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The Duty to Consult as the Authority to Recognize: A Continued Presumption of Crown Sovereignty

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This essay performs an analysis of the duty to consult and accommodate principle, a legal mandate that requires the Canadian state to consult and accommodate Indigenous nations when taking action that might interfere with established Aboriginal or treaty rights. Though Tsilhqot'in Nation v. British did make progress in terms of providing Indigenous peoples with more authority in the consultative process, the power still ultimately remains with the Crown in dictating whether or not the interference on Aboriginal or treaty rights is justified. That is, the Indigenous nation is invited to participate in the process, but they are not granted the authority to truly determine what happens on their land. In light of this limitation, this essay claims that this principle still operates within the presumption of Crown sovereignty, and therefore ultimately fails to confer upon the Indigenous nation their rightful political independence. In order to truly reconcile the relationship between Indigenous nations and the Canadian state, this essay concludes that it is necessary to establish a relationship premised on the rightful treaty-federalist framework.

Introduction

In a 2004, 2005 trilogy of landmark decisions, the Supreme Court interpreted Section 35 of the Constitution in a way that would require the Crown to consult and accommodate Indigenous nations "when the Crown contemplates conduct that might adversely impact potential or established Aboriginal or Treaty rights" (Indigenous and Northern Affairs Canada [INAC] 2011). In practice, this would mean that the Crown is legally obligated to consult with Indigenous peoples before taking resource or developmental action that concerns their traditional territory. While this can certainly be interpreted as a positive development in that it recognizes the government's unique obligations to Indigenous peoples, critics have argued that it is not much of a departure from previous, more explicit attempts to dispossess them from their traditional territory. Through an analysis of the Supreme Court case *Tsilhqot'in Nation v. British Columbia* and the politics of recognition, I will argue that the duty to consult and accommodate principle is insufficient in the context of Indigenous-Canada relations as it still operates within a colonial

framework that presumes Crown sovereignty. I have selected this particular case because, despite it being the most progressive development in terms of recognizing Indigenous self-determination, it still operates under the recognition framework that positions Indigenous peoples as existing under the authority of the Crown. Before making this case, however, it is first necessary to establish a more comprehensive understanding of how the politics of recognition actually operate to delegitimize Indigenous peoples as independent and self-governing nations.

According to Dene scholar, Glen Coulthard (2007), the language of Indigenous self-determination has recently shifted to that of recognition – recognition of their right to land, recognition of their right to economic autonomy, and recognition of their right to self-govern (2). This discursive shift has often been celebrated as a positive development, given that it no longer explicitly requires that Indigenous peoples be governed under the colonial state. According to Coulthard (2007), however, the politics of recognition promise "to reproduce the very configurations of colonialist, racist, patriarchal state power that Indigenous peoples' demands for recognition have historically sought to transcend" (3). Under the politics of recognition, he argues, Indigenous peoples only derive their political authority from the Crown, which still serves as the supreme and indisputable authority. This is because, in pursuit of recognition, "First Nations have to implicitly concede that the Crown's sovereign reign over all lands in Canada is just and legitimate" (Youdelis 2016, 7). In this sense, so long as the colonial state is positioned such that it has the authority to determine the legitimacy of Indigenous claims to nationhood, this colonial framework will continue to exist and prevent Indigenous peoples from truly reclaiming their political independence.

Now, in order to determine how the duty to consult principle is premised on the politics of recognition, it is important to understand the exact nature of these consultation requirements. Consider the most recent developments made to this practice by the legal dispute between the Tsilhqot'in Nation and the province of British Columbia. Problems first arose in 1983, when the province unilaterally approved a commercial logging license on alleged traditional territory (*Tsilhqot'in Nation v. British Columbia* 2014). In response, the Tsilhqot'in Nation launched a legal challenge on the grounds that they had not been properly consulted. The Supreme Court held the appeal, maintaining that the Tsilhqot'in did in fact have Aboriginal title over the area in dispute and therefore that the province had failed to satisfy its duty to consult. In fact, in this case, the Court determined that Aboriginal title "confers on the group that holds it the exclusive right to decide how the land is used" (*Tsilhqot'in* 2014). In theory, this would essentially mean that, in the absence of consent, the Crown is prohibited from using Aboriginal title land for their own development purposes. In this sense, this decision seems a radical departure from the earlier duty to consult practice, in which the "Crown [was] not under a duty to reach an agreement" (*Haida Nation v. British Columbia* 2004) before proceeding on established title land.

From this perspective, it would seem that this decision was made specifically with the interests of Indigenous peoples in mind. In fact, according to the federal government, the purpose of the broader duty to consult and accommodate practice is to "strengthen relationships and partnerships with Aboriginal peoples and...achieve reconciliation objectives" (INAC 2011). By providing Indigenous peoples with a legal mechanism that requires the government to consider their interests before proceeding with a land-based project, they reason, the duty to consult principle serves to protect their rights from unilateral exploitation. In other words, it provides them with an opportunity to participate in

a decision-making process from which they would otherwise be excluded. In fact, John Borrows (2015) provides a partial defense of the changes made in *Tsilhqot'in*, arguing that "it would be unwise to minimize the decision's potential" (705). Unfortunately, as he notes, there is perhaps more to this decision than is immediately evident. A more in-depth analysis of how the duty to consult principle operates even after *Tsilhqot'in* suggests that the government is not yet prepared to end its policy of dispossession.

Participation vs. Consent: Neither Free nor Informed

Despite the government's seeming commitment to ensuring that the consultative process is one of integrity and good faith, there is one component that is especially problematic in the context of Indigenous-Canada relations; despite the developments made in *Tsilhqot'in*, consultation still does not necessarily mean consent. In fact, even under the new regime that explicitly mandates consent, the Crown is still legally capable of overriding this requirement. Now, in order to proceed on Aboriginal title land without the consent of the Nation to whom the land belongs, "the Crown must justify its actions as fulfilling a 'compelling and substantial public purpose'" (Ariss, MacCallum, and Somani 2017, 21). This means that, as per this justified intervention clause, the Crown can override the doctrine of consent if they deem it necessary in pursuit of their own public objectives. In this sense, the doctrine of consent is qualified by the Crown's own interests.

Of course, on paper, the Crown is subject to strict legal requirements that govern whether or not their intervention is justified. More specifically, they are bound by the principle of proportionality, which maintains that the infringement is justified only if it is "necessary to achieve [the Crown's] objectives...only to the extent necessary; and [only if] there is minimal impairment of Aboriginal title" (Ariss, MacCallum, and Somani 2017, 21). Though it is still too early to see any tangible implications of this decision, some scholars argue that *Tsilhqot'in* "provides a legal test for the Crown – stringent but not unreachable – to override consent on Aboriginal title lands" (Ariss, MacCallum, Somani 2017, 22). Rosenberg and Woodward (2015) confirm this point, arguing that the *Tsilhqot'in* decision positions the Crown such that they have the authority "to move forward with settlement and industrial development on Aboriginal lands with relative impunity" (961).

In this sense, despite the introduction of the doctrine of consent, consultation still takes on the meaning of participation (Gilbert 2016, 239). The Crown need not reach an agreement to which the Indigenous nation consents, but rather must simply engage in a process of consultation to ensure the participation of the Indigenous peoples concerned. In fact, based on the standards established by *Tsilhqot'in*, if the proper consultation procedures were followed and if the Crown is capable of justifying its intrusion, even explicit dissent on the part of the Indigenous nation would not require that the government halt its construction. The access to participation in the consultation process therefore means that Indigenous peoples "have no right to determine their own destiny, but only a right to agree or not to a destiny imposed by the 'other people' forming the state in which they live" (Gilbert 2016, 240). In practice, then, given that Indigenous peoples still do not have the ultimate authority to determine what happens on their land, the *Tsilhqot'in* decision does not appear to be much of a departure from the previous guidelines that did not require consent. Their right to govern their land and protect their interests are still not absolute, but instead mediated by the Crown's own interests (Coulthard 2007, 124).

In this sense, the government is seemingly only willing to recognize the existence of such rights to the extent that it does not interfere with their own interests.

This absence of a mandatory consent requirement is puzzling given the state's supposed commitment to establishing a nation-to-nation relationship based on international legal standards. In fact, as of 2016, the Canadian government has fully committed itself to the United Nations Declaration on the Rights of Indigenous Peoples [UNDRIP], vowing to adopt the principle of free and informed consent without qualification (Papillon and Rodon 2017, 217). This document explicitly mandates consent under the very circumstances present in duty to consult disputes (UNDRIP 2008, 12). Clearly, given that Canada's duty to consult principle does not require that the Crown obtain consent if it can justify its interference, the government has failed to uphold these standards. It is worth noting that this document is not legally binding and that its violation cannot implicate the Canadian government. Despite the absence of any legal implications, however, Damstra (2015) argues that "the precise legal significance of UNDRIP is not determinate of its normative value" (164). This does not necessarily mean that it should not be regarded as a moral imperative (Damstra 2015, 164).

It is also worth taking a step back to consider where this authority to 'consult' Indigenous peoples emerged in the first place. While the concept of consultation is often celebrated as creating an inclusive environment in which Indigenous peoples have the opportunity to voice their concerns, critics argue that it merely "produces mechanisms which deny First Nations' voice and political agency" (Youdelis 2016, 1377). In doing so, this process serves as a justification to further domesticate Indigenous peoples within the paternal Canadian framework, treating them as an entity that can be subsumed under the Canadian Crown (Gilbert 2016, 63). In the context of the duty to consult principle, this process of consultation positions the Crown as the sovereign with the political capacity to recognize Indigenous claims to independence. However, a more in-depth and critical analysis of Canada's history reveals that Canadian claims to sovereignty are largely inconsistent with international legal standards of state legitimacy.

The Continued Presumption of Crown Sovereignty

In *Tsilhqot'in*, the Supreme Court confirmed what had already previously been established, that the duty to consult and Indigenous peoples "is grounded in the principle of the honour of the Crown" (*Haida Nation* 2004). While some argue that this statement imposes on the Crown the onus to act in good faith during the consultation process, it is in fact based on a flawed premise. More specifically, it is "grounded in the doctrine that the Crown is always already honourable, with this honour then seeping into the crown's 'mystical body' – the Canadian state" (Valverde 2011, 957). This statement situates the Crown as the "benevolent patriarch" (Valverde 2011, 967) with the supposed legal authority to govern Indigenous peoples. However, given that Indigenous peoples have never formally surrendered their right to govern themselves or their land, Borrows (2015) argues "some kind of legal vacuum must be imagined in order to create the Crown's radical title" (703).

Despite the well-established fact that Indigenous peoples occupied and governed the land long before European contact, the duty to consult principle still implicitly operates according to the legal principle of *terra nullius*, which assumes that the land was empty upon colonization and that the state is

now free to use it as they see fit (Keith 2015, 61). These narratives of emptiness and incivility serve to justify Crown sovereignty, as the Crown cannot otherwise legitimately assume the right to govern (Keith 2015, 62). Of course, the government no longer overtly abides by this principle, given that these claims are "factually untrue and lack legal cohesion" (Borrows 2002, 117). In fact, in *Tsilhqot'in*, the Supreme court formally determined that "the doctrine of *terra nullius*...never applied in Canada" (*Tsilhqot'in Nation* 2014). However, this does not necessarily mean that government policies have abandoned the presumption that the land was empty upon arrival. In fact, according to Borrows (2015), "Canadian law still has *terra nullius* written all over it" (702).

To understand how the principle of *terra nullius* continues to inform government policy, it is perhaps useful to imagine how a process like that of the duty to consult would operate according to the rightful presumption that Indigenous peoples have the authority to determine what is permitted on their land. If the state had truly abandoned the doctrine of discovery, there would be no 'justified intrusion'. In fact, there would be no intrusion at all. Questions of land development would be approached from the understanding that the nation that occupies the territory has the authority to determine what projects can and cannot proceed. The existing process of consultation would be replaced by a process that positions Indigenous peoples as the sovereign on their own territory. The 'public interest' of the general Canadian population would not serve as a justification to proceed, as the rightfully sovereign nations would act as the final arbiter in such decisions. In the absence of consent, the Canadian state would have no legal authority to intervene. In this sense, it would be under the unqualified authority of the nation to whom the territory belongs to determine what qualifies as an appropriate use of their land.

Of course, this is not the case. Instead, under the duty to consult process, Indigenous peoples are situated as the claimant who, in the face of concerns that a particular project interferes with their Aboriginal rights, are requesting that their land *not* be disturbed. In this sense, Indigenous peoples are not positioned as the original occupants. Rather, they are positioned as peoples whose independence exists at the mercy of the Crown, whose "governing authorities operate within the larger jurisdiction of federal and provincial authority" (Alfred 2001, 9). The Crown, therefore, is quite clearly positioned as the entity with the political authority to recognize the existence of Indigenous self-determination. In this sense, despite the developments made in *Tsilhqot'in*, this practice still refuses "to challenge the racist origin of Canada's assumed sovereign authority over Indigenous peoples" (Coulthard 2007, 41).

Consultation According to Canadian Legal Norms

Finally, it is worth noting that this right to be consulted is first and foremost grounded in the Canadian Constitution, a fundamentally colonial document. Clearly, then, the Canadian duty to consult is "not informed by international law obligations, but is seen first and foremost as a basic constitutional right" (Allard 2018, 37). According to Webber (2013), this is problematic because "rights are intrinsically bound up with the legal order by which they are defined and according to which they are interpreted, adjusted, and deployed" (79). This is because the Constitution "merely represent[s] the continuation of the colonial legacy and the forced imposition of western...traditions on Aboriginal communities" (Ladner 2001, 4). Regardless of the extent of these rights, then, the fact that they emerge from Canadian law prevents Indigenous peoples from truly reclaiming their political independence outside of the Canadian framework. Gilbert (2016) confirms this point, arguing that these structures

impose significant limitations on how well Indigenous peoples are able to govern themselves according to their own political practices, as their legal authority is ultimately still a product of the colonial legal system (239).

As an extension of this, it is also worth recognizing that it is at the discretion of the Supreme Court to determine what qualifies at a justified intrusion on behalf of the Crown. Despite the fact that *Tsilhqot'in* explicitly rejected the doctrine of discovery and therefore should have undermined Crown sovereignty, in duty to consult disputes, "the Crown will [still] get the last word in land use decisions" (Borrows 2015, 726). When operating according to the assumption that Canadian legal norms have the rightful authority to guide this process, the fact that the Supreme Court is positioned as the final arbiter in such cases would seem appropriate. However, as we have already established, given that Indigenous peoples occupied this territory long before colonization, the Crown has no rightful basis to govern. As an extension of the judiciary, then, the fact that the Supreme Court has the ultimate authority to make decisions about Indigenous sovereignty also rests on the flawed premise of Crown sovereignty.

In fact, according to Borrows (2002), pursuing Indigenous sovereignty through the Canadian legal system is a rather hopeless feat. More specifically, he argues that, in interpreting the Constitution, the Supreme Court "unquestionably support[s] notions of underlying Crown title and exclusive sovereignty in the face of contrary Aboriginal evidence" (116). Considering that questioning the legitimacy of the Crown would only serve to undermine the foundation on which the Supreme Court itself is premised, this "uncritical acceptance" (Borrows 2002, 116) of Crown sovereignty is perhaps not surprising. Therefore, when approached with a question about the validity of Crown interference without consent, it is unlikely that the Court would have an interest in challenging the Crown's legitimacy for the benefit of Indigenous sovereignty.

Using colonial institutions to recognize the existence of Indigenous rights traps them within the colonial framework that is responsible for their dispossession in the first place. In turning to the Courts to secure their rights, Indigenous peoples are forced to concede that the state has the supposed authority to determine the existence of these rights. When operating within the recognition framework in the context of the duty to consult, "the terms of recognition...remain in the possession of those in power to bestow on their 'inferiors' in ways they deem appropriate" (Coulthard 2007, 39). Therefore, while *Tsilhqot'in* secured the (qualified) right for Indigenous peoples to determine what happens on their land, this right nonetheless only exists because the supposedly sovereign colonial authority says so.

In Conclusion: Towards A Treaty-Federalist Framework

As it currently exists, the duty consult serves as a means through which the Crown can continue to assert its sovereignty at the expense of that of Indigenous peoples. Although the *Tsilhqot'in* case does provide Indigenous peoples with a greater opportunity to participate in the negotiation process, it still operates under the wrongful assumption that the Crown has the proper legal authority to recognize the independence of Indigenous peoples. Of course, then, the only way to escape from this framework is to establish a diplomatic relationship in which the Crown and Indigenous peoples are positioned as equal sovereigns. This is properly known as treaty-federalism. Though it is beyond my purpose in this paper to describe exactly how this practice would operate under a treaty-federalist framework, is it important to

take note of the principles that would guide this process. According to Ladner, the treaty federalist relationship is "premised on the idea that the treaties between the various Indigenous and colonial nations established (in law) federal relationships" (Ladner 2001, 9). In this sense, the Crown would be in no position to consult the Indigenous peoples whose land they wish to use; rather, the Indigenous peoples would be appropriately positioned as that body which administers the consultation in the event that the Canadian state wishes to proceed on their territory. Given the colonial tradition of consultation and recognition, this would perhaps seem like a rather provocative statement. However, considering that the Canadian state continues to rest on the flawed premise of Crown sovereignty, establishing this nation-to-nation partnership is the only way that this relationship can truly be reconciled.

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