Duty To Consult And The Aboriginal Reconciliation Process

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Aboriginal Consultation, Environmental Assessment, and Regulatory Review in Canada UBC Press
The Model Rules of Professional Conduct provides an up-to-date resource for information on legal ethics. Federal, state and local courts in all jurisdictions look to the Rules for guidance in solving lawyer malpractice cases, disciplinary actions, disqualification issues, sanctions questions and much more. In this volume, black-letter Rules of Professional Conduct are followed by numbered Comments that explain each Rule's purpose and provide suggestions for its practical application. The Rules will help you identify proper conduct in a variety of given situations, review those instances where discretionary action is possible, and define the nature of the relationship between you and your clients, colleagues and the courts.

Prior Consultation in International Law
Purich Publishing
The advancement of a constructive Aboriginal agenda in the form of rights-based litigation since the recognition and affirmation of Aboriginal and treaty rights in the Constitution Act, 1982 has led to the creation of the legal doctrine of the duty to consult and accommodate. As a discipline on Crown decision-making, the legal doctrine of the duty to consult and accommodate presents a prospective pathway for the reconciliation of Crown and Aboriginal interests in resource development. While maintaining promise as a framework to provide for the full and fair consideration of Aboriginal interests in regulatory reviews, administrative decision-makers representing the Crown have made the management of legal liabilities the principal policy objective of consultation and accommodation. As a result, there is minimal incentive for administrative decision-makers to deviate from highly legalistic interpretations of common law. This standard operating procedure is steadily reinforced, as the Crown, able to efficiently reduce the risk of

litigation by First Nations, permits projects without consideration of the continued and incremental diminishment of Aboriginal interests in lands and resources. The purpose of this thesis is to deconstruct processes of consultation and accommodation embedded in environmental assessment processes associated with major resource projects as a means to identify institutional arrangements that promote and provide for the full and fair consideration of Aboriginal interests in Crown decision-making.

Commentary and Analysis UBC Press
The legal doctrine, 'Duty to Consult', was set through a number of landmark court cases between 1997 and 2004. It is this duty that has helped First Nations receive official stakeholder status in the negotiation of land and resource use issues in British Columbia (BC), Canada. Later, policy initiatives, a best practices handbook, and procedure development shaped through the actual practice of consultation, contributed to the formation of an 'in practice' reality of this duty. When making an application to undertake a resource extraction or utilization project, industry proponents must go through BC's Environmental Assessment (EA) process. This process is one example of where the ?Duty to Consult' has been applied in the form of a required consultation with First Nations affected by a proposed project. Despite the formation of law and policy meant to guide this area of practice and produce successful consultation activities, it is left unclear from law and policy alone what actual strategies are used by industry proponents to meet the requirements of consultation during an EA. However, as successful consultation is the goal, understanding the strategies alone is insufficient for creating a clear picture of the important considerations of this process. For this reason, the research sought to understand what overarching approach, aside from legal parameters and policy frameworks, guide the practice of consultation with First Nations in private sector resource industry projects. Identifying and examining the difficulties of consultation from the perspective of industry helped explain what the overall approach must be when undertaking this type of consultation and why this approach is of such importance.In the last few years EA has gained greater attention in BC. Due to this, reviewing the legal context and documents that officially shape the practice of consultation within the EA process is timely, relevant and provides a basis for further research. The research involved interviews with industry proponents and staff at the Environmental Assessment Office (EAO). These served to develop an understanding of the individual experience of those working in the field. In developing a fuller picture of the subtleties of the consultation process, the interviews are supplemented with an analysis of the social and political context that influences consultation. The analysis revealed that more effective consultations prioritize relationship-building as their primary approach and are responsive to the varying local conditions, as each community engaged with is unique. The findings present challenges perceived on the industry side that may help provide better understanding of the influences on the EA process and approach used by industry proponents ... .

Duty to Consult with First Nations
Canadian Museum of Civilization/Musee Canadien Des Civilisations
Revisiting the Duty to Consult Aboriginal PeoplesPurich Publishing

The Duty to Consult First Nations Within the Environmental Assessment Process
Purich Publishing
Almost 5 years have passed since the doctrine of consultation with Aboriginal peoples was recognized by the Supreme Court of Canada. Still, there remain many uncertainties and a lack of understanding about this doctrine. The duty to consult has massive implications for governments, Aboriginal communities, and many industries, particularly the resource industries. This book examines the doctine through court decisions, legislation, policies developed by those affected by the duty, and offers thoughts on what constitutes "good" consultation.

The Duty to Consult Canadian Museum of Civilization/Musee Canadien Des Civilisations
Since the release of The Duty to Consult (Purich, 2009), there have been many important developments on the duty to consult, including three major Supreme Court of Canada decisions. Governments, Aboriginal communities, and industry stakeholders have engaged with the duty to consult in new and probably unexpected ways, developing policy statements or practices that build upon the duty, but often using it only as a starting point for different discussions. Evolving international legal norms have also come into practice that may have future bearing. Newman offers clarification and approaches to understanding the developing case law at a deeper and more principled level, and suggests possible future directions for the duty to consult in Canadian Aboriginal law.

Duty to Consult University of Wales Press
As we progress into the twenty-first century, Wales is acquiring a new identity and greater legislative autonomy. The National Assembly and the Welsh Government have power to create laws specifically for Wales. In parallel, the judicial system in Wales is acquiring greater autonomy in its ability to hold the Welsh public bodies to account. This book examines the principles involved in challenging the acts and omissions of Welsh authorities through the Administrative Court in Wales. It also examines the legal provisions behind the Administrative Court, the principles of administrative law, and the procedures involved in conducting a judicial review, as well as other Administrative Court cases. Despite extensive literature on public and administrative law, none are written solely from a Welsh perspective: this book examines the ability of the Welsh people to challenge the acts and omissions of Welsh authorities through the Administrative Court in Wales.

How the Duty to Consult Can Contribute to a Renewed Aboriginal-Crown Relationship
Harbour Publishing
Supreme Court of Canada decisions have defined a general framework for the "duty to consult" Aboriginal peoples and accomodate their concerns over natural resource development, but anticipate the details of that framework will be expanded upon in the future. Aboriginal Consultation, Environmental Assessment, and Regulatory Review in Canadaoffers a paradigm that advances that discussion. It proposes an integrated and robust planning model for natural resource planning model for natural resource extraction allowing Aboriginal peoples, industry, governments, tribunals, and the Courts to all make contributions to reconciliation in the context of sustainable development and environmental protection. Kirk Lambrecht surveys the law of actual and asserted Aboriginal rights and historical and modern Treaty rights in Canada and discusses the national and international purposes of environmental assessment and regulatory review. He appraises the fundamental principles of Supreme Court of Canada jurisprudence defining aboriginal consultation and accommodation as a constitutional imperative and uses case studies involving the National Energy Board to demonstrate how integrated process has evolved over time. Finally he offers general conclusions on the practical utility, and outstanding challenges, involving an integrated planning paradigm.

Does the Lack of Duty to Consult Create the Right to Infringe Aboriginal and Treaty

Rights?. University of Regina Press
Indigenous-settler relationships in Canada are grounded in constitutional obligations. When actors dispute the terms of Indigenous-settler relationships, these actors are seeking to change the nature and scope of existing constitutional obligations. The Crown's duty to consult Indigenous peoples is a constitutional obligation that is disputed between Indigenous and non-Indigenous peoples. The practices that guide actors' behaviours when contesting constitutional obligations, such as the duty to consult, influence the development of Indigenous-settler relations. Two main groups of actors portray different behaviours and practices when disputing constitutional obligations. Actors within institutions and actors engaging in collective mobilization interact with each other to change the character of Indigenous-settler relationships. A case study analysis portrays the dialogical interactions between institutions and social movements. The results reveal that actors confront their differences in a manner that prevents Indigenous-settler relationships from improving. For instance, institutions do not consider Indigenous interpretations of proper consultation before articulating consultation protocols. Consequently, only crisis situations, which are often provoked by Indigenous social movements, signal to institutions that different interpretations of consultation exist. However, using crises to initiate engagement with constitutional disputes results in parties treating other perspectives with distrust. Hostility between parties is communicated within dialogical processes, preventing Indigenous-settler relationships from respecting differences and reconciling interests. A new advisory institution that respects and articulates different interests may facilitate reconciliation between Indigenous and non-Indigenous perspectives. Implementing this reform would transform the contestation of constitutional obligations into a regular practice of engaging with different perspectives to improve Indigenous-settler relationships.

'Duty to Consult', Environmental Impacts, and Métis Indigenous Knowledge
University of Virginia Press
This study examines the role and the value of prior consultation among nations in international law. International disputes frequently occur when one nation, with no hostile intent, takes unilateral action that adversely affects the interests of other nations. It is generally acknowledged that some of these disputes could be avoided, and others could be ameliorated, if the acting government would assess beforehand the risk of harm to other nations. The most effective way to do this is through prior consultation with representatives of potentially affected nations. When governments are able to act unilaterally, they have very little incentive to refrain from taking self-interested action in order to consider the adverse interests of other nations. Thus, it is important to determine the circumstances in which international law imposes on them a duty to consult. The author examines these determining circumstances in detail.

Seizing Six Opportunities for More Clarity in the Duty to Consult and Accommodate Process Revisiting the Duty to Consult Aboriginal Peoples
This thesis employs Juergen Habermas's discourse theory of law to argue that Canada's duty to consult with indigenous communities is based on extra-legal communicative presumptions that fail to reflect the basic norm of communicative equality. It derives a set of communicative norms from discourse theory, demonstrates their dovetailing with discursive norms found within the intersocietal communicative practices of at least selected indigenous legal orders, such as treaty-making, and argues for normative revisions of the duty to consult appropriate to Canada's intersocietal legal order.

The Crown's Duty to Consult American Bar Association
"[W]hen precisely does a duty to consult arise? The foundation of the duty in the Crown's honour and the goal of reconciliation suggest that the duty arises when the Crown has knowledge, real or constructive, of the potential existence of the Aboriginal right or title and contemplates conduct that might adversely affect it." Chief Justice Beverley McLachlin, Supreme Court of Canada, Haida Nation v. British Columbia, 2004. Canada's Supreme Court has established a new legal framework requiring governments to consult with Aboriginal peoples when contemplating actions that may affect their rights. The nature of the duty is to be defined by negotiation, best practices, and future court decisions. According to Professor Newman, good consultations are about developing relationships and finding ways of living together in the encounter that history has thrust upon us. Professor Newman examines Supreme Court and lower court decisions, legislation at various levels, policies developed by governments and Aboriginal communities, and consultative round tables that have been held to deal with important questions regarding this duty. He succinctly examines issues such as: when is consultation required; who is to be consulted; what is the nature of a "good" consultation; can consultation be carried out by quasi-judicial agencies and third parties; to what extent does the duty apply in treaty areas; and what duty is owed to Métis and non-status Indians? Professor Newman also examines the evolving duty to consult in international law, similar developments in Australia, and the philosophical underpinnings of the duty.

Model Rules of Professional Conduct
"The Crown’s duty to consult and accommodate Aboriginal and treaty rights is a fundamental matter of social justice that invokes very solemn legal obligations. Reconciliation and win-win situations can be achieved with good faith negotiations if the federal and provincial Crown immediately endorses and commits to a significant change in their current consultation and accommodation policies and practices. Basic tenets relating to the respect, recognition and reconciliation of Aboriginal and treaty rights must be coupled with joint decision-making and dispute resolution processes. Our courts have established and developed legal principles concerning enforceable Crown obligations that provide shape and substance to the consultation and accommodation process. The courts have also underscored the need for reconciliation and negotiated solutions to outstanding aboriginal title and treaty rights disputes. Aboriginal peoples are entitled at law to have a clear and decisive voice in Crown decisions that may impact, not only the use and disposition of their traditional lands and resources, but also their social and cultural well-being. Unilateral decision-making by the Crown is no longer legal in this context. At the heart of the Crown’s legal responsibility to consult and accommodate aboriginal and treaty rights are choices made every day by Crown leaders and officials which very seriously impact, not only fundamental constitutional rights, but the very health and well being of hundreds of thousands of women, men and children living in Canada."--pub. website.

A Resource Industry Perspective
In 2004, two pivotal court cases, Haida First Nation v. British Columbia (Minister of Forests) and Taku River Tlingit First Nation v. British Columbia (Project Assessment Director), were heard by the Supreme Court of Canada. These two cases were fundamental in establishing the duty to consult and accommodate Aboriginals, whereby the Crown, as represented by

Canadian government agencies, must consult with and potentially accommodate Aboriginal interests when their rights may be infringed upon. This need for government consultation with Aboriginals raises important questions about the role of environmental assessments (EAs), where government agencies must assess the impacts of proposed projects and consult with members of the public, including Aboriginals. This thesis examines the relationship between the duty to consult and the EA process, and how well the duty to consult may be met through EAs. The potentially complementary role of impact and benefit agreements (IBAs) is also examined where possible. To accomplish this, the literature surrounding the duty to consult, EAs, and IBAs was analyzed to determine the best practices for each of these elements. From these best practices, a framework for analysis was developed and applied to a selection of 22 mining projects from various jurisdictions across Canada where EAs had been conducted. The cases were then analyzed to determine how well they conformed to the best practices established in the literature review. The results indicate that the territorial EAs have conformed better to the best practices for both the duty to consult and EAs than most other EA regimes in Canada, particularly the federal EA process. As well the results suggest that greater attention to direct socio-economic impacts and legacy effects of non-renewable resource extraction projects would allow for not only a healthier environment, but also better accommodation of Aboriginal interests and concerns.

New Relationships with Aboriginal Peoples

If someone is a citizen of a First Nation, an Inuit settlement region or a Metis nation, their Aboriginal and Treaty rights can be affected by Government decisions of various kinds. This information document explains Government duties to inform Aboriginal people and seek their views before making decisions that can affect Aboriginal and Treaty rights. The Government should consult urban Aboriginal people before making decisions about Aboriginal programs and services as well as Aboriginal and Treaty rights.

A Relational Approach

Thomas Isaac looks at the broad picture of trends that are developing in the law and the background, highlighting aspects of Canadian law that impact Aboriginal peoples and their relationship with the wider Canadian society. While covering issues such as Aboriginal and treaty rights, constitutional issues, land claims, self-government, provincial and federal roles, the rights of the Métis, and the Indian Act, this book pays particular attention to the Crown's duty to consult. The Supreme Court of Canada has clearly stated that achieving reconciliation between Aboriginal interests with the needs of Canadian society as a whole lies primarily with governments, which Isaac outlines.

The Extent to which the Duty to Consult and the Canadian Law Protect Cultural and Environmental Rights of Indigenous Communities

Faced with a constant stream of news reports of standoffs and confrontations, Canada's "reconciliation project" has obviously gone off the rails. In this series of concise and thoughtful essays, lawyer and historian Bruce McIvor explains why reconciliation with Indigenous peoples is failing and what needs to be done to fix it. Widely known as a passionate advocate for Indigenous rights, McIvor reports from the front lines of legal and political disputes that have gripped the nation. From Wet'suwet'en opposition to a pipeline in northern British Columbia, to Mi'kmaw exercising their fishing rights in Nova Scotia, McIvor has been actively involved in advising First Nation clients, fielding industry and non-Indigenous opposition to true reconciliation, and explaining to government officials why their policies are failing. McIvor's essays are honest and heartfelt. In clear, plain language he explains the historical and social forces that underpin the development of Aboriginal law, criticizes its shortcomings and charts a practical, principled way forward. By weaving in personal stories of growing up Métis on the fringes of the Peguis First Nation in Manitoba and representing First Nations in court and negotiations, McIvor brings to life the human side of the law and politics surrounding Indigenous peoples' ongoing struggle for fairness and justice. His writing covers many of the most important issues that have become part of a national dialogue, including systemic racism, treaty rights, violence against Indigenous people, Métis identity, the United Nations Declaration on the Rights of Indigenous People (UNDRIP) and the duty to consult. McIvor's message is consistent and powerful: if Canadians are brave enough to confront the reality of the country's colonialist past and present and insist that politicians replace empty promises with concrete, meaningful change, there is a realistic path forward based on respect, recognition and the implementation of Indigenous rights.

Aboriginal Consultation and Accommodation

In Canada, the duty to consult doctrine has been articulated as a legal remedy to address the potential infringement of Aboriginal and treaty rights by the Crown. The political dimension and implications of this legal duty on the evolving federal relationship between First Nations and the provincial Crown concerning lands and resources have yet to be fully explored. This research presents the argument that the duty to consult jurisprudence and the new relationship policy in British Columbia are moving towards the articulation of a treaty federalism relationship between the Crown and First Nations. The implications of these findings are then analyzed within the Saskatchewan policy environment, and a potential consultation framework is offered for this province. Crucial linkages between duty to consult jurisprudence and Aboriginal governance, and their implications for policy are highlighted, which contribute to further understanding the complex relationship between First Nations and the Crown in Canada on land and resources.

Aboriginal Law, Fourth Edition

The State Obligations to Consult and to Accommodate Indigenous Peoples' Rights

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