

## Emerging Challenges on Consultation with Indigenous Communities in the Canadian Provincial North

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**Abstract:** This paper examines particular emerging challenges on the workings of Canada's duty to consult doctrine in the Canadian Provincial North, focusing specifically on Northern Saskatchewan as an example. The duty is situated within a particular set of northern governance issues that are themselves closely interlinked with a set of Indigenous rights issues. The paper ultimately identifies various challenges as accentuated within the context of the Provincial North. These include certain technical questions about turning duty to consult principles into practical policy; larger problems arising from legal uncertainties; and general challenges to do with the way consultation regimes have developed in Canada's legal system differently than in other national systems. The paper is part of a special collection of brief discussion papers presented at the 2014 Walleye Seminar, held in Northern Saskatchewan, which explored consultation and engagement with northern communities and stakeholders in resource development.

As powerfully identified by Coates and subsequently others<sup>1</sup>, the Canadian Provincial North is a distinct region whose circumstances give rise to particular governance challenges. The northern parts of most provinces contain significant resource wealth and are also less populated, with the result that they are of policy significance to provincial governments, but may not capture adequate attention from politicians or the media. With provincial governance based in southern capitals, the Provincial North is invariably subject to legislation constructed outside the region meaning that the actual needs of the Provincial North may not receive sufficient attention. Some of these dynamics are significantly present in the

context of issues related to engagement and consultation with Indigenous communities. In many of the Provincial Norths, the Indigenous, or Aboriginal (in Canadian legal terminology<sup>2</sup>), population is a large portion of the population—an overwhelming majority of 80 or 90 percent in a number of provinces, though as little as 10 percent in northern Ontario, depending on how Northern Ontario is defined—accentuating both the symbolic distance from provincial capitals and the impacts of that distance.

In the context of engagement and consultation with Indigenous communities, on which there are a variety of international approaches concerning obligations regarding consultation, Canada has a distinctive legal doctrine called the “duty to consult.”<sup>3</sup> The Canadian version of this doctrine was developed in Canadian courts over the last decade since 2004.<sup>4</sup> This judicial development of the doctrine could occur because of the entrenchment of Aboriginal and treaty rights in section 35 of Canada’s *Constitution Act, 1982*, the text of which offers very little further definition of those rights.<sup>5</sup> The duty to consult, as developed in recent years, has a particular proactive dimension. The doctrine requires that Canadian federal, provincial, and territorial governments consult with Aboriginal communities prior to making governmental administrative decisions that have the potential to adversely affect Aboriginal rights or treaty rights. The duty is to consult with communities that hold Aboriginal or treaty rights (as those rights claims exist in Canadian law) and thus, in principle, includes not only *Indian Act*-recognized First Nations, but also other First Nations, Métis, Inuit, or non-status communities meeting the legal tests for Aboriginal or treaty rights. This duty applies even where there has not been final judicial resolution or negotiated settlement as to the scope of the rights, thus making the duty to consult in part a tool through which Canadian courts have seen the potential for Canadian governments to manage legal uncertainties concerning the impact of Indigenous rights. Notably, the fact that in Canada the duty to consult developed in the courts, rather than in legislatures or parliament, distinguishes its origins from those of parallel duties in many other jurisdictions, which have more deliberately adopted legislative frameworks, ratified treaty obligations, or otherwise adopted similar frameworks through means not based in the courts.<sup>6</sup>

This article commences from an understanding of the duty to consult as having promoted many positive outcomes. First, the judicial development of the duty to consult has led each Canadian jurisdiction—i.e., federal, provincial, and territorial governments—to develop duty to consult policies, to which government action is subject.<sup>7</sup> Although different jurisdictions have developed different policies in light of differing needs, policy choices, and

policy experiments,<sup>8</sup> the reality remains that governments are consulting with Aboriginal communities more than they would have without the judicial development, thus inherently furthering additional Aboriginal engagement.<sup>9</sup>

Second, in a development that the courts may not have anticipated, private industry proponents have taken up a major role in effectively negotiating agreements with Aboriginal communities, which achieve win-win outcomes in substitution for the results of a formal governmental duty-to-consult process—thus seemingly offering communities something more valuable than they would have achieved through the duty to consult itself (given that they have agreed to something else).<sup>10</sup> In return, industry achieves certainty relative to the uncertain outcomes that may result if matters are left simply to the vagaries of what government does or does not do on consultation. In jurisdictions like Northern Saskatchewan, industry proponents like Cameco have entered into major impact benefit agreements (IBAs) that deliver meaningful benefits—ranging from direct financial compensation to employment, contracting, and education-related benefits—to Aboriginal communities. These IBAs are, in a sense, leveraged from the duty to consult since the duty provides an underlying legal framework that generates an incentive for IBAs.<sup>11</sup>

However, there has been a set of ongoing concerns about the duty to consult that Aboriginal communities have raised.<sup>12</sup> The comments that follow are thus not based on one single study. Rather, they flow from a variety of comments from Aboriginal communities expressed in media reports; from comments in a more formal community-based study, not yet published, on views regarding the duty to consult; and also from a broad set of comments received by the author in ongoing work and presentations on the duty to consult in various settings, including in various Aboriginal communities. These informal sources nonetheless arguably provide reasonable accuracy about some of the communities' concerns. For example, in Saskatchewan, the province has operationalized the duty to consult through a provincial policy framework that seeks to meet and indeed exceed its legal obligations.<sup>13</sup> However, some elements of the policy framework receive consistent and notable criticism from within communities, such as complaints about the relatively short timelines that apply to some consultations. From the time the government gives notification of what it considers a minor-impact effect from a project, that timeline for a community response is sometimes as short as thirty days<sup>14</sup>; although, to be clear, that period can be significantly longer for projects with more impacts. Many northern Saskatchewan communities, in particular, have expressed concerns that this period is very short. As

northern Saskatchewan is characterized by Aboriginal communities spanned across large distances, meaningful engagement within a short period is difficult.<sup>15</sup> Some of the same dynamics underlie capacity challenges of various sorts for Aboriginal communities seeking to engage in consultation, which include lack of sufficient staff time or staff specialization to deal with the highly technical information that may accompany a consultation request. General criticisms that consultation occurs with seemingly little impact on government policy would similarly seem to be accentuated in the Provincial Norths, where policy goals of southern-based provincial governments are seen by Aboriginal and non-Aboriginal citizens alike as often lacking focus on northern concerns.

An emerging set of challenges in relation to the duty to consult stems from significant legal uncertainties. Admittedly, the duty to consult was intended to help manage some of these uncertainties; however, it has resulted in the unintended effects of perpetuating and encouraging uncertainties rather than furthering resolutions. In recent months, there has been national and international media attention on the Supreme Court of Canada's June 2014 Aboriginal title decision in *Tsilhqot'in Nation v. British Columbia*.<sup>16</sup> In a number of passages, the decision suggests that, in situations where governments or industry feel uncertain about their approach to the duty to consult, the solution will be to seek the consent of Aboriginal communities.<sup>17</sup> On the one hand, this may appear to be benign; on the other hand, the decision represents a significant shift from a careful balance the courts had struck by previously repeating, at length, that the duty to consult is not a veto power.<sup>18</sup> The very groundwork of the duty to consult doctrine is arguably in flux in some respects, particularly in situations where a credible claim to Aboriginal title can be asserted (even without movement forward on that claim)—this particular issue is not so applicable in northern Saskatchewan, which is subject to historic treaties with land cessions.<sup>19</sup>

However, in the context of northern Saskatchewan, as well as elsewhere, the presence of the duty to consult can give incentives to perpetuate or encourage legal uncertainties. Thus, the power that the duty to consult gives to Aboriginal communities, who can identify legal uncertainties and make legal assertions that are even just potentially credible, actually encourages communities to identify and seek out new legal uncertainties. In the Saskatchewan context then, there has been an increasing tendency on the part of Aboriginal leadership to attempt to reintroduce uncertainty related to the scope of the historic treaties that apply within the province, with significant leaders asserting the existence of "unfinished treaty business."<sup>20</sup> In particular, the claim is being made that the historic treaties, even when

transferring land, did not transfer subsurface mineral rights. This claim is inconsistent with the text of the treaties,<sup>21</sup> but it is asserted on the basis of evidence from Aboriginal oral history.<sup>22</sup> The intention is not so much a reclaiming of all subsurface mineral rights as an argument for some sort of “resource revenue share” for Aboriginal communities in the province.<sup>23</sup> The duty to consult has the potential to leverage that sort of claim, because sufficient legal uncertainty about subsurface mineral rights could generate a duty to consult in the context of various minerals development decisions. The presence of the duty to consult has thus provided an incentive for more talk about an alleged legal uncertainty than prior to the existence of the duty, which is potentially counterproductive to its purported aims of managing uncertainty on an interim basis and encouraging longer-term reconciliation. There are particularly significant consequences throughout the Provincial Norths, whether in Saskatchewan or elsewhere, where sufficient legal uncertainty could ultimately affect the availability of capital for minerals development. Legal uncertainties that the duty to consult actually encourages may, in the process, detrimentally affect economic development for northern Indigenous communities, and widen economic and social gaps compared to what might develop without the duty.

The development of the duty to consult, in the Canadian context, taking place in the courts rather than in legislative processes is a distinguishing feature from other jurisdictions. I argue that this feature of the duty’s development may actually cause additional problems for Canada’s Provincial North. Even if representatives of the North or of Indigenous communities are a minority within legislative bodies, they are there. By contrast, the courts seldom have any representation on the bench from the Provincial North; thus, there is a real possibility of the courts not understanding well the needs of this complex region. The general governance challenges for the Provincial North may be simply accentuated by the development of a doctrine—with significant effects on the region—that is, essentially, solely within the ambit of the courts.

As a broader example of how the courts may approach claims in certain predefined ways, it bears noting that the courts approach the duty to consult, as other areas of Aboriginal law, with certain preconceptions and approaches. One of those current preconceptions is that Aboriginal land must be communally held in every instance. This aspect is present in the *Tsilhqot’in* judgment in a particularly strong sense, so strong as to impose certain constraints on the use of the land.<sup>24</sup> Although collective ownership corresponds to the traditions of some communities, there are, however, other Aboriginal communities actively working toward individualized

property rights. Yet others have lively internal debates concerning the claims by particular users to resources, such as individuals engaged in traditional harvesting practices—whose own uses could be sold out in a generalized community consultation—and there are even possibilities that some may also seek the recognition of some individual Aboriginal rights to go alongside collective rights.<sup>25</sup> Judicial approaches may be locked into one model that corresponds to some situations, but not others. In so far as they are, the duty to consult will not be applied fully in the ways that it might have been if there were a recognition of the diversity of Aboriginal cultures and claims at issue.

Based on a quick survey of several emerging challenges on Canada's duty to consult framework, which partly results from distinct features of how Canada's framework developed, it is possible to offer some general suggestions that the Provincial North needs more attention in analyses of how the duty to consult is working. At the same time, Canada should be looking significantly to models from other jurisdictions. Outside of northern contexts, but with some interesting parallels, is Australia's complex legislative system, which may have interesting lessons.<sup>26</sup> The development of strong representational mechanisms for Indigenous communities in Scandinavia may have important lessons. And Russia, with a complex variety of approaches and effectiveness of these approaches, across various regions in light of complex regional differences and needs, may similarly have lessons for the idea of Canada approaching its Provincial Norths differently, as these Canadian regions appear to be increasingly caught in a sort of governance gap that has ever-larger implications over time.<sup>27</sup>

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### Notes

1. See the seminal Ken S. Coates & Bill Morrison, *The Forgotten North: A History of Canada's Provincial Norths* (Toronto: Lorimer, 1992). See also Ken Coates & Greg Poelzer, "The Next Northern Challenge: The Reality of the Provincial North," MLI Commentary (Macdonald Laurier Institute, April 2014). Other scholars are also increasingly recognizing the concept of the "provincial north." For an important set of essays see the *Northern Review* issue focusing on the Provincial North—*Northern Review* 38 (2014): Political and Economic Change in Canada's Provincial North, edited by Greg Poelzer and Ken Coates), which both contains a set of papers and cites further work on this concept.

2. Section 35 of the *Constitution Act, 1982* states that “the existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed” and defines the term as follows: “In this Act, ‘aboriginal peoples of Canada’ includes the Indian, Inuit and Métis peoples of Canada.”
3. The modern doctrine originates in a trilogy of cases: *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 SCR 511; *Taku River Tlingit*, 2004 SCC 74, [2004] 3 SCR 550; and *Misikew Cree First Nation*, 2005 SCC 43, [2005] 3 SC.R 388. On the duty to consult generally, see Dwight G. Newman, *The Duty to Consult: New Relationships with Aboriginal Peoples* (Saskatoon: Purich Publishing, 2009); Dwight G. Newman, *Revisiting the Duty to Consult* (Saskatoon: Purich Publishing, 2014); Dwight Newman, “The Rule and the Role of Law: The Duty to Consult, Aboriginal Communities, and the Canadian Natural Resource Sector” (Macdonald Laurier Institute, May 2014).
4. The development of the duty in *Haida Nation*, *ibid*, flowed from broad principles of honour of the Crown and reconciliation that the Court shaped into a specific legal duty.
5. Section 35 of the *Constitution Act, 1982* was enacted along with provisions that foresaw further constitutional discussions on the contents of section 35, but these discussions were unsuccessful in defining the contents of section 35, which remains simply a section that “recognizes and affirms existing Aboriginal and treaty rights.”
6. For example, some Latin American states, having previously ratified ILO Convention No. 169, have gone on to develop constitutional provisions on consultation or legislative frameworks for consultation. Scandinavian states have adopted representative mechanisms through legislation, also in the light of ILO Convention No. 169. Russia has adopted some mechanisms through legislation.
7. Such policies are discussed in Newman, *Revisiting the Duty to Consult*, *supra* note 3, at 116–27.
8. *Ibid*.
9. See Newman, “The Rule and the Role of Law,” *supra* note 3.
10. *Ibid*.
11. *Ibid*.
12. See *ibid*. for discussion of this process. See also Newman, *Revisiting the Duty to Consult*, *supra* note 3, at 112-13.
13. Government of Saskatchewan, *First Nation and Métis Consultation Policy Framework* (June 2010). The document commits the government to consultation concerning effects on not only Aboriginal and treaty rights, as legally required, but also on traditional uses, thus going beyond the general legal requirements. Moreover, on a point on which there remains legal uncertainty, Saskatchewan commits to consultation on legislation and regulations. For more on the Saskatchewan policy, see Newman, *Revisiting the Duty to Consult*, *supra* note 3 at 117–19.

14. Saskatchewan, *Consultation Policy Framework*, *ibid.*
15. For example, both Lac La Ronge Indian Band (LLRIB) and Peter Ballantyne Cree Nation (PBCN) have in the range of ten thousand members who are spread across multiple communities.
16. *Tsilhqot'in Nation v. British Columbia*, 2014 SCC 44. For discussion of the judgment, see Ken Coates & Dwight Newman, *Reason Over Alarmism in Analyzing the Tsilhqot'in Decision* (Ottawa: Macdonald-Laurier Institute, September 2014).
17. *Tsilhqot'in Nation v. British Columbia*, 2014 SCC 44, at para. 97 (stating that “[g]overnments proposing to use or exploit land, whether before or after a declaration of Aboriginal title, can avoid a charge of infringement or failure to adequately consult by obtaining the consent of the interested Aboriginal group.”)
18. For just one example, see *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 SCR 511, at para. 48.
19. That said, some argue that the land cessions within the treaties do not actually amount to a surrender of the land, either in whole or in part.
20. In his capacity as Federation of Saskatchewan Indian Nations (FSIN) Chief, Perry Bellegarde used this term in a number of presentations concerning the context of claims on subsurface mineral rights. He may continue to do so in the context of his new role as Assembly of First Nations (AFN) National Chief.
21. The surrender clause in the various treaties in the region at issue refers to an exception from hunting and fishing rights throughout the surrendered lands in relation to “saving and excepting such tracts as may, from time to time, be required or taken up for settlement, mining, lumbering or other purposes by Her said Government of the Dominion of Canada or by any of the subjects thereof duly authorized therefor by the said Government.” The explicit reference to mining makes this text inconsistent with a claim to retained subsurface rights.
22. See e.g., Walter Hildebrandt, Dorothy First Rider & Sarah Carter, *The True Spirit and Original Intent of Treaty 7* (Montreal: McGill-Queen’s University Press, 1996) at 144–45 (oral history concerning views of Treaty 7 chiefs at time of signature); Harold Cardinal, *Treaty Elders of Saskatchewan: Our Dream is That Our Peoples Will One Day Be Clearly Recognized as Nations* (Calgary: University of Calgary Press, 2000) at 31, 36—37, 63 (elders recollecting ongoing mineral ownership and sharing only to depth of a plough).
23. Perry Bellegarde thus uses the “unfinished treaty business” to argue that such resource revenue sharing is legally required.
24. *Tsilhqot'in*, *supra* note 16 at para. 74. See also Coates & Newman, *supra* note 16 at 14–15.
25. For such claims being raised but left partly aside, see *Behn v. Moulton Contracting Ltd.*, 2013 SCC 26, [2013] 2 SCR 227.

26. For some discussion, see Newman, *Revisiting the Duty to Consult Aboriginal Peoples*, supra note 3 at 153–58.
27. For other lessons from other northern contexts, see generally Dwight Newman, Michelle Biddulph & Lorelle Binnion, “Arctic Energy Development and Best Practices on Consultation with Indigenous Peoples” (2014) 32 Boston University International Law Journal 449. We engage in that piece with a variety of jurisdictions, including a substantial discussion on Russia. In Russia, of course, there are a variety of national and sub-national legal approaches and degrees of actual implementation of the law.