



**SUPREME COURT OF CANADA**

**CITATION:** Mikisew Cree First Nation v. Canada  
(Governor General in Council), 2018 SCC 40

**APPEAL HEARD:** January 15, 2018  
**JUDGMENT RENDERED:** October 11, 2018  
**DOCKET:** 37441

**BETWEEN:**

**Chief Steve Courtoreille on behalf of himself and the members of the Mikisew  
Cree First Nation**  
Appellant

and

**Governor General in Council, Minister of Aboriginal Affairs and Northern  
Development, Minister of Finance, Minister of the Environment, Minister of  
Fisheries and Oceans, Minister of Transport and Minister of Natural Resources**  
Respondents

- and -

**Attorney General of Quebec, Attorney General of New Brunswick, Attorney  
General of British Columbia, Attorney General of Saskatchewan, Attorney  
General of Alberta, Champagne and Aishihik First Nations, Kwanlin Dün First  
Nation, Little Salmon Carmacks First Nation, First Nation of Na-Cho Nyak Dun,  
Teslin Tlingit Council, First Nations of the Maa-nulth Treaty Society, Assembly  
of First Nations, Grand Council of the Crees (Eeyou Istchee), Cree Nation  
Government, Manitoba Metis Federation Inc., Advocates for the Rule of Law,  
Federation of Sovereign Indigenous Nations and Gitanyow Hereditary Chiefs**  
Intervenors

**CORAM:** Wagner C.J. and Abella, Moldaver, Karakatsanis, Gascon, Côté, Brown,  
Rowe and Martin JJ.

**REASONS FOR JUDGMENT:** Karakatsanis J. (Wagner C.J. and Gascon J. concurring)  
(paras. 1 to 53)

**CONCURRING REASONS:**  
(paras. 54 to 99)

Abella J. (Martin J. concurring)

**CONCURRING REASONS:**  
(paras. 100 to 147)

Brown J.

**CONCURRING REASONS:**  
(paras. 148 to 172)

Rowe J. (Moldaver and Côté JJ. concurring)

**NOTE:** This document is subject to editorial revision before its reproduction in final form in the *Canada Supreme Court Reports*.

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MIKISEW CREE FIRST NATION v. CANADA

**Chief Steve Courtoreille on behalf of himself and  
the members of the Mikisew Cree First Nation**

*Appellant*

v.

**Governor General in Council,  
Minister of Aboriginal Affairs and  
Northern Development,  
Minister of Finance,  
Minister of the Environment,  
Minister of Fisheries and Oceans,  
Minister of Transport and  
Minister of Natural Resources**

*Respondents*

and

**Attorney General of Quebec,  
Attorney General of New Brunswick,  
Attorney General of British Columbia,  
Attorney General of Saskatchewan,  
Attorney General of Alberta,  
Champagne and Aishihik First Nations,  
Kwanlin Dün First Nation,  
Little Salmon Carmacks First Nation,  
First Nation of Na-Cho Nyak Dun,  
Teslin Tlingit Council,  
First Nations of the Maa-nulth Treaty Society,  
Assembly of First Nations,  
Grand Council of the Crees (Eeyou Istchee),  
Cree Nation Government,  
Manitoba Metis Federation Inc.,  
Advocates for the Rule of Law,  
Federation of Sovereign Indigenous Nations and  
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**Indexed as: Mikisew Cree First Nation v. Canada (Governor General in Council)**

**2018 SCC 40**

File No.: 37441.

2018: January 15; 2018: October 11.

Present: Wagner C.J. and Abella, Moldaver, Karakatsanis, Gascon, Côté, Brown, Rowe and Martin JJ.

ON APPEAL FROM THE FEDERAL COURT OF APPEAL

*Courts — Federal Court — Jurisdiction — Judicial review — Parliament adopting legislation amending Canada’s environmental protection regime — First Nation bringing application for judicial review with respect to development and introduction of legislation — Whether Federal Court had jurisdiction to consider First Nation’s application — Federal Courts Act, R.S.C. 1985, c. F-7, ss. 2(1) “federal board, commission or other tribunal”, 2(2), 17, 18, 18.1.*

*Constitutional law — Aboriginal peoples — Treaty rights — Crown — Duty to consult — Parliament adopting legislation amending Canada’s environmental protection regime — First Nation not consulted on legislation at any stage of development or prior to granting of royal assent — First Nation seeking declaration that Crown owed and breached duty to consult since legislation had*

*potential to adversely affect treaty rights to hunt, trap, and fish — Whether duty to consult applies to law-making process.*

In April 2012, two pieces of omnibus legislation with significant effects on Canada's environmental protection regime were introduced into Parliament. The Mikisew Cree First Nation was not consulted on either of these omnibus bills at any stage in their development or prior to the granting of royal assent. The Mikisew brought an application for judicial review in Federal Court, arguing that the Crown had a duty to consult them on the development of the legislation, since it had the potential to adversely affect their treaty rights to hunt, trap, and fish under Treaty No. 8. The reviewing judge granted a declaration to the effect that the duty to consult was triggered and that the Mikisew were entitled to notice of the relevant provisions of the bills, as well as an opportunity to make submissions. On appeal, a majority of the Federal Court of Appeal concluded that the reviewing judge erred by conducting a judicial review of legislative action contrary to the *Federal Courts Act*. The majority held that when ministers develop policy, they act in a legislative capacity and their actions are immune from judicial review. It deemed the reviewing judge's decision to be inconsistent with the principles of parliamentary sovereignty, the separation of powers, and parliamentary privilege. The Mikisew appealed.

*Held:* The appeal should be dismissed.

*Per* Wagner C.J. and **Karakatsanis** and Gascon JJ.: The Federal Court lacked jurisdiction to consider the Mikisew's application for judicial review. For the

Federal Court to have jurisdiction over a claim, it must have a statutory grant of jurisdiction. Section 17(1) of the *Federal Courts Act* provides that the Federal Court has concurrent original jurisdiction where relief is claimed against the Crown, which the Act defines as Her Majesty in right of Canada. However, this definition does not extend to executive actors when they are exercising legislative power. In this case, the Mikisew challenge actions which are uniformly legislative in character, therefore, their application is not against the Crown in its executive capacity. In addition, ss. 18 and 18.1 of the Act only grant the Federal Court jurisdiction to judicially review action taken by a “federal board, commission or other tribunal”, defined in s. 2(1) of the Act as a body exercising statutory powers or powers under an order made pursuant to a prerogative of the Crown. Section 2(2) specifies that the Senate, the House of Commons, or any committee or member of either House is not included in this definition. Ministers do not act pursuant to statutory powers when developing legislation; rather, they act pursuant to powers under Part IV of the *Constitution Act, 1867*. As such, when developing legislation, they do not act as a federal board, commission or other tribunal and their actions are immune from judicial review. Accordingly, the Federal Court was not validly seized of the Mikisew’s application for judicial review in this case.

With respect to the duty to consult, the development of legislation by ministers is legislative action that does not trigger this duty. The duty to consult is an obligation that flows from the honour of the Crown, a foundational principle of Aboriginal law which governs the relationship between the Crown and Aboriginal

peoples. This duty requires the Crown to consult Aboriginal peoples before taking action that may adversely affect their asserted or established rights under s. 35 of the *Constitution Act, 1982* and ensures that the Crown acts honourably by preventing it from acting unilaterally in ways that undermine s. 35 rights. Although the duty to consult has been recognized in a variety of contexts, Crown conduct sufficient to trigger the duty has only been found to include executive action or action taken on behalf of the executive.

The duty to consult doctrine is ill-suited for legislative action. It is rarely appropriate for courts to scrutinize the law-making process, which includes the development of legislation by ministers. Longstanding constitutional principles underlie this reluctance to supervise the law-making process. The separation of powers is an essential feature of Canada's Constitution. It recognizes that each branch of government will be unable to fulfill its role if it is unduly interfered with by the others. Recognizing that a duty to consult applies during the law-making process may require courts to improperly trespass onto the legislature's domain. Parliamentary sovereignty mandates that the legislature can make or unmake any law it wishes, within the confines of its constitutional authority. Recognizing that the elected legislature has specific consultation obligations may constrain it. Parliamentary privilege also generally prevents courts from enforcing procedural constraints on the parliamentary process. Applying the duty to consult doctrine during the law-making process would lead to significant judicial incursion into the workings of the legislature.

Furthermore, the administrative law remedies normally available for breach of a duty to consult would invite inappropriate judicial intervention into the legislature's domain, as the duty would require the judiciary to directly interfere with the development of legislation. Applying a duty to consult to the development of legislation by ministers also raises practical concerns. If changes are made to a proposed bill to address concerns raised during consultation, these changes could later be undone by Parliament, as it is free to amend the proposed law. This may limit the possibility of meaningful accommodation. Additionally, private member bills would not trigger the duty, rendering the approach incongruous. Moreover, in the long chain of events contributing to the development of legislation, disentangling what steps the duty to consult applies to (because they are executive) and what actions are immune (because they are parliamentary) would be an enormously difficult task.

However, when legislation undermines s. 35 rights, Aboriginal groups are not left without a remedy. The duty to consult is not the only means to give effect to the honour of the Crown. Simply because the duty to consult doctrine, as it has evolved to regulate executive conduct, is inapplicable in the legislative sphere, does not mean the Crown is absolved of its obligation to conduct itself honourably. While an Aboriginal group will not be able to challenge legislation on the basis that the legislature had failed to fulfill the duty to consult, other protections may well be recognized in future cases when Aboriginal or treaty rights may be adversely affected by legislation, such as declaratory relief.



*Per Abella* and Martin JJ.: There is agreement with Karakatsanis J. that the appeal should be dismissed on the grounds that judicial review under the *Federal Courts Act* is not available for the actions of federal ministers in the parliamentary process.

However, there is disagreement with respect to the duty to consult. The enactment of legislation with the potential to adversely affect rights protected by s. 35 of the *Constitution Act, 1982* gives rise to a duty to consult, and legislation enacted in breach of that duty may be challenged directly for relief. The honour of the Crown governs the relationship between the government of Canada and Indigenous peoples. This obligation of honour gives rise to a duty to consult that applies to all contemplated government conduct with the potential to adversely impact asserted or established Aboriginal and treaty rights, including legislative action.

The honour of the Crown is always at stake in its dealings with Indigenous peoples, whether through the exercise of legislative power or executive authority. It is a constitutional imperative giving rise to obligations on the Crown which are enforced by the courts. When the government contemplates conduct that might adversely affect Aboriginal or treaty rights, the honour of the Crown gives rise to a duty to consult and accommodate. This duty is more than just a means of upholding the honour of the Crown. The question is not whether a duty to consult is appropriate in the circumstances, but whether the decision is one to which the duty to consult applies.

Because the honour of the Crown infuses the entirety of the government's relationship with Indigenous peoples, the duty to consult must apply to all exercises of authority which are subject to scrutiny under s. 35. This includes the enactment of legislation. This conclusion flows from the jurisprudential development of the duty to consult from an aspect of the infringement and justification analysis in *R. v. Sparrow*, [1990] 1 S.C.R. 1075, to an independent obligation in *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] S.C.R. 511. No longer confined to the justification context, the duty to consult now forms part of the essential legal framework of Aboriginal law, and requires consultation wherever the potential for adverse effects on claimed or established s. 35 rights arises. This approach recognizes that the legislative sphere is not excluded from the honour of the Crown. Endorsing such a void in the honour of the Crown would create a corresponding gap in the s. 35 framework, leaving Aboriginal rights-holders vulnerable to the same government objectives carried out through legislative, rather than executive, action.

Although parliamentary sovereignty and parliamentary privilege are central to ensuring that the legislative branch of government is able to do its work without undue interference, these concepts cannot displace the honour of the Crown. The issues in this appeal require this Court to reconcile, not choose between, protecting the legislative process from judicial interference and protecting Aboriginal rights from the legislative process. The right of Aboriginal groups to be consulted on decisions that may adversely affect their interests is not merely political, but a legal right with constitutional force. Cases which advocate against intrusion into the

parliamentary process must therefore be read in the context of a duty that is not only a constitutional imperative, but a recognition of the limits of Crown sovereignty itself. Parliamentary sovereignty should not be interpreted in a way that eradicates obligations under the honour of the Crown. Like all constitutional principles, parliamentary sovereignty must be balanced against other aspects of the constitutional order, including the duty to consult.

Although parliamentary sovereignty cannot displace the honour of the Crown, its force as a constitutional principle must be given adequate weight to achieve an appropriate balance between these concepts. The flexibility inherent in the duty to consult doctrine should be used to account for the wider area of discretion that legislatures must be afforded in the legislative context. Since the content of the duty to consult depends heavily on the circumstances, there is no reason why the unique challenges raised in the legislative sphere cannot be addressed by the spectrum of consultation and accommodation duties. Further, not every legislative effort triggers the duty to consult — it is triggered only where the Crown, with knowledge of the potential existence of the Aboriginal right or title in question, contemplates enacting legislation that might adversely affect it.

The procedure and scope of remedies available where the government breaches its duty to consult in the law-making process is also limited by the constitutional balance between the judiciary and the legislature. Institutional constraints in the legislative context require that applicants challenge existing

legislation. It would unduly interfere with the legislative process to allow direct challenges to a legislature's procedure prior to the enactment of legislation. While it is not the role of the courts to dictate the procedures legislatures adopt, they may consider whether the chosen process accords with the special relationship between the Crown and Indigenous peoples. Challenging existing legislation on procedural grounds is not a novel proposition in Canadian law.

A successful *Haida Nation* challenge will not, however, necessarily invalidate legislation. The duty to consult is about encouraging governments to consider their effects on Indigenous communities and consult proactively, and should not replace the *Sparrow* infringement and justification test or become a means by which legislation is routinely struck down. Without ruling out the possibility that in certain cases legislation enacted in breach of the duty to consult could be struck down, a declaration will generally be the appropriate remedy. This allows courts to shape the legal framework while respecting the constitutional role of another branch of government to act within those constraints. Therefore, an Indigenous group will be entitled to declaratory relief where the Crown has failed to consult during the process leading to the enactment of legislation that could adversely affect its interests.

*Per Brown J.:* There is agreement that the appeal should be dismissed on the grounds that the Federal Court did not have jurisdiction to consider the application for judicial review.

Even absent this jurisdictional bar, however, the separation of powers, parliamentary privilege, the scope of judicial review properly understood and the existing jurisprudence on the duty to consult all lead to the conclusion that the Mikisew's application for judicial review cannot succeed. The entire law-making process — from initial policy development to and including royal assent — is an exercise of legislative power which is immune from judicial interference. The making of policy choices is a legislative function, while the implementation and administration of those choices is an executive function. This precludes judicial imposition of a duty to consult in the course of the law-making process.

The formulation and introduction of bills is protected from judicial review by the separation of powers. In order for each branch of the Canadian state — legislative, executive and judiciary — to fulfill its role, it must not be unduly interfered with by the others. Ministers of the Crown play an essential role in, and are an integral part of, the legislative process. Their dual membership in the executive and legislative branches of the Canadian state does not render their corresponding executive and legislative roles indistinguishable for the purposes of judicial review. In the instant case, federal ministers took a set of policy decisions that eventually led to the drafting of a legislative proposal, and then to the formulation and introduction of the omnibus bills in the House of Commons. All of these actions form part of the legislative process of introducing bills in Parliament and were taken by the ministers acting in a legislative capacity.

The formulation and introduction of bills is also protected from judicial review by parliamentary privilege, which is understood as freedom from interference with the parliamentary work of a Member of Parliament. Parliamentary privilege is essential to allowing Parliament to perform its constitutional functions by giving it the right to exercise unfettered freedom in the formulation, tabling, amendment, and passage of legislation. While parliamentary privilege operates within certain constraints imposed by the Constitution, the duty to consult is distinct from the constitutionally mandated manner and form requirements with which Parliament must comply in order to enact valid legislation. The only procedure due any citizen of Canada is that proposed legislation receive three readings in the Senate and House of Commons and that it receive royal assent. While the Constitution's status as the supreme law of Canada operates to render of no force and effect enacted legislation that is inconsistent with its provisions, it does not empower plaintiffs to override parliamentary privilege.

The development, introduction, consideration and enactment of bills is not Crown conduct which triggers the duty to consult. Crown conduct triggering this duty must be understood as excluding the parliamentary functions of the Canadian state. The steps taken as part of the parliamentary process of law-making, including royal assent, are not the vehicle through which the Crown acts. The exercise of Crown authority in enacting legislation (assenting, refusing assent to, or reserving legislative or parliamentary bills) is legislative. It is not an instance of Crown conduct

— that is, executive conduct — which can trigger the duty to consult. The Crown does not enact legislation, Parliament does.

Consequently, judicial review of the legislative process, including *post-facto* review of the process of legislative enactment, for adherence to s. 35 of the *Constitution Act, 1982*, and for consistency with the honour of the Crown, is unconstitutional. That this is so, should not, however, be seen to diminish the value and wisdom of consulting Indigenous peoples prior to enacting legislation that has the potential to adversely impact the exercise of Aboriginal or treaty rights. Consultation during the legislative process is an important consideration in the justification analysis under s. 35. But the absence or inadequacy of consultation may be considered only once the legislation at issue has been enacted, and then, only in respect of a challenge under s. 35 to the substance or the effects of such enacted legislation, as opposed to a challenge to the legislative process.

Raising the possibility that legislation which adversely affects s. 35 rights might be declared inconsistent with the honour of the Crown undercuts the same principles of separation of powers and parliamentary privilege that lead to the conclusion that imposing the duty to consult would be inappropriate in the circumstances of this case. Further, this would cast the law into considerable uncertainty for all who rely upon the efficacy of validly enacted and constitutionally compliant laws.

*Per* Moldaver, Côté and **Rowe JJ.**: There is agreement with Brown J. In addition, the fact that the duty to consult has not been recognized as a procedural requirement in the legislative process does not leave Aboriginal claimants without effective means to have their rights, which are protected under s. 35 of the *Constitution Act, 1982*, vindicated by the courts. When legislation has been adopted, those who assert that the effect of the legislation is to infringe s. 35 rights have their remedies under the infringement and justification framework set out in *R. v. Sparrow*, [1990] 1 S.C.R. 1075. Those who assert that government decisions made pursuant to the legislation's authority will adversely affect their claims can rely on the duty to consult first recognized in *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] S.C.R. 511. Where new situations arise that require the adaptation or extension of the existing jurisprudence, the courts provide a means for further development of the law. No such requirement has been shown on the facts of this case. The current jurisprudence provides for protection and vindication of Aboriginal rights while upholding the constitutional principles of parliamentary sovereignty and the separation of powers.

Furthermore, recognizing a constitutionally mandated duty to consult during the process of preparing legislation would be highly disruptive to the carrying out of that work. The preparation of legislation is not a simple process. Rather, it is a highly complex process involving multiple actors across government. Imposing a duty to consult at this stage could effectively grind the day-to-day internal operation



of government to a halt. What is now complex and difficult could become drawn out and dysfunctional.

Finally, an additional and serious consequence of recognizing a duty to consult during the law-making process would be the interventionist role that the courts would be called upon to play in order to supervise interactions between Indigenous parties and those preparing legislation for consideration by Parliament and by provincial legislatures. If a duty to consult were to be imposed on the legislative process, disputes would arise about the way that this obligation would be fulfilled. Affected parties would inevitably turn to the courts, who would be drawn into a supervisory role as to the operation of a duty to consult in the preparation of legislation. The courts are ill-equipped to deal with the procedural complexities of the legislative process. If a legislature chooses to participate in consultation with Indigenous peoples, the stage at which such consultation takes place is a matter of discretion. Interference by a court in the exercise of that discretion would offend the separation of powers. Engaging the courts in regulating the exercise by Parliament and legislatures of their powers and privileges would be a profound change in Canada's system of government.

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By Karakatsanis J.

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*Nation v. British Columbia*, 2014 SCC 44, [2014] 2 S.C.R. 257; *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010; *Doré v. Barreau du Québec*, 2012 SCC 12, [2012] 1 S.C.R. 395; *R. v. Mercure*, [1988] 1 S.C.R. 234.

By Abella J.

**Considered:** *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 S.C.R. 511; *Manitoba Metis Federation Inc. v. Canada (Attorney General)*, 2013 SCC 14, [2013] 1 S.C.R. 623; *R. v. Sparrow*, [1990] 1 S.C.R. 1075; *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, 2005 SCC 69, [2005] 3 S.C.R. 388; *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, 2004 SCC 74, [2004] 3 S.C.R. 550; *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010; *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, 2010 SCC 43, [2010] 2 S.C.R. 650; *Clyde River (Hamlet) v. Petroleum Geo-Services Inc.*, 2017 SCC 40, [2017] 1 S.C.R. 1069; *Chippewas of the Thames First Nation v. Enbridge Pipelines Inc.*, 2017 SCC 41, [2017] 1 S.C.R. 1099; *Tsilhqot'in Nation v. British Columbia*, 2014 SCC 44, [2014] 2 S.C.R. 257; *New Brunswick Broadcasting Co. v. Nova Scotia (Speaker of the House of Assembly)*, [1993] 1 S.C.R. 319; *Authorson v. Canada (Attorney General)*, 2003 SCC 39, [2003] 2 S.C.R. 40; *British Columbia Teachers' Federation v. British Columbia*, 2016 SCC 49, [2016] 2 S.C.R. 407, rev'g (2015), 71 B.C.L.R. (5th) 223; **referred to:** *Beckman v. Little Salmon/Carmacks First Nation*, 2010 SCC 53, [2010] 3 S.C.R. 103; *R. v. Badger*, [1996] 1 S.C.R. 771; *Mitchell v. M.N.R.*, 2001 SCC 33,

[2001] 1 S.C.R. 911; *Calder v. Attorney-General of British Columbia*, [1973] S.C.R. 313; *R. v. Marshall*, [1999] 3 S.C.R. 456; *R. v. Nikal*, [1996] 1 S.C.R. 1013; *R. v. Gladstone*, [1996] 2 S.C.R. 723; *Ontario v. Criminal Lawyers' Association of Ontario*, 2013 SCC 43, [2013] 3 S.C.R. 3; *Canada (House of Commons) v. Vaid*, 2005 SCC 30, [2005] 1 S.C.R. 667; *St. Catherine's Milling and Lumber Co. v. The Queen* (1888), 14 App. Cas. 46; *Reference re Resolution to Amend the Constitution*, [1981] 1 S.C.R. 753; *Reference re Canada Assistance Plan (B.C.)*, [1991] 2 S.C.R. 525; *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217; *Health Services and Support — Facilities Subsector Bargaining Assn. v. British Columbia*, 2007 SCC 27, [2007] 2 S.C.R. 391; *Saskatchewan Federation of Labour v. Saskatchewan*, 2015 SCC 4, [2015] 1 S.C.R. 245; *Re Manitoba Language Rights*, [1985] 1 S.C.R. 721; *Gallant v. The King*, [1949] 2 D.L.R. 425; *Canada (Prime Minister) v. Khadr*, 2010 SCC 3, [2010] 1 S.C.R. 44; *Mohawks of the Bay of Quinte v. Canada (Minister of Indian Affairs and Northern Development)*, 2013 FC 669, 434 F.T.R. 241.

By Brown J.

**Considered:** *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 S.C.R. 511; **referred to:** *Canada (Attorney General) v. TeleZone Inc.*, 2010 SCC 62, [2010] 3 S.C.R. 585; *ITO — International Terminal Operators Ltd. v. Miida Electronics Inc.*, [1986] 1 S.C.R. 752; *Anisman v. Canada Border Services Agency*, 2010 FCA 52, 400 N.R. 137; *Air Canada v. Toronto Port Authority*, 2011 FCA 347, [2013] 3 F.C.R. 605; *Babcock v. Canada (Attorney*

*General*), 2002 SCC 57, [2002] 3 S.C.R. 3; *Ontario v. Criminal Lawyers' Association of Ontario*, 2013 SCC 43, [2013] 3 S.C.R. 3; *Wells v. Newfoundland*, [1999] 3 S.C.R. 199; *Reference re Canada Assistance Plan (B.C.)*, [1991] 2 S.C.R. 525; *Canada (House of Commons) v. Vaid*, 2005 SCC 30, [2005] 1 S.C.R. 667; *Galati v. Canada (Governor General)*, 2015 FC 91, [2015] 4 F.C.R. 3; *Re Manitoba Language Rights*, [1985] 1 S.C.R. 721; *Authorson v. Canada (Attorney General)*, 2003 SCC 39, [2003] 2 S.C.R. 40; *Health Services and Support — Facilities Subsector Bargaining Assn. v. British Columbia*, 2007 SCC 27, [2007] 2 S.C.R. 391; *R. v. Sparrow*, [1990] 1 S.C.R. 1075; *Tsilhqot'in Nation v. British Columbia*, 2014 SCC 44, [2014] 2 S.C.R. 257; *Case of Proclamations (1611)*, 12 Co. Rep. 74, 77 E.R. 1352; *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217; *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 S.C.R. 3; *Clyde River (Hamlet) v. Petroleum Geo-Services Inc.*, 2017 SCC 40, [2017] 1 S.C.R. 1069; *Fédération Franco-ténoise v. Canada*, 2001 FCA 220, [2001] 3 F.C. 641; *Manitoba Metis Federation Inc. v. Canada (Attorney General)*, 2013 SCC 14, [2013] 1 S.C.R. 623.

By Rowe J.

**Considered:** *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 S.C.R. 511; *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, 2010 SCC 43, [2010] 2 S.C.R. 650; **referred to:** *R. v. Sparrow*, [1990] 1 S.C.R. 1075; *Tsilhqot'in Nation v. British Columbia*, 2014 SCC 44, [2014] 2 S.C.R. 257; *Lax Kw'alaams Indian Band v. Canada (Attorney General)*, 2011 SCC 56,

[2011] 3 S.C.R. 535; *Paul v. British Columbia (Forest Appeals Commission)*, 2003 SCC 55, [2003] 2 S.C.R. 585; *Mitchell v. M.N.R.*, 2001 SCC 33, [2001] 1 S.C.R. 911; *R. v. Marshall*, [1999] 3 S.C.R. 456; *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010; *Ktunaxa Nation v. British Columbia (Forests, Lands and Natural Resource Operations)*, 2017 SCC 54, [2017] 2 S.C.R. 386; *Behn v. Moulton Contracting Ltd.*, 2013 SCC 26, [2013] 2 S.C.R. 227; *Beckman v. Little Salmon/Carmacks First Nation*, 2010 SCC 53, [2010] 3 S.C.R. 103; *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, 2004 SCC 74, [2004] 3 S.C.R. 550; *Manitoba Metis Federation Inc. v. Canada (Attorney General)*, 2013 SCC 14, [2013] 1 S.C.R. 623; *R. v. Van der Peet*, [1996] 2 S.C.R. 507; *R. v. Sappier*, 2006 SCC 54, [2006] 2 S.C.R. 686; *R. v. Badger*, [1996] 1 S.C.R. 771; *Authorson v. Canada (Attorney General)*, 2003 SCC 39, [2003] 2 S.C.R. 40; *Attorney General of Canada v. Inuit Tapirisat of Canada et al.*, [1980] 2 S.C.R. 735; *Reference re Canada Assistance Plan (B.C.)*, [1991] 2 S.C.R. 525; *Wells v. Newfoundland*, [1999] 3 S.C.R. 199.

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APPEAL from a judgment of the Federal Court of Appeal (Pelletier, Webb and de Montigny JJ.A.), 2016 FCA 311, [2017] 3 F.C.R. 298, 405 D.L.R. (4th) 721, 5 C.E.L.R. (4th) 302, [2017] 1 C.N.L.R. 354, [2016] F.C.J. No. 1389 (QL), 2016 CarswellNat 6599 (WL Can.), setting aside a declaration of Hughes J., 2014 FC 1244, 470 F.T.R. 243, 93 C.E.L.R. (3d) 199, [2015] 1 C.N.L.R. 243, [2014] F.C.J. No. 1308 (QL), 2014 CarswellNat 5539 (WL Can.). Appeal dismissed.

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*John Hurley* and *François Dandonneau*, for the interveners the Grand Council of the Crees (Eeyou Istchee) and the Cree Nation Government.

*Jason T. Madden*, *Alexandria Winterburn* and *Megan Strachan*, for the intervener the Manitoba Metis Federation Inc.

*Brandon Kain, Bryn Gray and Asher Honickman*, for the intervener the Advocates for the Rule of Law.

*Victor Carter, Allison Lachance and Darryl Korell*, for the intervener the Federation of Sovereign Indigenous Nations.

*Karenna Williams and Jeff Huberman*, for the intervener the Gitanyow Hereditary Chiefs.

The judgment of Wagner C.J. and Karakatsanis and Gascon JJ. was delivered by

KARAKATSANIS J. —

I. Overview

[1] Since this Court's landmark decision in *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 S.C.R. 511, the duty to consult has played a critical role in ensuring that Aboriginal and treaty rights receive meaningful protection. Grounded in the honour of the Crown, this duty requires the Crown to consult (and if appropriate, accommodate) Aboriginal peoples before taking action that may adversely affect their asserted or established rights under s. 35 of the *Constitution Act, 1982*. The appellant Mikisew Cree First Nation argues that the Crown had a duty to consult them on the development of environmental legislation

that had the potential to adversely affect their treaty rights to hunt, trap, and fish. This Court must therefore answer a vexing question it has left open in the past: Does the duty to consult apply to the law-making process?

[2] I conclude that it does not. Two constitutional principles — the separation of powers and parliamentary sovereignty — dictate that it is rarely appropriate for courts to scrutinize the law-making process. The process of law-making does not only take place in Parliament. Rather, it begins with the development of legislation. When ministers develop legislation, they act in a parliamentary capacity. As such, courts should exercise restraint when dealing with this process. Extending the duty to consult doctrine to the legislative process would oblige the judiciary to step beyond the core of its institutional role and threaten the respectful balance between the three pillars of our democracy. It would also transpose a consultation framework and judicial remedies developed in the context of executive action into the distinct realm of the legislature. Thus, the duty to consult doctrine is ill-suited to the law-making process; the law-making process does not constitute “Crown conduct” that triggers the duty to consult.

[3] This is not to suggest, however, that when the legislation undermines s. 35 rights, Aboriginal groups would be left without a remedy. Clearly, if legislation infringes s. 35, it may be declared invalid pursuant to s. 52(1) of the *Constitution Act, 1982*. Further, the Crown’s honour may well require judicial intervention where legislation may adversely affect — but does not necessarily infringe — Aboriginal or

treaty rights. However, the resolution of such questions must be left to another day. In this appeal, the issue was framed in terms of whether the duty to consult doctrine should apply to the law-making process. I find that it should not.

## II. Background

[4] The Mikisew are a band within the meaning of the *Indian Act*, R.S.C. 1985, c. I-5, whose traditional territory is situated primarily in northeastern Alberta. This is a region of immense beauty; it includes, for example, the lands and waters around Lake Athabasca, as well as the Peace-Athabasca Delta. This region is also home to significant existing and proposed oil sands development.

[5] The Mikisew are descendants of an Aboriginal group that, along with a number of other First Nations, adhered to Treaty No. 8 with Her Majesty in 1899. Under Treaty No. 8, First Nations ceded a large amount of land — much of what is now northern Alberta, northeastern British Columbia, northwestern Saskatchewan, and the southern portion of the Northwest Territories — to the Crown in exchange for certain guarantees. Among these guarantees was a provision protecting the right of the signatories to hunt, trap, and fish:

And Her Majesty the Queen HEREBY AGREES with the said Indians that they shall have right to pursue their usual vocations of hunting, trapping and fishing throughout the tract surrendered as heretofore described, subject to such regulations as may from time to time be made by the Government of the country, acting under the authority of Her Majesty, and saving and excepting such tracts as may be required or

taken up from time to time for settlement, mining, lumbering, trading or other purposes.

[6] The Mikisew's claim relates to two pieces of omnibus legislation that had significant effects on Canada's environmental protection regime. In April 2012, the federal Minister of Finance introduced Bill C-38 (enacted as the *Jobs, Growth and Long-term Prosperity Act*, S.C. 2012, c. 19), which received royal assent in June 2012. Later that year, the Minister introduced Bill C-45 (enacted as the *Jobs and Growth Act, 2012*, S.C. 2012, c. 31), which received royal assent in December 2012.

[7] These bills were broad in scope. Together, they resulted in the repeal of the *Canadian Environmental Assessment Act*, S.C. 1992, c. 37, and the enactment of the *Canadian Environmental Assessment Act, 2012*, S.C. 2012, c. 19, s. 52. They also resulted in significant amendments to the protection regime under the *Fisheries Act*, R.S.C. 1985, c. F-14, as well as amendments to the *Species at Risk Act*, S.C. 2002, c. 29, and the *Navigable Waters Protection Act*, which was renamed the *Navigation Protection Act*, R.S.C. 1985, c. N-22.

[8] The Mikisew were not consulted on either of these omnibus bills at any stage in their development or prior to the granting of royal assent.

[9] The Mikisew brought an application for judicial review under ss. 18 and 18.1 of the *Federal Courts Act*, R.S.C. 1985, c. F-7, seeking various declarations and orders concerning the respondent Ministers' duty to consult them with respect to the introduction and development of the omnibus bills.

[10] The reviewing judge, Hughes J., determined that the proceedings were not precluded by s. 2(2) of the *Federal Courts Act* and that they presented a justiciable issue (2014 FC 1244, 470 F.T.R. 243). He explained that judicial intervention in the law-making process is inconsistent with the separation of powers. Therefore, if the development of policy by ministers triggers a duty to consult, the judiciary cannot enforce this duty before a bill is introduced into Parliament. The reviewing judge then turned to determining whether a duty to consult was triggered in this case. He assumed that the steps that Cabinet ministers take during the law-making process prior to introducing a bill into Parliament can constitute Crown conduct triggering the duty to consult. He found that the proposals contained in the omnibus bills may adversely affect the Mikisew's treaty rights. Therefore, he concluded that the duty to consult was triggered. The Mikisew were entitled to notice of the provisions of the omnibus bills that reasonably might have been expected to affect their treaty rights, as well as an opportunity to make submissions. The Federal Court granted a declaration to this effect.

[11] The Federal Court of Appeal allowed the appeal (2016 FCA 311, [2017] 3 F.C.R. 298). The majority, de Montigny and Webb J.J.A., concluded that the reviewing judge erred by conducting a judicial review of legislative action contrary to the *Federal Courts Act*. In its view, when ministers develop policy, they act in a legislative capacity and their actions are immune from judicial review. The majority also held that the reviewing judge's decision was inconsistent with the principles of parliamentary sovereignty, the separation of powers, and parliamentary privilege.

These principles dictate that courts cannot supervise the legislative process. Further, imposing a duty to consult in the legislative process would be impractical and would fetter Parliament's law-making capacity.

[12] Concurring, Pelletier J.A. concluded that the *Federal Courts Act* did not preclude the Mikisew's claim. While the Federal Court may not have been validly seized of an application for judicial review, he determined that it nonetheless had jurisdiction over the matter under s. 17 of the *Federal Courts Act*, as the Mikisew sought relief against the Crown. Pelletier J.A. noted that it may be problematic to conclude that legislative action can *never* trigger the duty to consult. However, he concluded that the duty to consult is not triggered by legislation of general application that causes effects which are not limited to the specific rights at issue. Since the omnibus legislation was of this nature, the duty to consult was not triggered.

### III. Analysis

#### A. *Jurisdiction*

[13] For the Federal Court to have jurisdiction over a claim, it must have a statutory grant of jurisdiction (*Windsor (City) v. Canadian Transit Co.*, 2016 SCC 54, [2016] 2 S.C.R. 617, at para. 34).

[14] Two potential statutory grants of jurisdiction are live in this appeal: ss. 17 and 18 of the *Federal Courts Act*. I will address each in turn.



(1) Section 17 of the *Federal Courts Act*

[15] The Mikisew did not advance s. 17 as a basis for jurisdiction at first instance or in their submissions before this Court. However, Pelletier J.A. at the Federal Court of Appeal held that s. 17 was a basis for jurisdiction in this case. Further, while the Mikisew's initial application was framed as a judicial review under s. 18 (not s. 17), the *Federal Courts Rules*, SOR/98-106, provide that "[a]n originating document shall not be set aside only on the ground that a different originating document should have been used" (Rule 57).

[16] Section 17(1) of the Act provides that the "Federal Court has concurrent original jurisdiction in all cases in which relief is claimed against the Crown". Further, s. 2(1) of the Act defines the Crown as "Her Majesty in right of Canada". However, I agree that Her Majesty in right of Canada does not extend to executive actors when they are exercising "legislative power" (*Fédération Franco-ténoise v. Canada*, 2001 FCA 220, [2001] 3 F.C. 641, at para. 58). Here, as I will explain, the Mikisew challenge actions which are uniformly legislative in character. It follows that their application is not against "the Crown" in its executive capacity. Thus, the Federal Court lacked s. 17 jurisdiction over the Mikisew's claim.

(2) Section 18 of the *Federal Courts Act*

[17] The Mikisew brought this case as an application for judicial review of the development of the omnibus legislation by the respondent Ministers under ss. 18 and

18.1 of the *Federal Courts Act*. I agree with the conclusions and reasons of the majority of the Federal Court of Appeal that the Federal Court was not validly seized of an application for judicial review in this case.

[18] The *Federal Courts Act* does not allow for judicial review of parliamentary activities. Indeed, ss. 18 and 18.1 only grant the Federal Court jurisdiction to judicially review action taken by “any federal board, commission or other tribunal”. A “federal board, commission or other tribunal” is defined in the Act, subject to certain exceptions, as a body exercising statutory powers or powers under an order made pursuant to a prerogative of the Crown (s. 2; see also *Strickland v. Canada (Attorney General)*, 2015 SCC 37, [2015] 2 S.C.R. 713, at para. 64). Section 2(2) specifies that “federal board, commission or other tribunal” does not include “the Senate, the House of Commons, any committee or member of either House”. Thus, I agree that s. 2(2) is designed “to preclude judicial review of the legislative process at large” (C.A. reasons, at para. 32). As I will explain further below, Cabinet and ministers do not act pursuant to statutory powers when developing legislation; rather, they act pursuant to powers under Part IV of the *Constitution Act, 1867*. As such, when developing legislation, they do not act as a “federal board, commission or other tribunal” within the meaning of s. 2 (see *Shade v. Canada (Attorney General)*, 2003 FCT 327, 230 F.T.R. 53, at para. 34).

[19] Nonetheless, the parties have made extensive submissions on the substantive issues in this appeal. In these circumstances, it is important for this Court to determine whether the duty to consult applies to the law-making process.

B. *The Honour of the Crown and the Duty to Consult*

[20] The duty to consult is grounded in the honour of the Crown (*Haida Nation*, at para. 16). Thus, I turn first to the principles that underlie the honour of the Crown and its relationship with the duty to consult.

[21] The honour of the Crown is a foundational principle of Aboriginal law and governs the relationship between the Crown and Aboriginal peoples. It arises from “the Crown’s assertion of sovereignty over an Aboriginal people and *de facto* control of land and resources that were formerly in the control of that people” and goes back to the *Royal Proclamation* of 1763 (*Haida Nation*, at para. 32; *Manitoba Metis Federation Inc. v. Canada (Attorney General)*, 2013 SCC 14, [2013] 1 S.C.R. 623, at para. 66). It recognizes that the tension between the Crown’s assertion of sovereignty and the pre-existing sovereignty, rights and occupation of Aboriginal peoples creates a special relationship that requires that the Crown act honourably in its dealings with Aboriginal peoples (*Manitoba Metis*, at para. 67; B. Slattery, “Aboriginal Rights and the Honour of the Crown” (2005), 29 *S.C.L.R.* (2d) 433, at p. 436).

[22] The underlying purpose of the honour of the Crown is to facilitate the reconciliation of these interests (*Manitoba Metis*, at paras. 66-67). One way that it does so is by promoting negotiation and the just settlement of Aboriginal claims as an alternative to litigation and judicially imposed outcomes (*Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, 2004 SCC 74, [2004] 3 S.C.R. 550, at para. 24). This endeavour of reconciliation is a first principle of Aboriginal law.

[23] The honour of the Crown is always at stake in its dealings with Aboriginal peoples (*R. v. Badger*, [1996] 1 S.C.R. 771, at para. 41; *Manitoba Metis*, at paras. 68-72). As it emerges from the Crown's assertion of sovereignty, it binds the Crown *qua* sovereign. Indeed, it has been found to apply when the Crown acts either through legislation or executive conduct (see *R. v. Sparrow*, [1990] 1 S.C.R. 1075, at pp. 1110 and 1114; *R. v. Van der Peet*, [1996] 2 S.C.R. 507, at para. 231, per McLachlin J., as she then was, dissenting; *Haida Nation*; *Manitoba Metis*, at para. 69).

[24] As this Court stated in *Haida Nation*, the honour of the Crown “is not a mere incantation, but rather a core precept that finds its application in concrete practices” and “gives rise to different duties in different circumstances” (paras. 16 and 18). When engaged, it imposes “a heavy obligation” on the Crown (*Manitoba Metis*, at para. 68). Indeed, because of the close relationship between the honour of the Crown and s. 35, the honour of the Crown has been described as a “constitutional

principle” (*Beckman v. Little Salmon/Carmacks First Nation*, 2010 SCC 53, [2010] 3 S.C.R. 103, at para. 42). That said, this Court has made clear that the duties that flow from the honour of the Crown will vary with the situations in which it is engaged (*Manitoba Metis*, at para. 74). Determining what constitutes honourable dealing, and what specific obligations are imposed by the honour of the Crown, depends heavily on the circumstances (*Haida Nation*, at para. 38; *Taku River*, at para. 25; *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, 2010 SCC 43, [2010] 2 S.C.R. 650, at paras. 36-37).

[25] The duty to consult is one such obligation. In instances where the Crown contemplates executive action that may adversely affect s. 35 rights, the honour of the Crown has been found to give rise to a justiciable duty to consult (see e.g. *Haida Nation*, *Taku River*, *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, 2005 SCC 69, [2005] 3 S.C.R. 388, and *Little Salmon*). This obligation has also been applied in the context of statutory decision-makers that — while not part of the executive — act on behalf of the Crown (*Clyde River (Hamlet) v. Petroleum Geo-Services Inc.*, 2017 SCC 40, [2017] 1 S.C.R. 1069, at para. 29). These cases demonstrate that, in certain circumstances, Crown conduct may not constitute an “infringement” of established s. 35 rights; however, acting unilaterally in a way that may adversely affect such rights does not reflect well on the honour of the Crown and may thus warrant intervention on judicial review.

[26] The duty to consult jurisprudence makes clear that the duty to consult is best understood as a “valuable adjunct” to the honour of the Crown (*Little Salmon*, at para. 44). The duty to consult ensures that the Crown acts honourably by preventing it from acting unilaterally in ways that undermine s. 35 rights. This promotes reconciliation between the Crown and Aboriginal peoples first, by providing procedural protections to s. 35 rights, and second, by encouraging negotiation and just settlements as an alternative to the cost, delay and acrimony of litigating s. 35 infringement claims (*Clyde River*, at para. 1; *Haida Nation*, at paras. 14 and 32; *Mikisew Cree*, at para. 63).

[27] The duty to consult has been recognized in a variety of contexts. For example, in *Haida Nation*, this Court recognized a duty to consult when the Crown contemplated the replacement and transfer of tree farm licences that had the potential to affect asserted but unproven Aboriginal rights. In *Mikisew Cree*, the Court recognized that the contemplation of “taking up” lands under Treaty No. 8 could adversely affect the Mikisew’s rights under the treaty and thus required consultation. Crown conduct need not have an immediate impact on lands and resources to trigger the duty to consult. This Court has recognized that “high-level management decisions or structural changes to [a] resource’s management” may also trigger a consultative duty (*Carrier Sekani*, at para. 47; see also para. 44). However, to date, the duty to consult has only been applied to executive conduct and conduct taken on behalf of the executive.

[28] The Mikisew's treaty rights are protected under s. 35 of the *Constitution Act, 1982*, and the Crown's dealings with those rights engage the honour of the Crown. Here, the Mikisew argue that their hunting, trapping, and fishing rights under Treaty No. 8 may be adversely affected by the Crown's conduct. This Court has repeatedly found that the honour of the Crown governs treaty making and implementation, and requires the Crown to act in a way that accomplishes the intended purposes of treaties and solemn promises it makes to Aboriginal peoples (*Manitoba Metis*, at paras. 73 and 75; *Mikisew Cree*, at para. 51; *R. v. Marshall*, [1999] 3 S.C.R. 456, at para. 44; *Badger*, at paras. 41 and 47). Treaty agreements are sacred; it is always assumed that the Crown intends to fulfill its promises. No appearance of "sharp dealing" will be permitted (*Badger*, at para. 41).

[29] However, the question in this appeal is whether the honour of the Crown gives rise to a justiciable duty to consult when ministers develop legislation that could adversely affect the Mikisew's treaty rights. When confronted with a novel case like this, the Court must determine whether the duty to consult is the appropriate means to uphold the honour of the Crown. This Court has explicitly left open the question of whether the law-making process is "Crown conduct" that triggers the duty to consult (*Carrier Sekani*, at para. 44; *Clyde River*, at para. 28). I turn to analyzing this issue now.

### C. *The Duty to Consult During the Law-Making Process*

[30] The Mikisew submit that the development of policy by ministers leading to the formulation and introduction of a bill that may affect s. 35 rights triggers the duty to consult. In their view, ministers act in an executive capacity, not a parliamentary capacity, when developing legislation. Thus, concluding that legislative development triggers the duty to consult does not offend the separation of powers or parliamentary privilege. Further, concluding otherwise would leave some claimants whose s. 35 rights are affected by legislation without an effective remedy. Indeed, legislation may abolish Crown oversight of or involvement in resource development and thereby remove Crown conduct that would trigger the duty to consult. Additionally, requiring claimants to proceed by way of a s. 35 infringement claim to vindicate their rights places an onerous burden on them.

[31] The respondents submit that the development of legislation by ministers is legislative action that does not trigger the duty to consult, as this would be inconsistent with parliamentary sovereignty and the separation of powers. These principles dictate that courts cannot supervise the law-making process. The respondents ground their argument on the premise that ministers act in a parliamentary capacity, not an executive capacity, when developing legislation. Furthermore, they suggest that, while the duty to consult is not triggered by legislative action, this does not leave claimants without an effective remedy. Once legislation has passed, it can be challenged under the *Sparrow* framework if it infringes s. 35 rights. Additionally, decisions made *under* the new or amended legislation may trigger the duty to consult.



[32] For the reasons that follow, I conclude that the law-making process — that is, the development, passage, and enactment of legislation — does not trigger the duty to consult. The separation of powers and parliamentary sovereignty dictate that courts should forebear from intervening in the law-making process. Therefore, the duty to consult doctrine is ill-suited for legislative action.

[33] The Mikisew ask us to recognize that the duty to consult applies to ministers in the development of legislation. There is no doubt overlap between executive and legislative functions in Canada; Cabinet, for instance, is “a combining committee — a *hyphen* which joins, a *buckle* which fastens, the legislative part of the state to the executive part of the state” (*Reference re Canada Assistance Plan (B.C.)*, [1991] 2 S.C.R. 525, at p. 559, quoting W. Bagehot, *The English Constitution* (1872), at p. 14 (emphasis in original)). I do not accept, however, the Mikisew’s submission that ministers act in an executive capacity when they develop legislation. The legislative development at issue was not conducted pursuant to any statutory authority; rather, it was an exercise of legislative powers derived from Part IV of the *Constitution Act, 1867*. As the majority of the Court of Appeal noted, the departmental statutes relied on by the Mikisew to show that the Ministers acted in an executive capacity when developing legislation do not “refer even implicitly to . . . the development of legislation for introduction into Parliament” (C.A. reasons, at para. 28; *Department of Indian Affairs and Northern Development Act*, R.S.C. 1985, c. I-6; *Department of the Environment Act*, R.S.C. 1985, c. E-10; *Department of Fisheries and Oceans Act*, R.S.C. 1985, c. F-15; *Department of Transport Act*, R.S.C.

1985, c. T-18; *Department of Natural Resources Act*, S.C. 1994, c. 41; *Financial Administration Act*, R.S.C. 1985, c. F-11).

[34] The development of legislation by ministers is part of the law-making process, and this process is generally protected from judicial oversight. Further, this Court's jurisprudence makes clear that, if Cabinet is restrained from introducing legislation, then this effectively restrains Parliament (*Canada Assistance Plan*, at p. 560). This Court has emphasized the importance of safeguarding the law-making process from judicial supervision on numerous occasions. In *Reference re Resolution to amend the Constitution*, [1981] 1 S.C.R. 753, a majority of the Court stated that "[c]ourts come into the picture when legislation is enacted and not before" (p. 785). In *Canada Assistance Plan*, the Court underscored that "[t]he formulation and introduction of a bill are part of the legislative process with which the courts will not meddle" (p. 559).

[35] Longstanding constitutional principles underlie this reluctance to supervise the law-making process. The separation of powers is "an essential feature of our constitution" (*Wells v. Newfoundland*, [1999] 3 S.C.R. 199, at para. 52; see also *Ontario v. Criminal Lawyers' Association of Ontario*, 2013 SCC 43, [2013] 3 S.C.R. 3, at para. 27). It recognizes that each branch of government "will be unable to fulfill its role if it is unduly interfered with by the others" (*Criminal Lawyers' Association*, at para. 29). It dictates that "the courts and Parliament strive to respect each other's role in the conduct of public affairs"; as such, there is no doubt that

Parliament's legislative activities should "proceed unimpeded by any external body or institution, including the courts" (*Canada (House of Commons) v. Vaid*, 2005 SCC 30, [2005] 1 S.C.R. 667, at para. 20). Recognizing that a duty to consult applies during the law-making process may require courts to improperly trespass onto the legislature's domain.

[36] Parliamentary sovereignty mandates that the legislature can make or unmake any law it wishes, within the confines of its constitutional authority. While the adoption of the *Canadian Charter of Rights and Freedoms* transformed the Canadian system of government "to a significant extent from a system of Parliamentary supremacy to one of constitutional supremacy" (*Reference re Secession of Quebec*, [1998] 2 S.C.R. 217, at para. 72), democracy remains one of the unwritten principles of the Constitution (*Secession Reference*, at paras. 61-69). Recognizing that the elected legislature has specific consultation obligations may constrain it in pursuing its mandate and therefore undermine its ability to act as the voice of the electorate.

[37] Parliamentary privilege, a related constitutional principle, also demonstrates that the law-making process is largely beyond the reach of judicial interference. It is defined as "the sum of the privileges, immunities and powers enjoyed by the Senate, the House of Commons and provincial legislative assemblies, and by each member individually, without which they could not discharge their functions" (*Vaid*, at para. 29). Once a category of parliamentary privilege is

established, “it is for Parliament, not the courts, to determine whether in a particular case the *exercise* of the privilege is necessary or appropriate” (*Vaid*, at paras. 29 and 47-48 (emphasis in original)). Canadian jurisprudence makes clear that parliamentary privilege protects control over “debates or proceedings in Parliament” (*Vaid*, at para. 29, point 10; J. P. J. Maingot, *Parliamentary Immunity in Canada* (2016), at pp. 166-71; see also *New Brunswick Broadcasting Co. v. Nova Scotia (Speaker of the House of Assembly)*, [1993] 1 S.C.R. 319, at p. 385; P. W. Hogg, *Constitutional Law of Canada* (5th ed. Supp.), at s. 1.7; Article 9 of the U.K. *Bill of Rights* of 1689). The existence of this privilege generally prevents courts from enforcing procedural constraints on the parliamentary process.

[38] Applying the duty to consult doctrine during the law-making process would lead to significant judicial incursion into the workings of the legislature, even if such a duty were only enforced post-enactment. The duty to consult jurisprudence has developed a spectrum of consultation requirements that fit in the context of administrative decision-making processes. Directly transposing such *executive* requirements into the *legislative* context would be an inappropriate constraint on legislatures’ ability to control their own processes.

[39] The administrative law remedies normally available for breach of a duty to consult would further invite inappropriate judicial intervention into the legislature’s domain. The Crown’s failure to consult can lead to a number of remedies, including quashing the decision at issue or granting injunctive relief, damages, or an order to

carry out consultation prior to proceeding further with the proposed action (*Carrier Sekani*, at paras. 37 and 54; *Clyde River*, at para. 24; K. Roach, *Constitutional Remedies in Canada* (2nd ed. (loose-leaf)), at ¶15.820 to 15.980). Thus, if a duty to consult applied to the law-making process, it would require the judiciary to directly interfere with the development of legislation. I recognize that the Mikisew only sought declaratory relief in this case. However, their rationale for seeking declaratory relief was that Canada was considering changing its environmental protection framework at the time of this litigation. The Mikisew acknowledged that it may be appropriate, in future litigation, for courts to consider granting ancillary relief requiring further consultation on the challenged legislation, a stay of further implementation of the challenged legislation, or judicial supervision. Such remedies could significantly fetter the will of Parliament.

[40] Applying a duty to consult to the development of legislation by ministers, as the Mikisew propose, also raises practical concerns. If the duty to consult is triggered by the development of legislation by ministers, but not later in the law-making process, this may limit the possibility of meaningful accommodation. Changes made to the proposed bill at the policy development stage to address concerns raised during consultation may be undone by Parliament, as it is free to amend the proposed law. Additionally, the introduction of private member bills would not trigger the duty, rendering the approach incongruous. The Mikisew's proposed approach could also be difficult to apply where ministers pursue both executive conduct and parliamentary conduct in the Cabinet decision-making process.

In the long chain of events contributing to the development of legislation, disentangling what steps the duty to consult applies to (because they are executive) and what actions are immune (because they are parliamentary) would be an enormously difficult task.

[41] For these reasons, the duty to consult doctrine is ill-suited to be applied directly to the law-making process.

[42] That said, parliamentary sovereignty and the separation of powers are not the only constitutional principles relevant to this appeal. The duty to consult was recognized to help protect the constitutional rights enshrined in s. 35 and uphold the honour of the Crown — itself a constitutional principle (*Little Salmon*, at para. 42).

[43] The Mikisew argue that if the duty to consult does not apply to the legislative process, Aboriginal or treaty rights will be subject to inconsistent protection. When the executive or a statutory decision-maker takes action that may affect asserted or established s. 35 rights, the honour of the Crown imposes a duty to consult. As noted above, this prevents the Crown from acting unilaterally in a way that could erode s. 35 rights and promotes the ongoing process of reconciliation. In contrast, if the state takes the *same action* through legislative means, the Aboriginal communities whose rights are potentially affected may be left without effective recourse. If such legislation *infringes* s. 35 rights, it may be declared of no force and effect pursuant to s. 52 of the *Constitution Act, 1982* (see *Sparrow*). However, if the effects of the legislation do not rise to the level of infringement, or if the rights are

merely asserted (and not established), an Aboriginal group will not be able to successfully challenge the constitutional validity of the legislation through a *Sparrow* claim. Further, there may be situations where legislation effectively removes future consultation obligations by removing Crown decision-making that would otherwise have triggered the duty to consult.

[44] I accept that these are valid concerns. It is of little import to Aboriginal peoples whether it is the executive or Parliament which acts in a way that may adversely affect their rights. The relationship of Aboriginal peoples “with the Crown or sovereign has never depended on the particular representatives of the Crown involved” (*Williams Lake Indian Band v. Canada (Aboriginal Affairs and Northern Development)*, 2018 SCC 4, at para. 130, quoting *Mitchell v. Peguis Indian Band*, [1990] 2 S.C.R. 85, at p. 109, per Dickson C.J.). As noted above, the honour of the Crown binds the Crown *qua* sovereign. Indeed, permitting the Crown to do by one means that which it cannot do by another would undermine the endeavour of reconciliation, which animates Aboriginal law. The principle of reconciliation and not rigid formalism should drive the development of Aboriginal law.

[45] Given these concerns, it is worth noting that the duty to consult is not the only means to give effect to the honour of the Crown when Aboriginal or treaty rights may be adversely affected by legislation. Other doctrines may be developed to ensure the consistent protection of s. 35 rights and to give full effect to the honour of the Crown through review of enacted legislation.

[46] For example, it may not be consistent with s. 35 to legislate in a way that effectively removes future Crown conduct which would otherwise trigger the duty to consult. I note that, in *Ross River Dena Council v. Yukon*, 2012 YKCA 14, 358 D.L.R. (4th) 100, the Yukon Court of Appeal held that “[s]tatutory regimes that do not allow for consultation and fail to provide any other equally effective means to acknowledge and accommodate Aboriginal claims are defective and cannot be allowed to subsist” (para. 37; see also *Constitution Act, 1982*, s. 52(1)).

[47] Other forms of recourse may also be available. For example, declaratory relief may be appropriate in a case where legislation is enacted that is not consistent with the Crown’s duty of honourable dealing toward Aboriginal peoples (see *Manitoba Metis*, at paras. 69 and 143). A declaration is available without a cause of action (*ibid*, at para. 143). Further, as this Court has previously held, declaratory relief may be an appropriate remedy even in situations where other forms of relief would be inconsistent with the separation of powers (see *Canada (Prime Minister) v. Khadr*, 2010 SCC 3, [2010] 1 S.C.R. 44, at para. 2).

[48] To be clear, legislation cannot be challenged on the basis that the legislature failed to fulfill the duty to consult. The duty to consult doctrine does not apply to the legislature. However, if other forms of recourse are available, the extent of any consultation may well be a relevant consideration, as it was in *Sparrow*, when assessing whether the enactment is consistent with constitutional principles. In *Sparrow*, this Court held that, when there has been a *prima facie* infringement of a s.



35 right, the “first consideration” in determining whether the legislation or action can be justified is the honour of the Crown (p. 1114). And an important part of that inquiry is whether the Aboriginal group in question was consulted on the impugned measure (*Sparrow*, at p. 1119; see also *Badger*, at para. 97; *Tsilhqot’in Nation v. British Columbia*, 2014 SCC 44, [2014] 2 S.C.R. 257, at paras. 77, 80 and 125; *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, at para. 168).

[49] However, the issue of whether other protections are, or should be, available is not squarely before the Court in this appeal. As discussed above, the Federal Court was not validly seized of the application in this case, so no relief can be granted. Moreover, the Mikisew framed their claim exclusively around whether the duty to consult doctrine should apply to the legislative process. We have not received sufficient submissions on how to ensure that the honour of the Crown is upheld other than through the specific mechanism of the duty to consult. A different context attracts different considerations. I would note that there are important distinctions between judicial review of administrative action in the duty to consult context and judicial review of legislation (*Doré v. Barreau du Québec*, 2012 SCC 12, [2012] 1 S.C.R. 395, at para. 36).

#### IV. Conclusion

[50] For the reasons set out above, I conclude that no aspect of the law-making process — from the development of legislation to its enactment — triggers a duty to consult. In the duty to consult context, “Crown conduct” has only been found

to include executive action or action taken on behalf of the executive. I would not expand the application of the duty to consult doctrine to the legislative process.

[51] Finally, my conclusions respecting the duty to consult do not apply to the process by which subordinate legislation (such as regulations or rules) is adopted, as such conduct is clearly executive rather than parliamentary (see N. Bankes, “The Duty to Consult and the Legislative Process: But What About Reconciliation?” (2016) (online), at p. 5). Furthermore, this conclusion does not affect the enforceability of treaty provisions, implemented through legislation, that explicitly require pre-legislative consultation (see e.g. Nisga’a Final Agreement, Chapter 11, paras. 30-31; *Nisga’a Final Agreement Act*, S.B.C. 1999, c. 2; *Nisga’a Final Agreement Act*, S.C. 2000, c. 7). Manner and form requirements (i.e. procedural restraints on enactments) imposed by legislation are binding (Hogg, at s. 12.3(b); see also *R. v. Mercure*, [1988] 1 S.C.R. 234).

[52] I add this. Even though the duty to consult does not apply to the law-making process, it does not necessarily follow that once enacted, legislation that may adversely affect s. 35 rights is consistent with the honour of the Crown. 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 or limit the application of s. 35. While an Aboriginal group will not be able to challenge legislation on the basis that the duty to consult was not fulfilled, other protections

may well be recognized in future cases. Simply because the duty to consult doctrine, as it has evolved to regulate executive conduct, is inapplicable in the legislative sphere, does not mean the Crown *qua* sovereign is absolved of its obligation to conduct itself honourably.

[53] For these reasons, I would dismiss the appeal.

The reasons of Abella and Martin JJ. were delivered by

ABELLA J. —

[54] I agree with Justice Karakatsanis that the appeal should be dismissed on the grounds that judicial review under the *Federal Courts Act*, R.S.C. 1985, c. F-7 is not available for the actions of federal Ministers in the parliamentary process (ss. 2(2), 18 and 18.1). But, in my respectful view, the enactment of legislation with the potential to adversely affect rights protected by s. 35 of the *Constitution Act, 1982* does give rise to a duty to consult, and legislation enacted in breach of that duty may be challenged directly for relief.

[55] The honour of the Crown governs the relationship between the government of Canada and Indigenous peoples. This obligation of honour gives rise to a duty to consult and accommodate that applies to all contemplated government conduct with the potential to adversely impact asserted or established Aboriginal and

treaty rights, including, in my view, legislative action. The duty to consult arises based on the effect, not the source, of the government action. The Crown's overarching responsibility to act honourably in all its dealings with Indigenous peoples does not depend on the formal label applied to the type of action that the government takes with respect to Aboriginal rights and interests protected by s. 35 of the *Constitution Act, 1982*. As a constitutional imperative, the honour of the Crown cannot be undermined, let alone extinguished, by the legislature's assertion of parliamentary sovereignty.

[56] The analysis in this case must begin with the fundamental principle of Canadian Aboriginal law that the government's relationship with Indigenous peoples is governed by the honour of the Crown (*Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511, at para. 17; *Beckman v. Little Salmon/Carmacks First Nation*, [2010] 3 S.C.R. 103, at para. 62). According to this principle, servants of the Crown must conduct themselves with honour when acting on behalf of the sovereign (*Manitoba Metis Federation Inc. v. Canada (Attorney General)*, [2013] 1 S.C.R. 623, at para. 65). The honour of the Crown is always at stake in its dealings with Indigenous peoples, whether through the exercise of legislative power (see *R. v. Sparrow*, [1990] 1 S.C.R. 1075, at p. 1114) or executive authority (see *R. v. Badger*, [1996] 1 S.C.R. 771, at para. 41; *Haida Nation*, at para. 16).

[57] The position that the honour of the Crown does not bind Parliament strikes me as untenable in light of this Court's Aboriginal law jurisprudence. The

honour of the Crown arises from the Crown's *de facto* control over land and resources previously in the control of Aboriginal peoples, and its asserted sovereignty over those peoples (*Haida Nation*, at para. 32; *Manitoba Metis Federation*, at para. 66). At the time of French and British colonization, Indigenous peoples were living in distinct societies, with their own social and political structures, as well as laws and interests in land (*Mitchell v. M.N.R.*, [2001] 1 S.C.R. 911, at para. 9 (per McLachlin C.J.)). While English policy was to acknowledge and respect certain rights of occupation for Indigenous inhabitants, the underlying premise was that "sovereignty and legislative power, and indeed the underlying title, to such lands vested in the Crown" (*Sparrow*, at p. 1103). With this assumed sovereignty, arose the obligation to treat Aboriginal peoples fairly and honourably (*Mitchell*, at para. 9; *Manitoba Metis Federation*, at paras. 66-67).

[58] As a result, the ultimate purpose of the honour of the Crown is the reconciliation of pre-existing Indigenous societies with the assertion of Crown sovereignty (*Manitoba Metis Federation*, at para. 66). Reconciliation is the "fundamental objective of the modern law of aboriginal and treaty rights" (*Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, [2005] 3 S.C.R. 388, at para. 1 (per Binnie J.)). The purpose of s. 35 of the *Constitution Act, 1982*, is to facilitate this reconciliation (*Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, [2004] 3 S.C.R. 550, at para. 42).

[59] The honour of the Crown defines the historic relationship between the government and Indigenous peoples in which contemporary rights are to be understood (*Sparrow*, at p. 1108). The honour of the Crown has deep roots as a concept in Aboriginal law and can be traced back to the *Royal Proclamation* of 1763, a fundamental document which this Court has described as “analogous to the . . . Magna Carta” (*Calder v. Attorney-General of British Columbia*, [1973] S.C.R. 313, at p. 395 (per Hall J.)). The honour of the Crown has since received constitutional status with the entrenchment of s. 35 and is therefore a constitutional imperative, giving rise to obligations on the Crown which are enforced by the courts (J. Timothy S. McCabe, *The Honour of the Crown and its Fiduciary Duties to Aboriginal Peoples* (2008), at p. 53).

[60] But the honour of the Crown is not itself a cause of action. Rather, it speaks to the way in which the Crown’s specific obligations must be fulfilled (*Manitoba Metis Federation*, at para. 73). These obligations vary depending on the circumstances. In negotiating and applying treaties, the Crown must act with integrity and honour, and avoid even the appearance of sharp dealing (*Haida Nation*, at para. 19; *Badger*, at para. 41; *R. v. Marshall*, [1999] 3 S.C.R. 456, at para. 4). Where the government enacts regulations that infringe on Aboriginal rights, the honour of the Crown demands that those measures be justified (*Sparrow*, at p. 1109). And when the government contemplates conduct that might adversely affect Aboriginal or treaty rights, the honour of the Crown gives rise to a duty to consult and accommodate.

[61] Grounded in the honour of the Crown, the duty to consult arises from the assertion of Crown sovereignty and aims to advance the process of reconciliation (McCabe, at p. 90; *Haida Nation*, at paras. 45 and 59). It serves an important role in the “process of fair dealing and reconciliation that begins with the assertion of sovereignty and continues beyond formal claims resolution” (*Haida Nation*, at para. 32). Where the duty arises, it requires meaningful consultation between the government and the affected group. This means a meaningful effort by the government to act in a manner that is consistent with the honour of the Crown in that particular context (Dwight G. Newman, *Revisiting the Duty to Consult Aboriginal Peoples* (2014), at pp. 88-89). Consultation obligations can be viewed as falling on a spectrum, which accommodates the different contexts in which more or less consultation is necessary to fulfill its purpose (*Newman*, at p. 89; *Haida Nation*, at para. 43).

[62] I see this duty as being more than a “means” to uphold the honour of the Crown. The obligation arises because it would not be honourable to make important decisions that have an adverse impact on Aboriginal and treaty rights without efforts to consult and, if appropriate, accommodate those interests. The Crown must act honourably in defining the rights guaranteed by s. 35 and in reconciling them with other societal rights and interests. This implies a duty to consult (*Haida Nation*, at para. 20). The question is not whether the duty to consult is *appropriate* in the circumstances, but whether the decision is one to which the duty to consult applies.

[63] Because the honour of the Crown infuses the entirety of the government's relationship with Indigenous peoples, the duty to consult must apply to all exercises of authority which are subject to scrutiny under s. 35. This includes, in my view, the enactment of legislation. Like the infringement analysis under *Sparrow*, the duty to consult does not discriminate based on the type of government action, but rather is triggered based on the potential for adverse *effects*.

[64] This conclusion flows from the jurisprudential development of the duty to consult from an aspect of the infringement analysis in *Sparrow* to an independent obligation in *Haida Nation*. *Sparrow* was the Court's first opportunity to consider the legal impact of s. 35, and to sketch a framework which would give appropriate weight to the constitutional nature of the words "recognized and affirmed" (*Sparrow*, at p. 1106). Acknowledging the importance of context and an incremental approach to s. 35, Dickson C.J. and La Forest J. proposed a justificatory test that would require the government to establish not only that it had a valid legislative objective, but that the legislative action was consistent with the honour of the Crown. They held, at p. 1114:

. . . the honour of the Crown is at stake in dealings with aboriginal peoples. The special trust relationship and the responsibility of the government vis-à-vis aboriginals must be the first consideration in determining whether the legislation or action in question can be justified.

Determining whether the Crown's legislative actions were consistent with the honour of the Crown would include, depending on the circumstances, an inquiry into whether the Aboriginal group in question had been consulted (*Sparrow*, at p. 1119; see also *R.*



*v. Nikal*, [1996] 1 S.C.R. 1013, at para. 110; *R. v. Gladstone*, [1996] 2 S.C.R. 723, at para. 64).

[65] Consultation took on an even greater role in *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, an Aboriginal title case, where Lamer C.J. first acknowledged that consultation was a procedural “duty”. In his view, while the nature and scope of the obligation would vary with the circumstances, “[t]here is always a duty of consultation” (para. 168). Lamer C.J. drew from his recent comments on the doctrine of priority in *Gladstone*, which described a right that was both procedural and substantive: “. . . at the stage of justification the government must demonstrate both that the process by which it allocated the resource and the actual allocation of the resource which results from that process reflect the prior interest of Aboriginal rights holders in the fishery” (*Gladstone*, at para. 62). By analogy, in the Aboriginal title context, this might entail that “governments accommodate the participation of Aboriginal peoples in the development of the resources of British Columbia” (*Delgamuukw*, at para. 167). As Lamer C.J. explained, this duty of consultation flowed from the fiduciary relationship between the Crown and Aboriginal peoples (*Delgamuukw*, at para. 168).

[66] Through these early justification cases, the honour of the Crown had emerged as a fundamental backdrop against which the enactment of legislation would be measured. It required not only a substantive outcome which gave adequate weight to the Aboriginal rights and interests at stake, but a manner of dealing that was in

keeping with the special relationship between the Crown and Aboriginal rights-holders. In particular, the Court identified consultation as a significant consideration in assessing whether the government's infringement of Aboriginal or treaty rights was justified under s. 35. This did not change based on the kind of government action in question; even in *Sparrow*, which involved a challenge to the federal *Fisheries Act*, R.S.C. 1970, c. F-14, the importance of notice and consultation in the context of regulatory conservation measures was acknowledged (p. 1119).

[67] Although these cases looked at consultation to determine whether an infringement was justified, it was the process *prior* to the infringement which engaged the honour of the Crown. As a matter of logic, then, the Crown's duty to consult is not dependent on the finding that an infringement resulted, but is, instead, a component of the Crown's overarching obligation to deal honourably with Indigenous peoples when regulating their rights. This is exactly the reasoning that led to the Court's landmark recognition of a free-standing duty to consult in *Haida Nation*, *Taku River*, and *Mikisew Cree*.

[68] In the companion appeals *Haida Nation* and *Taku River*, McLachlin C.J. found that a legal duty to consult and accommodate arose when the Crown had knowledge, real or constructive, of the potential existence of the Aboriginal right or title, and contemplated conduct that might adversely affect it (*Haida Nation*, at para. 31; *Taku River*, at paras. 24-25). As McLachlin C.J. explained, the existence of this legal duty to consult, prior to proof of claims, was necessary to understand the

Court's previous decisions which considered consultation where confirmation of the right and justification of an alleged infringement were litigated at the same time. The duty to consult could not depend on either the existence of a proven right, or, by extension, proof of infringement. The fact that Crown behaviour *before* the determination of the right could be considered in the context of justification negated any arguments to the contrary (*Haida Nation*, at para. 34).

[69] While *Haida Nation* and *Taku River* were primarily concerned with protecting unproven claims during the treaty negotiation process, *Mikisew Cree* made clear that the duty to consult arose in respect of established rights as well. The parties had asked what obligations the Crown owed when exercising its power under Treaty No. 8 to take up portions of the Mikisew's surrendered lands "from time to time". Binnie J. explicitly rejected an approach that would find each subsequent "taking up" by the Crown to be an infringement of the Mikisew's treaty rights, requiring justification under the *Sparrow* test (paras. 31-32). Instead, he concluded that where the Crown's contemplated course of action would adversely affect those treaty rights, a duty to consult was triggered (para. 34). Although "taking up" was clearly anticipated by the treaty, the Crown was obliged to manage the process honourably (paras. 31 and 33).

[70] Through this trilogy of decisions, the Court affirmed that the Crown's obligation to consult and accommodate Indigenous groups arises independently from its obligation to justify infringements of Aboriginal and treaty rights. In the duty to

consult context, the controlling question is not whether the limit on rights is justified, but “what is required to maintain the honour of the Crown and to effect reconciliation between the Crown and the Aboriginal peoples with respect to the interests at stake” (*Haida Nation*, at para. 45). In this sense, the trilogy represents a shift towards mutual reconciliation between Aboriginal and Crown sovereignty, and a further step towards embracing the honour of the Crown as a limit on Crown sovereignty in relation to Indigenous peoples (Mark D. Walters, “The Morality of Aboriginal Law” (2006), 31 *Queen’s L.J.* 470, at pp. 513-14).

[71] *Haida Nation* established a new legal framework in which to understand the government’s obligations towards Indigenous peoples, organized around the principle of the honour of the Crown (Jamie D. Dickson, *The Honour and Dishonour of the Crown: Making Sense of Aboriginal Law in Canada* (2015), at p. 116). This is the overarching framework in which the duty to consult, and the obligation to justify infringements, must now be understood. Under the *Sparrow* analysis, government conduct could always be scrutinized for consistency with the honour of the Crown, including the duty of consultation, irrespective of whether that conduct was executive or legislative in nature. No longer confined to the justification context, the duty to consult now forms “part of the essential legal framework” of Aboriginal law in Canada (*Little Salmon/Carmacks*, at para. 69). Like the *Sparrow* inquiry, the duty to consult doctrine infuses the field of governmental action, requiring consultation wherever the potential for adverse effects on claimed or established s. 35 rights arises.

[72] Subsequent appeals have reinforced this expansive understanding of the duty to consult. In *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, [2010] 2 S.C.R. 650, McLachlin C.J. reiterated the “generous, purposive approach” that applies to the duty to consult (para. 43). “Government action” triggering the duty was not confined to the exercise of statutory powers. Further, it included “strategic, higher level decisions” that could have an impact on Aboriginal rights or claims (*Carrier Sekani*, at para. 44, citing Jack Woodward, *Native Law*, (loose-leaf), vol. 1, at p. 5-41). As McLachlin C.J. explained, high-level management decisions or structural changes to resource management may set the stage for future decisions that will have a direct adverse impact on lands and resources, and leave Aboriginal groups with a lost or diminished constitutional right to have their interests considered (*Carrier Sekani*, at para. 47). This is itself an adverse impact sufficient to trigger the *Haida Nation* duty to consult and accommodate.

[73] More recently, in *Clyde River (Hamlet) v. Petroleum Geo-Services Inc.*, [2017] 1 S.C.R. 1069, and the companion case *Chippewas of the Thames First Nation v. Enbridge Pipelines Inc.*, [2017] 1 S.C.R. 1099, the Court considered whether an administrative scheme, namely the National Energy Board’s approval process, could trigger a duty to consult. Noting that the Board was the “vehicle through which the Crown acts”, the Court held that its decisions would constitute Crown conduct that implicated the duty to consult (*Clyde River*, at para. 29; *Chippewas*, at para. 29). The Crown cannot avoid its duty to consult, or the honour of the Crown, by delegating decision-making power to a tribunal established by Parliament.

[74] But I do not see this extension of the duty to consult into the administrative context as a *rejection* of its application in other aspects of the government's relationship with Indigenous peoples, especially since that question was expressly left open by this Court (*Carrier Sekani*, at para. 44; see also *Clyde River*, at para. 28). In *Clyde River*, the Court reiterated that relevant Crown conduct was to be defined based not on its form, but on its potential for adverse impacts, at para. 25:

Crown conduct which would trigger the duty is not restricted to the exercise by or on behalf of the Crown of statutory powers or of the royal prerogative, nor is it limited to decisions that have an immediate impact on lands and resources. The concern is for adverse impacts, however made, upon Aboriginal and treaty rights and, indeed, a goal of consultation is to identify, minimize and address adverse impacts where possible (*Carrier Sekani*, at paras. 45-46). [Emphasis added.]

[75] Although the law of judicial review, which applies to the exercise of statutory powers or the royal prerogative, is often implicated in consultation cases, the duty to consult itself attaches to all exercises of Crown power, including legislative action.

[76] *Haida Nation* and *Sparrow* provide distinctive analyses based not on the type of government action at issue, but on the nature of the engagement with s. 35 rights. *Sparrow* provides a framework for determining whether government action, including the exercise of legislative or executive authority, constitutes an infringement of s. 35 rights, and whether that infringement can be justified. *Haida Nation*, on the other hand, obliges the government to consult when it contemplates action that has the potential to adversely affect those same rights and claims.

Together, these complementary obligations ensure that the honour of the Crown is upheld throughout all actions which engage its special relationship with Aboriginal peoples. The government has both the obligation to consult, and the obligation to justify infringements — neither duty takes away from the other, and each can be owed and breached independently.

[77] The coextensive nature of these two duties was confirmed in *Tsilhqot'in Nation v. British Columbia*, [2014] 2 S.C.R. 257 (per McLachlin C.J.). As this case makes clear, the procedural duty to consult applies *in addition to* the government's substantive obligation to act in a way that is consistent with Aboriginal and treaty rights guaranteed by s. 35 (para. 80). To justify an infringement, the Crown must demonstrate that it complied with its procedural duty at the time that the action was contemplated, that the infringement is backed by a compelling and substantial objective, and that the public benefit achieved is proportionate to any adverse effect on the Aboriginal interest (*Tsilhqot'in*, at para. 125). The same analysis applies whether the infringing action is legislative or executive in nature (paras. 77 and 125).

[78] Because the rationale for the duty to consult applies equally as in the executive context, it would make little sense to adopt a different analytical approach where legislative action is impugned. Ongoing consultation is preferable to the backward-looking approach of subsequent challenges, since it protects s. 35 rights from irreversible harm and enhances reconciliation. Most importantly, this approach recognizes that the legislative sphere is not excluded from the honour of the Crown,

which attaches to all exercises of sovereignty. Both grounded in the honour of the Crown, the *Haida Nation* and *Sparrow* frameworks cover all arenas of decision-making equally, providing for consultation where the potential for adverse effects arises, and the obligation to provide justification where infringements result. To revive a pre-*Haida Nation* state of affairs in this context would essentially extinguish the honour of the Crown in the legislative process by conflating the government's duty to consult with its distinct obligation to justify infringements.

[79] Endorsing such a void in the honour of the Crown would also leave a corresponding gap in the s. 35 framework. *Haida Nation* provides consultation remedies on a reduced threshold, based on the potential for adverse effects on a claimed or asserted right. If legislative decisions were only subject to the *Sparrow* framework, Indigenous groups with established rights would be required to meet the more onerous infringement threshold in order to access consultation rights, and those with unproven claims would be excluded entirely. Adverse effects which do not rise to the level of a *prima facie* infringement would be without remedy, leaving Aboriginal rights-holders vulnerable to the same government objectives carried out through legislative, rather than executive, action.

[80] This result would be contrary to the spirit of the Court's decision in *Haida Nation* and would sit uncomfortably with the approach adopted in *Mikisew Cree*. Where the government takes up land under Treaty No. 8, it is not appropriate to move directly to a *Sparrow* analysis; the court must first consider whether the process



was compatible with the honour of the Crown (*Mikisew Cree*, at paras. 57 and 59). Action which would adversely affect the Mikisew's guaranteed rights to hunt, fish, and trap, triggers a duty to consult, whether or not an infringement results (para. 34). The underlying premise of the decision in *Mikisew Cree* would be frustrated if the same action could be carried out through legislation without consultation. Notably, while *Mikisew Cree* dealt with the "taking up" clause, Treaty No. 8 similarly subjects the Mikisew's treaty rights to "such regulations as may from time to time be made by the Government of the country, acting under the authority of Her Majesty". This process, too, must be carried out with honour.

[81] As this discussion reveals, there is no doctrinal or conceptual justification which would preclude a duty to consult in the legislative context. But this appeal calls on this Court to consider whether and how the principles of parliamentary sovereignty and privilege constrain the justiciability of the duty to consult when applied to legislative action.

[82] Parliamentary sovereignty invokes the concept that Parliament has the power to make or unmake any law whatever (Peter W. Hogg, *Constitutional Law of Canada* (5th ed. Supp.), at p. 12-1). Parliamentary privilege or immunity describes the set of powers and privileges possessed by the federal Houses of Parliament and provincial legislative assemblies that are necessary to their capacity to function as legislative bodies (Hogg, at p. 1-13).

[83] I do not share the view of my colleagues that the separation of powers and parliamentary privilege necessarily immunize the law-making process from judicial scrutiny to assess adequate consultation with Indigenous peoples. The government's obligation to consult on the enactment of legislation which regulates Aboriginal rights has been considered a justiciable issue since the Court's decision in *Sparrow* first identified consultation as a relevant marker of justification. With respect, it is difficult to see how assessing consultation under the *Sparrow* justification analysis would not similarly offend these principles. And I fail to see how these principles would preclude enforcing the duty to consult under s. 35, but not modern treaty provisions implemented by legislation which provide for Crown consultation with First Nations in respect of legislative developments and amendments.<sup>1</sup>

[84] It seems to me that the issues in this appeal require this Court to reconcile, not choose between, protecting the legislative process from judicial interference and protecting Aboriginal rights from the legislative process. As my colleagues explain, the concepts of parliamentary sovereignty and parliamentary privilege are central to ensuring that the legislative branch of government is able to do its work without undue interference (*Ontario v. Criminal Lawyers' Association of Ontario*, [2013] 3 S.C.R. 3, at paras. 28-29; *Canada (House of Commons) v. Vaid*, [2005] 1 S.C.R. 667, at para. 41; *New Brunswick Broadcasting Co. v. Nova Scotia (Speaker of the House of Assembly)*, [1993] 1 S.C.R. 319, at p. 389). But these

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<sup>1</sup> Factum of the Joint Intervenors, Champagne and Aishihik First Nations, Kwanlin Dün First Nation, Little Salmon Carmacks First Nation, First Nation of Na-Cho Nyak Dun, Teslin Tlingit Council, and the First Nations of the Maa-Nulth Treaty Society.

concepts cannot displace the honour of the Crown. The jurisprudence makes clear that the right of Aboriginal groups to be consulted on decisions that may adversely affect their interests is not merely political, but a legal right with constitutional force (*Haida Nation*, at paras. 10 and 34; *Sparrow*, at pp. 1103-4). I do not accept an approach that replaces an enforceable legal right to consultation, with a vague and unenforceable right to “honourable dealing”. The duty to consult is not a *suggestion* to consult, it is a duty, just as the honour of the Crown is not a mere “incantation” or aspirational goal (*Haida Nation*, at para. 16).

[85] There is no doubt that the honour of the Crown and the corresponding duty to consult may have an impact on the legislative process. But that is inevitable if the guarantee under s. 35 is to be taken seriously. Adjustments to the legislative process cannot justify the erasure of constitutionally mandated rights. Indeed, there would be little point in having a Constitution if legislatures could proceed as if it did not exist when expedient.

[86] In *Sparrow*, the Court found it impossible to conceive of s. 35 as anything *other than* a constitutional limit on the exercise of parliamentary sovereignty (p. 1109). It seems to me quite ironic that parliamentary sovereignty would now be used as a shield to *prevent* the Mikisew’s claim for consultation. With respect, such an approach reactivates the happily silenced spirit of *St. Catherine’s Milling and Lumber Co. v. The Queen* (1888), 14 App. Cas. 46 (P.C.), where Aboriginal rights were “dependent upon the good will of the Sovereign” (p. 54).

[87] The fact that these rights are political in implication does not detract from their enforceability in law, but highlights their essential role in reconciling Aboriginal and Crown sovereignty. Our Constitution places a responsibility on the executive and legislative branches, along with Indigenous leaders, to collaborate and reconcile competing claims and historical grievances (Dickson, at p. 146). This has been described as a generative constitutional order, which “mandates the Crown to negotiate with Aboriginal peoples for the recognition of their rights in a contemporary form that balances their needs with the interests of the broader society” (Brian Slattery, “Aboriginal Rights and the Honour of the Crown” (2005), 29 *S.C.L.R.* (2d) 433, at p. 436; *Carrier Sekani*, at para. 38). This process is supported by the judiciary’s role in enforcing the honour of the Crown, and holding the Crown accountable where that standard is not met. Unilateral action is the very antithesis of honour and reconciliation, concepts which underlie both the duty to consult and the very premise of modern Aboriginal law (*Mitchell*, at para. 11).

[88] Cases which advocate against intrusion into the parliamentary process must therefore be read in the context of a duty that is not only a constitutional imperative, but a recognition of the limits of Crown sovereignty itself. The unique nature of s. 35 means that its limits can be distinguished from cases which considered the impact of other rights and obligations on parliamentary sovereignty. In *New Brunswick Broadcasting Co.*, broadcasting companies had challenged the Nova Scotia House of Assembly’s ban on television cameras as being contrary to s. 2(b) of the *Canadian Charter of Rights and Freedoms*, which protects freedom of the press

and other media communication. McLachlin J. was of the view that the reallocation of powers effected by the *Charter* did not go to the extreme of removing the legislature's inherent constitutional right to exclude strangers from its chamber (p. 389). However, while the *Charter* defines a sphere of rights for individuals that are protected from state action, the majority of the Constitution, including s. 35, allocates power between governing entities, such as the division of powers between the provincial and federal governments, or the separation of powers between the branches of government. In the same way, s. 35 defines the relationship between the sovereignty of the Crown and the "aboriginal peoples of Canada", mandating a process of reconciliation between the Crown and Indigenous groups.

[89] Similarly, in *Authorson v. Canada (Attorney General)*, [2003] 2 S.C.R. 40 (per Major J.), the issue was whether the *Canadian Bill of Rights*, R.S.C. 1985, App. III, provided any due-process protections for veterans when Parliament enacted legislation to make interest debt unenforceable. Major J. noted that "parliamentary tradition makes it clear that the only procedure due any citizen of Canada is that proposed legislation receive three readings in the Senate and House of Commons and that it receive Royal Assent" (para. 37). But the relevance of this decision is necessarily limited by its context as a *Bill of Rights* case, which, unlike the *Constitution Act, 1982*, applies only to enacted legislation. As well, Major J.'s concern that the interpretation of the *Bill of Rights* urged by the applicants "would effectively amend the Canadian constitution" (para. 41) is less compelling in the s. 35 context, where the limitations do in fact result from a constitutional amendment.

Further, as s. 35 makes clear, it is inappropriate to equate Aboriginal peoples with “any citizen of Canada”, particularly when considering the procedural rights owed under the Constitution.

[90] In fact, other cases specifically contemplate the imposition of constitutional norms on the legislative process. For example, *Reference re Resolution to Amend the Constitution*, [1981] 1 S.C.R. 753, relied on in *Authorson*, noted that the self-definitional nature of legislative procedure is “subject to any overriding constitutional or self-imposed statutory or indoor prescription” (p. 785). And *Reference re Canada Assistance Plan (B.C.)*, [1991] 2 S.C.R. 525, which articulates a strong protection for the formulation and introduction of a Bill against court intervention, specifically leaves aside the issue of review under the *Charter* where a guaranteed right could be affected (p. 559). As discussed above, although *New Brunswick Broadcasting Co.* suggests that procedural requirements will not readily be imposed in the *Charter* context, I am doubtful as to whether that reasoning is compelling when faced with a constitutional imperative under s. 35.

[91] While the judiciary must respect the separate roles of each institution in our constitutional order, its own role is to maintain the rule of law and protect the rights guaranteed by the Constitution (*Criminal Lawyers’ Association*, at paras. 28-29; *New Brunswick Broadcasting Co.*, at p. 389). It would be a mistake, in my respectful view, to interpret parliamentary sovereignty in a way that eradicates the obligations under the honour of the Crown that arose at its assertion. Like all

constitutional principles, parliamentary sovereignty must be balanced against other aspects of our constitutional order, including the duty to consult (Zachary Davis, “The Duty to Consult and Legislative Action” (2016), 79 *Sask. L. Rev.* 17, at pp. 21-22). “Sovereign will” alone does not itself indicate legitimacy in the context of a constitutional democracy characterized by competing values, rights, and obligations (*Reference re Secession of Quebec*, [1998] 2 S.C.R. 217, at paras. 61-63).

[92] Although parliamentary sovereignty cannot displace the honour of the Crown, its force as a constitutional principle must be given adequate weight to achieve an appropriate balance between these concepts. The flexibility inherent in the duty to consult doctrine should be used to account for the wider area of discretion that legislatures must be afforded in the legislative context. Since the content of the duty to consult depends heavily on the circumstances, I see no reason why the unique challenges raised in the legislative sphere cannot be addressed by the spectrum of consultation and accommodation duties that may arise (*Delgamuukw*, at para. 168; *Haida Nation*, at paras. 43-45). Commonly observed duties of consultation such as notice to affected parties and the opportunity to make submissions are hardly foreign to the law-making process. Further, not every legislative effort will attract a duty of consultation. The duty is only triggered where the Crown, with knowledge of the potential existence of the Aboriginal right or title in question, contemplates enacting legislation that might adversely affect it. These potential impacts must be sufficiently foreseeable and direct to engage the honour of the Crown.

[93] The procedure and scope of remedies available where the government breaches its duty to consult in the law-making process will also necessarily be limited by the constitutional balance between the judiciary and the legislature. On judicial review of executive action, consultation challenges are often initiated prior to the decision being made, and common remedies include an order for consultation, appointment of a mediator, and ongoing court supervision (Newman, at p. 78; *Clyde River*, at para. 24). Conversely, in my view institutional constraints in the legislative context require that applicants challenge existing legislation. It would unduly interfere with the legislative process to allow direct challenges to a legislature's procedure prior to the enactment of legislation. Parliament has exclusive control over its own proceedings, which should be respected by the courts (*New Brunswick Broadcasting, Co.*, at p. 386). While it is not the role of the courts to dictate the procedures legislatures adopt to fulfill their consultation obligations, they may consider whether the chosen process accords with the special relationship between the Crown and Indigenous peoples of Canada. This need not be any more onerous than the judicial oversight already conducted under the *Sparrow* justification inquiry.

[94] Challenging existing legislation on procedural grounds is not a novel proposition in Canadian law. In *British Columbia Teachers' Federation v. British Columbia*, [2016] 2 S.C.R. 407, rev'g (2015), 71 B.C.L.R. (5th) 223 (C.A.), the majority of the Court endorsed Donald J.A.'s approach to collective bargaining rights under s. 2(d) of the *Charter* in the British Columbia Court of Appeal that would permit courts to consider a lack of consultation in the legislative context. Donald J.A.



in his dissent held that Parliament could not act unilaterally through legislation to amend employment terms without satisfying its constitutional obligations to engage in pre-legislative consultation as a substitute for collective bargaining under s. 2(d). Similar to the duty to consult in the Aboriginal context, freedom of association in the labour relations context guarantees the right to a meaningful process in which to pursue workplace goals (*Health Services and Support — Facilities Subsector Bargaining Assn. v. British Columbia*, [2007] 2 S.C.R. 391, at para. 94; *Saskatchewan Federation of Labour v. Saskatchewan*, [2015] 1 S.C.R. 245, at para. 53).

[95] In his reasons, Donald J.A. recognized that it made no difference to the employees' s. 2(d) rights whether the terms of employment were captured in a traditional collective agreement or through the passage of legislation (para. 287). Even in the legislative context, a *Charter* breach could be grounded in the government's failure to consult in good faith prior to enactment. Donald J.A. was alive to the responsibility of the courts to monitor and restrain government actions to maintain a check on power imbalance in the labour relations context. "[A]n obligation to consult in this context does not unduly restrict the Legislature any more than all the other rights and freedoms enumerated in the *Charter* restrict the Legislature" (para. 293). Nor does the honour of the Crown under s. 35 of the *Constitution Act, 1982*.

[96] However, this does not mean that a successful *Haida Nation* challenge will necessarily invalidate legislation. The duty to consult is about encouraging governments to consider their effects on Indigenous communities and consult

proactively, and should not replace the *Sparrow* infringement test or become a means by which legislation is routinely struck down (see Newman, at p. 63). In this sense, the duty to consult differs from constitutional (and self-imposed) manner and form requirements, which are another accepted instance of court review of legislative processes (see for e.g. *Re Manitoba Language Rights*, [1985] 1 S.C.R. 721; *Gallant v. The King*, [1949] 2 D.L.R. 425 (P.E.I.S.C.) (per Campbell C. J.)). Failure to comply with a manner and form requirement will result in the legislation being invalid, as there is “no doubt as to the binding character of the rules in the Constitution” (Hogg, at pp. 12-11, 12-18 and 12-19). However, the duty to consult is a constitutional obligation that must be satisfied, not a rule of procedure itself. The test is what will uphold the honour of the Crown and effect reconciliation in those circumstances (*Haida Nation*, at para. 45).

[97] Without ruling out the possibility that in certain cases legislation enacted in breach of the duty to consult could be struck down by the reviewing court, a declaration will generally be the appropriate remedy. Declaratory relief in these circumstances recognizes that the ultimate purpose of the duty to consult is reconciliation, which “is not a final legal remedy in the usual sense” (*Haida Nation*, at para. 32). In *Manitoba Metis Federation*, a declaration was issued to the effect that Canada did not act diligently to fulfill the specific obligation to the Métis contained in s. 31 of the *Manitoba Act, 1870*, S.C. 1870, c. 3. This constituted a failure of another specific obligation flowing from the honour of the Crown — the duty to purposively and diligently fulfill constitutional obligations (Dickson, at p. 116). Declarations are a

narrow remedy that may be ordered whether or not consequential relief is available (*Manitoba Metis Federation*, at para. 143). In the legislative context, a declaration allows courts to shape the legal framework while respecting the constitutional role of another branch of government to act within those constraints (*Canada (Prime Minister) v. Khadr*, [2010] 1 S.C.R. 44, at paras. 46-47).

[98] Therefore, an Indigenous group will be entitled to declaratory relief where the Crown has failed to consult during the process leading to the enactment of legislation that could adversely affect its interests. Such a remedy has the practical effect of clarifying what the obligations and rights of both parties are in their special relationship and process of reconciliation (*Mohawks of the Bay of Quinte v. Canada (Minister of Indian Affairs and Northern Development)* (2013), 434 F.T.R. 241, at para. 61 (per Rennie J.)).

#### I. Disposition

[99] Since the Federal Court lacked jurisdiction to consider a judicial review under ss. 18 and 18.1 of the *Federal Courts Act*, the appeal should be dismissed.

The following are the reasons delivered by

BROWN J. —

## I. Introduction

[100] This appeal presents two issues. First, does the *Federal Courts Act*, R.S.C. 1985, c. F-7, authorize judicial review of the impugned conduct which underlies Mikisew Cree First Nation's application for judicial review? And, secondly, does the impugned conduct in this case trigger the duty to consult?

[101] I would answer both questions in the negative. I agree with the reasons of the majority of the Federal Court of Appeal (2016 FCA 311, [2017] 3 F.C.R. 298). Sections 2(1), 2(2) and 18.1 of the *Federal Courts Act* preclude judicial review of the development, drafting or introduction of the omnibus bills. Ministers of the Crown engaged in the development, drafting or introduction of legislation are acting as legislators empowered by Part IV of the *Constitution Act, 1867*. They are not a "federal board, commission or other tribunal" within the meaning of the *Federal Courts Act* and are, therefore, not subject to judicial review when acting in that capacity.

[102] Further, the separation of powers and parliamentary privilege apply to parliamentary proceedings and to the process leading to the introduction of a bill in the House of Commons. The development, drafting and introduction of the omnibus bills are immune from judicial interference. In addition, none of the actions taken in relation to the development, drafting and introduction of the omnibus bills can be characterized as "Crown conduct" which triggers the duty to consult. In this case, the impugned conduct is, in its entirety, an exercise of legislative power (that is, part of

the law-making process) and is therefore not executive conduct, to which the duty to consult applies.

[103] While my colleague Karakatsanis J. appears to accept that parliamentary privilege and the separation of powers preclude judicial imposition of the duty to consult (paras. 2 and 38-50), her conclusions are, with respect, less than categorical on this point (para. 2: “courts should *exercise restraint*”; paras. 2, 32 and 41: “the duty to consult doctrine is *ill-suited*”; para. 29: “whether the duty to consult is *the appropriate means*”; para. 32: “courts should *forebear* from intervening in the law-making process”; para. 35: “this *reluctance* to supervise the law-making process”; para. 38: “an *inappropriate* constraint”; para. 40: “an *enormously difficult* task”; emphasis added throughout). For the reasons which follow (under the heading “II. C. The Development, Introduction, Consideration and Enactment of Bills is Not ‘Crown Conduct’ Triggering the Duty to Consult”), whether a court may impose a duty to consult upon the process by which legislative power is exercised is not a question of mere “restraint”, “forbearance”, “reluctance”, or of deciding whether imposing a duty to consult would be an “ill-suited” or “inappropriate” constraint upon that exercise of power. Rather, it is a question of constitutionality going to the limits of judicial power, which should receive from a majority of this Court a clear and constitutionally correct answer.

[104] My colleague would, however, go further, raising — and then leaving open — the possibility that legislation which does not infringe s. 35 rights but may

“adversely affect” them, might be found to be inconsistent with the honour of the Crown. (paras. 3 and 25). In so doing, however, she undercuts the same principles which have led her to conclude that imposing the duty to consult would be “inappropriate” in the circumstances of this case. Further, by raising the possibility (without, I note, having been asked to do so by any party to this appeal) that validly enacted and constitutionally compliant legislation which has not or could not be the subject of a successful s. 35 infringement claim can nonetheless be declared by a court to be “not consistent with [the honour of the Crown]”, my colleague would throw this area of the law into significant uncertainty. Such uncertainty would have deleterious effects on Indigenous peoples, and indeed on all who rely upon the efficacy of validly enacted and constitutionally compliant laws.

[105] I therefore cannot endorse Karakatsanis J.’s reasons. While agreeing with her that the appeal should be dismissed, I write separately in an attempt to bring some analytical clarity to the matter. The facts, decisions below and relevant legislation are outlined in my colleague’s reasons.

## II. Analysis

### A. *The Federal Courts Act Precludes Review of Legislative Policy Development and Implementation Through Omnibus Bills by the Ministers and the Governor General in Council*

[106] First principles are instructive. The Federal Court is not a court of inherent jurisdiction. It follows that Parliament must grant jurisdiction in order for the

Federal Court to hear and decide a matter (*Canada (Attorney General) v. TeleZone Inc.*, 2010 SCC 62, [2010] 3 S.C.R. 585, at para. 43; *ITO — International Terminal Operators Ltd. v. Miida Electronics Inc.*, [1986] 1 S.C.R. 752, at p. 766). And, by enacting ss. 18, 18.1 and 28 of the *Federal Courts Act*, Parliament granted to the Federal Court and the Federal Court of Appeal exclusive jurisdiction to review the actions taken or decisions made by a “federal board, commission or other tribunal”.

[107] Section 2(1) of the *Federal Courts Act* defines “federal board, commission or other tribunal” as follows:

### **Definitions**

**2 (1)** In this Act,

...

*federal board, commission or other tribunal* means any body, person or persons having, exercising or purporting to exercise jurisdiction or powers conferred by or under an Act of Parliament or by or under an order made pursuant to a prerogative of the Crown, other than the Tax Court of Canada or any of its judges, any such body constituted or established by or under a law of a province or any such person or persons appointed under or in accordance with a law of a province or under section 96 of the *Constitution Act, 1867*;

[108] The Senate and House of Commons are expressly excluded from this definition by s. 2(2) of the *Federal Courts Act*:

### **Senate and House of Commons**

**(2)** For greater certainty, the expression *federal board, commission or other tribunal*, as defined in subsection (1), does not include the Senate,

the House of Commons, any committee or member of either House, the Senate Ethics Officer, the Conflict of Interest and Ethics Commissioner with respect to the exercise of the jurisdiction or powers referred to in sections 41.1 to 41.5 and 86 of the *Parliament of Canada Act*, the Parliamentary Protective Service or the Parliamentary Budget Officer.

[109] Taken together, ss. 2(1) and 2(2) identify the source of “the jurisdiction or power” being exercised as the principal determinant of whether a decision-maker falls within the definition of a “federal board, commission or other tribunal” (*Anisman v. Canada Border Services Agency*, 2010 FCA 52, 400 N.R. 137, at paras. 29-31; *Air Canada v. Toronto Port Authority*, 2011 FCA 347, [2013] 3 F.C.R. 605, at para. 47; D. J. M. Brown and J. M. Evans, with the assistance of D. Fairlie, *Judicial Review of Administrative Action in Canada* (loose-leaf), at topic 2:4310). And, the removal of legislative actors from the definition of “federal board, commission or other tribunal” statutorily affirms the general principle, to which I return below, that where the source of authority for exercising jurisdiction or powers is found in the law governing the legislative process, such an exercise is not judicially reviewable.

[110] Mikisew Cree First Nation’s application for judicial review was directed at the respondent Ministers’ failure to consult regarding the development of “environmental policies”, including the implementation of such policies through the development and introduction of the two omnibus bills (*Jobs, Growth and Long-term Prosperity Act*, S.C. 2012, c. 19 — Bill C-38; *Jobs and Growth Act, 2012*, S.C. 2012, c. 31 — Bill C-45; notice of application, A.R., at p. 122). Official actions undertaken by the executive which are neither granted by the Constitution nor properly



understood as an exercise of a Crown prerogative must flow from “statutory authority clearly granted and properly exercised” (*Babcock v. Canada (Attorney General)*, 2002 SCC 57, [2002] 3 S.C.R. 3, at para. 20).

[111] Mikisew Cree First Nation has not, however, identified any point in the course of the omnibus bills’ development, drafting or introduction at which the Ministers were exercising a statutory power or a Crown prerogative. Rather, and as the majority of the Court of Appeal recognized (at para. 28), the departmental legislation relied upon by Mikisew Cree First Nation (A.F., at para. 101, fn. 109) for its claim that the Ministers were exercising their executive powers as ministers of the Crown during the policy development phase of law-making refers only to the scope of the Ministers’ mandate and their duties and functions in carrying out their mandate (see *Department of Fisheries and Oceans Act*, R.S.C. 1985, c. F-15; *Department of Indian Affairs and Northern Development Act*, R.S.C. 1985, c. I-6; *Department of the Environment Act*, R.S.C. 1985, c. E-10; *Department of Transport Act*, R.S.C. 1985, c. T-18; *Department of Natural Resources Act*, S.C. 1994, c. 41; *Financial Administration Act*, R.S.C. 1985, c. F-11).

[112] I note that none of these statutes make express or implicit reference to the development of legislation for introduction in Parliament. The Ministers were not exercising power *in a ministerial — that is, executive — capacity*. And it follows that none of the impugned actions or decisions cited in Mikisew Cree First Nation’s application for judicial review were made by a “federal board, commission or other

tribunal”. As a result, the majority of the Court of Appeal correctly held that the courts below were not validly seized of this matter.

[113] This conclusion is also compelled by Part IV of the *Constitution Act, 1867* — entitled “Legislative Power”. Part IV sets out, *inter alia*, the powers of both houses of Parliament — the House of Commons and the Senate — in respect of whose exercise Parliament is sovereign, subject only to the limits of its legislative authority as set out in the *Constitution Act, 1867*. The development, introduction and consideration of bills in the House of Commons are all necessary exercises of legislative power in the law-making process. While Cabinet ministers are members of the executive, they participate in this process — for example, by presenting a government bill — not in an executive capacity, but in a legislative capacity.

[114] Mikisew Cree First Nation’s application for judicial review therefore impugns the conduct of ministers who were acting as members of Parliament and who were, like all members of Parliament, empowered to legislate by Part IV of the *Constitution Act, 1867*. This fortifies my conclusion that the Federal Court did not have jurisdiction to consider Mikisew Cree First Nation’s application for judicial review.

[115] Even absent this jurisdictional bar, however, the separation of powers, parliamentary privilege, the scope of judicial review properly understood and this Court’s jurisprudence on the duty to consult all lead me to conclude that Mikisew Cree First Nation’s application for judicial review cannot succeed.

B. *The Formulation and Introduction of Bills Is Protected From Judicial Review by the Separation of Powers and by Parliamentary Privilege*

(1) Separation of Powers

[116] There was disagreement, before this Court and the Court of Appeal, about the scope of activity which is protected by the separation of powers and by parliamentary privilege. Mikisew Cree First Nation argues that, while the formulation and introduction of a bill before Parliament is unreviewable legislative action, the development of policies that inform the formulation and introduction of a bill is carried out by public servants at the direction of ministers, and must therefore be viewed as executive conduct that is judicially reviewable. By contrast, Canada contends that the entire law-making process — from initial policy development to royal assent — is legislative activity that cannot be supervised by the courts.

[117] I agree with the majority of the Court of Appeal that the entire law-making process — from initial policy development to and including royal assent — is an exercise of legislative power which is immune from judicial interference. As this Court explained in *Ontario v. Criminal Lawyers' Association of Ontario*, 2013 SCC 43, [2013] 3 S.C.R. 3, at para. 28, the making of “policy choices” is a legislative function, while the implementation and administration of those choices is an executive function. This precludes judicial imposition of a duty to consult in the course of the law-making process.

[118] The separation of powers protects the process of legislative policy-making by Cabinet and the preparation and introduction of bills for consideration by Parliament (and provincial legislatures) from judicial review. Again in *Criminal Lawyers' Association*, at para. 28, this Court recognized each branch of the Canadian state as having a distinct role:

The legislative branch makes policy choices, adopts laws and holds the purse strings of government, as only it can authorize the spending of public funds. The executive implements and administers those policy choices and laws with the assistance of a professional public service. The judiciary maintains the rule of law, by interpreting and applying these laws through the independent and impartial adjudication of references and disputes, and protects the fundamental liberties and freedoms guaranteed under the *Charter*.

In order for each branch to fulfill its role, it must not be “unduly interfered with by the others” (*Criminal Lawyers' Association*, at para. 29).

[119] Admittedly, the separation of powers in our parliamentary system “is not a rigid and absolute structure” (*Wells v. Newfoundland*, [1999] 3 S.C.R. 199, at para. 54) which follows neatly drawn lines. Ministers of the Crown play an essential role in, and are an integral part of, the legislative process (*Reference re Canada Assistance Plan (B.C.)*, [1991] 2 S.C.R. 525, at p. 559). The fact that “except in certain rare cases, the executive frequently and *de facto* controls the legislature” (*Wells*, at para. 54) does not, however, mean that ministers’ dual membership in the executive and legislative branches of the Canadian state renders their corresponding executive and legislative roles indistinguishable for the purposes of judicial review. In *Re Canada*

*Assistance Plan*, at p. 559, this Court *rejected* British Columbia’s argument that, while parliamentary privilege protected internal parliamentary procedures, the doctrine of legitimate expectations could nevertheless apply to the executive, so as to preclude it from developing and introducing the impugned bill: “The formulation and introduction of a bill”, the Court said, “are part of the legislative process with which the courts will not meddle. . . . [I]t is not the place of the courts to interpose further procedural requirements in the legislative process.”

[120] As a matter of applying this Court’s jurisprudence, then, the legislative process begins with a bill’s formative stages, even where the bill is developed by ministers of the Crown. While a minister acts in an executive capacity when exercising statutory powers to advance government policy, that is not what happened here. The named Ministers took a set of policy decisions that eventually led to the drafting of a legislative proposal which was submitted to Cabinet. This ultimately led to the formulation and introduction of the omnibus bills in the House of Commons. All of the impugned actions form part of the legislative process of introducing bills in Parliament and were taken by the Ministers acting in a legislative capacity.

[121] Moreover, the impugned actions in this case did not become “executive” as opposed to “legislative” simply because they were carried out by, or with the assistance of, public servants. Public servants making policy recommendations prior to the formulation and introduction of a bill are not “executing” existing legislative

policy or direction. Their actions, rather, are directed to informing potential changes to legislative policy and are squarely legislative in nature.

(2) Parliamentary Privilege

[122] Imposing a duty to consult with respect to legislative policy development would also be contrary to parliamentary privilege, understood as freedom from interference with “the parliamentary work of a Member of Parliament — *i.e.*, any of the Member’s activities that have a connection with a proceeding in Parliament” (J. P. J. Maingot, *Parliamentary Immunity in Canada* (2016), at p. 16 (emphasis added)). This is no anachronism or technical nicety. Parliamentary privilege is “the necessary immunity that the law provides for Members of Parliament . . . in order for these legislators to do their legislative work, ‘including the assembly’s work in holding the government to account’” (Maingot, at p. 15, citing *Canada (House of Commons) v. Vaid*, 2005 SCC 30, [2005] 1 S.C.R. 667, at para. 46). Since “holding government to account” is the *raison d’être* of Parliament (Maingot, at p. 317, citing W. Gladstone, U.K. House of Commons debates (Hansard), January 29, 1855, at p. 1202; see also *Vaid*, at para. 46), parliamentary privilege is therefore essential to allowing Parliament to perform its constitutional functions. As this Court said in *Re Canada Assistance Plan*, at p. 560, “[a] restraint . . . in the introduction of legislation is a fetter on the sovereignty of Parliament itself.” Parliament therefore has the right to “exercise unfettered freedom in the formulation, tabling, amendment, and passage

of legislation” (*Galati v. Canada (Governor General)*, 2015 FC 91, [2015] 4 F.C.R. 3, at para. 34).

[123] I acknowledge that parliamentary privilege operates within certain constraints imposed by the Constitution of Canada. For example, in *Reference re Manitoba Language Rights*, [1985] 1 S.C.R. 721, the Court held that s. 23 of the *Manitoba Act, 1870*, S.C. 1870, c. 3, entrenches a mandatory requirement to enact, print and publish provincial statutes in both official languages. In doing so, it imposed a constitutional duty on the Manitoba Legislature with respect to the manner and form by which legislation could be validly enacted. Other manner and form requirements are contained in Part IV of the *Constitution Act, 1867* (for example, in s. 48 (“Quorum of House of Commons”) and s. 49 (“Voting in House of Commons”), and in s. 52(1) of the *Constitution Act, 1982*).

[124] Mikisew Cree First Nation argues that s. 35 of the *Constitution Act, 1982* also creates a manner and form requirement which applies to the legislative process in the form of a constitutional and justiciable duty to consult. But the duty to consult is distinct from the constitutionally mandated manner and form requirements with which Parliament must comply in order to enact valid legislation. Applied to the exercise of legislative power, it is a claim *not* about the *manner and form* of enactment, but about the *procedure* of (or leading to) enactment. And, as this Court said in *Authorson v. Canada (Attorney General)*, 2003 SCC 39, [2003] 2 S.C.R. 40, at para. 37, “the only procedure due any citizen of Canada is that proposed legislation

receive three readings in the Senate and House of Commons and that it receive Royal Assent”. In a similar vein, although legislation which substantially interferes with the right to collective bargaining protected by s. 2(d) of the *Canadian Charter of Rights and Freedoms* can be declared invalid, “[l]egislators are not bound to consult with affected parties before passing legislation” (*Health Services and Support — Facilities Subsector Bargaining Assn. v. British Columbia*, 2007 SCC 27, [2007] 2 S.C.R. 391, at para. 157). In short, while the Constitution’s status as the supreme law of Canada operates to render of no force and effect enacted legislation that is inconsistent with its provisions, it does not empower plaintiffs to override parliamentary privilege by challenging the process by which legislation was formulated, introduced or enacted.

[125] Understanding the development and discussion of policy options related to the development and introduction of bills as being legislative in nature is most consistent with our law’s understanding of the scope of judicial review (in the sense of judicial review for constitutionality, as opposed to judicial review of administrative action). Judicial review is “the power to determine whether [a] particular law is valid or invalid” (P. W. Hogg, *Constitutional Law of Canada*, (5th ed. Supp.), at p. 15-2 (emphasis added). It therefore contemplates review of enacted legislation for constitutional compliance and does not, as a general rule, contemplate the exposure of legislative processes to judicial scrutiny.

[126] This view is, moreover, consistent with the text of s. 52(1) of the *Constitution Act, 1982*: “. . . any law that is inconsistent with the provisions of the



Constitution is, to the extent of the inconsistency, of no force or effect.” It is also consistent with this Court’s balancing in *R. v. Sparrow*, [1990] 1 S.C.R. 1075, at p. 1109, and *Tsilhqot’in Nation v. British Columbia*, 2014 SCC 44, [2014] 2 S.C.R. 257, at paras. 77-78, of legislative authority with the rights guaranteed in s. 35 and the goal of reconciliation by requiring that “government” justify enacted legislation that infringes s. 35. This is, I stress, distinct from the framework governing contemplated or actual Crown conduct taken under a power conferred in an enacted statute — to which framework I now turn.

C. *The Development, Introduction, Consideration and Enactment of Bills Is Not “Crown Conduct” Triggering the Duty to Consult*

[127] In *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 S.C.R. 511, at para. 35, this Court set out the three elements which, taken together, trigger a duty to consult: (i) the Crown must have knowledge — actual or constructive — of a potential Aboriginal claim or right; (ii) the Crown must contemplate conduct; and (iii) the contemplated Crown conduct must have the potential to adversely affect an Aboriginal claim or Aboriginal or treaty right. The duty to consult and, where necessary, to accommodate the interests of Indigenous peoples is grounded in the honour of the Crown (*Haida Nation*, at para. 16).

[128] “Crown conduct” triggering the duty to consult must, however, be understood as excluding the parliamentary (and, indeed judicial) functions of the Canadian state. The Crown represents a collection of powers and privileges, and the

term “Crown” is primarily *but not exclusively* used to denote two aspects of the Canadian state: the Monarch and the executive. In one sense, no activity of the state is independent of the Crown (O. Hood Phillips, P. Jackson and P. Leopold, *O. Hood Phillips & Jackson: Constitutional and Administrative Law* (8th ed. 2001), at para. 2-020). That said, parliamentary and judicial functions have been clearly separated from Crown control: *Magna Carta* (1215); *Case of Proclamations* (1611), 12 Co. Rep. 74, 77 E.R. 1352; *Bill of Rights* of 1689; *Act of Settlement* of 1701; *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217, at para. 63. The preamble to the *Constitution Act, 1867*, which proclaims Canada’s Constitution to be “similar in Principle to [the Constitution] of the United Kingdom” is, as Lamer C.J. recognized, the “grand entrance hall” through which the principles affirmed in these legal instruments have become a part of Canada’s constitutional architecture (*Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 S.C.R. 3, at para. 109; see also paras. 83, 87 and 107).

[129] Before us, counsel for Mikisew Cree First Nation disputed this, suggesting that the language of legislative enactment clauses in Canada (“ . . . Her Majesty, by and with the advice and consent of the Senate and the House of Commons of Canada, enacts as follows . . .”) signifies Crown control of the process of legislative enactment (transcript, at p. 149). But this misconceives the significance of the reference to “Her Majesty” in those clauses. It does not signify, as he argued, that “[l]egislation is Crown action” (transcript, at p. 149). Rather, it simply records the role of the Crown-in-Parliament in the legislative process of enacting laws.

[130] By way of explanation, Parliament consists of the House of Commons, the Senate and the Queen (*Constitution Act, 1867*, s. 17). The scope of the Queen’s legislative role — that is, the role of the Crown-in-Parliament — embraces “three determinative acts that are part of Parliament’s core functions as a legislative body: royal recommendation, royal consent and royal assent” (C. Robert, “The Role of the Crown-in-Parliament: A Matter of Form and Substance”, in M. Bédard and P. Lagassé, eds., *The Crown and Parliament* (2015), 95, at p. 96 (emphasis added)).

[131] Royal recommendation, which is retained in s. 54 of the *Constitution Act, 1867*, provides for the procedure to be followed in respect of authorizing expenditure of public monies. Royal consent is a practice based on a convention limiting Parliament’s right to take measures infringing the Crown prerogative or other Crown rights and interests. Of relevance here, however, is royal assent. This is because royal assent is what is conferred by the language of legislative enactment clauses relied upon by Mikisew Cree First Nation’s counsel. Royal assent is also expressly required by s. 55 of the *Constitution Act, 1867*, which provides that, upon a bill passed by both the House of Commons and the Senate being presented to the Governor General for the Queen’s assent, the Queen’s assent (or withholding of consent, or reservation of the bill) shall be declared.

[132] Sections 54 and 55 appear within Part IV of the *Constitution Act, 1867* and are therefore designated by the Constitution as falling within “Legislative Power”. This makes sense, because royal recommendation, royal consent and royal

assent are distinct from other exercises of Crown authority. Unlike, for example, statutory bodies such as the National Energy Board, or ministers of the Crown acting under delegated statutory powers, the Crown-in-Parliament does not “exis[t] to exercise executive power as authorized by legislatures”; and, the steps taken as part of the parliamentary process of law-making, including royal assent, are not “the vehicle through which the Crown acts” (*Clyde River (Hamlet) v. Petroleum Geo-Services Inc.*, 2017 SCC 40, [2017] 1 S.C.R. 1069, at para. 29). As this Court noted in *Clyde River*, at paras. 28-29:

It bears reiterating that the duty to consult is owed by the Crown. In one sense, the “Crown” refers to the personification in Her Majesty of the Canadian state in exercising the prerogatives and privileges reserved to it. The Crown also, however, denotes the sovereign in the exercise of her formal legislative role (in assenting, refusing assent to, or reserving legislative or parliamentary bills), and as the head of executive authority (*McAteer v. Canada (Attorney General)*, 2014 ONCA 578, 121 O.R. (3d) 1, at para. 51; P. W. Hogg, P. J. Monahan and W. K. Wright, *Liability of the Crown* (4th ed. 2011), at pp. 11-12; but see *Carrier Sekani*, at para. 44). For this reason, the term “Crown” is commonly used to symbolize and denote executive power. . . .

By this understanding, the NEB is not, strictly speaking, “the Crown”. Nor is it, strictly speaking, an agent of the Crown, since — as the NEB operates independently of the Crown’s ministers — no relationship of control exists between them (Hogg, Monahan and Wright, at p. 465). As a statutory body holding responsibility under s. 5(1)(b) of *COGOA*, however, the NEB acts on behalf of the Crown when making a final decision on a project application. Put plainly, once it is accepted that a regulatory agency exists to exercise executive power as authorized by legislatures, any distinction between its actions and Crown action quickly falls away. In this context, the NEB is the vehicle through which the Crown acts. Hence this Court’s interchangeable references in *Carrier Sekani* to “government action” and “Crown conduct” (paras. 42-44). It therefore does not matter whether the final decision maker on a resource project is Cabinet or the NEB. In either case, the decision constitutes Crown action that may trigger the duty to consult. As Rennie J.A. said in dissent at the Federal Court of Appeal in *Chippewas of the Thames*, “[t]he

duty, like the honour of the Crown, does not evaporate simply because a final decision has been made by a tribunal established by Parliament, as opposed to Cabinet” (para. 105). The action of the NEB, taken in furtherance of its statutory powers under s. 5(1)(b) of *COGOA* to make final decisions respecting such testing as was proposed here, clearly constitutes Crown action. [Emphasis added.]

[133] This description of the various and distinct aspects of Crown authority (and also, it follows, Crown conduct) affirms that the exercise of Crown authority in enacting legislation (“assenting, refusing assent to, or reserving legislative or parliamentary bills”) is legislative. It is not an instance of “Crown conduct” — that is, executive conduct — which can trigger the duty to consult.

D. *The Honour of the Crown*

[134] The foregoing is an answer to the concurring reasons at the Court of Appeal of Pelletier J.A., who suggested that declaratory relief would be available under s. 17 of the *Federal Courts Act*, which provides that, “[e]xcept as otherwise provided in this Act or any other Act of Parliament, the Federal Court has concurrent original jurisdiction in all cases in which relief is claimed against the Crown.” Simply put, the reference in s. 17 to “the Crown” does not include the Crown acting in its legislative capacity. (See *Fédération Franco-ténoise v. Canada*, 2001 FCA 220, [2001] 3 F.C. 641, at para. 58.)

[135] It also follows from the foregoing that, contrary to the submissions of Mikisew Cree First Nation, and to the views of my colleague Abella J. that “the duty

to consult . . . attaches to all exercises of Crown power, including legislative action” (para. 75), the Crown does not enact legislation. Parliament does. The honour of the Crown does not bind Parliament.

[136] While my colleague Karakatsanis J. appears to accept that conclusion so far as the duty to consult goes, she also raises the possibility that legislation which does not infringe s. 35 rights but “may adversely affect” them might nonetheless be inconsistent with the honour of the Crown (paras. 3, 25, 44 and 52). As she sees it, *independent of any infringement claim*, a rights claimant could seek a declaration that validly enacted and constitutionally compliant legislation — none of which, in law, is the result of Crown conduct — nonetheless fails to “give effect to the honour of the Crown” (para. 45). Otherwise, where “the effects of the legislation do not rise to the level of infringement, or if the rights are merely asserted (and not established), an Aboriginal group will not be able to successfully challenge the constitutional validity of the legislation through a *Sparrow* claim” (para. 43). Permitting the Crown “to do by one means” (presumably, by legislating) “that which it cannot do by another” (presumably acting pursuant to legislative authority) would “undermine the endeavour of reconciliation” (para. 44), which entails “promoting negotiation and the just settlement of Aboriginal claims as an alternative to litigation and judicially imposed outcomes” (para. 22).

[137] It follows, says my colleague, that “the duty to consult is not the only means to give effect to the honour of the Crown when Aboriginal or treaty rights may

be adversely affected by legislation” (para. 45). While acknowledging that “the issue of whether other protections are, or should be, available is not squarely before the Court in this appeal” (para. 49), she nevertheless speculates that “[o]ther doctrines may be developed” (para. 45). While “[w]e have not received sufficient submissions on how to ensure that the honour of the Crown is upheld other than through the specific mechanism of the duty to consult” (para. 49), she nonetheless proposes that “declaratory relief may be appropriate in a case where legislation is enacted that is not consistent with the Crown’s duty of honourable dealing toward Aboriginal peoples” (para. 47).

[138] I note, first of all, that much of my colleague’s speculation is inapplicable here. Mikisew Cree First Nation’s rights are not merely asserted. They are established Treaty No. 8 rights. As such, the only concern posited by my colleague which could conceivably arise here is that those rights might be “affected”, albeit not actually infringed, by the legislation which is the subject of this appeal.

[139] In any event, and in my respectful view, having acknowledged that there is no demonstrated infringement in this case, my colleague is searching for a problem to solve (while at the same time expressly declining to solve it). And she believes she has found that problem in what she sees as the potentially dishonourable conduct of the Crown in enacting non-rights-infringing (although rights-“affecting”) legislation—which, as I have already made clear, is not really a problem since, as a matter of constitutional law, “the Crown” does not enact legislation. In other words, my

colleague undercuts the very constitutional principles of separation of powers and parliamentary privilege, and the constitutional limits that they impose upon judicial supervision of the legislative process, which support her conclusion that no duty to consult is owed in respect of that process, including legislative enactment. And in so doing, she endorses the potential engorgement of judicial power — not required by the law of our Constitution, but rather precluded by it — at the expense of legislatures’ power over their processes. Far from preserving what my colleague calls “the respectful balance between the . . . pillars of our democracy” (para. 2), this conveys inter-institutional *disrespect*. It would be no more “respectful” (or constitutionally legitimate) for a legislature to purport to direct this Court or any other court on its own deliberative processes.

[140] Even putting that objection aside, my colleague’s reasons invoking the honour of the Crown appear to leave 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. But in doing so, she runs up against those same constitutional principles of separation of powers and parliamentary privilege which furnish the entire constitutional basis for her conclusion that no duty to consult is owed in respect of legislative processes. The honour of the Crown is not a cause of action itself; rather, it speaks to *how* obligations that attract it must be fulfilled (*Manitoba Metis Federation Inc. v. Canada (Attorney General)*, 2013 SCC 14, [2013] 1 S.C.R. 623, at para. 73). While she finds that the enforceable duty to



consult flowing from the honour of the Crown does not apply to the law-making process, my colleague, 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.

[141] In this regard, my colleague’s reference to “[o]ther forms of recourse [such as] declaratory relief . . . where legislation is enacted that is not consistent with the Crown’s duty of honourable dealing” (para. 47), is telling. For *what*, precisely, would a court grant “recourse”? Absent a s. 35 infringement, the answer is nothing, *unless* the duty to consult flowing from the honour of the Crown is itself being treated as applicable to the law-making process, despite my colleague’s conclusion to the contrary. Irrespective, then, of how a court might cast the speculative “[o]ther doctrines [that] may be developed” (para. 45) — for example, as a duty to accommodate, a duty not to “affect” rights, or as some fiduciary obligation — the resulting obligation would be, in substance, reducible either to the obligation which the Mikisew Cree First Nation asks the Court to impose here, or to some other formulation that still runs into the separation of powers and parliamentary privilege. While, therefore, I acknowledge that my colleague holds that there can be no enforceable duty to consult in the legislative process, the logic of her reasons nevertheless risks leading her toward the result advocated by Abella J., albeit via the circuitous and uncertain route of further litigation.

[142] This brings me to a further objection. By raising (and then leaving undecided) this quixotic argument about the honour of the Crown — which neither the appellant nor any of the intervenors even thought to raise — my colleague Karakatsanis J. would cast the law into considerable uncertainty. It is worth reflecting upon just who would bear the brunt of this uncertainty. In this regard, there is a degree of irony in my colleague’s emphasis upon the honour of the Crown as facilitating “reconciliation” which, she says, entails “promoting negotiation and the just settlement of Aboriginal claims as *an alternative to litigation and judicially imposed outcomes*” (para. 22, emphasis added). The effect of my colleague’s reasons would be quite the opposite. She invites s. 35 rights holders — that is, Indigenous peoples themselves — to spend many years and considerable resources *litigating* on the faint possibility that they have identified some “other form of recourse” that this Court finds “appropriate”. In other words, even though “[t]rue reconciliation is rarely, if ever, achieved in courtrooms” (*Clyde River*, at para. 24), it is to the courtroom that my colleague’s unresolved speculation would direct them. The burden of achieving reconciliation is thereby placed upon the one group of Canadians whose assertion of sovereignty is not what demands reconciliation with anyone or anything.

[143] As my colleague Rowe J. explains (paras. 160-65), the effects of the legal uncertainty generated by Karakatsanis J.’s reasons would also be felt by legislators, who are, in essence, being told that they cannot enact legislation that “affects” (but does not infringe) certain rights that might exist — and that, if they do, they may be subject to as-yet unrecognized “recourse”. This would leave legislators in the dark,

possibly for many years, about the efficacy of supply bills (and, therefore, of government budgets), and of legislation relating to matters as diverse as the delivery of health care and education, environmental protection, transportation infrastructure, agriculture and industrial activity, even where — it bears emphasizing — such legislation is validly enacted and fully compliant with Aboriginal and treaty rights guaranteed by s. 35. It would also generate intolerable uncertainty for governments charged with implementing such legislation, and for all those who pursue economic or other activities in reliance upon the efficacy of validly enacted and constitutionally compliant laws.

### III. Conclusion

[144] An apex court should not strive to sow uncertainty, but rather to resolve it by, wherever possible (as here), stating clear legal rules. To be clear, then: 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.

[145] That this is so should not, however, be seen to diminish the value and wisdom of consulting Indigenous peoples prior to enacting legislation that has the potential to adversely impact the exercise of Aboriginal or treaty rights. Consultation during the legislative process, including the formulation of policy, is an important consideration in the justification analysis under s. 35 (*Sparrow*, at p. 1119; *Tsilhqot'in*, at paras. 77-78). But the absence or inadequacy of consultation may be

considered only once the legislation at issue has been enacted, and then, only in respect of a challenge under s. 35 to the substance or the effects of such enacted legislation (as opposed to a challenge to the legislative process leading to and including its enactment).

[146] I would therefore dismiss the appeal.

[147] Canada does not seek costs. The Federal Court of Appeal awarded Canada its costs when it struck the Federal Court's declaration. As Canada did not ask us to upset that order, I would not do so. I would make no order as to costs in this Court.

The reasons of Moldaver, Côté and Rowe JJ. were delivered by

ROWE J. —

[148] I concur with the reasons of Justice Brown. In particular, I would adopt his analysis with respect to the lack of jurisdiction of the Federal Court to conduct the review under the *Federal Courts Act*, R.S.C. 1985, c. F-7; the distinction between the Crown and the legislature; the preparation of legislation as a legislative function; the separation of powers, notably between the legislature and the judiciary; and the critical importance of maintaining parliamentary privilege.

[149] To this I would add three main points. First, contrary to submissions made by the appellant Mikisew Cree First Nation, the fact that the duty to consult has not been recognized as a procedural requirement in the legislative process does not leave Aboriginal claimants without effective means to have their rights, which are protected under s. 35 of the *Constitution Act, 1982*, vindicated by the courts. Second, recognizing a constitutionally mandated duty to consult with Indigenous peoples during the process of preparing legislation (and other matters to go before the legislature for consideration, notably budgets) would be highly disruptive to the carrying out of that work. Finally, an additional and serious consequence to the appellant's suggested course of action would be the interventionist role that the courts would be called upon to play in order to supervise interactions between Indigenous parties and those preparing legislation (and other measures) for consideration by Parliament and by provincial legislatures.

I. Effective Means Exist to Vindicate and Protect Rights Under Section 35

[150] Counsel for the Mikisew claims that in the absence of the extension of the duty to consult into the law-making process, their right to be meaningfully consulted by the Crown would be rendered unenforceable. This assertion hinges on an understanding of "Crown conduct" to include law-making functions; an understanding that my colleague Justice Brown has properly rejected. This does not mean that the Mikisew are without avenue to pursue their treaty rights in the face of impugned legislation.

[151] As I shall explain more fully below, the means to challenge an alleged infringement of the Mikisew's treaty rights are well established in *R. v. Sparrow*, [1990] 1 S.C.R. 1075, and subsequent cases (see e.g. *Tsilhqot'in Nation v. British Columbia*, 2014 SCC 44, [2014] 2 S.C.R. 257; *Lax Kw'alaams Indian Band v. Canada (Attorney General)*, 2011 SCC 56, [2011] 3 S.C.R. 535; *Paul v. British Columbia (Forest Appeals Commission)*, 2003 SCC 55, [2003] 2 S.C.R. 585; *Mitchell v. M.N.R.* 2001 SCC 33, [2001] 1 S.C.R. 911; *R. v. Marshall*, [1999] 3 S.C.R. 456; *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010). As well, the Mikisew can allege a failure by the Crown to fulfill its duty to consult when contemplating government action, as required by *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 S.C.R. 511, and subsequent cases (see e.g. *Ktunaxa Nation v. British Columbia (Forests, Lands and Natural Resource Operations)*, 2017 SCC 54, [2017] 2 S.C.R. 386; *Behn v. Moulton Contracting Ltd.*, 2013 SCC 26, [2013] 2 S.C.R. 227; *Beckman v. Little Salmon/Carmacks First Nation*, 2010 SCC 53, [2010] 3 S.C.R. 103; *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, 2010 SCC 43, [2010] 2 S.C.R. 650).

[152] The appellant asks this Court to recognize that the duty to consult is triggered by the preparation of legislation, in other words, at the policy development stage of law making. On a practical level, this can be seen as moving the procedural duty first recognized in *Haida Nation* from executive decision making, either through the operation of legislation, or otherwise (*Rio Tinto*, at para. 43), all the way to the initial stages of the legislative process. As the law stands, the avenue by which

aggrieved Aboriginal rights holders can challenge the constitutionality of legislation under s. 35 is through the infringement/justification framework laid out by this Court in *Sparrow*, as affirmed recently in *Tsilhqot'in* (see paras. 118-25). The Mikisew's proposal would short-circuit this process by mandating that consultation occur before any ink is spilled in the drafting of a bill. All legislation that could potentially have an adverse effect on an Aboriginal right or claim would be presumptively unconstitutional unless adequate consultation had occurred. Practically, this would transform pre-legislative consultation from a factor in the *Sparrow* framework (as described below), to a constitutional requirement. Such consultation would be not only with proven rights holders, but with anyone with an unproven Aboriginal interest that might be adversely impacted by contemplated legislation.

[153] It is not warranted to extend the law in this way. Section 35 rights are not absolute. Like other provisions of the *Constitution Act, 1982*, s. 35 is both supported and confined by broader constitutional principles. The honour of the Crown arises from the fiduciary duty that Canada owes to Indigenous peoples following the assertion of sovereignty; it is an overarching guide to Canada's dealings with Indigenous peoples: *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, 2004 SCC 74, [2004] 3 S.C.R. 550, at para. 24, quoted with approval in *Manitoba Metis Federation Inc. v. Canada (Attorney General)*, 2013 SCC 14, [2013] 1 S.C.R. 623, at para. 66. The current jurisprudence provides for protection and vindication of Aboriginal rights *and* for upholding the constitutional principles of

parliamentary sovereignty and the separation of powers. It is important to continue to do both. This can be done while upholding the honour of the Crown.

[154] Legislation said to infringe an Aboriginal or treaty right can be challenged under the infringement/justification framework in *Sparrow*. To establish a s. 35 violation, a party must first demonstrate that it holds an Aboriginal right that remains unextinguished as of the enactment of the *Constitution Act, 1982* (*R. v. Van der Peet*, [1996] 2 S.C.R. 507; *R. v. Sappier*, 2006 SCC 54, [2006] 2 S.C.R. 686), or a treaty right (*R. v. Badger*, [1996] 1 S.C.R. 771; *Delgamuukw*). Next, the party must establish that there has been a *prima facie* infringement of that right by way of an unreasonable limitation, undue hardship, or the denial of the preferred means of exercising the right: (*Sparrow*, at pp. 1112-13). Once a *prima facie* infringement has been established, the burden shifts to the Crown to show that the interference was based on a valid legislative objective and that the interference was consistent with the Crown's honour and fiduciary duty to Indigenous peoples. Along with other factors, including compensation and minimizing the infringement, any prior consultation is considered in determining whether the infringement was justified. It is settled jurisprudence that where a right is infringed and where that infringement has not been justified (to the requisite legal standard), then the courts will grant a substantive remedy to prevent the infringement or (if that is not possible) to mitigate its consequences for those whose s. 35 rights were infringed. In the case of infringing legislation, provisions found not to be justified will be a nullity and will not authorize



any regulatory action (P.W. Hogg, *Constitutional Law of Canada*, (5th ed. (loose-leaf), at p. 28-62).

[155] The significance of prior consultation in the infringement/justification analysis is a strong incentive for law makers to seek input from Indigenous communities whose interests may be affected by nascent legislation. This is exemplified by provinces which have recognized the importance of consulting Indigenous peoples prior to enacting legislation that has the potential to adversely impact the exercise of treaty or Aboriginal rights in the province (see e.g. Saskatchewan, “First Nation and Metis Consultation Policy Framework” (June 2010) (online), at p. 5; Manitoba, “Interim Provincial Policy For Crown Consultations with First Nations, Métis Communities and Other Aboriginal Communities” (May 4, 2009) (online), at p. 1; Quebec, Interministerial Support Group on Aboriginal Consultation, *Interim Guide for Consulting the Aboriginal Communities*, Quebec City: 2008, at p. 4). However, good public policy does not necessarily equate to a constitutional right. It is for each jurisdiction, federal, provincial and territorial, to decide on the modalities for consultation in the context of *Sparrow*.

[156] I turn now to the duty to consult recognized in *Haida Nation*. The duty to consult arises when three conditions are met. First, the Crown must have knowledge, actual or constructive, of a potential Aboriginal right or claim. Second, there must be Crown conduct or a decision that is contemplated. Finally, the conduct must have the potential to adversely affect an Aboriginal right or claim. On the part of the Crown,

the duty to consult serves two distinct objectives: first is a fact-finding function, as through consultation the Crown learns about the content of the interest or right, and how the proposed Crown conduct would impact that interest or right. The second objective is practical; the Crown must consider whether and how the Aboriginal interests should be accommodated. The Crown must approach the process with a view to reconciling interests. Where it is shown that the duty to consult has not been fulfilled, the decision in question will be quashed and, in effect, the decision maker will be told to “go back and do it again”, this time with adequate consultation. Where consultation has been adequate, but the duty to accommodate has not been fulfilled, various remedies can arise, both procedural and substantive.

[157] This Court stated in *Rio Tinto* that any *potential* for adverse impact as a result of Crown conduct will trigger the duty to consult and accommodate. The Court further stated that the duty may arise with respect to “high-level managerial or policy decisions” (para. 87). The policy decisions at issue in *Rio Tinto* were made by the executive in regards to a *particular development project*; in that case, the impugned decision concerned the sale of power produced from a hydroelectric dam on the Nechako River. The Court’s statement needs to be understood in the context in which it was made; it does not support the proposition that a duty to consult is constitutionally mandated in the law-making process. This is reinforced by the requirement that the impugned decision would result in potential adverse impacts. This Court held that there must be a “*causal relationship* between the proposed government conduct or decision and a potential for adverse impacts on pending

Aboriginal claims or rights” (para. 45 (emphasis added)). Counsel for the Mikisew rely heavily on the reasons given by this Court in *Rio Tinto*. But *Rio Tinto* does not support the conclusion that the duty to consult must apply to the legislative process. In fact, this Court explicitly left open the question of whether “government conduct” attracting the duty to consult includes the legislative process (para. 44).

[158] While Bills C-38 (enacted as *Jobs, Growth and Long Term Prosperity Act*, S.C. 2012, c. 19) and C-45 (enacted as *Jobs and Growth Act, 2012*, S.C. 2012, c. 31) modified the regulatory framework for certain waterways, the use of those waters was not thereby returned to a situation of laissez-faire. Environmental regulation, provincial and territorial as well as federal, continues to apply. The appellants submit that the reduction in federal environmental oversight “profoundly affects” treaty rights by removing an environmental assessment process that would trigger the duty to consult (A.F., at para. 13). However, this is not the type of adverse effect that was contemplated in *Haida Nation* and subsequent jurisprudence. What is protected by s. 35 is the Aboriginal or treaty right itself. A specific set of arrangements for environmental regulation is not equivalent to a s. 35 right, and in particular is not equivalent to the treaty right relied on by the Mikisew in this case. As this Court stated in *Rio Tinto*: “the definition of what constitutes an adverse effect [does not] extend to adverse impacts on the negotiating position of an Aboriginal group” (para. 50). The adverse impact must be to the future exercise of the *right itself* (para. 46).

[159] In summary, when legislation has been adopted, those who assert that the effect of the legislation is to infringe s. 35 rights have their remedies under *Sparrow*. Those who assert that government decisions made pursuant to the legislation's authority will adversely affect their claims will have their remedies under *Haida Nation*. Other Crown conduct beyond decisions made pursuant to statutory authority may also attract the duty to consult: *Rio Tinto*, at para. 43. Where new situations arise that require the adaptation or extension of this jurisprudence, the courts provide a means for such development of the law. But, no such requirement has been shown on the facts of this case.

## II. Consequences for the Separation of Powers

[160] In order to understand the consequences of imposing a duty to consult on the process of preparing legislation for consideration by Parliament and by provincial legislatures, one needs to begin by understanding the many steps involved in this process. (I make no comment on territorial legislatures, as they operate with notable differences from Parliament and provincial legislatures.) Counsel for the Mikisew was of considerable assistance in this regard by placing before the Court and referring in his submissions to a document prepared by the Privy Council Office identifying the many steps involved (Canada, Privy Council, *Guide to Making Federal Acts and Regulations* (2nd ed. 2001), at p. 59). With slight paraphrasing, these steps are as follows :

### Preparation

1. The department prepares analyses and plans; ministerial approval is required to proceed with policy consultations.
2. The Prime Minister reviews and approves machinery-related issues (where applicable).
3. The sponsoring Minister makes a decision on the policy options and recommendations to Cabinet.
4. The memorandum to Cabinet is prepared.
5. The memorandum to Cabinet is subject to interdepartmental consultation.
6. The memorandum to Cabinet is approved by the Deputy Minister and senior management.
7. The memorandum to Cabinet is approved by the sponsoring Minister, and sent to the Privy Council Office.
8. The Privy Council Office briefs the chair of the Cabinet Committee.
9. The Cabinet Committee considers the memorandum to Cabinet, and the Privy Council Office issues a Committee Report.
10. Cabinet ratifies the Committee Report, and the Privy Council Office issues a Record of Decision.
11. The Department of Justice prepares a draft bill with the assistance of the legislation section drafting team, the sponsoring department, and the departmental legal services unit.

12. The bill is approved by appropriate senior officials in the sponsoring department.
13. The sponsoring Minister reviews and signs off on the bill.
14. The Government House Leader reviews the bill.
15. The Government House Leader seeks delegated authority from Cabinet to approve the bill for introduction.
16. The Privy Council Office issues the bill.

#### The House of Commons

17. The Government House Leader gives notice of the bill's introduction.
18. The bill is introduced in the House of Commons: First Reading.
19. The bill proceeds to Second Reading (approval in principle).
20. The bill is considered in Committee (clause by clause consideration).
21. The Committee reports on the bill, including any recommended amendments.
22. The bill proceeds to Third Reading and final approval by the House of Commons.

#### The Senate

23. The bill is introduced in the Senate: First Reading.
24. The bill proceeds to Second Reading (approval in principle).

25. The bill is considered in Committee (clause by clause consideration).
26. The Committee reports on the bill, including any recommended amendments.
27. The bill proceeds to Third Reading and final approval by which the Senate.

#### Royal Assent

28. The bill receives Royal Assent from the Governor General.
29. The legislation (now a statute) comes into effect upon royal assent or (if the statute so provides) at a later date.

#### Operation of the Legislation

30. Regulations are made and decisions are taken pursuant to the authority conferred by the legislation.

[161] The situation is similar in the provinces, except for the fact that their legislatures are unicameral, i.e., they have no upper house corresponding to the Senate. The focus of the Mikisew's argument was on the first 16 steps listed above, relating to preparation of legislation which they mischaracterize as Crown conduct. Justice Brown has dealt with the confusion in the Mikisew's position in conflating the Crown and the legislature. (For an example, see the use of the ambiguous term "legislative processes" in paragraph 50 and elsewhere in their factum.) If the

distinction between the Crown and the legislature were cast aside, then the next logical step would be to say that the duty to consult extends to consideration by Parliament (or provincial legislatures), as set out in steps 17 to 29 above.

[162] From another perspective, why should the duty to consult relate only to legislation? Why not budgetary measures (including the Estimates)? These are prepared for Parliament's consideration and arguably they could infringe s. 35 rights or adversely affect claims to such rights?

[163] If one breaches the separation of powers and treats the legislature as part of the Crown, then all of this can follow. The consequences of the foregoing are profound and warrant careful reflection. And, I would repeat, the consequences would relate not only to the Parliament of Canada, but also to the legislatures of the provinces.

[164] The first 16 steps involved in the preparation of legislation show that this is not a simple process. Rather, it is a highly complex process involving multiple actors across government. Imposing a duty to consult at this stage could effectively grind the day-to-day internal operation of government to a halt. What is now complex and difficult could become drawn out and dysfunctional. Inevitably, disputes would arise about the way that this obligation would be fulfilled. This is why the separation of powers operates the way it does. The courts are ill-equipped to deal with the procedural complexities of the legislative process. Consider the following practical



questions that would arise if this Court were to recognize a duty to consult in the preparation of legislation.

[165] Four questions (each with several facets) arise directly from what the Mikisew are seeking:

- a) *Which types of legislation would trigger the duty to consult?* Would it be only legislation whose focus was the situation of Indigenous peoples? Arguably not; rather, it would extend to many laws of general application (as on the facts of this case).
- b) In giving effect to the duty, *which Indigenous groups would need to be consulted?* How would they be identified? In the case of legislation of general application might not the duty require consultation with all Aboriginal groups within the jurisdiction?
- c) *At what stage (in the 16 step process) is consultation to take place?* Might the duty require consultation to take place at more than one stage, as one moves from formulating policy options, to deciding on a recommended approach, to consideration and approval (possibly with changes) by Cabinet committee and then full Cabinet, to the drafting of the bill and its approval for introduction?
- d) *What would be needed to fulfill the duty to consult in various circumstances?* How would this be decided and by whom?

Three further questions arise from the logical extension of the framework that the Mikisew are asking this court to adopt:

- e) If the preparation of legislation that might affect s. 35 rights triggers the duty to consult, then would not that duty also be triggered by the preparation of other measures for Parliament's consideration, notably the Budget, including the Estimates?
  
- f) And, if the duty to consult extended to consideration by Parliament and provincial legislatures, then would not there also be significant and likely unforeseeable consequences for the operation of legislative assemblies, affecting their powers and privileges?
  
- g) The relationship among the institutions of the executive and between them and Parliament are complex. What would be the impact on the operation of Cabinet, on the role of the Prime Minister or Premier as the head of Cabinet, and on the responsibility of the ministry to the legislature? Would there not be significant and likely unforeseeable consequences for the conventions, practices and procedures by which Cabinet operates and its relationship to the legislature?

[166] The careful reader of the foregoing list of 30 steps will have noted a reference to "policy consultations" in step 1. As a matter of practice and in furtherance of good public administration, consultation on policy options in the

preparation of legislation is very often undertaken. But, it is not constitutionally required.

[167] Similarly, I would note again that under the jurisprudence, consultation is a factor in the justification of any s. 35 infringement under *Sparrow*. Thus, where an infringement of rights protected under s. 35 is possible by virtue of the adoption of legislation, there is strong incentive to consult. As mentioned above, it is fundamentally different to impose a constitutionally mandated duty to consult, the operation of that would inevitably be supervised by the courts. If Parliament or a provincial legislature wishes to bind itself to a manner and form requirement incorporating the duty to consult Indigenous peoples before the passing of legislation, it is free to do so (Hogg, at p. 12-12). But the courts will not infringe on the discretion of legislatures by imposing additional procedural requirements on legislative bodies (*Authorson v. Canada (Attorney General)*, 2003 SCC 39, [2003] 2 S.C.R. 40).

[168] Finally, I note that legislation itself will not ordinarily give rise to an infringement of rights under s. 35. When it does, an infringement claim may be brought under *Sparrow*. Rather, what is ordinarily the case is that it is *Crown conduct*, whether through the exercise of authority conferred by legislation, or by its own authority, that gives rise to an infringement of rights or to adverse effects to a claimed right. In such instances, *Haida Nation* and the cases following it impose a duty to consult and, where necessary, to accommodate. With respect to the duty to consult, the Crown's actions are reviewable by the courts under the general principles

of judicial review: *Haida Nation*. These principles do not allow for courts to review decisions of a legislative nature on grounds of procedural fairness (*Attorney General of Canada v. Inuit Tapirisat of Canada et al.*, [1980] 2 S.C.R. 735, at pp. 758-59). As a general rule, no duty of procedural fairness is owed by the government in the exercise of any legislative function (*Reference re Canada Assistance Plan, (B.C.)*, [1991] 2 S.C.R. 525, at p. 558; *Wells v. Newfoundland*, [1999] 3 S.C.R. 199, at para. 59; *Authorson*, at para. 41).

### III. The Role of the Court

[169] As surely as night follows day, if such a duty were to be imposed, disagreements would arise as to the foregoing questions and many others. How would such disagreements be resolved? Where a constitutionally mandated duty exists, affected parties would inevitably turn to the courts. Thus, courts would be drawn into a supervisory role as to the operation of a duty to consult in the preparation of legislation (as well as, in all likelihood, other matters, notably budgets, requiring approval by the legislature). I agree with Justice Brown's discussion on the impact of imposing a duty to consult on the separation of powers.

[170] I would add the following point. If the courts were to impose a duty to consult on the preparation of legislation, would not the next logical step be for the courts to impose a duty to consult on legislatures in their consideration of legislation? In such an eventuality, one would have to situate "consultations" somewhere in the sequence of First Reading, Second Reading, Committee Stage, Report Stage, Third

Reading, Royal Assent. If a legislature chooses to participate in consultation with Indigenous peoples pursuant to *Sparrow*, at what stage that consultation takes place is a matter of discretion. Yet the trial judge in this case suggested just such a remedy — that affected groups would be able to make submissions in Parliament. The trial judge’s order stated that the duty arose “at the time that each of the [bills] was introduced into Parliament” (2014 FC 1244, 470 F.T.R. 2014, at para. 112. Such a result offends the separation of powers and would necessarily engage the courts in regulating the exercise by Parliament and legislatures of their powers and privileges. That would be a profound change in our system of government.

#### IV. Conclusion

[171] This brings me full circle, back to whether there is a “gap” in the jurisprudence that needs to be filled. As I have set out above, no such gap exists. Vindicating s. 35 rights does not require imposition of a duty to consult in the preparation of legislation. Indeed, the imposition of such a duty would be contrary to the distinction between the Crown and the legislature. It would offend the separation of powers. It would encroach on parliamentary privilege. It would involve the courts in supervising matters that they have always held back from doing. In short, imposing such a duty would not provide needed protection for s. 35 rights. Rather, it would offend foundational constitutional principles and create rather than resolve problems.

[172] For the above reasons, I would dismiss the appeal with no costs ordered.

*Appeal dismissed.*

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