THE DUTY TO CONSULT

NEW RELATIONSHIPS WITH ABORIGINAL PEOPLES

00000

DWIGHT G. NEWMAN



Copyright © 2009 Dwight G. Newman

All rights reserved. No part of this publication may be reproduced or transmitted in any form or by any means without permission in writing from the publisher, except by a reviewer who may quote brief passages in a review, or in the case of photocopying or other reprographic copying, a license from ACCESS (Canadian Copyright Licensing Agency) in Toronto. All inquiries and orders regarding this publication should be addressed to:

PURICH PUBLISHING LTD.

Box 23032, Market Mall Post Office, Saskatoon, sк, Canada, s7J 5H3 Tel: (306) 373-5311 Fax: (306) 373-5315 Email: purich@sasktel.net

Library and Archives Canada Cataloguing in Publication

Newman, Dwight

The duty to consult : new relationships with Aboriginal peoples / Dwight G. Newman.

(Purich's aboriginal issues series) Includes index.

ISBN 978-I-895830-37-8

1. Native peoples – Legal status, laws, etc. – Canada. 2. Native peoples – Canada – Government relations. 3. Native peoples – Canada – Claims. 4. Constitutional law – Canada – Cases. 1. Title. 11. Series: Purich's aboriginal issues series

KE7709.N49 2009 342.7108'72 C2009-904810-8 KF8205.N49 2009

Edited, designed, and typeset by Donald Ward. Cover design by Duncan Campbell. Index by Ursula Acton.

Purich Publishing gratefully acknowledges the assistance of the Government of Canada through the Book Publishing Industry Development Program and the Government of Saskatchewan through the Creative Economy Entrepreneurial Fund for its publishing program.

Printed on 100 per cent post-consumer, recycled, ancient-forest-friendly paper.

Updates on important developments on the duty to consult will be available on our website: www.purichpublishing.com.

Contents

Preface ... 9

. 1: Doctrine and Theory 12	
1.1 The Supreme Court Trilogy	12
1.2 Understanding the Duty to Consult	14
1.3 Theoretical Approaches to the Duty to Consult	15
2: Legal Parameters of the Duty to Consult 23	
2.1 Introduction	23
2.2 Triggering the Duty to Consult	24
2.2(a) Knowledge of the Aboriginal Title, Right,	
or Treaty Right	25
2.2(b) Adverse Effect Element of the Triggering Test	29
2.2(c) Contemplated Government Conduct	32
2.2(d) Summary on Triggering Test	34
2.3 Consultation Partners	35
2.4 Judicial and Quasi-Judicial Intervention	
on the Duty to Consult	41
2.5 Conclusion	44
3: The Doctrinal Scope and Content	
of the Duty to Consult 46	
3.1 Introduction	46
3.2 Content of the Duty to Consult	47
3.2(a) Introducing the Spectrum of Requirements	.,
on the Duty to Consult	48
	•

3.2(b) Specific Factors within the Consultation Requirements

.

•

53

3.2(c) The Consultation Spectrum	55
Table: Matrix on Consultation Intensity	56
3.2(d) An Example: The Keystone Pipeline Case	57
3.3 The Duty to Accommodate	59
3.4 The Duty to Consult and Economic	
Accommodation	61
3.5 Legally Acceptable Consultation and	·
Good Consultation	63
4: The Law in Action of the Duty to Consult 65	
4.1 Introduction: The Concept of the Law in Action	65
4.2 Development of Governmental Consultation Policies	66
4.3 Aboriginal Communities' Consultation Policies	70
4.4 Development of Corporate Consultation Policies	74
4.5 Policies, Practices, and the Formation of "Law"	78
4.6 Conclusion	80
5: INTERNATIONAL AND COMPARATIVE	
Perspectives for the Future 81	
5.1 Introduction	81
5.2 International Law and the Duty to Consult	82
5.3 Comparative Law: Australia's Experience	
with the "Right to Negotiate"	87
5.4 Conclusion	91
6: Understanding the Duty to Consult 93	

Notes ... 96

INDEX ... 120