the constituency or constituencies that it represents.<sup>26</sup>

Newman has made some excellent choices in structuring this handbook and selecting its content. Inevitably, however, his analysis is also limited by these choices. Most critically, it only partially explores how the act of identify-

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21. 288 D.L.R. (4th) 641, leave to appeal to S.C.C. refused 32468 (29 May 2008)[*Labrador Métis Nation*].

22. Newman, *Duty to Consult*, *supra* note 1 at 70.

23. *Labrador Métis Nation*, *supra* note 21 at paras. 46-49.

24. Summarized in *ibid.* at para. 13.

25. Newman, *Duty to Consult*, *supra* note 1 at 40. Newman notes a potential additional requirement that the representative body not encompass "conflicting interests." This is an interesting point that will require further explanation and analysis in future iterations. See *e.g. Nlaka'pamux Nation Tribal Council v. Griffin*, [2009] 4 C.N.L.R. 213 (B.C. S.C.) (in which the court accepted different roles for a band and tribal-level government within the duty to consult in spite of their conflicting positions regarding the project in issue and the possibility of duplicate representation of the same community through the tribal council).

26. CAP is a national body. Its members are affiliate provincially-based organizations, such as the Labrador Métis Nation (LMN). Unlike the LMN, there is no authorization via membership in CAP to represent communities in duty to consult matters. For information about CAP's political structure, see Congress of Aboriginal Peoples, "CAP Political Structure," online: <[http://www.abo-peoples.org/CAP/About/Political\\_Structure.html](http://www.abo-peoples.org/CAP/About/Political_Structure.html)>.

ing relevant participants in duty to consult matters implicates section 35 jurisprudence around the notion of an Aboriginal community and the renewal or reform of its governance structures. As Brent Olthius points out, the test for identifying section 35 rights-holding communities is largely unsettled, with *R. v. Powley*<sup>27</sup> constituting the extent of the Supreme Court's consideration of this issue to date.<sup>28</sup> Within this jurisprudential gap, the duty to consult functions as a catalyst for change. It encourages new roles for nation-level organizations such as tribal councils; it creates incentives for communities and organizations to reorganize their membership along jurisprudentially derived criteria in order to be recognized as consultation partners; it may open the door for greater involvement of non-status or otherwise unrecognized communities in section 35 rights matters;<sup>29</sup> and it generates incentives for communities and organizations to create guidelines and laws to try to achieve consultations on their own terms. These dynamics will impact *Indian Act*<sup>30</sup> band governments, the evolution of self-government, and the governance structure of Aboriginal communities in general. Thus, as Newman observes, the duty to consult may "inadvertently enhance the power of already relatively advantaged Aboriginal groups over more disadvantaged ones."<sup>31</sup> But it is more in keeping with his optimistic view of the potential products of "law in action" to consider how the duty to consult might also erode the structures that maintain the power of the more advantaged groups and provide the impetus for some long overdue reform and renewal of self-government and claims processes.

A less optimistic view of "law in action" leads to greater emphasis on what Newman's observations suggest about the limitations of the duty to consult doctrine. While the duty pushes recognition and governance issues to the fore, the doctrinal development to date is not (and perhaps never will be) sufficient to force governments to provide an adequate framework for recognizing rights-holding communities, or negotiating land settlements and self-government

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27. [2003] 2 S.C.R. 207.

28. Brent Olthius, "The Constitution's Peoples: Approaching Community in the Context of Section 35 of the Constitution Act, 1982" (2009) 54 McGill L.J. 1.

29. See the discussion of CAP and LMN, above. See also National Association of Friendship Centres, "The Government's Duty to Consult Urban Aboriginal People," online: <<http://www.nafc.ca/PDF/NAFC%20Duty%20to%20Consult%20-%20ENGLISH.pdf>>.

30. R.S.C. 1985, c.I-5.

31. Newman, *Duty to Consult*, *supra* note 1 at 71.



agreements (beyond existing treaty processes, although those might also be considered inadequate). This lack of influence is particularly interesting in light of Newman's analysis of how the ramifications of any changes to Aboriginal rights tests are intensified via the duty to consult. He suggests that, as a result, the duty may inhibit the further development of the Aboriginal rights tests.<sup>32</sup> If this doctrinal dynamic plays out, the branch of Aboriginal law that may more directly encourage the resolution of these rights issues will be limited by a branch of Aboriginal law that, in spite of its massive impact on government and resource development, appears to lack the force required to catalyze progress on the broader reconciliation processes. Regardless of how these dynamics eventually play out, both the potential and the limitations of the duty to consult doctrine to influence the larger picture of section 35 rights makes this interaction a subject that, in a realist approach to "law in action," deserves greater attention.

These bits of incomplete analysis and the brevity of the book's conclusion make it clear that Newman and his publisher have approached this project as a work in progress. Given the evolutionary nature of the subject, this is a fair decision. It is indeed better to have this resource in its current state than not at all. Those involved in the implementation and daily practice of the constitutional obligation to consult are well served by Newman's synthesis of illustrative materials into an accessible and compact format. But I, for one, will look forward to the next iteration of this project, and hope that it will bring better integration of the analysis in various chapters, greater exploration of the difficult dynamics unleashed by the duty to consult, and more emphasis on normatively sound directions for the development of both doctrine and policy—all of which Newman is well situated to deliver.

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32. *Ibid.* at 26-27.