The Duty to Consult: A Philosophical and Historical Investigation

Megan Ryan-Lloyd, Department of Political Science

The fact that the duty to consult is fundamentally a legal doctrine can lead to narrowly focusing on it application in a technical-legalistic way.

However, taking a more political-scientific approach to the duty to consult allows for discussion beyond 'minimum legal requirements' and into a **more nuanced examination of this doctrine, with a reflection on the power dynamics it perpetuates**. In recognition of this angle, I conduct this research to develop a more serviceable understanding of the duty to consult, including helping to demonstrate the doctrine's colonial implications.

Research Question: What are the Historical and Philosophical underpinnings of the Duty to Consult?

Looking into the areas of philosophy and history positions us to see patterns that might otherwise be invisible in the present – thus providing a crucial perspective for understanding the current limitations of legal doctrine alone and what concepts may need to become fundamental going forward.

Literature and Significance

Literature in this area discusses the duty to consult by framing it as progressive, 'the best of section 35', and, importantly, something 'other than colonial dynamics in the past. ' While the duty to consult is fundamentally a very important doctrine, placing it in a 'larger context' allows us to recognize some of its inherent colonial power dynamics. Being able to recognize the more nuanced nature of this doctrine allows for more meaningful discussions about the future of this framework.

Chapter 1: History

This chapter is conducted through consideration of 2 case studies.

Case study #1: The Numbered Treaties and the Construction of the Canadian Pacific Railway.

- Treaties negotiated between 1871 and 1921.
- The railway stretched over the prairies, through Treaty 6 through 11 lands, including vast unceded territory where treaties were not signed (Approx. Toronto to Vancouver).

While some efforts at consultation engaged some Indigenous nations during the construction of the C.P.R., through such efforts, including treaty processes, authorities had to meet with Indigenous leaders and hear their views, though the end result was dismissal of views put forward with some violence. Important dynamics appear in CPR construction with the numbered treaties include:

- Disparity in oral agreement and written treaty terms.
  - Transactional interpretation was not understood across all parties.
- Purposeful and outright dispossession when negotiations were seen as unnecessary or burdensome.

Overall, this highlights a power imbalance in the consultations.

Case Study 2: The Mackenzie Valley Pipeline Inquiry

- Commissioned by the federal government in 1974.
- Berger Commission investigated the social, environmental, and economic impact of a proposed gas pipeline through the Mackenzie Vallery Region in Yukon and the Northwest Territories.

At first glance, the Mackenzie Valley pipeline seems to break the pattern observed with the C.P.R. However, the de facto authority of the state was still extant in this case. Important dynamics for consideration in this case include:

- To what degree is the inquiry defined by Berger's personal investment v. government investment?
- Consulting individuals of a community ≠ consulting a First Nation
- Berger recommended a ten-year moratorium to deal with critical issues, such as land claims
  - Three years after this inquiry, an oil pipeline was constructed in northern Alberta, passing through some of the same Dene territory that the gas line would have done.

Discussion: In both cases, the Canadian government prioritized Canada's imperial and economic interests, and Indigenous peoples were seen as obstacles, if even that, to this bigger project (Daschuk, 2013, p. 89).

Chapter 2: Philosophy

How, in a Canadian Context, is Sovereignty "Rationalized"?

- If Indigenous nations' sovereignty is seen to be less valid than Canadian sovereignty, how can this be reconciled in a moral and politically valid manner?
  - Some rationalities include concepts such as terra nullius, the doctrines of discovery, occupation, adverse possession, conquest, and cessation.
  - These doctrines all share the underlying recognition that to 'legitimize colonization' or land title; the colonizer needed to demonstrate some legal claim beyond a merely enforceable military claim to the territory in question.

How, in a Canadian context, are Aboriginal Rights "Rationalized"?

- Fundamental Nature of Aboriginal Rights.
  - Historically defined by courts on a case-by-case basis
  - Includes intersocial connections to land, title, and Indigenous traditions, culture, knowledge
  - 'sui generis' - connotes uniqueness and difference; translated, it means "of its own kind or class."
  - Difference between the Specific v. General Nature of rights

Aboriginal Rights Debates on Limitations

I. Contingent v. Inherent Rights
- Contingent: must be 'recognized' by the Canadian state
- Inherent: recognition by the Canadian state would be considered supplemental.

II. Frozen v. Evolving Rights and R v. Van der Peet
- What about the living tree doctrine?

III. Inaccuracies of the Fiduciary Framework
- No-profit rule and no-conflict rule.
- Crown's competing interests go against fiduciary common law frameworks.

IV. The Burden of Proof
- The burden of determining the proof of aboriginal entirely rests on First Nations to prove it exists.

Discussion: Theory-based issues arise in this area of law because Aboriginal law operates on the view that Indigenous nations are nations of a 'lesser degree.'
- This area of law allows for multiple assertions of sovereignty to exist in a continual, unresolved tension and confusion (Webber, 2016, p. 63).

Discussion and Conclusion

Understanding the duty to consult in a categorically legal framework diminishes its scope. The duty to consult is not merely an issue for law or resource development. Instead, the duty to consult is grounded in a fundamental acknowledgement of the importance of reconciliation in our society.

"...Questioning the justice of the legal order does not imply skepticism about the possibility of justice or the negation of everything that is of value in Canadian constitutional traditions, but rather a commitment to and humility before a great unfinished task." (Stevenson, 2015 p. 421)

Reconciliation is a largely future-oriented journey that should begin with an acknowledgement and understanding of the past and move forward based on recognizing rights, respect, and partnership. To best understand and imagine some of the issues this project has addressed, we need to understand the broader political agenda within which those issues exist.

References:

Daschuk, J. (2013). Clearing the Plains. University of Regina Press.

Stevenson, R. (2015). The Political Theory of Aboriginal Rights Law in Canada: Prospects for Reconciliation. University of Ottawa, 1–613. https://doi.org/https://ruor.uottawa.ca/items/624996a5-b468-484c-ba1d-30f620a74871

Webber, J. (2016). We Are Still In The Age Of Encounter: Section 35 And A Canada Beyond Sovereignty. In From Recognition to Reconciliation (pp. 63–99). https://doi-org.ezproxy.library.uvic.ca/10.3138/9781442624986-006

Acknowledgements: This project was made possible with the support of the Jamie Cassel Undergraduate Research Award (JCURA), and supervised by Dr. Matt James.

March 10, 2024.

University of Victoria