

“ON DIALOGUE ACROSS LEGAL ORDERS : RECIPROCAL GIFT-GIVING AND THE IMPLICIT LAW
OF THE CONSULTATION PROCESS BETWEEN FIRST NATIONS AND THE CANADIAN STATE”

by ANDRÉE BOISSELLE

CANADIAN LAW AND SOCIETY CONFERENCE
CONGRESS OF THE CANADIAN FEDERATION FOR THE HUMANITIES AND SOCIAL SCIENCES
UNIVERSITY OF SASKATCHEWAN, SASKATOON
JUNE 1ST, 2007

The topic of my talk can be summarized as “the implicit law of the consultation process between the Canadian government and indigenous peoples.” What I wish to articulate is the most fundamental tacit understanding that underlies the consultation process, the background that informs its *meaning* or, put somewhat differently, the *ethos* of consultation. The inspiration for my inquiry is the work of the legal theorist Lon Fuller, who sought to explain how it is that we come to construct for ourselves a peaceful and stable life together, that is, a *legal order*. Fuller’s approach is to make *explicit* the purposes of the legal order’s main institutions, and to show how each of those purposes translates into a set of institutional features – in other words, how what Fuller calls the inherent morality of a legal institution gets *concretized* into the *specific shape* it has, and into the roles and responsibilities of its actors. The best example of this approach concerns the role and duties of the bodies that make and interpret the laws in western societies, the legislator and the Courts. If we believe, as Fuller did, that the purpose of laws is to facilitate human interaction, a whole series of consequences follow for how they are to be expressed by the legislator and interpreted by the Courts. First and foremost, they must be understandable by the people whose conduct they purport to guide, that is, what they mean must be construed in accordance with the understandings that are already present, be it implicitly, in society’s culture and practices. More generally, Fuller’s teaching is that the maintenance of a really *legal* order, as opposed to various forms of tyranny, depends on us remaining sensitive to and reflective on the purpose of each of our institutions, on being guardians of their particular *ethos* : in the case of the legislator, this means a deep and subtle responsiveness to the citizenry; and in the case of the adjudicative bodies, the ethos is captured by impartiality, which involves a profound openness and attentiveness to what each party has to say, and responsiveness as well, as the judge’s listening must be made manifest in the tailoring of his reasons for judgment, to the arguments of the parties. Fuller’s important point is that legal institutions – and eventually the whole legal order – can become perverted and crumble, or somewhat less dramatically, become irrelevant, which also threatens to tear the fabric of our interactions, if we fail to see and properly construe their *purpose*. What I want to argue today is that the purpose of the consultation process is that of *mutual recognition*, that its ethos is found in the spirit of gift-giving, and perhaps most importantly, what I would like to show is that this spirit of gift-giving embedded in mutual recognition is *not*, as we could be led to think, *alien* or *marginal* to western culture and practices, but that it rather constitutes the heart of the normativity inherent in human interaction everywhere, including in the West – in other words, that gift-giving forms the very substratum of western law, the implicit background on which the western legal tradition draws to articulate itself. I think that uncovering this is crucial for fruitful dialogue between indigenous and non indigenous peoples, *precisely* because it needs uncovering, since the dominant way in which we, in the West, have come to think of ourselves is either minimizing or completely ignoring and actually hiding this important key to our own self-understanding. But before I get to this, I will start by fleshing out briefly the

context for my argument, and that is : what is this consultation process that I've been referring to, in Canadian law.

Between 1982 and 2004, in interpreting the meaning of section 35, the constitutional provision recognizing Aboriginal rights, the Supreme Court repeatedly and unquestioningly affirmed the sovereignty of the Canadian State over all peoples, including indigenous peoples, and all territories, of what is known internationally as "Canada." This has meant a completely skewed relationship, as far as both power and right have been concerned, between the State – the unquestioned, sole Sovereign – on the one side, and Aboriginal peoples on the other, who have been conceived as different from other constituencies, indeed, but nevertheless as subjects of the State. For about 20 years, the Supreme Court has conceived of its own role as that of fleshing out a legal test for *assessing the Aboriginal difference*, a test that Aboriginal peoples had to meet to justify whatever *they* would come forward to claim as their rights. In this context, the State remained almost completely free to make any decision concerning in particular the use of land and natural resources for the benefit of the majority. The duty to consult indigenous peoples whose rights would be undermined by such decisions, a duty the Court alluded to as soon as its 1984 decision in the case of Sparrow, seemed for twenty years to be nothing more than a formality, for it only seemed to entail a superficial requirement that the State give notice of its purported infringement, and allow the Aboriginal community concerned to comment on it.

The duty to consult was further weakened by the fact that it only seemed to kick in when the underlying Aboriginal right to the territory had already been proven in front of the Courts, or *officially recognized by treaty*. The problem is, the governments – federal and provincial – also seemed to retain the ability to forever delay the signing of treaties (negotiations span over decades) – and thus, if the duty to consult only kicked in when a Court decision or treaty provided official recognition to an Aboriginal territorial claim, it effectively meant that the State could do whatever it wanted with the land.

This was exactly the situation that the Haida people brought to the Supreme Court in 2004. Although the Haida clearly had the strongest possible claim to the Haida Gwaii, the islands of the Queen Charlotte, which have been their home for centuries, and had been trying to negotiate with the province of British Columbia for a hundred years, the province still had not formally recognized their rights to that land in a treaty, and kept on renewing the harvesting licenses of logging companies on the Haida islands. Before the Supreme Court, the Haida attacked the latest issuance of logging permits by the province. They argued that even though their land claims had not yet been officially settled, they had a right to be consulted and to see their concerns demonstrably accommodated before any new logging permits were granted or renewed. They showed that if the harvesting of the old growth forests on their land continued as allowed by the authorities, their ancient forests would be completely obliterated before the province ever came to acknowledge their rights – in other words, that their constitutionally entrenched rights to maintain their culture and way of life would in the end amount to nothing at all.

Faced with this, the Court saw that it could not remain within the framework of its previous caselaw. In what looks like a genuine effort to reconfigure the balance of power between the Aboriginal peoples and the Crown, the Court used unprecedented language, speaking for the first time of Canadian sovereignty as a *de facto* sovereignty – meaning, an authority *still in need of legitimation* through the negotiation and settling of indigenous claims on the land. For the first time, the Court spoke, on the one hand, of the indigenous claims as embodying a *pre-*

existing sovereignty on the land, and on the other hand, of Canadian sovereignty as a *claim* that needed to be reconciled with Aboriginal sovereignty through a process of honourable negotiation. The duty to consult and accommodate was now presented by the Court as an integral part of this process, and so it is that the 2004 case of Haida can be seen as having finally really given birth to a meaningful legal institution, that of consultation.

I say “meaningful,” because characterizing the duty to consult as part of a necessary process of reconciliation of *competing* sovereignties radically transforms the consultation process. From a formalistic hurdle to overcome before one of the parties unilaterally imposes its *will* upon the other, it turns into a dialogic process that has a real purpose, that of generating *mutual understanding* between *interdependent* partners. It becomes the locus of a recognition no longer understood as a unilateral bestowal *from* the State, *to* the Aboriginal peoples (as section 35 of the Constitution seems to suggest) – but as a *mutual* recognition, drawing on the acknowledgement of the past, and present, *interdependence* of equal peoples.

What shall we turn to, to *concretize* our understanding of what underlies mutual recognition, of the attitudes and practices that foster it ? Obviously not to the paternalism and greed of relationships of domination. But neither can we learn from the accounting spirit of trade exchanges, for even though trade is built on reciprocity, what gets confronted and eventually harmonized through trade are very specific, segmented needs and interests. It is true that recognition is not devoid of interest nor even of calculation. The need for recognition rests, like trade, on mutual dependence, and the “things” it procures, be they material or immaterial, undoubtedly constitute an enrichment that we do need and seek, in seeking recognition. But the *mutuality* of recognition is of an altogether different *nature* than the reciprocity of trade : it is interested in the relationship *itself* – not *solely* in the *things* that a relationship punctually procures. There *is* a human practice that springs directly from this unity between our need for relationships *and* for the *concrete* things they procure, and that is the practice of gift-giving.

There are three key features of gift-giving that I believe capture both its complexity and its unique importance for human interaction. The first is its motivation. We make a gift to enter into a relationship, and what is expressed in the thing given is the *hope* of a return, a *desire* for the relationship – or put otherwise still, a demand for recognition. This is why receiving a gift from someone with whom we do *not* wish to have a relationship makes us uneasy, rather than provoking gratitude. If we do respond to such an unwanted gift, it will often be with something commercial, or something of equal market value, which will not carry with it any of our personality, of our being. For the gift puts the object in the service of the relationship. A gift is invaluable (and so we remove any price tag on it, if it had one) because what it carries escapes calculation, and that is, *the value of the relationship*. A lot of the ambiguity and complexity of gift-giving comes from this, from the fact that the relationship it seeks to nurture goes *well beyond* the goods or services it procures, but is nevertheless *carried out through* these objects. Gift-giving preserves the unity of the world, it collapses the subject-object dichotomy, shows the artificiality of the distinction between *beings* and *things*. The second feature of the practice is its relationship with uncertainty and with time. Hoping to enter into or sustain a relationship is another way of saying that we do not want it to end. And so gift-giving cannot properly be conceived as an isolated act, but as a cycle that has no foreseeable end. Contrary to the contractual relationship, where the exchange is immediate or at least, planned and pre-arranged, gift-giving takes the risk of loss, of non-return. Indeed, a major aspect of gift-giving is that it must preserve the freedom of the receiver to become or not become a donor in turn. This entails two things : firstly that the hope of a return must remain tacit; if it is explicit, gift-giving collapses onto itself; and secondly that gift-giving

accepts, and even requires, *that time pass* between one prestation and the next. Gift-giving inscribes itself in a history between people. With gift-giving, nothing is ever finished or concluded. The third feature of the practice also speaks of its ongoing quality, but in terms of the *nature* of what circulates between the protagonists, rather than of the dimension of time. The first gift brings the parties into a state of indebtedness. Seeking to *extinguish* the debt amounts to wanting the relationship to end. What is involved in the act of *giving back* is the showing of one's shared desire for going on, for building on and deepening the relationship. But what makes gift-giving so unique is that this shared desire for a relationship is always mainly expressed in giving back something intangible, and that is, *gratitude*. Here, the connection of gift-giving with mutual recognition appears in its most deeply metaphorical and symbolic form, for in many languages, such as French, the word recognition (*reconnaissance*) also means gratitude. Actually, the French word captures the GENERative quality of the recognition expressed through gift-giving, for RE-CON-NAISSANCE literally means "to be born again together." Generosity is about the giving of oneself, which gives birth to, feeds, and renews the relationships we have with one another.

So we come to see gift-giving as actually more profound and amorphous than the idea of practice is able to capture : it is present everywhere in the background of our most significant human interactions, with each other, and even beyond, with the world of which we are a part. We are brought into this world, socialized, and constantly evolve throughout our lives through gift-receiving and gift-giving. I am here today because of the innumerable and invaluable gifts of guidance, knowledge and ideas of my earliest teachers all the way through my present mentors, who are bringing me into their conversation, into their community, through the gift of speech, both by talking to me and by allowing me to speak, to say "I think". Their gifts, the value that their teachings has for me, I can never even hope to return to them, *except* through gratitude. But I can also *dream* of eventually passing their gifts along, within the limits of my own abilities, to another generation, which is to show that some gift cycles are not circles but something like spirals.

With this, I hope to have shown gift-giving as the implicit normativity underlying human interaction and mutual recognition, which is the raw purpose of the consultation process. Gift-giving carries the hope, the dream, the desire for interconnectedness, and as such, it represents the very substratum of our relationships. This idea, that there is something there, tacit but inherently normative, in the background, that holds us together, on which we draw to articulate our relationships, is a characterization of human beings, and one profoundly at odds with a mechanistic or rationalistic account of ourselves, that would reduce us to rational calculators of individual interests. Showing the pervasiveness of gift-giving as the basic normativity at play in our most significant interactions and expectations shows us to be embedded in a world and in communities that nurture us, that make us into what we are. Aboriginal peoples are still very much aware of this. I believe that it is also the key to our own self-understanding, in the West, and so, as well, to a long awaited understanding between our peoples.

Sources :

Lon Fuller, Paul Ricoeur, Charles Taylor, Jacques Godbout, Brian Slattery