The Supreme Court Law Review: Osgoode's Annual Constitutional Cases Conference

Volume 94 Article 8

2020

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Citation Information

Ogden, Richard. "Williams Lake and Mikisew Cree: Update on Fiduciary Duty and the Honour of the Crown." *The Supreme Court Law Review: Osgoode's Annual Constitutional Cases Conference* 94. (2020).
https://digitalcommons.osgoode.yorku.ca/sclr/vol94/iss1/8

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Williams Lake and *Mikisew Cree*: Update on Fiduciary Duty and the Honour of the Crown

Richard Ogden*

I. INTRODUCTION

This article considers the Supreme Court's two Aboriginal law decisions of 2018. They are not ground-breaking: the first applies existing Aboriginal law jurisprudence, and the second limits the application of existing jurisprudence. Neither case says anything fundamental about the nature of reconciliation or the honour of the Crown. When seen together, however, they show a court that is invested in reconciliation but wanting to limit its role in achieving reconciliation.

The first and second parts of the article examine the cases' key findings. By way of overview here, in *Williams Lake* the Supreme Court applied and affirmed existing case law on Crown fiduciary duties to Indigenous Peoples, and considered the role of the Specific Claims Tribunal in addressing pre-Confederation breaches of those duties.[1] In *Mikisew Cree*, the Court held that it could not review the introduction of Bills to Parliament under the *Federal Court Act*, and went on to conclude, technically in *obiter*, that the development and passage of primary legislation does not trigger a duty to consult.[2] However, the reasons of five judges in that case support the conclusion that the Crown can have a duty to consult with section 35 rights-holders prior to

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* Counsel, Crown Law Office — Civil, Ontario Ministry of the Attorney General. This article was prepared for the 2019 Osgoode Constitutional Cases Conference. The views expressed in this article are mine and should not be taken to be those of my employer. I would like to thank Craig Scott, Patricia Burke Wood, Scott Franks, Manizeh Fancy, and Sonia Lawrence for helpful comments on an earlier draft, and Lisa La Horey for related discussions, although any errors remain mine. In case the author ever finishes his PhD at the University of Cambridge, this article contains research carried out for that degree.

1 *Williams Lake Indian Band v. Canada (Aboriginal Affairs and Northern Development)*, [2018] S.C.J. No. 4, 2018 SCC 4 (S.C.C.) [hereinafter "*Williams Lake*"].

2 *Mikisew Cree First Nation v. Canada (Governor in Council)*, [2018] S.C.J. No. 40, 2018 SCC 40 (S.C.C.) [hereinafter "*Mikisew Cree*"].

adopting subordinate legislation. In addition, three judges stated that the Crown may have a duty to deal honourably with section 35 rights-holders in relation to the passage of primary legislation. The reasons of two further judges suggest they would support such a duty.

The third and final part of the article explores briefly the relationship between reconciliation and the doctrine of the honour of the Crown. It notes how, in these two cases, the Supreme Court applied the doctrine in a manner that would advance reconciliation while respecting the limited role of the courts. The article concludes by suggesting that the Supreme Court will use the honour of the Crown to advance reconciliation, but in doing so will not stray beyond the functions it commonly performs outside of the Aboriginal law context, such as judicial review of administrative action and of legislative interference with constitutionally protected rights.

II. *Williams Lake*

This case addressed the federal Specific Claims Tribunal ("Tribunal") and potential breaches by the Crown of the fiduciary duty it owes First Nations in the creation of reserves. The Tribunal is a statutory body that considers First Nations' allegations of historical Crown wrongdoing. The Tribunal can order compensation for any such wrongdoing up to $150 million but cannot award land.

1. Facts

In mid-19th century British Columbia, colonial encroachment threatened First Nations' land. In response, the colony enacted a law protecting First Nations' settlements. This law applied to land which Williams Lake First Nation ("Williams Lake") occupied as a village site ("Village Lands"). Before British Columbia entered into Confederation, Williams Lake was dispossessed of the Village Lands by colonial settlement. Soon after Confederation, Canada chose not to return the Village Lands to Williams Lake, which it could have done by cancelling rights of pre-emption to the Village Lands that non-Indigenous people, including the local land commissioner, had acquired contrary to law. Instead, Canada offered Williams Lake less desirable land, which Williams Lake accepted. These circumstances were the basis of Williams Lake's complaint to the Tribunal.

The Tribunal found in favour of Williams Lake, holding that the actions of the colony of British Columbia were a breach of the Imperial Crown's fiduciary duty.[3] It held that Canada could be liable for this breach. It also held that Canada's inaction after Confederation was a breach of the Crown's fiduciary duty. On judicial review, the Federal Court of Appeal held that the Tribunal's decision was unreasonable.[4] Williams Lake appealed to the Supreme Court, which by majority allowed the appeal and restored the Tribunal's decision.

The Supreme Court held that before Confederation, the Imperial Crown owed a fiduciary duty to Williams Lake to protect the Village Lands, and then breached that duty by failing to protect those lands. The Court held that the Tribunal's conclusion that it has jurisdiction to find Canada liable for such pre-Confederation breaches was reasonable. Finally, it held that after Confederation, Canada owed a fiduciary duty in respect of those lands, and then breached that duty by not establishing those lands as a reserve. There were three sets of reasons. As discussed further below, the judges agreed on the first question, but parted ways on the second and third.

2. Fiduciary Duty

The decision confirms existing law on Crown fiduciary duties to Indigenous Peoples.[5] In this part of the article I summarize the legal findings in *Williams Lake*, and in the last part I return to the case to consider some implications that may be drawn from it.

(a) Overview of Crown Fiduciary Duties

There are two main types of fiduciary duty that the Crown can owe to Indigenous Peoples. The first type is the *sui generis* fiduciary duty, which arises from the honour of the Crown and the Crown's assumption of discretionary control over specific "Aboriginal" interests. A *sui generis* fiduciary duty in respect of Aboriginal interests in lands, prior to creation of a reserve, includes the duties of good faith, loyalty, and full disclosure

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[3] 2014 SCTC 3.

[4] *Canada v. Williams Lake Indian Band*, [2016] F.C.J. No. 237, 2016 FCA 63 (F.C.A.).

[5] For a summary of that law prior to *Williams Lake* see Jamie D. Dickson, *The Honour and Dishonour of the Crown: Making Sense of Aboriginal Law in Canada* (Saskatoon: Purich Publishing, 2015).

of information. When meeting such a duty the Crown can take into account its obligations to others, including the general public.[6]

The second type is the *ad hoc* or general fiduciary duty, which arises from: (1) a Crown undertaking to an Indigenous community to act in its best interests; (2) the community's corresponding vulnerability; and (3) a legal or substantial practical interest of the community that can be adversely affected by the Crown's discretion or control. Crown *ad hoc* fiduciary duties are rare — the Crown's responsibility for the public interest means that it rarely will be found to have assumed a paramount obligation to an Indigenous community to act in its best interests.[7]

(b) Standard of Review

All judges agreed that the standard of review of the Tribunal's decision was reasonableness, not correctness.[8] In particular, the majority held that the Tribunal's decision did not depend on the resolution of a constitutional issue in the terms contemplated in *Dunsmuir*.[9] They held that the Crown's fiduciary duty to Indigenous Peoples was, in this context, a common law duty.[10] I will return to this point in the final part of the article.

(c) Existence and Breach of Pre- and Post-Confederation Duties

All judges held that it was reasonable for the Tribunal to conclude that the Imperial Crown in the form of British Columbia owed a *sui generis* fiduciary duty to Williams Lake to protect its interest in the Village Lands before Confederation.[11] The Imperial Crown's failure to protect the Village Lands was a breach of this duty. They did not consider whether the Crown owed an *ad hoc* duty before Confederation.

Seven judges agreed that after Confederation, Canada owed and breached a *sui generis* fiduciary duty to Williams Lake.[12] Canada could have secured the Village Lands for the First Nation, including by

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6 *Williams Lake*, at para. 55.

7 *Id.*, at para. 163.

8 *Id.*, at paras. 26-27, 138, 160.

9 *Dunsmuir v. New Brunswick*, [2008] S.C.J. No. 9, 2008 SCC 9, at paras. 58-61; *Williams Lake*, at paras. 27-29.

10 *Id.*, at paras. 27-35, 88.

11 *Id.*, at paras. 67-68, 133, 179.

12 *Id.*, at paras. 74-89, 134.

cancelling the settlers' rights of pre-emption. Canada's offer of other, less desirable lands was a breach of the duty. The majority did not consider whether an *ad hoc* duty was owed by Canada. Justice Brown (McLachlin C.J.C. concurring) dissented on this issue of post-Confederation fiduciary duty, holding that Canada had not owed an *ad hoc* duty, and had owed but did not breach a *sui generis* fiduciary duty.

(d) Expansion of Existing Law

Although the reasons do not establish any new principles in respect of Crown fiduciary duties, they confirm and expand on three points worth noting. First, a *sui generis* duty requires that the relevant Aboriginal interest be sufficiently independent of Crown executive and legislative functions to invoke Crown responsibility in the nature of a private law duty. If the proper description of an obligation is that it is "public" in nature, for example because it primarily concerns public interests, then it cannot give rise to a fiduciary duty. In the present case the Aboriginal interest was Williams Lake's pre-existing interest in the use and occupation of the Village Lands. Such an interest was sufficient to give rise to a *sui generis* fiduciary duty, even if the interest did not rise to the level of Aboriginal title.[13]

Second, the Crown's obligation under a *sui generis* fiduciary duty is to balance the Indigenous community's best interests against the interests of other people or groups for which the Crown is responsible, including the broader public. The majority described this as a Crown obligation to act "*with respect to* the best interests of" the Indigenous People (emphasis added).[14] In contrast, the obligation under an *ad hoc* fiduciary duty engages a more traditional fiduciary obligation to act "*in* the best interests" of the beneficiary (emphasis added).[15] Further, the Crown's obligation when balancing interests under a *sui generis* duty is to "reconcile them fairly".[16]

Third, the relevant Indigenous interest that gives rise to and is the subject of the fiduciary duty must be carefully identified, as this is the interest to be balanced against non-Indigenous interests.[17] In *Williams*

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[13] *Id.*, at paras. 52, 54, 67-68.

[14] *Id.*, at para. 51. Compare *Haida Nation v. British Columbia (Minister of Forests)*, [2004] S.C.J. No. 70, 2004 SCC 73, at, para. 18 (S.C.C.) [hereinafter "*Haida Nation*"], which used variants of both formulations. It said that the Crown's obligation was to act "with reference to the Aboriginal group's best interests" and to "act in the Aboriginal group's best interests".

[15] *Id.*, at paras. 44, 162.

[16] *Id.*, at paras. 55, 110.

[17] *Id.*, at paras. 52, 60, 64.

Lake, the relevant interest was the Village Lands. Seven judges held that it was reasonable for the Tribunal to conclude that Canada's offer of alternative reserve lands was not a fair reconciliation between non-Indigenous interests and Williams Lake's best interests in respect of the Village Lands.[18] The two dissenting judges held that this was not a reasonable conclusion. In their view, the Tribunal made an error in not considering whether the alternative reserve lands were in the best interests of Williams Lake, seen in the context of what Canada could reasonably have achieved for Williams Lake in a timely manner.[19] The opposing conclusions on this point indicate different ways of determining the First Nation's perspective as to what were its best interests at the time of breach. The minority referred to evidence of what the First Nation claimed at the time of breach that it wanted, and also to what the Crown could reasonably achieve in the context of the times. The majority seems to have prioritized the land which was the subject of the breach and which is claimed, *i.e.*, sought by the First Nation in the present. While both the majority and minority might assert they are looking to what the First Nation wanted, the majority appears to have given more weight to the present Indigenous perspective.

3. Present-Day Crown Responsibility for Pre-Confederation Breach

The majority held that it was reasonable for the Tribunal to conclude that Canada could, under the *Specific Claims Tribunal Act*,[20] be found liable for a pre-Confederation breach of fiduciary duty.[21] The legal issue was whether under section 14(2) of that Act a colonial liability or obligation, such as a fiduciary duty, could be said to have become the "responsibility" of Canada. In finding in favour of liability, the majority gave reasons that it said were "supplementary" to those of the Tribunal on this point. These reasons relied in part on the "Indigenous perspective" on the interpretation of the legislation, and the principle that courts should adopt a large, liberal and purposive interpretation of legislation relating to Indigenous Peoples and should resolve uncertainty in their favour.[22] The majority held that, in the context of legislation designed to facilitate resolution of claims relating to historical breaches

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18 *Id.*, at paras. 74-89.
19 *Id.*, at paras. 173-177.
20 S.C. 2008, c. 22.
21 *Id.*, at para. 131.
22 *Id.*, at para. 130.

of fiduciary duty by the Crown to Indigenous Peoples, Canada could be said to be "responsible" under the Act for pre-Confederation breaches. This conclusion was informed by the majority's view that claims for historic breach of fiduciary duty are often barred from the courts by limitations statutes, but that a "just resolution of these types of claims is essential to the process of reconciliation".[23]

The two minority decisions would have returned this question to the Tribunal. Justice Rowe held that the Tribunal had not provided any reasons on this point that the majority could properly be said to be "supplementing".[24] Justice Brown held that the theory on which the Tribunal ostensibly found Canada to be liable was not a reasonable interpretation of section 14(2). He also held that the majority's interpretive approaches were not available because the authorities on which the majority relied dealt with ambiguous or inconclusive provisions whereas, in his view, section 14(2) was neither.[25] On this point, then, Brown J. (and McLachlin C.J.C.) did not see ambiguity, while the majority did. The majority's decision may indicate increased judicial willingness to consider and adopt an interpretation of a provision which, where reasonably available, supports an Indigenous perspective of that provision.

The conclusion that Canada can be liable in the Specific Claims context for pre-Confederation breaches by the Imperial Crown for the latter's fiduciary duty to First Nations may provide greater incentive for First Nations to commence claims in that forum rather than civil courts. On the other hand, given the $150 million cap and the Tribunal's inability to make *in rem* orders in land, a substantial reduction in the number of civil claims is unlikely.

III. *MIKISEW CREE*

While *Williams Lake* considered the remedying of historical Crown wrongs, *Mikisew Cree* looked at the manner in which the Crown in the present reconciles Indigenous and non-Indigenous interests in the process of making legislation. The narrow question in this case was whether the Crown can owe a duty to consult in the development and passage of

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[23] *Id.*, at para. 2.
[24] *Id.*, at paras. 146, 155.
[25] *Id.*, at para. 206.

primary legislation. However, the broader, underlying issue was the extent of procedural limits on law-making in relation to section 35 rights.

The basic characteristics of the duty to consult and accommodate are well settled. Specifically, a duty to consult arises where the Crown has actual or constructive knowledge of the existence of a section 35 right and contemplates an action that may adversely impact that right. A duty to accommodate arises where the Crown determines that an adverse impact is likely. Accommodation is a process of proportionate balancing of the impact on the section 35 right with the public interest that the Crown decision seeks to advance.[26]

The consultation and accommodation process must be reasonable; it need not be perfect.[27] The ultimate question is what is required to maintain the honour of the Crown.[28] Remedies for breach include quashing the decision at issue, granting injunctive relief, damages, or an order to carry out consultation prior to proceeding further with the proposed action.[29]

1. Facts

In 2012, the federal Minister of Finance introduced into Parliament two omnibus bills with significant effects on Canada's environmental protection regime. Mikisew Cree First Nation ("Mikisew") filed a judicial review application in the Federal Court, alleging that the Crown had a duty to consult Mikisew on the basis that the amendments had the potential to adversely affect their Treaty 8 rights, but they had not been consulted by Canada. The Federal Court held that the decision was reviewable under the *Federal Court Act* and that a duty was triggered.[30] At the Federal Court of Appeal a majority concluded that there was no jurisdiction to review parliamentary legislative action.[31] The majority also held that the doctrines of parliamentary sovereignty, separation of powers, and parliamentary privilege precluded a duty to consult. Mikisew appealed to the Supreme Court.

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[26] *Haida Nation*, at paras. 35 and 47-50 (S.C.C.); *Mikisew Cree*, at paras. 3, 25 (S.C.C.).

[27] *Haida Nation*, at paras. 62-63 (S.C.C.).

[28] *Id.*, at para. 45.

[29] *Mikisew Cree*, at para. 39 (S.C.C.).

[30] *Mikisew Cree First Nation v. Canada (Minister of Aboriginal Affairs and Northern Development)*, [2014] F.C.J. No. 1308, 2014 FC 1244 (F.C.).

[31] *Canada (Governor General in Council) v. Mikisew Cree First Nation*, [2016] F.C.J. No. 1389, [2017] 3 F.C.R. 298, 2016 FCA 311 (F.C.A.).

All nine judges held that the Federal Court cannot review the actions of federal ministers in the parliamentary legislative process. Nevertheless, the Court proceeded to consider extensively, in what are technically *obiter* statements, whether there was a duty to consult. A majority of seven judges held that the development of legislation does not trigger a duty to consult. Justice Karakatsanis (Wagner C.J.C. and Gascon J. concurring) held that the duty does not apply to Parliament because the separation of powers makes it inappropriate for the courts to interfere in the law-making process.[32] In her view, the duty to consult is a particular administrative law remedy by which courts can review executive decision-making.[33] Further, the duty gives rise to particular processes developed in case law, and particular remedies, which are appropriate to executive activity but not to the law-making activity of Parliament.[34]

Justice Brown held that the enactment of legislation, including Crown assent, was not Crown action and so could not give rise to a duty to consult. He also held that the honour of the Crown did not apply to the enactment of legislation.[35] Justice Rowe (Moldaver and Côté JJ. concurring) agreed with Brown J.'s reasons on these points.[36] In the minority on this issue, Abella J. (Martin J. concurring) held that the honour of the Crown applied to all Crown action, including parliamentary law-making.[37] She concluded that the separation of powers did not mean that the duty to consult was an inappropriate means to

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[32] *Mikisew Cree*, at paras. 2, 32 (S.C.C.). Compare the recent New Zealand Supreme Court decision in *Ngāti Whātua Ōrākei Trust v. Attorney General*, [2018] NZSC 84. The Trust had settled a historic Ngāti Whātua grievance with the Crown, and the settlement gave it rights of first refusal over certain Crown-owned land. The settlement was implemented by legislation. Subsequently, the Crown proposed in a settlement with a different *iwi* (tribe) to transfer that same land to the second *iwi*, and to implement that latter settlement in legislation. The Trust sought a declaration of its rights of first refusal under the first settlement legislation. The Crown argued that such a declaration would impinge on the legislative process, as the executive had announced that the second settlement would be implemented by legislation. The Supreme Court rejected that argument and granted the declaration. It held that the "determination of present right of itself" was not an interference with proceedings in Parliament [para. 115]. In other words, statements by the executive that the law would be changed by legislation in a specific way that would affect the rights of an Indigenous community did not mark a "no-go area" for the courts. See further Dean R. Knight "New Zealand: Treaty of Waitangi settlements and the principle of non-interference with Parliamentary proceedings — *Ngati Whatua Orakei Trust v. Attorney General*, [2018] NZSC 84, Westlaw New Zealand Public Law, January 2019, at 218-20.

[33] *Mikisew Cree*, at paras. 38-39, 49 (S.C.C.).

[34] *Id.*, at para. 39.

[35] *Id.*, at paras. 136, 144.

[36] *Id.*, at paras. 102, 117, 126-133.

[37] *Id.*, at para. 55.

uphold the honour of the Crown in respect of parliamentary law-making.[38] However, it did mean that judicial remedies should only be available after the passage of legislation.[39] Further, while invalidation of legislation was a possible remedy, a declaration of breach of the duty to consult was more suitable.[40]

2. Substantive Limit — Justification of Infringement

This ruling does not mean that the Crown never has to consult before enacting legislation. As *Mikisew Cree* confirmed, the Crown must justify legislation that infringes a section 35 right.[41] If the Crown cannot justify the infringement, then the legislation will be invalid. An infringement can be justified only where it is (1) based on a compelling and substantive legislative objective, and (2) consistent with the honour of the Crown and the Crown's fiduciary obligation to the Indigenous community.[42]

The majority reasons in *Mikisew Cree* stated that prior consultation by the Crown was an "important part" or a "factor" in justifying infringement.[43] This characterization of consultation in the justification test marked a slight shift from the proposition in *Tsilhqot'in Nation* that prior consultation is a formal, stand-alone part of the justification test that must always be satisfied,[44] although it could also be seen as a return to earlier jurisprudence which had said it was one of the considerations.[45] Justice Abella, the only judge who held that there was a duty to consult on the passage of legislation, was also the only judge to rely on

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[38] *Id.*, at paras. 81-83, 91.

[39] *Id.*, at para. 93.

[40] *Id.*, at paras. 97-98.

[41] *Tsilhqot'in Nation v. British Columbia*, [2014] S.C.J. No. 44, 2014 SCC 44, at para. 104 (S.C.C.).

[42] The interference with the Aboriginal interest must also be proportionate to the legislative objective, and courts must consider the future interest of the Aboriginal group in the right in question. This latter consideration makes the test more onerous than the test for justifying infringements of Charter rights and freedoms. It is worth noting that the legislature cannot use the "notwithstanding" provision in s. 33 of the Charter to bypass a Crown failure to justify an infringement, as s. 33 does not apply to the rights guaranteed by s. 35.

[43] *Mikisew Cree*, at paras. 48, 152, 154, 167 (S.C.C.).

[44] *Tsilhqot'in Nation v. British Columbia*, [2014] S.C.J. No. 44, 2014 SCC 44, at paras. 77, 125 (S.C.C.). See further Peter Hogg and Daniel Styler, "Statutory Limitation of Aboriginal Rights: What Counts as Justification?" (2015-2016) 1 *Lakehead Law Journal* 1, at 12.

[45] See for example, *Delgamuukw v. British Columbia*, [1997] S.C.J. No. 108, [1997] 3 S.C.R. 1010, at para. 168 (S.C.C.): "relevant to determining whether the infringement … is justified".

Tsilhqot'in Nation and to conclude that consultation was a separate requirement in the justification analysis and not merely a factor.[46]

Technically this means that although consultation is not necessary for justification, the Crown's failure to consult at all would make justification of infringement unlikely. This gives the Crown a "strong incentive" to consult prior to legislating.[47] As Brown J. said, there is "value and wisdom" in consulting prior to enacting legislation that "has the potential to adversely impact the exercise of Aboriginal or treaty rights".[48]

3. Duty to Consult on Subordinate Legislation

The reasons of five judges suggest that a duty to consult may arise prior to the passage of subordinate legislation, such as regulations or rules. Justice Abella found that a duty to consult could arise in respect of all law-making, which necessarily includes secondary, or subordinate, legislation.[49] Justice Karakatsanis held that although there was no duty in respect of primary legislation, this conclusion did not apply to subordinate legislation "as such conduct is clearly executive rather than parliamentary".[50]

It is worth considering what such a duty would — or could — entail. Whether a duty arises, its content, and whether it has been satisfied, will likely depend on the particular facts of each executive law-making action. Below I consider each of these questions in turn.

(a) When Would the Duty Arise?

As stated earlier, a duty to consult arises where an executive action has the potential to adversely impact a proven or credibly-asserted section 35 right. The formal designation of the proposed subordinate legislation would likely not matter.[51]

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[46] *Mikisew Cree*, at para. 77 (S.C.C.).

[47] *Id.*, at para. 155, *per* Rowe J.

[48] *Id.*, at para. 145, *per* Brown J.

[49] *Id.*, at paras. 55-57, 62-63, 76.

[50] *Id.*, at para. 51.

[51] In Ontario, statutory instruments are divided into those that are and those that are not "regulations" within the meaning of Part III of the *Legislation Act, 2006*, S.O. 2006, c. 21, Sch. F. These must be filed with the Office of the Registrar of Regulations, generally after approval by the Lieutenant Governor in Council, a specified minister, or a specified body. What an instrument is called in a statute (*e.g.*, "regulation", "rule", "directive") does not determine whether it is or is not a

In my view, subordinate legislation that is in substance intended to limit the exercise of the particular section 35 rights of a particular Indigenous community is most likely to trigger a duty. Legislation that is intended to limit the exercise of particular section 35 rights held by Indigenous communities in general is less likely to trigger a duty. Legislation that has as an incidental effect a potential limit on the exercise of section 35 rights is further less likely. It is important to bear in mind that the threshold for a duty is low.[52]

The other part of the equation is the section 35 right at issue. Again in my view, a duty to consult is more likely where the right is established in a treaty or is a credible assertion of Aboriginal title. A duty is less likely where the right is an unproven but asserted Aboriginal right in relation to a particular place, such as a right to protect an important cultural site. This is because the right is not yet established as a matter of fact. A duty is even less likely where the asserted but unproven right is of a jurisdictional nature, as the Supreme Court has defined such rights very narrowly.[53] It is important to emphasize that the assertion need only be credible.[54]

Assuming the proposed regulation would have an adverse impact, there is also a question of when in the process the duty to consult would be triggered. There is a good argument that the duty would be triggered when the Crown considers the use of subordinate legislation, since that is the proposed Crown action with the potential to have adverse impacts. There would need to be a real consideration of the use of subordinate legislation, and real consideration of policy alternatives which could form the content of that subordinate legislation. Accordingly, there is a good argument that a duty may arise in the policy development stage, prior to drafting of the subordinate legislation. At the same time, the potential impact on section 35 rights from subordinate legislation must be more than speculative: it must be a chain of facts and inferences, joined together by logic.[55]

Part III "regulation". For example, the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194 made under s. 66 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43 are Part III "regulations".

[52] *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, [2005] S.C.J. No. 71, 2005 SCC 69, at paras. 34, 55 (S.C.C.).

[53] *R. v. Pamajewon*, [1996] S.C.J. No. 20, [1996], 2 S.C.R. 821, at paras. 24, 27 (S.C.C.).

[54] *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, [2010] S.C.J. No. 43, 2010 SCC 43, at para. 40 (S.C.C.).

[55] *Hupacasath First Nation v. Canada (Foreign Affairs and International Trade Canada)*, [2015] F.C.J. No. 4, 2015 FCA 4, at para. 117 (F.C.A.).

If the duty arises at the policy development stage, assuming the use of regulation is a real consideration, it may be acceptable to consult on the policy, and not always necessary to consult on a formal draft regulation.[56]

Even if a duty were triggered at the policy development stage the Crown generally has until the Crown decision has been made to complete adequate consultation. That means the Crown could consult up until the subordinate legislation becomes law, although this may not foreclose a court stepping in prior to that point if requested.

(b) With Whom Would the Crown Consult?

The duty to consult requires the Crown to consult with section 35 right-holders. Where proposed subordinate legislation is specifically directed at a particular Indigenous community the Crown is more likely to have a duty to consult directly with that community. However, in the context of subordinate legislation that is cast more broadly, this could pose obvious practical challenges: consulting separately with every section 35 right-holding community could be very costly and time-consuming.

However, it is important to bear in mind that the standard for satisfaction of the duty is reasonableness. For example, it may not be necessary to meet in-person with every section 35 right-holding community in every circumstance. Where the legislation is expressed in general terms, and the potential for adverse impacts is similarly general, notice to each community and a reasonable means for individual communities to express their views about the potential impacts may suffice. In appropriate circumstances, notice could, if the community has advised in advance, be through a representative organization such as a tribal council or provincial territorial organization. The communities' responses could similarly be channelled through a representative organization. That said, and although such efforts could work, there is a good argument that the Crown could have an obligation to hold a meeting with a community that wished to meet in person, depending on the particular proposed legislation.

[56] Postings on the Environmental Registry of Ontario do not have to include the draft regulation itself, but rather merely the proposed content of the regulation, *i.e.*, the gist of the regulation.

(c) Reliance on Existing Processes

As a general proposition, the Crown can rely on pre-existing regulatory processes to satisfy a duty to consult.[57] However, the extent of consultation required is case-specific and so flexibility is needed. An obvious point is that time to undertake additional consultation requirements may have to be built into the process.[58]

The following considerations may arise when using existing processes. First, the Crown has an obligation to provide notice. Second, the obligation is to consult about the potential impacts on the rights, and not just about the environmental, physical, or social impacts.[59] Existing processes may be limited to discussions about environmental impacts. Third, the honour of the Crown may require additional efforts. These may include such actions as providing additional time, capacity support,[60] offering meetings, the development of additional materials including discussion guides to solicit detailed feedback, and sharing of draft legislation under "lock-down" conditions. Fourth, the potential for adverse impacts may require a "moderate" or a "deep" level of consultation with obligations to meet separately with each community, to provide written responses to its concerns, to respond with potential alternative plans that reflect the consultation, and even to involve the community in the process of deciding whether to adopt the proposed legislation.[61]

4. Procedural Limit — The Honour of the Crown

The proposition that the Crown must act honourably when enacting primary legislation that has the potential to adversely impact section 35 rights was raised only by Karakatsanis J. and was not directly before the

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[57] See *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, [2004] S.C.J. No. 69, 2004 SCC 74, at para. 40 (S.C.C.).

[58] For potential processes see Ontario's Regulatory Registry for proposed regulations with an impact on business, online: <http://www.ontariocanada.com/registry/>; the Environmental Registry of Ontario for environmental legislation, regulations, policies and instruments, has proposal, review and consideration, and decision stages, online: <https://ero.ontario.ca/>,) under the *Environmental Bill of Rights*, *1993*, S.O. 1993, c. 28; and the Ontario Consultations Directory, online: <https://www.ontario.ca/page/consultations-directory>.

[59] *Hamlet of Clyde River v. Petroleum Geo-Services Inc.*, [2017] S.C.J. No. 40, 2017 SCC 40, at para. 45 (S.C.C.).

[60] *Id.*, at paras. 48-49; *Saugeen First Nation v. Ontario* (MNRF), [2017] O.J. No. 3701, 2017 ONSC 3456, at paras. 156-160 (Ont. S.C.J.).

[61] *Id.*, at paras. 41-52.

Court. Justice Karakatsanis and, in response, Brown J. discussed the question in some depth. Since this issue may be raised before a court at some point in the near future, it is worth considering here.

(a) The Honour of the Crown

The honour of the Crown is a foundational principle in Aboriginal law.[62] It arose on the Crown's assertion of sovereignty over what is now Canada and describes the standard the Crown must attain when meeting its constitutional obligations to Indigenous Peoples.[63] Its purpose is the reconciliation of Indigenous and non-Indigenous Canadians in a mutually-respectful long-term relationship.[64]

Because it is a foundational principle, the honour of the Crown can give rise to particular obligations, such as the duty to consult and accommodate, where such obligations are necessary to uphold the Crown's honour. In addition, it may be that the Crown has, as Karakatsanis J. described, a "duty of honourable dealing".[65] In this sense, the honour of the Crown "governs" the relationship,[66] controlling and not just guiding it.

Remedies for breach of the honour of the Crown can vary. In *Manitoba Metis* the Court granted a declaration that the Crown had breached its honour when satisfying its constitutional obligation to Métis under the *Manitoba Act, 1871*.[67] Where the honour of the Crown gives rise to other obligations, such as the duty to consult, a court may invalidate the Crown decision or even award damages.[68]

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[62] *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, [2005] S.C.J. No. 71, 2005 SCC 69, at para. 21 (S.C.C.).

[63] *Manitoba Metis Federation Inc. v. Canada (Attorney General)*, [2013] S.C.J. No. 14, 2013 SCC 14, at paras. 70-73 (S.C.C.).

[64] *Beckman v. Little Salmon/Carmacks First Nation*, [2010] S.C.J. No. 53, 2010 SCC 53, at para. 42 (S.C.C.); *Manitoba Metis Federation Inc. v. Canada (Attorney General)*, *id.*, at paras. 66-67.

[65] *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, [2005] S.C.J. No. 71, 2005 SCC 69, at para. 47 (S.C.C.). See also paras. 137, 141, *per* Brown J. Reference to a broad "duty of honourable dealing" first appears in *Haida Nation*, at para. 32 (S.C.C.).

[66] *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, [2005] S.C.J. No. 71, 2005 SCC 69, at paras. 21, 55 (S.C.C.). See also para. 28.

[67] *Manitoba Metis Federation Inc. v. Canada (Attorney General)*, [2013] S.C.J. No. 14, 2013 SCC 14, at para. 143 (S.C.C.).

[68] *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, [2005] S.C.J. No. 71, 2005 SCC 69, at para. 39 (S.C.C.).

(b) Honourable Legislating?

Comparison of the reasons of Karakatsanis and Abella JJ. shows that they largely agree about the existence of a Crown obligation to act honourably when passing legislation. On the main issue in *Mikisew Cree* — the duty to consult — Karakatsanis J. held that the "duty to consult doctrine", with its particular processes, was developed to address executive decision-making and so was not suitable to the parliamentary legislative process. She did not conclude that the honour of the Crown does not apply to that law-making process, rather she appeared to take it for granted that it does apply:[69]

> The constitutional principles — such as the separation of powers and parliamentary sovereignty — that preclude the application of the duty to consult during the legislative process do not absolve the Crown of its duty to act honourably…

She further wrote that the most likely remedy for breach of any duty of honourable dealing in the passage of primary legislation would be a declaration,[70] although she did not rule out other remedies including invalidity.[71]

The analysis of Karakatsanis J. was framed in the hypothetical, and she was careful to equivocate on whether a remedy might be available at all.[72] But this equivocation should be taken as mild judicial caution rather than as strong doubt on her part. It is difficult to see a court concluding if a proper case came before it that the Crown had breached a duty to act honourably with respect to section 35 interests, but then declining to issue, at the very least, a declaration to that effect.[73]

Justice Abella held that the honour of the Crown applied to all Crown action, including parliamentary law-making. In concluding that there was a duty to consult, she held that the Crown's honour is engaged where a proposed law has the potential to adversely affect section 35 rights. She limited availability of relief for breach of the duty to consult until after

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[69] *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, [2005] S.C.J. No. 71, 2005 SCC 69, at para. 52 (S.C.C.).

[70] *Id.*, at para. 47. See also para. 97.

[71] *Id.*, at para. 6. See also para. 46 where Karakatsanis J. cited s. 52(1) of the *Constitution Act, 1982* when discussing an example of potential breach of such a duty.

[72] *Id.*, at para. 3.

[73] *Manitoba Metis Federation Inc. v. Canada (Attorney General)*, [2013] S.C.J. No. 14, 2013 SCC 14, at para. 143 (S.C.C.): "…A declaration is a narrow remedy. It is available without a cause of action, and courts make declarations whether or not any consequential relief is available… In some cases, declaratory relief may be the only way to give effect to the honour of the Crown…"

the legislation was enacted, and held that even at that point a declaration was the more suitable remedy.[74]

In summary, the only difference between Karakatsanis and Abella JJ. was whether the legislature is bound by the particular processes developed in jurisprudence about the duty to consult on executive decision-making:

- Both concluded that the honour of the Crown applies to parliamentary law-making and may be engaged by legislation that adversely affects section 35 rights.
- Justice Karakatsanis only suggested that a court could review legislation for breach of the honour of the Crown after it was passed, while Abella J. determined clearly that it could.
- Both concluded that the likely remedy for breach of the honour of the Crown in the legislative process was a declaration but that a breach might also result in invalidity of the legislation at issue.

Justice Brown disagreed with the proposition that legislation could be reviewed for consistency with the Crown's honour in the absence of an infringement, *i.e.*, outside of a "*Sparrow*" analysis. Justice Rowe agreed with that conclusion.

But it is clear that Brown J. understood the proposition. He recognized the similarity between the reasons of Karakatsanis J. and Abella J. He said that accepting Karakatsanis J.'s proposition would result in the "obligation which the Mikisew Cree First Nation asks the Court to impose" in the appeal actually before the Court.[75] In his view, Karakatsanis J:.[76]

> …leave[s] open the possibility that validly enacted legislation (which has not been or could not be the subject of a s. 35 infringement claim) might be declared to be "not consistent with [the honour of the Crown]" due to some failure to uphold the honour of the Crown…
>
> [She], in substance, proceeds to treat the honour of the Crown as the potential source of an enforceable obligation *on legislators* to either refrain from passing certain legislation because it "affects" rights writ large, or not to do so without consultation.

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[74] *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, [2005] S.C.J. No. 71, 2005 SCC 69, at paras. 93, 96-98 (S.C.C.).

[75] *Id.*, at para. 141.

[76] *Id.*, at paras. 140, 143; see also para. 104.

> …legislators [are], in essence, being told that they cannot enact legislation that "affects" (but does not infringe) certain rights that might exist...
>
> [original emphasis]

Justice Brown said that the "honour of the Crown does not bind Parliament",[77] and that "judicial review of the legislative process, including *post-facto* review of the process of legislative enactment, for adherence to s. 35 and for consistency with the honour of the Crown, is unconstitutional".[78] Assuming Brown J. was talking about general review of legislation by judges, and not specifically judicial review with administrative law remedies, then neither of these statements is accurate: the honour of the Crown requires the Crown to justify a legislative infringement of section 35 rights.[79]

Further, the basis for his conclusion was his assertion that the "Crown" does not make legislation. Whatever the merit for this assertion that may exist outside of the field of Aboriginal law, there is little merit for it within that field. In Aboriginal law, the concept of the "Crown" represents the *entirety* of the legal system which Indigenous Peoples did not share when the Crown first asserted sovereignty, but to which they became subject over time.[80] It is the Crown writ large with whom reconciliation must occur.

In rejecting a legislative duty to act honourably, Brown J. was concerned that legislators would be left without certainty as to the constitutionality of regular, general legislation, including budget legislation.[81] Indeed, the sphere of unimpeded legislative capacity is greater if courts review only legislation that actually does infringe section 35 rights, and not legislation that only adversely affects them, or had the potential to do so. However, in my view Brown J. overstated

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[77] *Id.*, at para. 136.

[78] *Id.*, at para. 144.

[79] *Id.*, at para. 48 *per* Karakatsanis J.; *R. v. Sparrow*, [1990] S.C.J. No. 49, [1990], 1 S.C.R. 1075, at 1114 (S.C.C.). Justice Brown appeared to recognize this immediately after making the second statement. He said that judicial review was only appropriate after the passage of legislation, in respect of a challenge to its substance rather than the manner in which it was passed. That is also wrong, since the justification test requires the Crown to consider the manner in which the legislation was passed. It is also, perhaps, an exception that proves the rule that the honour of the Crown can bind Parliament.

[80] *Manitoba Metis Federation Inc. v. Canada (Attorney General)*, [2013] S.C.J. No. 14, 2013 SCC 14, at para. 67 (S.C.C.).

[81] *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, [2005] S.C.J. No. 71, 2005 SCC 69, at para. 143 (S.C.C.). See also paras. 160-165, *per* Rowe J.

those practical concerns.[82] Legislators would not be "left in the dark, possibly for many years" about legislation, any more than they might be about any other legislation that raises constitutional issues and on which they can seek and obtain legal advice.

He may instead have been motivated by an abstract desire to ensure that courts not "supervise" the parliamentary law-making process.[83] Consider that he is not averse to consultation by the Crown with Indigenous Peoples; indeed, he recommends it:[84]

> [There is] value and wisdom [in] consulting Indigenous peoples prior to enacting legislation that has the potential to adversely impact the exercise of Aboriginal or treaty rights.

It is important to note that this "potential to adversely impact" standard is the test for the trigger of a duty to consult. In effect, Brown J. is saying that the Crown *should* consult, but that a court will not make the Crown consult, nor will it declare after the passage of legislation that the Crown failed to consult. He recommends that the Crown consult (and so make the effort to act honourably), but without guidance at any point from the courts about how that consultation should proceed. In his view, then, courts may not tell the *legislature* when it has acted dishonourably, although they may tell the *executive* when it has acted dishonourably and intervene directly to prevent it from doing so.

If and when a court considers the proposition that the Crown must act honourably in parliamentary law-making, it will do so in relation to the particular process of making a particular statute that had the potential for adverse impact on, but ultimately proves not to infringe, section 35 rights. It will be a statute in respect of which the Crown did not consult with holders of section 35 rights, or in some other way acted dishonourably. The issue will be whether it is sufficiently important to reconciliation that the court should provide guidance to the legislature about what constitutes honourable law-making.[85] The answer to that question is highly fact-dependent, and difficult to answer in advance of such a proceeding.

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[82] I presume that Karakatsanis J., having spent three years as Ontario Deputy Attorney General and two as Secretary to Cabinet, was in a good position to judge their practical import.

[83] *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, [2005] S.C.J. No. 71, 2005 SCC 69, at paras. 103, 116 (S.C.C.).

[84] *Id.*, at para. 145.

[85] *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, [2005] S.C.J. No. 71, 2005 SCC 69, at para. 44 (S.C.C.). In this area of law "reconciliation and not rigid formalism" is more important.

(c) When Would Such a Duty Arise?

Justice Karakatsanis would consider it dishonourable to pass legislation that *may* adversely impact section 35 rights, even if the legislation ultimately does not have any adverse impact.[86] This is consistent with the duty to consult.[87] The Indigenous community would not have to prove the existence or content of section 35 rights, or show that the legislation does in fact have an adverse impact on such section 35 rights. Such a standard recognizes that it may be detrimental to the relationship where the Crown acts as if it does not matter that there might be an adverse impact.

Justice Karakatsanis provided one example of legislative action that might be dishonourable — the passage of legislation that removes future Crown conduct that would otherwise trigger a duty to consult.[88] For this point she quoted from the Yukon Court of Appeal decision in *Ross River Dena Council*.[89] There the Court held that a statutory scheme which does not allow for consultation or provide other equally effective means to acknowledge and accommodate Aboriginal claims is "defective and cannot be allowed to subsist".[90]

(d) What Would the Duty Require?

As Abella J. noted, an obligation to act honourably in the passage of legislation is "vague".[91] In broad terms, the Crown would have to consider the section 35 rights that are at stake, how the proposed legislation may impact on those rights, and whether to take any opportunities to avoid, minimize, or mitigate such impacts. This would likely involve some engagement with Indigenous Peoples.

In *Mikisew Cree*, Abella J. said that "[u]nilateral action is the very antithesis of honour and reconciliation".[92] Justice Karakatsanis likewise said that the duty to consult exists to prevent the Crown from "acting

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[86] *Id.*, at paras. 3, 45, 52. See also paras. 136-137, *per* Brown J.

[87] See for example *id.*, at paras. 79, 84, 92, *per* Abella J.

[88] *Id.*, at paras. 30, 43, 46.

[89] *Ross River Dena Council v. Yukon*, [2012] Y.J. No. 123, 2012 YKCA 14 (Y.K.C.A.), leave to appeal to the Supreme Court of Canada refused [2013] S.C.C.A. No. 106.

[90] *Id.*, at para. 37; *Mikisew Cree*, at para. 46.

[91] *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, [2005] S.C.J. No. 71, 2005 SCC 69, at para. 84 (S.C.C.).

[92] *Id.*, at para. 87.

unilaterally" in a way that undermines or erodes section 35 rights.[93] Therefore a duty of honourable dealing would likely require that the Crown talk with potentially adversely impacted section 35 rights-holders about legislation before it is enacted. This comes close to a duty to consult which, in its least technical definition, is talking together for mutual understanding.[94] Indeed, the Crown could look to processes that satisfy a duty to consult, because in the terms in which the duty is defined in *Haida Nation*, a satisfactory consultation process must uphold the honour of the Crown.[95] Regard could also be had to the constitutional principle of reconciliation.[96] We can perhaps draw on the majority in *Williams Lake* who, although speaking about historical reconciliation of interests by the Crown under its *sui generis* fiduciary duty, said that the honour of the Crown required the Crown to "reconcile [the interests] fairly".[97] Further, as noted above, *Williams Lake* may suggest that in reconciliation of Indigenous interests, weight should be given to the Indigenous perspective of what those interests are.

Current parliamentary processes, in particular parliamentary committees, might provide an opportunity for the Crown to ascertain Indigenous Peoples' views on the potential for adverse impacts on section 35 rights, with any adjustments to such processes that would be necessary to uphold the Crown's honour.

IV. Final Reflections

The cases leave one feeling slightly unsettled. Neither gives the sense that the judges have amongst themselves a common, clear conception of what reconciliation requires — of the direction of the reconciliation project and how each case fits into it. In this manner, these cases highlight the importance of the person — in this context a judge — to the relationship between the Crown and Indigenous Peoples.

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[93] *Id.*, at paras. 25-26, 43. The Court did not address the United Nations Declaration on the Rights of Indigenous Peoples ("UNDRIP"), but it likely will not be long before the concept of the honour of the Crown is guided in part by UNDRIP's concept of "free, prior and informed consent".

[94] *Haida Nation*, at para. 43 (S.C.C.).

[95] See *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, [2005] S.C.J. No. 71, 2005 SCC 69, at para. 141 (S.C.C.).

[96] *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, [2005] S.C.J. No. 71, 2005 SCC 69, at paras. 66-67 (S.C.C.).

[97] *Williams Lake*, at paras. 55, 110 (S.C.C.).

However, the cases complement nicely, and it is possible to draw some strands of hope from their juxtaposition. *Williams Lake* is about having an efficient, effective way to resolve historical grievances; *Mikisew Cree* is about how far courts should intervene to prevent future grievances. Seeing the cases together makes it easier to draw some conclusions about how the Supreme Court conceives of the honour of the Crown and reconciliation.

In my view, these two concepts are inextricably tied together — reconciliation is the purpose and the goal, and the honour of the Crown is the means toward it. More specifically, the honour of the Crown describes the standard of behaviour which the Crown must meet in order to maintain a long-term, respectful relationship between Indigenous and non-Indigenous Canadians. This view ties together two important statements that the Supreme Court has made about reconciliation and the honour of the Crown. First, it has said that the "grand purpose" of section 35 is the "reconciliation of Aboriginal and non-Aboriginal Canadians in a mutually respectful long-term relationship".[98] Second, it has said that the objective of the duty to consult — which arises from and satisfies the honour of the Crown — is "fostering reconciliation by promoting an ongoing relationship".[99] The duty to consult is, in the words of Dwight Newman and adopted by the Court, "[c]oncerned with an ethic of ongoing relationships".[100] Since the duty to consult exists to satisfy the honour of the Crown, it follows that the "ethic of ongoing relationships" is the goal of the honour of the Crown.

The view I express above advances the conception of the honour of the Crown suggested by Brian Slattery, who called section 35 a "generative constitutional order" — a phrase also adopted by the Supreme Court.[101] In his conception, section 35, guided by the honour of the Crown, is not merely static, identifying and protecting historical

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[98] *Beckman v. Little Salmon/Carmacks First Nation*, [2010] S.C.J. No. 53, 2010 SCC 53, at para. 10 (S.C.C.). See also Mark Walters "The Jurisprudence of Reconciliation: Aboriginal Rights in Canada", in Will Kymlicka and Bashir Bashir (eds.) The Politics of Reconciliation in Multicultural Societies (Oxford University Press: 2008), advancing the theory of "reconciliation as relationship".

[99] *Hamlet of Clyde River v. Petroleum Geo-Services Inc.*, [2017] S.C.J. No. 40, 2017 SCC 40, at para. 47 (S.C.C.).

[100] *Id.*, at para. 24, quoting *Haida Nation*, at para. 38 (S.C.C.) and D. G. Newman, *The Duty to Consult: New Relationships with Aboriginal Peoples* (2009), at 21 (also quoted in *Haida Nation*).

[101] Brian Slattery, "Aboriginal Rights and the Honour of the Crown", (2005) 29 S.C.L.R. (2d) 433, at 436. See also *Haida Nation*, at para. 38 (S.C.C.); *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, [2005] S.C.J. No. 71, 2005 SCC 69, at para. 87 (S.C.C.).

Aboriginal rights, but is also dynamic, mandating a process of active participation by the Crown and Indigenous Peoples in the identification of Indigenous rights. I think the honour of the Crown does more than just assist in the identification of rights, with any Crown obligations that arise from the honour of the Crown being directed to that end. Perhaps a better way to conceive of the honour of the Crown is that it creates obligations not simply so that rights can appear out of a process of rights-identification, but also for the purpose of the process itself, regardless of whether rights result or not. The honour of the Crown requires it to identify and then balance Indigenous interests with those of the broader society whenever the Crown undertakes action that can adversely impact those Indigenous interests. This process of identifying and balancing occurs irrespective of whether there are or will be specifically-identified rights arising from those Indigenous interests. This process occurs because that is what is necessary for a mutually-respectful long-term relationship. Not only then does the honour of the Crown give a standard through which the Crown can maintain a mutually-respectful, long-term relationship, but it ensures that this standard is met through procedural obligations.

For the most part a process of identifying and balancing Indigenous interests occurs in the present and the future. The role of the honour of the Crown in such present and future processes is shown by the duty to consult, the test for justifying infringements of section 35 rights, and the proposition in *Mikisew Cree* discussed above that the legislative process must be honourable. But courts and tribunals are also called on to assess whether the process was met in the past. Reconciliation in a mutually-respectful long-term relationship requires the acknowledgment of instances when the Crown has not met an honourable standard in the past. As Mark Walters has noted, reconciliation can "involve acts of repentance and forgiveness ... so that a line can be drawn under a troubled past and relationships of social and political harmony may flourish."[102] And as Kirsten Manley-Casimir has noted, no relationship can prosper or be respectful without the parties addressing, on an ongoing basis, their past relationship and taking responsibility for what has occurred.[103] The role of the honour of the Crown in assessing the past

[102] Mark Walters "The Jurisprudence of Reconciliation: Aboriginal Rights in Canada", in Will Kymlicka and Bashir Bashir (eds.) *The Politics of Reconciliation in Multicultural Societies* (Oxford University Press: 2008), at 183.

[103] See Kirsten Manley-Casimir "Toward a Bijural Interpretation of the Principle of Respect in Aboriginal Law", (2016) 61 *McGill Law Journal* 939, 967.

balancing of interests is seen in the *sui generis* fiduciary duty in *Williams Lake*, as discussed above, and the *Manitoba Metis* case.

Williams Lake and *Mikisew Cree* are consistent with the idea that the honour of the Crown gives a standard through which the Crown can maintain a mutually-respectful, long-term relationship, and ensures that the Crown meets this standard through the imposition of procedural obligations. *Williams Lake* reinforces the *sui generis* fiduciary duty as a means of assessing historic Crown action, and remedying — where necessary — through equitable relief. Indeed, it could be argued that the need for an equitable remedy is what distinguishes the existence and breach of a *sui generis* fiduciary duty from the mere engagement and breach of the honour of the Crown, as in *Manitoba Metis*. The proposition advanced by Karakatsanis and Abella JJ. in *Mikisew Cree* that the Crown must act honourably in the passage of legislation reinforces the desirability of an honourable process of reconciling interests.

But these two cases also suggest that, in spite of the judicial recognition and imposition of Crown obligations arising from the honour of the Crown, courts should where possible play a limited role in advancing reconciliation. I noted earlier the conclusion in *Williams Lake* that the standard of review of Specific Claims decisions on the Crown *sui generis* fiduciary duty is reasonableness. This is an interesting conclusion because the *sui generis* duty arises from the honour of the Crown and, in *Mikisew Cree* and elsewhere, the Court has described the honour of the Crown as a constitutional principle.[104] Indeed, it is hard to consider that the honour of the Crown is not a constitutional principle, when it "arises …from the Crown's assertion of sovereignty",[105] and its purpose is to reconcile "the Crown's assertion of sovereignty and the prior sovereignty, rights and occupation of Aboriginal peoples".[106] The Court in *Williams Lake* could comfortably have determined that the Tribunal's findings in respect of a *sui generis* fiduciary duty were constitutional in nature and not entitled to deference. Instead it acknowledged that assessment of satisfaction of a *sui generis* fiduciary duty is a "heavily fact-based inquiry".[107]

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[104] *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, [2005] S.C.J. No. 71, 2005 SCC 69, at paras. 24, 42 (S.C.C.); *Beckman v. Little Salmon/Carmacks First Nation*, [2010] S.C.J. No. 53, 2010 SCC 53, at para. 69 (S.C.C.).

[105] *Haida Nation*, at para. 32 (S.C.C.).

[106] *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, [2005] S.C.J. No. 71, 2005 SCC 69, at para. 21 (S.C.C.).

[107] *Williams Lake*, at para. 92 (S.C.C.). See also para. 173.

The Court's decision that the Tribunal's ruling on a *sui generis* fiduciary duty was not constitutional in the terms contemplated in *Dunsmuir* suggests two things. First, that the honour of the Crown does not involve, in this *sui generis* fiduciary context, a constitutional issue in the sense of the reconciliation of rights presently protected by the *Constitution Act, 1982*. It is fair to conclude that the Crown fiduciary's obligation to reconcile Indigenous and non-Indigenous interests did not, in that past time, involve balancing interests which were constitutionally protected in that sense. Second, the Court's decision suggests that deference to the Specific Claims process is consistent with the honour of the Crown. I noted earlier the statement by the majority in *Williams Lake* that a "just resolution of these types of claims is essential to the process of reconciliation".[108] The Court appears to be signalling that reconciliation and the maintenance of the honour of the Crown require a specialized, efficient, means of resolving disputes about the past that is outside of the regular court process.

Then in *Mikisew Cree* seven judges said that the honour of the Crown did not require a duty to consult on the passage of legislation. This means that maintenance of the Crown's honour does not require courts to get involved in the process of balancing Indigenous and non-Indigenous interests through legislation while that process is underway. Five judges, however, appear to support the ability of a court to say after the legislation has passed whether that balancing of interests was done in an honourable way.[109]

So we can see in both *Williams Lake* and *Mikisew Cree* the Supreme Court's desire to stay out of the "nitty gritty" of reconciliation, where possible, while still making sure reconciliation happens. The Supreme Court is comfortable performing functions in Crown-Indigenous disputes that are analogous to the functions it commonly performs outside of the Aboriginal law context, such as judicial review of administrative action, or of legislative infringement of constitutional rights. Perhaps outside of these common functions the Supreme Court sees itself not as an actor in reconciliation, but as an arbiter or, more accurately, not a referee with a whistle, but a commentator with a keyboard. *Williams Lake* and *Mikisew Cree* suggest that courts must apply the concept of the honour of the Crown in a way that respects that difference.

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[108] *Id.*, at para. 2.

[109] See *R. v. Ibanescu*, [2013] S.C.J. No. 31, 2013 SCC 31, at para. 1 (S.C.C.), by the Court: "In our view, a statement of a legal principle that is accepted by a majority of the Court constitutes the opinion of the Court with respect to that legal principle. This is so even if some of the members of the Court who endorse that legal principle dissent from the majority's disposition of the appeal."