# Recent Honour of the Crown Jurisprudence and the Problem of Legal Uncertainty

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## I. INTRODUCTION

Unwritten constitutional principles have a controversial history in Canadian law. There remains intense debate among jurists and constitutional scholars as to their legitimacy as a source of substantive law. This was starkly illustrated in the recent, narrowly split decision in *Toronto (City) v. Ontario (Attorney General)*, in which a five-member majority of the Supreme Court of Canada held that unwritten constitutional principles cannot be used to invalidate legislation, with a vigorous dissent from the remaining panellists.[1] Yet the majority noted that there was a possible exception when it came to the honour of the Crown, which is *sui generis* or "unique".[2]

I argue here that the honour of the Crown is indeed unique in its potential to generate considerable legal uncertainty and unpredictability for Indigenous peoples.[3] To this end, I discuss the majority decisions in *Manitoba Métis Federation v. Canada (Attorney General)*[4] and *Mikisew Cree First Nation v. Canada (Governor*

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[1] *Toronto (City) v. Ontario (Attorney General)*, [2021] S.C.J. No. 34, 2021 SCC 34 (S.C.C.). See also La Forest J.'s blistering dissent in *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1997] S.C.J. No. 75, [1997] 3 S.C.R. 3 (S.C.C.).

[2] *Toronto (City) v. Ontario (Attorney General)*, [2021] S.C.J. No. 34, 2021 SCC 34, at para. 62 (S.C.C.).

[3] This article adopts the term "Aboriginal" when referring to constitutional rights protected under s. 35 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11, consistent with the terminology contained in that provision, or where quoting a source that uses the term "Aboriginal". Otherwise, the terms "Indigenous", "First Nation" and "Métis" are employed as appropriate to refer to the peoples who hold these rights.

[4] *Manitoba Métis Federation v. Canada (Attorney General)*, [2013] 1 S.C.R. 623, 2013 SCC 14 (S.C.C.) [hereinafter "*Manitoba Métis Federation*"].

*General in Council)*,[5] as examples of how the honour of the Crown has been applied to considerably expand Crown liability in novel ways, while failing to advance the substantive recognition of Aboriginal rights.

## II. THE HONOUR OF THE CROWN AND THE DUTY TO CONSULT

Initially, the honour of the Crown had a fairly narrow application in Canadian law. The principle was primarily applied in the context of interpreting treaty provisions or specific fiduciary duties owed by the Crown to Indigenous peoples as a function of the Crown's assertion of sovereignty over Indigenous territories.[6] Over time, the doctrine has evolved to focus more broadly on advancing reconciliation and improving relations between the Crown and Indigenous peoples.[7] As a result, the honour of the Crown now gives rise to duties that are not strictly fiduciary in nature.

The best-known of these obligations is the duty to consult. There is no equivalent to the duty to consult for non-Indigenous Canadians.[8] While a duty of procedural fairness is owed to everyone in the context of administrative decision-making, Canadian courts have been very clear that the duty to consult is distinct from (and considerably more demanding than) the duty of procedural fairness.[9]

Over time, Canadian courts have applied the concept of the honour of the Crown to expand the scope of the duty to consult considerably. The duty was initially developed as part of the test for determining whether government infringement of a recognized Aboriginal right under section 35 right was justifiable.[10] In order for this

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[5] *Mikisew Cree First Nation v. Canada (Governor General in Council)*, [2018] 2 S.C.R. 765, 2018 SCC 40 (S.C.C.) [hereinafter "*Mikisew Cree 2018*"].

[6] *R. v. Sparrow*, [1990] S.C.J. No. 49, [1990] 1 S.C.R. 1075 (S.C.C.); *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511, 2004 SCC 73, at para. 32 (S.C.C.). See also *R. v. Badger*, [1996] S.C.J. No. 39, [1996] 1 S.C.R. 771, at para. 41 (S.C.C.); *R. v. Sundown*, [1999] S.C.J. No. 13, [1999] 1 S.C.R. 393, at paras. 24, 46 (S.C.C.).

[7] *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, [2010] 2 S.C.R. 650, 2010 SCC 43, at para. 34 (S.C.C.).

[8] Although there are specific constitutional consultation obligations owed in the context of judicial compensation committees (see, *e.g.*, *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1997] S.C.J. No. 75, [1997] 3 S.C.R. 3 (S.C.C.); and *Provincial Court Judges' Assn. of New Brunswick v. New Brunswick (Minister of Justice)*, [2005] 2 S.C.R. 286, 2005 SCC 44 (S.C.C.)) and public sector bargaining rights (see, *e.g.*, *British Columbia Teachers' Federation v. British Columbia*, [2016] 2 S.C.R. 407, 2016 SCC 49 (S.C.C.); and *Saskatchewan Federation of Labour v. Saskatchewan*, [2015] 1 S.C.R. 245, 2015 SCC 4 (S.C.C.)).

[9] *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511, 2004 SCC 7, at para. 28 (S.C.C.). See further discussion in Lorne Sossin, "The Duty to Consult and Accommodate: Procedural Justice as Aboriginal Rights" (2010) 23 Can. J. Admin. Law & Prac. 93.

[10] *R. v. Sparrow*, [1990] S.C.J. No. 49, [1990] 1 S.C.R. 1075 (S.C.C.).

duty to apply, an Indigenous claimant first had to establish the existence of a section 35 right, either through a treaty or in court. The jurisprudence subsequently broadened the scope of the duty to encompass asserted but unproven rights, and cases where Crown conduct stood to affect, but not necessarily infringe, such a right.[11]

In 2010, a majority of the Supreme Court of Canada held in *Beckman v. Little Salmon/Carmacks First Nation* that the duty to consult could impose additional consultation obligations beyond those agreed to in a modern treaty.[12] Justice Deschamps dissented vigorously, opining that the majority decision undermined the legal value of treaties, and failed to respect "the ability of Aboriginal peoples to participate in actively defining their special constitutional rights, and . . . their autonomy of judgment".[13]

Justice Deschamps' dissent in *Little Salmon/Carmacks* described an insidious problem that has continued to plague honour of the Crown jurisprudence, namely, the idea that legal certainty is somehow incompatible with the honour of the Crown, or that Indigenous peoples do not desire or value legal certainty.[14] This is seemingly at odds with the fundamental importance of the rule of law and its associated principles within Indigenous legal and governance traditions.[15] Further, as correctly noted by Deschamps J. in citing work by the United Nations Economic and Social

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[11] *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511, 2004 SCC 73 (S.C.C.); *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, [2004] 3 S.C.R 550, 2004 SCC 74 (S.C.C.); *Mikisew Cree First Nation v. Canada*, [2005] 3 S.C.R. 388, 2005 SCC 69 (S.C.C.).

[12] *Beckman v. Little Salmon/Carmacks First Nation*, [2010] 3 S.C.R. 103, 2010 SCC 53, at paras. 61, 62, 66 (S.C.C.).

[13] *Beckman v. Little Salmon/Carmacks First Nation*, [2010] 3 S.C.R. 103, 2010 SCC 53, at para. 106 (S.C.C.), *per* Deschamps J. (in dissent).

[14] *Beckman v. Little Salmon/Carmacks First Nation*, [2010] 3 S.C.R. 103, 2010 SCC 53, at paras. 109-110 (S.C.C.).

[15] See, *e.g.*, discussion in Malcolm Lavoie & Moira Lavoie, "Indigenous Institutions and the Indigenous Rule of Law" (2021) 101 S.C.L.R. (2d) 325. See also Royal Commission on Aboriginal Peoples, Vol. 2, *Restructuring the Relationship* (Ottawa: Canada Communication Group, 1996), at 115; Centre for First Nation Governance, at 11, online: <http://www.fngovernance.org//publication_docs/Five_Pillars-CFNG.pdf>; First Nations Financial Management Board, First Nations Governance Project – Phase 1, at 7, online: <http://fnfmb.com/sites/default/files/2018-09/2018_FN-Governance_Project_phase1-low-res_update.pdf>; Taiaiake Alfred, Peace, Power, Righteousness: An Indigenous Manifesto, 1st ed. (Don Mills, Ontario: Oxford University Press, 1999), at 82; and John Borrows, *Canada's Indigenous Constitution* (Toronto: University of Toronto Press, 2010), at 59-106. See also Jason Madden, John Graham & Jake Wilson, "Exploring Options for Métis Governance in the 21st Century" (Institute on Governance, September 2005), which identifies the following "universal" principles of good governance: (1) legitimacy and voice; (2) fairness; (3) accountability; (4) performance; and (5) direction.

Council, "lack of precision with respect to their special rights continues to be the most serious problem faced by Aboriginal peoples".[16]

Much of the jurisprudential evolution of the duty to consult has occurred in the past 15 years, and the doctrine continues to evolve rapidly as a result of the courts' ever-broadening interpretation of the requirements imposed by the honour of the Crown. In 2021 alone, there have been trial-level decisions finding that the duty to consult can now be triggered by cumulative impacts of resource development within traditional territories,[17] as well as by impact benefit agreements between First Nations and private corporations.[18]

Yet the duty to consult falls far short of achieving *substantive* justice for Indigenous peoples seeking recognition of rights and title. It is, at best, a procedural stopgap measure for Indigenous communities. It is true that the ability to challenge regulatory approvals for inadequate consultation can give Indigenous claimants leverage in negotiating impact-benefit agreements with resource development companies. However, clearly defined substantive Indigenous rights can achieve the same objective without the associated legal uncertainty.

At best, an Indigenous claimant suing the Crown on the duty to consult might receive an injunction against a particular Crown action pending further consultation and potential adjustment to the proposed course of action. Granted, this is a costly remedy, and can serve as a strong incentive for the Crown to meet its consultative obligations. Such a remedy might also assist Indigenous claimants in seeking further accommodation from the Crown in relation to their section 35 rights. However, the duty to consult ultimately fails to provide substantive recognition of unproven rights and title. While the duty may provide a semblance of recognition of Indigenous jurisdiction over lands and resources, it does not in fact recognize any such jurisdiction. Further, it has increased the costs of doing business with Indigenous

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[16] *Beckman v. Little Salmon/Carmacks First Nation*, [2010] 3 S.C.R. 103, 2010 SCC 53, at para. 111 (S.C.C.), citing Maxime St-Hilaire, "La proposition d'entente de principe avec les Innus: vers une nouvelle generation de traités?" (2003)] 44 C. d. D. 365, at 397-98. See also United Nations, Economic and Social Council, *Study on Treaties, Agreements and Other Constructive Arrangements Between States and Indigenous Populations: Final Report*, by Miguel Alfonso Martinez, Special *Rapporteur* (June 22, 1999), E/CN.4/Sub.2/1999/20, online: <https://digitallibrary.un.org/record/133666?ln=en>; and United Nations, Economic and Social Council, Sub-Commission on Prevention of Discrimination and Protection of Minorities, *Study of the Problem of Discrimination Against Indigenous Populations: Volume 5 – Conclusions, Proposals and Recommendations*, by José R. Martinez Cobo, Special Rapporteur (March 1986), E/CN.4/Sub.2/1986/7/Add.4, online: <https://digitallibrary.un.org/record/133666?ln=en>.

[17] *Yahey v. British Columbia*, [2021] B.C.J. No. 1428, 2021 BCSC 1287, at paras. 520, 521, 529, 533, 541, 543 (B.C.S.C.).

[18] *Ermineskin Cree Nation v. Canada (Environment and Climate Change)*, [2021] F.C.J. No. 756, 2021 FC 758 at paras. 99, 101, 132 (F.C.).

communities,[19] and, in many cases, litigation over the duty to consult has exacerbated political divisions within and among those communities.[20]

In other words, it is not clear that judicial recognition and development of the duty to consult has actually advanced reconciliation or improved Crown-Indigenous relations — the ostensible goals at the core of the honour of the Crown. While it has raised the profile of Indigenous issues within the courts and the public sphere, the recognition and expansion of the duty to consult has largely failed to incentivize out-of-court resolution of outstanding Aboriginal rights claims.[21]

## III. THE HONOUR OF THE CROWN AND NOVEL DUTIES

Moving beyond the duty to consult, two recent Supreme Court decisions illustrate how Canadian courts continue to use the honour of the Crown to expand Crown liability and perpetuate legal uncertainty for Indigenous communities in new ways.

### 1. *Manitoba Métis Federation*

In 2013, the Supreme Court of Canada applied the honour of the Crown to recognize a new duty to diligently implement solemn promises, exempting claims based in that duty from statutory limitations periods and the equitable doctrine of laches.[22]

The novelty of these findings is particularly striking given that the duty in

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[19] See, *e.g.*, Dwight Newman, "The Canadian resource sector's messy duty to consult", *The Financial Post* (October 30, 2015), online: <https://financialpost.com/opinion/the-canadian-resource-sectors-messy-duty-to-consult>; Malcolm Lavoie, "Assessing the Duty to Consult" (Vancouver: Fraser Institute, 2019), online: <https://financialpost.com/opinion/the-canadian-resource-sectors-messy-duty-to-consult>.

[20] The recent controversy over consultation on the Coastal GasLink Project is a striking example: *Coastal GasLink Pipeline v. Huson*, [2019] B.C.J. No. 2532, 2019 BCSC 2264 (B.C.S.C.). See also Malcolm Lavoie & Moira Lavoie, "Indigenous Institutions and the Rule of Indigenous Law" (2021) 1 S.C.L.R. (2d) 325; Jody Wilson-Raybould, "Who speaks for the Wet'suwet'en People? Making sense of the Coastal Gas Link conflict" (January 24, 2020), *The Globe and Mail*, online: <https://www.theglobeandmail.com/opinion/article-who-speaks-for-the-wetsuweten-people-making-sense-of-the-coastal/>. There is also the ongoing problem of overlapping claims between Indigenous communities, primarily in British Columbia; see, *e.g.*, the recent decision in *Gamlaxyeltxw v. British Columbia (Minister of Forests)*, [2020] B.C.J. No. 1178, 2020 BCCA 215 (B.C.C.A.).

[21] Only 26 comprehensive land claim agreements have been concluded since 1973: House of Commons, Standing Committee on Indigenous and Northern Affairs, *Indigenous Land Rights: Towards Respect and Implementation* (February 2018) (Chair: MaryAnn Mihychuk), online: <inanrp12-e.pdf>, at 37. See also Government of Canada, *A New Direction – Advancing Aboriginal and Treaty Rights*, by Douglas R. Eyford (February 20, 2015), online: <eyford_newDirection-report_april2015_1427810490332_eng.pdf> (<rcaanc-cirnac.gc.ca>), at 48, 67.

[22] *Manitoba Métis Federation v. Canada (Attorney General)*, [2013] 1 S.C.R. 623, 2013 SCC 14, at paras. 78, 79, 128, 133, 139, 153 (S.C.C.).

question was not argued by any of the parties. The Manitoba Métis Federation ("the MMF"), on behalf of its membership, had sought a declaration that the Crown had breached a fiduciary duty to the Métis in its implementation of section 31 of the *Manitoba Act, 1870*.[23] Section 31 of the Act enabled Canada to peacefully incorporate Manitoba into Confederation, after years of resistance by the majority Métis population in the Red River Settlement, by setting aside 1.4 million acres of land to be given to Métis children. It was not disputed between the parties that Canada, for various reasons, took over 10 years to make the allotments of land to the Métis children, during which time there was a very large, well-anticipated influx of European settlers into the area. By the time the allotments were eventually completed, the Métis territory had been reduced and many Métis had moved further west.

It is well established that the honour of the Crown only gives rise to a fiduciary duty where the Crown assumes discretionary control over a specific Aboriginal right or interest.[24] There is otherwise no absolute duty on the part of the Crown to act in the best interests of Indigenous peoples. In this case, the Court unanimously held that section 31 of the *Manitoba Act, 1870* did not give rise to a fiduciary duty. Although the Crown had assumed discretionary control over the lands in question, the Métis' interests in those lands were purely *personal* in nature — the MMF had failed to establish that there was a communal Aboriginal interest at play. The Crown had not otherwise undertaken to act in the best interests of the Métis in allocating the lands.[25]

The Court's conclusion that there was no fiduciary duty owed to the Métis was sufficient to dispose of the case. However, the majority nevertheless went on to create a *new* duty on the basis of which declaratory relief could be granted to the Métis — the duty of diligent implementation of solemn promises, founded in the honour of the Crown.

The Court had received no submissions from the parties on the validity, scope or content of such a duty. Unsurprisingly, the resulting duty is broad, vague and ambiguous.[26] The majority reasoned that the duty of diligent implementation arises out of "an explicit obligation to an Aboriginal group that is enshrined in the

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[23] S.C. 1870, c. 3.

[24] *Wewaykum Indian Band v. Canada*, [2002] 4 S.C.R. 245, 2002 SCC 79, at paras. 79, 81 (S.C.C.); *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511, 2004 SCC 73, at para. 18 (S.C.C.); *Roberts v. R.*, [2002] 4 S.C.R. 245, 2002 SCC 79, at para. 79 (S.C.C.); *Guerin v. Canada*, [1984] S.C.J. No. 45, [1984] 2 S.C.R. 335 (S.C.C.).

[25] *Manitoba Métis Federation v. Canada (Attorney General)*, [2013] 1 S.C.R. 623, 2013 SCC 14, at paras. 59, 63, 64 (S.C.C.).

[26] *Manitoba Métis Federation v. Canada (Attorney General)*, [2013] 1 S.C.R. 623, 2013 SCC 14, at paras. 210-214 (S.C.C.), *per* Rothstein J.

Constitution".[27] This is a broader cause of action than a breach of fiduciary obligation, as the claimant need not establish a breach of a specific Aboriginal right, but simply an obligation owed to an Aboriginal group. Further, and as noted in dissent by Rothstein J., "the majority acknowledges at para. 108, [that] this new duty can be breached as a result of actions that would not rise to the level required to constitute a breach of fiduciary duty".[28]

The majority failed to specify what types of legal documents might engage the duty of diligent implementation. The duty is apparently not limited to obligations set out in treaties, as the constitutional document at issue in *Manitoba Métis Federation* — the *Manitoba Act, 1870* — was not a treaty agreement. Further, while the duty attaches to obligations "enshrined in the Constitution", the majority does not actually say that the "solemn promise" must itself be set out in a constitutional document.

As an illustration of the potential breadth of documents that could qualify, a recent decision from the Alberta Court of Appeal suggests that a solemn obligation could arise from a political letter of intent agreed between a provincial premier and a First Nation leader.[29] One potential policy implication of such a finding is that future governments may be reluctant to make any political commitments to Indigenous communities in relation to their section 35 rights, lest they open themselves up to liability under the new duty of diligent implementation. There are, indeed, many potential policy implications that could result from recognition of this novel duty. Unfortunately, none of the parties or intervenors was given the opportunity to make submissions on these implications nor any other aspects of a duty of diligent implementation, since such a duty was not actually pleaded by the claimants.

Opposing parties in a legal action in Canada's adversarial justice system are typically given the opportunity to present their best arguments and evidence for their respective positions. In *Manitoba Métis Federation*, the majority departed from this principle on the basis that the parties had made *general* submissions about whether the Crown's conduct comported with the honour of the Crown.[30] In theory, this

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[27] *Manitoba Métis Federation v. Canada (Attorney General)*, [2013] 1 S.C.R. 623, 2013 SCC 14, at para. 70 (S.C.C.).

[28] *Manitoba Métis Federation v. Canada (Attorney General)*, [2013] 1 S.C.R. 623, 2013 SCC 14, at para. 208 (S.C.C.), *per* Rothstein J.

[29] *Fort McKay First Nation v. Prosper*, [2020] A.J. No. 482, 2020 ABCA 163 (Alta. C.A.). The court unanimously held that the Alberta Energy Regulator bore a duty to consider the honour of the Crown in assessing a particular bitumen recovery project proposal. The proposal involved lands that were the subject of ongoing access management plan negotiations between the province and the First Nation. These negotiations were initiated pursuant to a letter of intent between a previous Premier (Jim Prentice) and the Chief of the Fort McKay First Nation.

[30] *Manitoba Métis Federation v. Canada (Attorney General)*, [2013] 1 S.C.R. 623, 2013 SCC 14, at paras. 84-90 (S.C.C.).

means that a future claimant could receive the benefit of a remedy for a breach of the honour of the Crown that it did not specifically plead, in which case the Crown could face liability for a breach of the honour of the Crown against which it did not have the opportunity to defend itself. Such a jurisprudential shift comes perilously close to violating the Supreme Court's own principle that the honour of the Crown is not a stand-alone cause of action.[31] One potential consequence is that it could be more difficult for the Crown to succeed on an application to strike a claim grounded in a breach of the honour of the Crown.

The majority in *Manitoba Métis Federation* then went on to find that claims seeking a declaration of a breach of the duty of diligent implementation are beyond the reach of limitations legislation or the equitable defence of laches. Such claims, in other words, "will apparently be possible forever".[32]

With regard to limitations, the majority reasoned that because limitations cannot prevent the courts from declaring legislation to be unconstitutional, "by extension, limitations acts cannot prevent the courts from issuing a declaration on the constitutionality of the Crown's conduct".[33]

This conclusion is not entirely inconsistent with previous case law,[34] if MMF's claim is indeed "collective", as reasoned by the majority, and not a series of claims for individual, personal relief.[35] To this end, the majority's move to exempt the claim from limitations rests entirely on the parameters of the new duty in which they base the Crown's liability in this case. As noted, the duty of diligent implementation enables an Indigenous claimant to argue a breach of a duty owed to an Aboriginal *group*, without having to actually prove the existence of an Aboriginal *right* or *interest*. Notwithstanding the majority's conclusion that the Métis' interest in the section 31 lands was essentially *individual*, the claimants were able to bypass limitations rules by virtue of the Crown's breach of a duty ostensibly owed to an

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[31] Reiterated by the majority in *Manitoba Métis Federation v. Canada (Attorney General)*, [2013] 1 S.C.R. 623, 2013 SCC 14, at para. 73 (S.C.C.).

[32] *Manitoba Métis Federation v. Canada (Attorney General)*, [2013] 1 S.C.R. 623, 2013 SCC 14, at para. 266 (S.C.C.), *per* Rothstein J.

[33] *Manitoba Métis Federation v. Canada (Attorney General)*, [2013] 1 S.C.R. 623, 2013 SCC 14, at para. 135 (S.C.C.).

[34] Individual factual claims with constitutional elements, including such claims brought by Indigenous individuals, remain subject to limitations statutes. See, *e.g.*, *Wewaykum Indian Band v. Canada*, [2002] 4 S.C.R. 245, 2002 SCC 79 (S.C.C.); *Canada (Attorney General) v. Lameman*, [2008] 1 S.C.R. 372, 2008 SCC 14 (S.C.C.); *Ravndahl v. Saskatchewan*, [2009] 1 S.C.R. 181, 2009 SCC 7, at para. 16 (S.C.C.).

[35] *Manitoba Métis Federation v. Canada (Attorney General)*, [2013] 1 S.C.R. 623, 2013 SCC 14, at para. 44 (S.C.C.).

Aboriginal *collective*.[36]

As to the inapplicability of laches, the majority found, among other things, that the Métis could not have acquiesced to their legal situation because of: (1) the injustice of Crown delay in allocating the lands; and (2) "the imbalance in power that followed Crown sovereignty".[37]

Regarding this first point, while it is appropriate to assess the conscionability of the defendant's conduct in determining the availability of an equitable defence like laches, it borders on the absurd to reduce this assessment to a determination of whether the plaintiff has proven that it suffered injustice at the hands of the defendant. As Rothstein J. rightly observes in his dissent, the laches defence is only ever invoked as a defence by a defendant who is alleged to have perpetrated an injustice against the plaintiff.[38]

On the second point, there is undoubtedly an established history of the Crown using law and policy to prevent Indigenous peoples from obtaining judicial remedies, as I will discuss in my examination of the *Mikisew Cree 2018* decision. It is important to acknowledge this history, to condemn the marginalizing and racist effects of these laws, and to endeavour to ensure that the litigation process is accessible and fair to Indigenous litigants. For instance, a case could be made that limitations periods and the laches defence ought not to apply where the Crown had legally barred an Indigenous group from bringing a claim, as was the case for Status Indian claims against the Crown until 1951.[39]

However, the trial judge in *Manitoba Métis Federation* had found that the Métis litigants were not legally barred from bringing such claims in the years following Manitoba's entry into Confederation. Indeed, the evidence showed that many Métis individuals pursued legal action in the 1890s for other claims arising under the *Manitoba Act, 1870*.[40] The majority did not identify palpable and overriding error in the trial judge's findings on this point that would have justified the Supreme Court substituting its own factual findings about the legal freedoms of Métis claimants.[41]

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[36] *Manitoba Métis Federation v. Canada (Attorney General)*, [2013] 1 S.C.R. 623, 2013 SCC 14, at paras. 133-139 (S.C.C.).

[37] *Manitoba Métis Federation v. Canada (Attorney General)*, [2013] 1 S.C.R. 623, 2013 SCC 14, at paras. 147 (S.C.C.).

[38] *Manitoba Métis Federation v. Canada (Attorney General)*, [2013] 1 S.C.R. 623, 2013 SCC 14, at para. 284 (S.C.C.).

[39] *Indian Act*, S.C. 1926-27, s. 6 (repealed).

[40] *Manitoba Métis Federation v. Canada (Attorney General)*, [2013] 1 S.C.R. 623, 2013 SCC 14, at para. 148 (S.C.C.). See also paras. 287-91, *per* Rothstein J. The actions in question were *Barber v. Proudfoot*, [1890-91] 1 W.L.T.R. 144 (Man Q.B. *en banc*), *Hardy v. Desjarlais* (1892), 8 Man. R. 550 (Man. C.A.) and *Robinson v. Sutherland* (1893), 9 Man. R. 199 (Man. Q.B.).

[41] The appellate standard of review established in *Housen v. Nikolaisen*, [2002] 2 S.C.R.

Instead, the majority took issue with the legal inference drawn from those facts by the trial judge,[42] noting that "[a]lthough many [petitioners] were Métis, the petitioners were, in fact, a broader group, including many signatories and community leaders who were not Métis".[43] It is debatable whether this is sufficient to displace the inference that the Métis' participation in these actions demonstrated their capacity and freedom at the time to pursue litigation against the Crown for infringement of their rights under the *Manitoba Act, 1870*.

Notwithstanding these previous actions brought by Métis individuals, the majority suggested in passing that it was unrealistic to expect the Métis to have enforced their claims for Crown delay in allocating the section 31 lands, as the courts had yet to recognize their rights in that regard.[44] In other words, courts have only proven themselves to be "ready" to deal with such claims following the recent jurisprudential evolution of the honour of the Crown. Justice Rothstein rightly counters that the common law has always allowed for laches to apply to complainants despite such changes in the law.[45] It is not clear whether the majority intended to dismiss this principle in the context of Indigenous claims, or whether it was simply an observation made in *obiter*. To overcome an established common law practice, one would expect a substantive discussion of the legal and equitable considerations at play — certainly more than the two brief sentences of comment by the majority in this decision.[46]

Courts need not distort civil procedure in order to ensure that Indigenous claims receive fair hearings, especially since present-day Indigenous claimants are often represented by experienced, specialized counsel.[47] It is neither inequitable nor

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235, 2002 SCC 33, at para. 36 (S.C.C.) provides that where an issue on appeal "involves the trial judge's interpretation of the evidence as a whole, it should not be overturned absent palpable and overriding error".

[42] *Manitoba Métis Federation v. Canada (Attorney General)*, [2013] 1 S.C.R. 623, 2013 SCC 14, at para. 148 (S.C.C.).

[43] *Manitoba Métis Federation v. Canada (Attorney General)*, [2013] 1 S.C.R. 623, 2013 SCC 14, at para. 148 (S.C.C.).

[44] *Manitoba Métis Federation v. Canada (Attorney General)*, [2013] 1 S.C.R. 623, 2013 SCC 14, at para. 149 (S.C.C.).

[45] *Manitoba Métis Federation v. Canada (Attorney General)*, [2013] 1 S.C.R. 623, 2013 SCC 14, at para. 279 (S.C.C.), citing *Spectrum Plus Ltd (in liquidation) (In re)*, 2005 UKHL 41, and *Canada (Attorney General) v. Hislop*, [2007] 1 S.C.R. 429, 2007 SCC 10 (S.C.C.).

[46] *Manitoba Métis Federation v. Canada (Attorney General)*, [2013] 1 S.C.R. 623, 2013 SCC 14, at para. 149 (S.C.C.).

[47] Indigenous law has exploded as a practice area in the Canadian legal profession. As an illustration, most of Canada's top-ranked national law firms have dedicated Aboriginal law practice teams: see, *e.g.*, Blakes, online: <https://www.blakes.com/expertise/practices/indigenous>; McCarthy Tetrault, online: <https://www.mccarthy.ca/en/services/practices/transactions/environmental-regulatory-aboriginal-era>; Osler, Hoskin & Harcourt, online:

unjust for an appellate court, in the context of an Indigenous claim, to defer to the factual findings of a trial court barring a palpable and overriding error in those findings, consistent with the usual rules of appellate review. Nor is it unreasonable to require an Indigenous claimant, represented by competent legal counsel, to plead a particular cause of action in order for it to be considered by a court. Access to justice is not necessarily advanced by courts awarding novel constitutional remedies that were neither sought nor argued by Indigenous claimants.

Indeed, it is worth noting that the Crown is itself an increasingly active, and often proactive, participant in promoting access to justice for Indigenous litigants. For instance, the federal government has implemented a "Directive on Civil Litigation Involving Indigenous Peoples" that expressly embraces the objectives of: (1) advancing reconciliation; (2) recognizing rights; (3) upholding the honour of the Crown; and (4) respecting and advancing Indigenous self-determination and self-governance.[48] This Directive provides specific instructions to Crown counsel on how to manage files involving Indigenous litigants, including avoiding laches and limitations defences where possible.[49]

The MMF, unsurprisingly, praised the majority outcome in *Manitoba Métis Federation*.[50] The ruling had the desired effect of bringing the Crown to the table to negotiate a land claim agreement with the Métis claimants. In the summer of 2021, the MMF and the federal government signed a self-government agreement which sets out a process for recognizing Métis jurisdiction over various matters.[51] In this sense the legacy of *Manitoba Métis Federation* is a positive one, having led to substantive recognition of Métis jurisdiction, albeit indirectly.

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<https://www.osler.com/en/expertise/services/regulatory-environmental-indigenous-land/indigenous>; Stikeman Elliott, online: <https://www.stikeman.com/en-ca/expertise/indigenous>; Torys, online: <https://www.torys.com/expertise/services/indigenous>; Bennett Jones, online: <https://www.bennettjones.com/AboriginalLaw>; Gowling WLG, online: <https://gowlingwlg.com/en/services/indigenous-law/>; Borden Ladner Gervais, online: <https://www.blg.com/en/services/practice-areas/indigenous-law>; Fasken, online: <https://www.fasken.com/en/solution/practice/indigenous-law#sort=%40fclientworksortdate75392%20descending>.

[48] Government of Canada, *The Attorney General of Canada's Directive on Civil Litigation Involving Indigenous Peoples*, online: <https://www.justice.gc.ca/eng/csj-sjc/ijr-dja/dclip-dlcpa/litigation-litiges.html>.

[49] Government of Canada, *The Attorney General of Canada's Directive on Civil Litigation Involving Indigenous Peoples*, online: <https://www.justice.gc.ca/eng/csj-sjc/ijr-dja/dclip-dlcpa/litigation-litiges.html>.

[50] "Métis celebrate historic Supreme Court land ruling" (March 8, 2013), *CBC News*, online: <https://www.cbc.ca/news/politics/métis-celebrate-historic-supreme-court-land-ruling-1.1377827>.

[51] "Manitoba Métis Federation signs self-government agreement with feds" (July 6, 2021), *CBC News*, online: <https://www.cbc.ca/news/canada/manitoba/manitoba-Métis-federation-self-government-agreement-1.6092332>.

However, the *Manitoba Métis Federation* decision comes at the cost of broader uncertainty regarding when and how the courts may, first, apply the honour of the Crown to recognize new Crown duties, and, second, provide relief for claims which would not otherwise qualify for relief under existing common law rules.

### 2. *Mikisew Cree 2018*

In 2012, the federal government introduced two omnibus bills that, among other things, amended or repealed several pieces of environmental assessment and protection legislation.[52] The Mikisew Cree First Nation, which had not been formally consulted on the development of these bills, challenged them on the basis that the legislation had the potential to affect the First Nation's treaty rights to hunt and fish.[53]

Up to this point, Canadian courts had applied the principle of parliamentary sovereignty to restrict the duty to consult to executive, as opposed to legislative, conduct. While Canadian courts have embraced judicial review of legislation on the basis of its substantive content, they have generally avoided review of legislative *development*, whether as a function of procedural fairness,[54] statutory consultation requirements,[55] or manner and form limitations.[56] In recognition of this fact, the appellants in *Mikisew Cree 2018* argued that the duty to consult should only apply to the "pre-enactment" stage of legislative development — specifically, to ministerial oversight of and participation in the development of legislation prior to its introduction in Parliament. The First Nation argued this ministerial participation to

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[52] Bill C-38, eventually enacted as the *Jobs, Growth and Long-term Prosperity Act*, S.C. 2012, c. 9 and Bill C-35, eventually enacted as the *Jobs and Growth Act*, S.C. 2012, c. 30.

[53] *Mikisew Cree First Nation v. Canada (Attorney General)*, [2014] F.C.J. No. 1308, 2014 FC 1244 (F.C.) (Notice of Application).

[54] *Reference re Canada Assistance Plan (Canada)*, [1991] S.C.J. No. 60, [1991] 2 S.C.R. 525 (S.C.C.); *Babcock v. Canada (Attorney General)*, [2002] 3 S.C.R. 3, 2002 SCC 57 (S.C.C.); *Authorson v. Canada (Attorney General)*, [2003] 2 S.C.R. 40, 2003 SCC 39 (S.C.C.).

[55] See, *e.g.*, *Friends of the Canadian Wheat Board v. Canada (Attorney General)*, [2012] F.C.J. No. 706, 2012 FCA 183 (F.C.A.). Admittedly, this case was not explicitly decided on the basis of parliamentary sovereignty, but through statutory interpretation of the *Canadian Wheat Board Act*, R.S.C. 1985, c. C-25. However, the court relied heavily on the legislative intent behind the Act, and ultimately concluded that legislators did not intend to provide wheat producers with a veto over the government's ability to repeal the act.

[56] It has been over 30 years since the Supreme Court last acknowledged a contested "manner and form limitation" wherein Parliament is taken to have expressly limited its own legislative supremacy by imposing procedural limits on how certain types of statutes can be enacted: *Reference re Canada Assistance Plan (Canada)*, [1991] S.C.J. No. 60, [1991] 2 S.C.R. 525 (S.C.C.); *R. v. Drybones*, [1969] S.C.J. No. 83, [1970] S.C.R. 282 (S.C.C.); *R. v. Mercure*, [1988] S.C.J. No. 11, [1988] 1 S.C.R. 234 (S.C.C.); *Reference re Manitoba Language Rights*, [1985] S.C.J. No. 36, [1985] 1 S.C.R. 721 (S.C.C.).

be judicially reviewable executive conduct, distinct from legislative conduct subject to parliamentary supremacy and privilege.[57] This distinction was not ultimately accepted by the Supreme Court of Canada.

A majority of the Supreme Court in *Mikisew Cree 2018* (Abella and Martin JJ. dissenting) agreed that the duty to consult did not apply to legislative action, whether "pre-enactment" action or otherwise. However, five members of the Court nevertheless agreed that the honour of the Crown could be engaged by the legislative process in some way.[58] Justice Karakatsanis (Wagner C.J.C., Gascon J. concurring) noted that, even though the duty to consult does not apply to the legislative process, "the extent of any consultation may well be a relevant consideration" when assessing whether legislative action was consistent with the honour of the Crown.[59]

It is worth noting that the prospect of recognizing novel constitutional duties in the context of legislative development was not actually addressed in the submissions of the parties and intervenors, which focused expressly on the applicability of the duty to consult. This did not appear to trouble Karakatsanis J. and her concurring colleagues, just as it did not trouble the majority in *Manitoba Métis Federation*.

The majority result in *Mikisew Cree 2018* creates significant uncertainty for lawmakers who otherwise have no judicial guidance on what constitutes "honourable" legislative conduct. It also does not make very much sense, given the majority view that the duty to consult does not apply to legislative development. As reasoned in the opinions of Brown and Rowe JJ. (Moldaver and Côté JJ. concurring), parliamentary sovereignty is directly infringed by judicial review of legislative development for any reason, regardless of whether that review is grounded in the duty to consult or some other duty arising from the honour of the Crown.[60]

The legal uncertainty and practical challenges associated with enforcing the duty to consult in the legislative process would similarly arise in the enforcement of some other honourable duty. The legislative process is inherently complex and political.

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[57] *Mikisew Cree First Nation v. Canada (Governor General in Council)*, [2018] 2 S.C.R. 765, 2018 SCC 40 (S.C.C.), Factum of the Appellants – Mikisew Cree First Nation, at para. 101, online: <FM010_Appellant_Chief-Steve-Courtoreille.pdf (scc-csc.ca)>.

[58] Justice Abella (Martin J. concurring) opined that the duty to consult did apply to the legislative process when laws are being developed that might adversely affect Aboriginal rights. When combined with Karakatsanis J.'s opinion (Wagner C.J.C., Gascon J. concurring), this represents a majority of five justices who left open the possibility of the honour of the Crown applying to legislative development.

[59] *Mikisew Cree First Nation v. Canada (Governor General in Council)*, [2018] 2 S.C.R. 765, 2018 SCC 40, at para. 48 (S.C.C.).

[60] *Mikisew Cree First Nation v. Canada (Governor General in Council)*, [2018] 2 S.C.R. 765, 2018 SCC 40 (S.C.C.), at paras. 103, 104, 136-143, *per* Brown J., and at para. 148, *per* Rowe J. (Moldaver, Côté JJ. concurring).

It is unclear how honourable conduct could be assessed, and how it would be discharged, especially since draft legislation may be subject to many substantive amendments at various points by various actors before it is enacted into law. Legislators must ultimately be free to balance and compromise between competing rights and interests, including those of Indigenous peoples, and must be held accountable by the electorate for their actions. This is the imperfect nature of law-making in a parliamentary democracy. Moreover, the need for procedural safeguards for Indigenous peoples within in the legislative process is debatable, given that the *substance* of resulting legislation can already be judicially reviewed for infringement of section 35 rights.

It may well be that members of the judiciary feel a moral imperative to provide Indigenous peoples with a constitutional mechanism for preventing unilateral legislative action, even where it does not necessarily infringe their section 35 rights. There are indeed many reasons why it is difficult to expect Indigenous communities to trust that legislators will be conscientious and accountable in legislating for Indigenous peoples, who remain a minority within the electorate. The ability of lawmakers to unilaterally amend or repeal legislation is particularly problematic for Indigenous peoples governed by the provisions of the *Indian Act*,[61] which governs everything from land use to education to tax obligations. Historically, federal lawmakers used the *Indian Act* to deny various rights and services to Indigenous peoples, criminalize Indigenous cultural practices, and forcibly remove Indigenous children from their parents and communities. These abuses were detailed in the submissions of several intervenors in *Mikisew Cree 2018*,[62] and have been extensively documented by the Royal Commission on Aboriginal Peoples[63] and the Truth and Reconciliation Commission.[64] Legislators undoubtedly continue to make mistakes, and can at times be disingenuous when it comes to their treatment of Indigenous issues.

Yet there are many ways in which present-day legislators are making good faith

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[61] *Indian Act*, R.S.C. 1985, c. I-5.

[62] See, *e.g.*, *Mikisew Cree First Nation v. Canada (Governor General in Council)*, [2018] 2 S.C.R. 765, 2018 SCC 40 (S.C.C.); Factum of the Intervenor – Federation of Sovereign Indigenous Nations, at paras. 4, 5, 24 online: <17 11 10 FSIN Intervener Factum - SCC File 37441 (00026030.DOCX;2) (scc-csc.ca)>; Factum of the Intervenor – Assembly of First Nations, at paras. 5-7, online: <FM070_Intervener_Assembly-of-First-Nations.pdf (scc-csc.ca)>; Factum of the Intervenor – Manitoba Métis Foundation, at paras. 13, 16, 18, 27, online: <37441 Factum of the Intervener MMF (00019215.DOCX;11) (scc-csc.ca)>.

[63] Royal Commission on Aboriginal Peoples, *Final Report* (Ottawa: Government of Canada, 1996), online: <https://www.bac-lac.gc.ca/eng/discover/aboriginal-heritage/royal-commission-aboriginal-peoples/Pages/final-report.aspx>.

[64] Truth and Reconciliation Commission of Canada, *Final Report* (Winnipeg, TRC 2015), online: <https://ehprnh2mwo3.exactdn.com/wp-content/uploads/2021/01/Executive_Summary_English_Web.pdf>.

efforts to support meaningful Indigenous participation within the legislative process. There are numerous examples of provincial and federal lawmakers engaging extensively with Indigenous leaders, communities and advocates when contemplating legislative and regulatory change that will specifically affect on-reserve communities,[65] and rejecting legislative changes that are opposed by Indigenous representatives.[66] It is increasingly common for federal legislative regimes to be opt-in[67] or opt-out[68] for affected Indigenous communities. There are also examples of legislative proposals being initiated by Indigenous representatives before being adopted into law by Parliament,[69] and of administrative responsibility being devolved to Indigenous-led regulatory bodies.[70] Further, Indigenous issues are gaining visibility in electoral platforms, and Indigenous representation is increasing in the provincial legislatures and the federal Parliament.[71] Successive federal

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[65] See, *e.g.*, recent engagement on regulations under the federal *Safe Drinking Water for First Nations Act*, S.C. 2013, c. 21, detailed at Indigenous Services Canada, "Safe Drinking Water for First Nations Act", online: <https://www.sac-isc.gc.ca/eng/1330528512623/1533729830801>. See also "Co-developing distinctions-based Indigenous health legislation" (August 13, 2021), *Indigenous Services Canada*, online: <https://www.sac-isc.gc.ca/eng/1611843547229/1611844047055>. For provincial examples, see, *e.g.*, engagement on Alberta's *First Nation Consultation Policy*: Indigenous Relations, Government of Alberta "First Nations and Metis Settlements Consultation Policies Renewal", online: <https://open.alberta.ca/dataset/d9adaef0-5ff3-4308-ad44-0c949dd80e6b/resource/710b3c23-a6a6-41c6-b411-574d74d9d3d9/download/discussion-guide.pdf>.

[66] See, *e.g.*, the demise of federal on-reserve education reforms amidst Indigenous opposition: "How the First Nations education act fell apart in a matter of months" (May 11, 2014), *Canadian Press*, online: <https://www.cbc.ca/news/politics/how-the-first-nations-education-act-fell-apart-in-matter-of-months-1.2639378>.

[67] See, *e.g.*, *First Nations Land Management Act*, S.C. 1999, c. 24; *First Nations Elections Act*, S.C. 2014, c. 5.

[68] See, *e.g.*, *Family Homes on Reserves and Matrimonial Interests or Rights Act*, S.C. 2013, c. 20.

[69] See, *e.g.*, *First Nations Land Management Act*, S.C. 1999, c. 24. See also discussion of the history of the FNLMA: Nations Land Management Resource Centre, "A history of the *Framework Agreement on First Nation Land Management*", online: <https://labrc.com/our-history/>. See also *First Nations Fiscal Management Act*, S.C. 2005, c. 9, the history of which is discussed at First Nations Financial Management Board, "About the First Nations Fiscal Management Act", online: <https://fnfmb.com/en/about-fmb/about-first-nations-fiscal-management-act-fma>.

[70] See, *e.g.*, the bodies established under *First Nations Fiscal Management Act*, S.C. 2005, c. 9. These include the First Nations Tax Commission, online: <https://fntc.ca/>; the First Nation Financial Management Board, online: <https://fnfmb.com/en>; and the First Nations Finance Authority, online: <https://www.fnfa.ca/en/>.

[71] See, *e.g.*, Brittany Hobson, "Record number of indigenous candidates running in the federal election" (September 1, 2021), *CTV News*, online: <https://www.ctvnews.ca/politics/federal-election-2021/record-number-of-indigenous-candidates-running-in-federal-election-1.

governments have also examined ways in which Aboriginal rights can be protected within the legislative process by policy[72] or statute.[73]

## IV. CONCLUSION

Canadian courts have the heavy responsibility of holding the Crown to account for the historical injustices it has perpetrated against Indigenous peoples, while also maintaining coherence and consistency within the common law. Existing common law doctrines will always have limits, beyond which a remedy may not be available for a particular Indigenous claimant, at least not on the grounds which they have put before the court. As shown in *Manitoba Métis Federation* and *Mikisew Cree 2018*, the courts have responded to this reality by using the honour of the Crown to create new doctrines in the name of advancing reconciliation. But the increased availability of judicial review of Crown or, potentially, legislative, action does not itself clarify the substantive rights of Indigenous peoples, and can actively undermine policy incentives for seeking resolution of substantive claims through negotiated agreements or declarations of rights and title. In order to meaningfully advance reconciliation, the honour of the Crown must be consistent with legal certainty and clarity for Indigenous communities and the Crown alike.

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5570074>; Tim Fontaine, "Record 10 Indigenous MPs elected to the House of Commons" (October 20, 2015), *CBC News*, online: <https://www.cbc.ca/news/indigenous/indigenous-guide-to-house-of-commons-1.3278957>; Karin Larsin, "Record number of Indigenous MLAs heading to Victoria" (May 10, 2017), *CBC News*, online: <https://www.cbc.ca/news/canada/british-columbia/four-indigenous-candidates-elected-bc-1.4108121>; "Nearly a quarter of NDP MLAs are indigenous" (April 20, 2016), *CBC News*, online: <https://www.cbc.ca/news/canada/manitoba/manitoba-indigenous-ndp-mla-1.3545635>.

[72] See, *e.g.*, Government of Canada, *Cabinet Directive on Modern Treaty Implementation*, online: <https://www.rcaanc-cirnac.gc.ca/eng/1436450503766/1544714947616>.

[73] See, *e.g.*, the Trudeau government's proposed "Indigenous Rights, Recognition and Implementation Framework", online: <https://www.rcaanc-cirnac.gc.ca/eng/1536350959665/1539959903708>. See also critical discussion in Joanne Cave, "From Rights Recognition to Reconciliation: Reflecting on the Government of Canada's Proposed Indigenous Rights Recognition Framework" (2019) 77 U.T. Fac. L. Rev. 59, and in Hayden King & Shiri Pasternak, "Canada's Emerging Indigenous Rights Framework: A Critical Analysis" (June 5, 2018), *Yellowhead Institute*, online: <https://yellowheadinstitute.org/wp-content/uploads/2018/06/yi-rights-report-june-2018-final-5.4.pdf>. See also the federal government's engagement on Bill C-15: "Proposed legislation to implement the United Nations Declaration on the Rights of Indigenous People" (September 1, 2021), *Government of Canada, Department of Justice* <https://www.justice.gc.ca/eng/csj-sjc/pl/declaration/index.html>.