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Résumé de l'article

Les membres de la Première Nation crie de Mikisew sont des descendants des signataires du Traité n^{o} 8. *Leur territoire traditionnel englobe le parc national Wood Buffalo et certaines parties de la zone d'exploitation des sables bitumineux de l'Alberta. En 2013, ils ont intenté une action en justice devant la Cour fédérale, soutenant que la couronne aurait l'obligation de consulter la Première Nation crie de Mikisew avant de proposer des modifications à des lois régissant la protection de l'environnement, qui pourraient avoir une incidence sur leurs droits issus du traité. L'affaire s'est rendue jusqu'à la Cour suprême du Canada, qui a tranché en invoquant des motifs fondés sur la compétence. Or, dans trois opinions distinctes, la majorité des juges ont expliqué que la couronne n'a pas l'obligation de consulter la Première Nation crie de Mikisew. Les juges ont à peine fait référence au* Traité n^{o} 8, *préférant se concentrer sur des principes constitutionnels très pointus pour écarter catégoriquement l'obligation de consulter dans le contexte de la loi proposée. Dans cet article, nous démontrons que cette approche est difficile à concilier avec les promesses distinctes faites par le Canada aux Cris de Mikisew dans le* Traité n^{o} 8. *Bien que la meilleure façon d'intégrer l'obligation de consulter dans le processus législatif ne soit pas évidente et qu'il existe des limites normatives et pragmatiques quant au rôle des tribunaux, nous soutenons que le* Traité n^{o} 8 *aurait offert un cadre idéal et circonscrit pour développer la doctrine de l'obligation de consulter en ce qui a trait aux lois, et ce, d'une manière qui la rend compatible avec la séparation des pouvoirs et la souveraineté parlementaire, solution qui aurait été possible plutôt que d'invoquer ces derniers principes pour rejeter l'obligation de consulter.*

Treaty Promises and the Duty to Consult on Legislation

Vanessa MacDonnell & Jula Hughes*

ABSTRACT

The members of Mikisew Cree First Nation are descended from signatories of Treaty 8. *Their traditional territory encompasses Wood Buffalo National Park and parts of Alberta's tar sands developments. In 2013, they filed suit in Federal Court, arguing that the Crown had a duty to consult Mikisew Cree First Nation prior to proposing amendments to environmental protection legislation that could impact upon their treaty rights. The litigation made its way to the Supreme Court of Canada, where the Court resolved the case on jurisdictional grounds. In three separate opinions, however, the majority went on to explain that the Crown did not have a duty to consult Mikisew Cree First Nation. The majority proceed with barely a nod to* Treaty 8, *preferring instead to focus on high-level constitutional principles to categorically rule out a duty to consult in the context of proposed legislation. In this article, we show that this approach is difficult to reconcile with the specific promises made by Canada in* Treaty 8. *While it is not obvious how the duty to consult would best be integrated into the legislative process, and there are normative and pragmatic limits on the role of the courts, we argue that* Treaty 8 *would have offered an ideal, discrete context for developing the doctrine of the duty to consult with respect to legislation in a manner that reconciles it with the separation of powers and parliamentary sovereignty, rather than invoking the latter principles to oust the duty to consult.*

KEYWORDS:

Treaty rights, Treaty 8*, section 35 of the* Constitution Act, 1982*, duty to consult, Mikisew Cree First Nation, parliamentary sovereignty, separation of powers.*

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RÉSUMÉ

Les membres de la Première Nation crie de Mikisew sont des descendants des signataires du Traité nº 8. *Leur territoire traditionnel englobe le parc national Wood Buffalo et certaines parties de la zone d'exploitation des sables bitumineux de l'Alberta. En 2013, ils ont intenté une action en justice devant la Cour fédérale, soutenant que la couronne aurait l'obligation de consulter la Première Nation crie de Mikisew avant de proposer des modifications à des lois régissant la protection de l'environnement, qui pourraient avoir une incidence sur leurs droits issus du traité. L'affaire s'est rendue jusqu'à la Cour suprême du Canada, qui a tranché en invoquant des motifs fondés sur la compétence. Or, dans trois opinions distinctes, la majorité des juges ont expliqué que la couronne n'a pas l'obligation de consulter la Première Nation crie de Mikisew. Les juges ont à peine fait référence au* Traité nº 8, *préférant se concentrer sur des principes constitutionnels très pointus pour écarter catégoriquement l'obligation de consulter dans le contexte de la loi proposée. Dans cet article, nous démontrons que cette approche est difficile à concilier avec les promesses distinctes faites par le Canada aux Cris de Mikisew dans le* Traité nº 8. *Bien que la meilleure façon d'intégrer l'obligation de consulter dans le processus législatif ne soit pas évidente et qu'il existe des limites normatives et pragmatiques quant au rôle des tribunaux, nous soutenons que le* Traité nº 8 *aurait offert un cadre idéal et circonscrit pour développer la doctrine de l'obligation de consulter en ce qui a trait aux lois, et ce, d'une manière qui la rend compatible avec la séparation des pouvoirs et la souveraineté parlementaire, solution qui aurait été possible plutôt que d'invoquer ces derniers principes pour rejeter l'obligation de consulter.*

MOTS-CLÉS :

Droits issus de traités,* Traité nº 8, *article 35 de la* Loi constitutionnelle de 1982, *obligation de consulter, Première Nation crie Mikisew, souveraineté parlementaire, séparation des pouvoirs.

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INTRODUCTION

Treaty 8 is the largest treaty territory in Canada, similar in size to France and Great Britain combined. The Cree, Dene, Saulteaux and Beaver signatories to *Treaty 8* controlled access to the Klondike. The gold rush and the discovery of oil reserves in the territory in the late 1880s motivated Canada to enter into the Treaty in 1899, after resisting Indigenous requests for treaty negotiations for more than a decade. During this time, Indigenous people in the region experienced ecological depletion of their hunting grounds, theft of everything from horses and dogs to furs and traps by settlers and prospectors, and even starvation.[1]

The members of Mikisew Cree First Nation[2] are descendants of the original *Treaty 8* signatories and today Mikisew Cree First Nation is part of the Athabasca Tribal Council. Their traditional territory encompasses Wood Buffalo National Park and parts of Alberta's tar sands developments.[3] For over a century, the Mikisew Cree have had to deal with the impact of settlement and extractive projects on their land and way of life. Throughout this time, they have negotiated with Canada to first secure and then implement the benefits of a treaty. Mikisew Cree First Nation was instrumental in efforts to challenge amendments to federal environmental protection legislation introduced in 2012 which were intended, among other economic development objectives, to facilitate tar sand development in the region. Protests against the amendments gave rise to the Idle No More movement. In opposing the amendments, Mikisew Crew First Nation pursued a multi-pronged strategy.

1. René Fumoleau, *As Long as This Land Shall Last: A History of Treaty 8 and Treaty 11, 1870–1939* (Calgary: University of Calgary Press, 2004); Arthur J Ray, "Treaty 8: A British Columbian Anomaly" (1999) 123 BC Studies: The British Columbian Quarterly 5.

2. References to "Mikisew Cree First Nation" connote the current reserve, its Chief and council and its members. References to "Mikisew Cree" encompass the current, past and, where the context requires, future members of the Mikisew Cree, whether recognized under the *Indian Act* at the time or not.

3. Phillip Vannini and April Vannini, "The Exhaustion of Wood Buffalo National Park: Mikisew Cree First Nation Experiences and Perspectives" (2019) 12:3 International Review of Qualitative Research 278.

In addition to organizing protests and seeking UNESCO protection for Wood Buffalo National Park, they filed suit in Federal Court, arguing that the Crown had a duty to consult Mikisew Cree First Nation prior to enacting legislation that could impact upon their Treaty rights. The litigation made its way through the courts to the Supreme Court of Canada. In short, the context that gave rise to *Treaty 8* in the 19th century, the tensions between resource extraction and environmental protection, in *Treaty 8* territory is the very context that also gave rise to the present-day litigation.

The Supreme Court of Canada released its decision in *Mikisew Cree First Nation v Canada (Governor General in Council) Mikisew Cree* in 2018.[4] The Court resolved the case on jurisdictional grounds, unanimously concluding that the Federal Court had lacked authority to hear the case.[5] In three separate opinions, however, the majority went on to explain that in their view, the Crown did not owe a duty to consult Mikisew Cree First Nation prior to the enactment of legislation that could impact upon their section 35 Aboriginal or treaty rights.

In this article we examine the Court's key rulings in *Mikisew Cree* 2018, and ask whether they represent a reasonable interpretation of the Constitution in an era of reconciliation. We focus on three aspects of the majority's decision: its treatment of *Treaty 8*, the source of the alleged duty to consult; its conclusion that the pre-legislative process is entirely legislative in character; and its approach to the separation of powers and parliamentary sovereignty issues in the case.

In the opening paragraphs of her opinion, Justice Karakatsanis, writing for three justices, acknowledged that the Mikisew Cree are descended from signatories of *Treaty 8*, which includes a provision preserving the Indigenous signatories' rights to hunt, trap and fish in the territory.[6] However, neither the Treaty text nor its context informed the Court's analysis of whether the Crown had a duty to consult the Mikisew Cree prior to making changes to environmental protection legislation which could impact upon those hunting, trapping and fishing rights.[7] Instead, the Court addressed the more general question

4. *Mikisew Cree First Nation v Canada (Governor General in Council)*, 2018 SCC 40, [2018] 2 SCR 765 [*Mikisew Cree* 2018].

5. *Ibid* at paras 17–18.

6. *Ibid* at para 5.

7. *Ibid* at paras 6–7, Karakatsanis J.

of whether the Crown owes a duty to consult Indigenous peoples where legislative initiatives have potential impacts on Aboriginal or treaty rights.[8]

Had the Supreme Court engaged more deeply with the Treaty text and context, as it did in earlier *Treaty 8* decisions, including one involving Mikisew Cree First Nation,[9] it would have been required to grapple with the very specific representations made by the Treaty commissioners regarding future laws that might affect the rights to hunt, trap and fish.[10] It would have also appreciated that the Treaty imposes both a duty of non-interference and a positive obligation on Canada to facilitate these activities and ways of life. These aspects of the Treaty suggest that the Crown has a duty to consult the Mikisew Cree about future laws, not because all legislative initiatives attract a duty to consult, but because the Treaty requires it.

Second, the majority began its analysis by reaffirming that the duty to consult is a duty owed by the Crown. It explained that although the pre-legislative process occurs within the executive and is directed by Ministers of the Crown, it should be understood as being wholly legislative in character. This meant that there is no relevant Crown conduct to which the duty to consult could attach. This conclusion raises a number of questions. Law-making does not occur in a vacuum; it is typically part of a larger policy process in which legislation is but one possible vehicle for achieving the state's objectives.[11] In responding to an ongoing policy challenge, it is not unusual for the executive to consider both legislative and non-legislative options.[12] In short, there is no bright line between "making law" (the legislative function) and "implementing policy" (the executive function), and relying on such a distinction to conclude that no duty to consult is owed is problematic.

Third, in ruling that the Crown does not owe a duty to consult in relation to proposed legislation, the majority was heavily influenced by the concern that judicial enforcement of the duty to consult would

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8. Justice Abella briefly refers to the taking up provisions in *Treaty 8*, but still focuses on the high-level question.

9. *Mikisew Cree First Nation v Canada (Minister of Canadian Heritage)*, 2005 SCC 69, [2005] 3 SCR 388 [*Mikisew Cree* 2005]; *R v Badger*, [1996] 1 SCR 771, 1996 CanLII 236 (SCC) [*Badger*].

10. *Badger*, *ibid* at para 39.

11. *Mikisew Cree* 2018, *supra* note 4 at para 40.

12. See generally John Mark Keyes, "Power Tools: The Form and Function of Legal Instruments for Government Action" (1996) 10 Can J Admin L & Prac 133; Carl Böhret and Götz Konzendorf, *Leitfaden zur Gesetzesfolgenabschätzung* (Berlin: Bundesministerium des Innern, 2000).

violate parliamentary sovereignty, parliamentary privilege and the separation of powers. As we explain, however, the enactment of the *Constitution Act, 1982* greatly diminished the salience of parliamentary sovereignty as a constitutional principle.[13] Even on the pre-*Charter*, settler colonial account of things, moreover, Canada's treaty obligations to Indigenous people have always been best understood as a limit on state sovereignty (and, by an extension, as a limit on parliamentary sovereignty). In short, we conclude that the majority's analysis inverted the relationship between parliamentary sovereignty and the duty to consult arising from *Treaty 8*.

In terms of the separation of powers, the majority's reasoning presumed that if it were to recognize a duty to consult, the duty would be fully judicially enforceable. The majority did not consider the possibility that the duty to consult might be only partially justiciable in this context.[14] Nor did it seriously consider enforcements options which would have largely given effect to the duty to consult with only minor impacts on the separation of powers and parliamentary sovereignty.[15]

In Part I, we identify the critical steps along the majority's path to concluding that there is no duty to consult Indigenous people prior to the enactment of legislation which may impact Aboriginal or treaty rights. In Part II, we consider whether the majority might have arrived at a different conclusion had its analysis been more attentive to *Treaty 8* text and context, the realities of policy-making within government, and the constitutional relationship between the duty to consult, parliamentary sovereignty, parliamentary privilege and the separation of powers.

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13. *Reference re Secession of Quebec*, [1998] 2 SCR 217, 1998 CanLII 793 (SCC), at para 72 [*Secession Reference*]; *Reference re Pan-Canadian Securities Regulation*, 2018 SCC 48, [2018] 3 SCR 189 at para 57.

14. *Secession Reference*, *supra* note 13.

15. The Supreme Court of Canada arguably adopted a similar approach in *Doucet-Boudreau v Nova Scotia (Minister of Education)*, 2003 SCC 62, [2003] 3 SCR 3 [*Doucet-Boudreau*] when it upheld the trial judge's decision to retain jurisdiction over implementation of the language rights recognized in that case. We are grateful to Peter Oliver for pointing this out to us.

I. THE DECISION

In 2013, Mikisew Cree First Nation brought an application for judicial review of the federal government's failure to consult prior to introducing two substantial pieces of environmental protection legislation.[16] As the Supreme Court explained,

> [t]hese bills were broad in scope. Together, they resulted in the repeal of the *Canadian Environmental Assessment Act*, and the enactment of the *Canadian Environmental Assessment Act, 2012*. They also resulted in significant amendments to the protection regime under the *Fisheries Act*, as well as amendments to the *Species at Risk Act*, and the *Navigable Waters Protection Act*, which was renamed the *Navigation Protection Act*.[17]

The Mikisew Cree are descended from signatories of *Treaty 8*. The Treaty explicitly preserves rights to hunt, trap and fish.[18] It also contains provisions requiring the federal government to facilitate the exercise of these rights.[19] In their application for judicial review, Mikisew Cree First Nation argued that they ought to have been consulted prior to the enactment of legislation which could impact upon those rights.

The Court delivered four sets of reasons. Justice Karakatsanis wrote for herself, Chief Justice Wagner and Justice Gascon. Justice Brown, concurring in the result, wrote alone. Justice Rowe, also concurring, wrote for himself, Justice Moldaver and Côté. And Justice Abella, concurring, wrote for herself and Justice Martin. The Court unanimously concluded that the Federal Court lacked jurisdiction to hear the case, but divided on the question of whether the Crown owed a duty to consult.

A. Reasons of Justice Karakatsanis

Justice Karakatsanis began with the question of jurisdiction, concluding that neither section 17 nor section 18 of the *Federal Courts Act* granted the Federal Court jurisdiction to hear the case. Section 17 states that the "Federal Court has concurrent original jurisdiction in all

16. *Mikisew Cree* 2018, *supra* note 4 at para 5.

17. *Ibid* at para 7 [citations omitted].

18. *Ibid* at para 5.

19. See Indigenous and Northern Affairs Canada, *Treaty Texts: Treaty No 8*, online: <www.rcaanc-cirnac.gc.ca/eng/1100100028813/1581293624572>.

cases in which relief is claimed against the Crown."[20] According to Justice Karakatsanis, this provision is not engaged where the Crown conduct is legislative in nature.[21] Section 18 grants a power to review decisions of "any federal board, commission or other tribunal."[22] Subsection 2(2) of the Act explains that:

> 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 […].

Justice Karakatsanis concluded that the purpose of subsection 2(2) is to "preclude judicial review of the legislative process at large".[23] Jurisdiction could therefore not be found in section 18 either. Turning to the duty to consult, Justice Karakatsanis noted that:

> The honour of the Crown is always at stake in its dealings with Aboriginal peoples. 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.[24]

She also observed 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."[25]

When the analysis turned to the question of *judicial enforcement* of the duty to consult, however, Justice Karakatsanis' tone shifted.[26] She explained that the pre-legislative process should be understood as being legislative, rather than executive, in nature, and that for reasons grounded in the separation of powers, parliamentary sovereignty and parliamentary privilege, recognizing a judicially enforceable duty to consult would be inappropriate. "The separation of powers and

20. *Mikisew Cree* 2018, *supra* note 4 at para 16.

21. *Ibid*.

22. *Ibid* at para 18.

23. *Ibid*, citing CA reasons at para 32.

24. *Ibid* at para 23 [citations omitted].

25. *Ibid* at para 28 [citations omitted].

26. Presentation by Kareena Williams, 27 September 2019, Conference on Parliament and the Courts, Canadian Study of Parliament Group, Ottawa, Ontario [Williams].

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."[27]

In support of her conclusion that the pre-legislative process should be considered legislative, Justice Karakatsanis returned to section 18 of the *Federal Courts Act*. She explained that: "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."[28] She treated this definition as an authoritative statement of Crown functions that are to be considered "executive" in nature under the constitution, concluding that no duty to consult was owed because "[t]he 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*."[29]

Justice Karakatsanis also identified "practical concerns" with recognizing a duty to consult as part of the legislative process.[30] It could not be guaranteed that aspects of the Bill that were the result of pre-legislative consultation would survive the legislative process intact. Nor would private members bills be subject to prior consultation.[31]

In response to the argument that as-of-yet unproven Aboriginal and treaty rights would be vulnerable under the outcome she had reached, Justice Karakatsanis suggested that there might be other legal means of protecting these rights: "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."[32] For example, declaratory relief might be available in circumstances in which "legislation is enacted that is not consistent with the Crown's duty of honourable dealing toward Aboriginal peoples."[33] And while

27. *Mikisew Cree* 2018, *supra* note 4 at para 32.
28. *Ibid* at para 18 [citations omitted].
29. *Ibid* at para 33.
30. *Ibid* at para 40.
31. *Ibid*.
32. *Ibid* at para 45.
33. *Ibid* at para 47.

the legislature itself does not owe a duty to consult, she noted that the degree of consultation might be taken into account in determining whether a law is consistent with the Honour of the Crown.[34]

B. Reasons of Justice Brown

Justice Brown agreed that the Federal Court lacked jurisdiction to hear the case. Like Justice Karakatsanis, he held that the process leading to the enactment of legislation should be treated as wholly legislative in nature.

Justice Brown also noted that, quite apart from the question of the Federal Court's jurisdiction, the separation of powers and parliamentary privilege prevented the Court from enforcing a duty to consult in relation to legislative action.[35] For separation of powers reasons, he explained, the "exercise of legislative power […] is immune from judicial interference."[36] Judicial review would also run afoul of parliamentary privilege, which is required for the proper functioning of the legislature.[37]

Finally, Justice Brown disagreed with Justice Karakatsanis' comments regarding other possible avenues for enforcing the Honour of the Crown, noting that it was difficult to see how legislation could be inconsistent with the honour of the Crown, given that it is the product of legislative, rather than executive, activity.[38] He also observed that alternative forms of recourse would raise separation of powers and parliamentary privilege concerns akin to the ones Justice Karakatsanis considered determinative in rejecting a duty to consult, and that the "uncertainty" created by her decision would invariably result in confusion and further litigation.[39]

C. Reasons of Justice Rowe

Justice Rowe concurred in the reasons of Justice Brown, and added his own reasons. He explained that Mikisew Cree First Nation could

34. *Ibid* at paras 48, 52.
35. *Ibid* at para 115.
36. *Ibid* at para 117.
37. *Ibid* at para 122.
38. *Ibid* at para 141.
39. *Ibid* at paras 142–43.

challenge the legislation or any conduct it authorized *post hoc* by bringing a claim arguing that action taken under the legislation was not preceded by adequate consultation, or that the legislation unjustifiably infringed treaty rights, per *Sparrow*.[40] Either of these approaches would protect treaty rights without raising parliamentary sovereignty and separation of powers concerns.

Justice Rowe also expressed concern regarding the workability of recognizing a duty to consult in relation to legislation. He explained that

> The [. . .] 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.[41]

Equally seriously, he suggested, if a duty to consult were to be imposed on the Crown in connection with legislation, "the next logical step" would be to recognize a corresponding duty to consult on the legislature.[42] This would raise additional concerns.[43]

Justice Rowe stated that if a duty to consult were to be recognized in this context, the courts would inevitably be required to play an "interventionist role" in enforcing it.[44] Courts, he explained, simply could not adjudicate the sufficiency of this type of consultation competently.[45] Moreover, such an approach would be inconsistent with the separation of powers and "involve the courts in supervising matters [in a way] that they have always held back from doing."[46]

D. Reasons of Justice Abella

Justice Abella took a distinctly different approach to the issues in the case. While she concurred with Justice Karakatsanis that sections 18, 18.1 and 22 of the *Federal Courts Act* did not confer jurisdiction

40. *Ibid* at paras 148–52.
41. *Ibid* at para 164.
42. *Ibid* at para 170.
43. *Ibid*.
44. *Ibid* at para 149.
45. *Ibid* at para 164.
46. *Ibid* at para 171.

on the Federal Court to hear the application, she held that the Crown has a duty to consult Indigenous people prior to the enactment of legislation which could impact upon their Aboriginal or treaty rights. She also concluded that "legislation enacted in breach of that duty may be challenged directly for relief."[47]

In determining whether the Crown owes a duty to consult, she explained, the focus should be on the "effect" of Crown action rather than its "source"[48] because the Crown always has a duty to act honourably in its dealings with Indigenous people. "[I]t 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."[49] The Crown's duty to consult thus applies regardless of whether it is acting in an executive or a legislative capacity,[50] and it cannot be curtailed by invoking arguments relating to the sovereignty of Parliament.[51]

Justice Abella also took the opportunity to clarify the relationship between the duty to consult and the infringement and justification analysis prescribed by *Sparrow*.[52] She expressed concern that the majority had conflated two distinct obligations under section 35 by suggesting that Mikisew Cree First Nation could vindicate their rights by challenging legislation under the *Sparrow* framework after it had been enacted.[53] She explained that the duty to consult is engaged whenever the Crown has "knowledge, real or constructive, of the potential existence of the Aboriginal right or title, and contemplate[s] conduct that might adversely affect it."[54] In *Mikisew Cree* 2005, the Supreme Court extended the duty to consult to treaty implementation.[55] The Court has also concluded that the duty to consult applies to "strategic, higher level decisions" as well as to more concrete decisions.[56]

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47. *Ibid* at para 54.
48. *Ibid* at para 55.
49. *Ibid* at para 62.
50. *Ibid* at paras 55–56.
51. *Ibid* at para 55.
52. *Ibid* at para 76.
53. *Ibid* at paras 78–80.
54. *Ibid* at para 68.
55. *Ibid* at para 69; *Mikisew Cree* 2005, *supra* note 9.
56. *Mikisew Cree* 2018, *supra* note 4 at para 72, citing *Rio Tinto Alcan Inc v Carrier Sekani Tribal Council*, 2010 SCC 43, [2010] 2 SCR 650 [*Rio Tinto*].

By contrast, the *Sparrow* analysis is focused on whether an infringement of Aboriginal and treaty rights is justified. These two duties—to consult and to justify infringements of Aboriginal or treaty rights—have different emphases. The duty to consult is concerned with "a manner of dealing that [is] in keeping with the special relationship between the Crown and Aboriginal rights-holders,"[57] while the *Sparrow* analysis is concerned with "substantive outcome[s]," though here too the integrity of the process weighs in the balance.[58] "Together, these complementary obligations ensure that the honour of the Crown is upheld throughout all actions which engage its special relationship with Aboriginal peoples,"[59] including Crown conduct which is legislative in nature.[60] The effect of the majority's analysis was to provide no recourse for unproven claims that may be impacted by legislation, since those claims are not ripe for adjudication under the *Sparrow* test.[61]

Justice Abella then considered the impact of parliamentary sovereignty and parliamentary privilege on the duty to consult. She noted that the courts inquire into the extent to which consultation preceded the enactment of legislation as part of the *Sparrow* justification analysis. This suggested that parliamentary sovereignty and parliamentary privilege are attenuated where Aboriginal and treaty rights are at stake.[62] Rather than allowing parliamentary sovereignty and parliamentary privilege to trump the duty to consult, these competing demands should be reconciled.[63] But this reconciliation must reflect the fact that the duty to consult "is not only a constitutional imperative, but a recognition of the limits of Crown sovereignty itself."[64] Earlier cases giving full effect to sovereignty and parliamentary privilege are distinguishable on that basis.[65]

57. *Ibid* at para 66.
58. *Ibid*.
59. *Ibid* at para 76.
60. *Ibid* at para 78.
61. *Ibid* at para 79.
62. *Ibid* at paras 83, 86.
63. *Ibid* at para 84.
64. *Ibid* at para 88.
65. *Ibid*.

How, then, should this reconciliation proceed? In Justice Abella's view, the content of the duty to consult would need to be compatible with the law-making process. Existing consultation procedures, such as notice and an opportunity to be heard, are both capable of fulfilling the duty to consult and are well-suited to the legislative process.[66]

Parliamentary sovereignty and parliamentary privilege also shape the nature and extent of judicial review.[67] Review of the adequacy of consultation would have to wait until the law received Royal Assent. And the remedy for inadequate consultation would typically be a declaration rather than invalidation. In reaching this conclusion, she drew a distinction between the duty to consult and manner and form requirements which, if not followed, resulted in a law not being validly enacted.[68]

At points in her decision, Justice Abella seemed to refer to the Crown having an obligation to consult in relation to both executive and legislative activities. At other points in her decision, however, she stated clearly that Parliament has a duty to consult.[69] For example, she wrote that "[t]he position that the honour of the Crown does not bind Parliament strikes me as untenable in light of this Court's Aboriginal law jurisprudence"[70] and that the Honour of the Crown "attaches to all exercises of sovereignty."[71]

In the next three sections, we analyse the key analytical moves that led the majority to conclude that no duty to consult was owed on the facts of the case. First, we argue that the Court ought to have engaged with the text and context of *Treaty 8*. Instead of asking whether the Crown has a duty to consult before proposing legislation that may impact upon section 35 Aboriginal or treaty rights, the Court ought to have asked whether, given the text and context of *Treaty 8*, the Mikisew Cree were entitled to be consulted prior to the enactment of the two omnibus environmental protection bills. Second, we question the Court's conclusion that everything that occurs in the pre-legislative phase is legislative, rather than executive in character. And third, we argue that the majority's analysis would have been more compelling if it had distinguished the question of whether there was a duty to consult

66. *Ibid* at para 92.
67. *Ibid* at para 93.
68. *Ibid* at paras 96–97.
69. *Ibid* at para 57.
70. *Ibid*.
71. *Ibid* at para 78.

from the question of how courts ought to enforce that duty. This may have opened up the possibility of arriving at a conclusion that gave effect to the full range of constitutional imperatives at play.

II. TREATY ISSUES

Mikisew Cree 2018, was a "first look" case. Prior to the appeal, the Supreme Court had never ruled on whether a constitutional duty to consult might be owed as part of the legislative process—in fact, the Court had explicitly reserved the issue in prior cases.[72] Despite this, and despite the fact that the Court was unanimous in concluding that the Federal Court lacked jurisdiction to hear the case, the Court decided the issues fully, without distinguishing between treaty and non-treaty cases, let alone wrestling with the particular treaty context. The majority simply concluded that no duty to consult is owed with respect to legislative action.

This approach clashes with the general approach of deciding significant constitutional questions incrementally.[73] It is also a departure from the duty to consult jurisprudence, which has always emphasized the importance of adopting a contextual, case-by-case approach.[74] In *Haida Nation*, the Court established the broad framework of the duty to consult in the context of an unresolved Aboriginal title claim. The content of the duty has since been elaborated in a variety of other

72. *Rio Tinto*, *supra* note 56 at para 44. It might be argued that the Court was analogizing to consultation obligations arising from administrative fairness requirements. However, the constitutional duty to consult is distinct in scope. See Lorne Sossin, "The Duty to Consult and Accommodate: Procedural Justice as Aboriginal Rights" (2010) 23 Can J Admin L & Prac 93 at 106–07.

73. In *Vancouver (City) v Ward*, 2010 SCC 27, [2010] 2 SCR 28 at para 21, the Supreme Court emphasized the importance of incrementalism in new areas of the law. In *Nevsun Resources Ltd v Araya*, 2020 SCC 5 at para 159, Brown and Rowe JJ (dissenting in part) stressed the linkage between judicial incrementalism and respect for the separation of powers. See also Jula Hughes, Vanessa MacDonnell & Karen Pearlston, "Equality & Incrementalism: The Role of Common Law Reasoning in Constitutional Rights Cases" (2014) 44:3 Ottawa L Rev 467.

74. See *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73 at para 11, [2004] 3 SCR 511 [*Haida Nation*]:

> This case [on the duty to consult] is the first of its kind to reach this Court. Our task is the modest one of establishing a general framework for the duty to consult and accommodate, where indicated, before Aboriginal title or rights claims have been decided. As this framework is applied, courts, in the age-old tradition of the common law, will be called on to fill in the details of the duty to consult and accommodate.

contexts, including in relation to Aboriginal rights,[75] and existing[76] and future[77] treaty rights.[78] It has been refined procedurally in cases in the administrative law context.[79] The duties of different public actors have been explored,[80] as have the demands of consultation in relation to both communal and individual beneficiaries.[81] The Court has also insisted that the degree of consultation required is highly contextual,[82] and has developed a nuanced account of the relationship between the duty to consult and other constitutional and fiduciary duties. In short, the jurisprudential project of articulating the duty to consult has been ongoing, multifaceted and incremental.

Building on this approach, we suggest that rather than asking whether the Crown has a duty to consult in the context of proposed legislation in the abstract, the Court should have asked whether the text and context of *Treaty 8* rise to a duty to consult with Mikisew Cree First Nation prior to introducing environmental legislation that could impact upon the exercise of their hunting, trapping and fishing rights under *Treaty 8*. We say this for three reasons. First, the scope of the duty to consult may be different when it arises from a treaty rather than from an Aboriginal rights or title claim that has yet to be determined. Second, the specific promises made by the treaty commissioners in the context of the Treaty negotiations are relevant to determining the existence and scope of the duty to consult.[83] And third, it may be legally significant that *Treaty 8*, like other numbered treaties, is a post-Confederation treaty.

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75. *Ktunaxa Nation v British Columbia (Forests, Lands and Natural Resource Operations)*, 2017 SCC 54, [2017] 2 SCR 386 at para 79.

76. *Mikisew Cree* 2005, *supra* note 9.

77. *Rio Tinto*, *supra* note 56 at para 50.

78. See generally Karen Drake, "The Trials and Tribulations of Ontario's *Mining Act*: The Duty to Consult and Anishinaabek Law" (2015) 11:2 MJSDL 184.

79. *Clyde River (Hamlet) v Petroleum Geo-Services Inc*, 2017 SCC 40, [2017] 1 SCR 1069; *Chippewas of the Thames First Nation v Enbridge Pipelines Inc*, 2017 SCC 41, [2017] 1 SCR 1099.

80. See Felix Hoehn & Michael Stevens, "Local Government and the Crown's Duty to Consult" (2017) 55 Alta L Rev 971.

81. *Behn v Moulton Contracting Ltd*, 2013 SCC 26, [2013] 2 SCR 227 [*Behn*].

82. *Haida Nation*, *supra* note 74; *Taku River Tlingit First Nation v British Columbia (Project Assessment Director)*, 2004 SCC 74, [2004] 3 SCR 550; *Rio Tinto*, *supra* note 56.

83. In treaty interpretation cases, the salience of Commissioner reports is not in dispute. It is supported by the treaty jurisprudence, *infra* note 89.

In the treaty context, consultation is a component of treaty implementation, and determining whether there is a duty to consult begins with the treaty itself. Some of the difficulties generally associated with the duty to consult are therefore attenuated in the treaty context. For example, one challenge with the duty to consult is that consultation may require a significant investment of resources for governments and Indigenous communities alike. Interpreting the duty broadly may overtax communities and delay important economic development decisions. This risk is greatly reduced in the treaty context, because the treaty sets out the relevant rights and, by extension, provides guidance on when, specifically, consultation is required. A related concern is that it can be difficult for the Crown to predict when its actions might impact upon Aboriginal rights or title that have yet to be established. At the early stages of policy development, governments may be uncertain about which legislative initiatives might have such effects, and the First Nation may not be in a position to give notice of their interest until proposed legislation becomes public at first reading. In the treaty context, by contrast, the Crown is always on notice.[84]

There are a number of distinct benefits to beginning the analysis with a discussion of the Treaty. First, prior to *Mikisew Cree* 2018, the Supreme Court had considered *Treaty 8* on at least six occasions.[85] In these prior cases, and in a number of decisions of lower appellate courts,[86] the courts had articulated an understanding of the overall history, context, meaning and purposes of *Treaty 8*, and its hunting, trapping and fishing rights provisions in particular. These cases have been informed by, and have also prompted, a considerable historical and legal academic literature.[87] Anchoring the decision in the Court's

84. *Mikisew Cree* 2005, *supra* note 9 at para 34.

85. *R v Horseman*, 1990 CanLII 96 (SCC), [1990] 1 SCR 901 [*Horseman*]; *Badger*, *supra* note 9; *Ross River Dena Council Band v Canada*, 2002 SCC 54, [2002] 2 SCR 816; *Mikisew Cree* 2005, *supra* note 9; *Behn*, *supra* note 81; *Grassy Narrows First Nation v Ontario (Natural Resources)*, 2014 SCC 48, [2014] 2 SCR 447.

86. See e.g. *R v Van der Peet*, 1993 CanLII 4519 (BC CA) [*Van der Peet*]; *Canada v Benoit*, 2003 FCA 236; *Prophet River First Nation v Canada (AG)*, 2017 FCA 15; *Fort McKay First Nation v Prosper Petroleum Ltd*, 2019 ABCA 14.

87. Examples include Fumoleau, *supra* note 1; Ray, *supra* note 1; Rachel Gutman, "The Stories We Tell: Site-C, Treaty 8, and the Duty to Consult and Accommodate", (2018) 23 Appeal 3; Robert Metcs and Christopher G Devlin, "Land Entitlement Under Treaty 8", (2004) 41:4 Alta L Rev 951; Monique M Ross and Cheryl Y Sharvit, "Forest Management in Alberta and Rights to Hunt, Trap and Fish Under Treaty 8", (1998) 36:3 Alta L Rev 645; Alexander Buchan, "Does the Duty to Consult Create Economic Uncertainty? How Greater Recognition of Self-Determination Can Benefit Both Industry and Indigenous Peoples" (2019) 3:2 Lakehead LJ 78; Graham R Statt, "Tapping Into Water

prior interpretation of *Treaty 8* would have permitted the Court to better evaluate the duty to consult claim under consideration.

Second, answering the narrower question posed above—does *Treaty 8* give rise to a duty to consult with Mikisew Cree First Nation before introducing environmental legislation that could impact upon the exercise of their rights under *Treaty 8*?—would have allowed the Court to dismiss some of the *in terrorem* arguments about the consequences of recognizing a duty to consult in the case. For example, Justice Rowe's concern about the machinery of government "effectively grinding to a halt" should a duty to consult be recognized loses much of its bite once the legal question is properly contextualized and viewed as a matter of treaty implementation.

Third, beginning with the Treaty text and context would have been in line with the Court's general approach to cases involving treaties, including treaty cases involving the duty to consult. We hasten to add that our argument is not that the Court ought to have interpreted *Treaty 8* in a particular way. Our claim is merely that *Mikisew Cree* 2018 is a treaty case and that treaty interpretation should have formed a part, and ideally the starting place, of the analysis. Doing so would have invited a consideration of the canons of treaty interpretation. As the Court has recognized on a number of occasions,[88] treaty cases require regard to the treaty text and context, including any oral terms.[89]

Following this approach in *Mikisew Cree* 2018 was especially warranted because of the particular treaty context. The treaty commissioners made specific promises regarding future legislation, and reported to Ottawa that without these promises, *Treaty 8* would not have been signed.[90] As Sopinka J noted in *Badger*, the commissioners assured

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Rights: An Exploration of Native Entitlement in the Treaty 8 Area of Northern Alberta" (2008) 18:1 CJLS 103.

88. *R v Marshall,* [1999] 3 SCR 456, 1999 CanLII 665 (SCC) at para 11 [*Marshall*], citing *Delgamuukw v British Columbia*, [1997] 3 SCR 1010, 1997 CanLII 302 (SCC) at para 87 [*Delgamuukw*] and *R v Sioui*, [1990] 1 SCR 1025, 1990 CanLII 103 (SCC) at para 1045 [*Sioui*] per Binnie J for the majority, and at para 78 per McLachlin J (as she then was) in dissent, but not on this point. See also *R v Morris*, 2006 SCC 59, [2006] 2 SCR 915 at para 18.

89. *Marshall*, *supra* note 88 at para 12, citing *Guerin v R*, [1984] 2 SCR 335, 1984 CanLII 25 (SCC) at 388. See also *Drake*, *supra* note 78 at 206–07.

90. The Commissioner reported that their "chief difficulty was the apprehension that the hunting and fishing privileges were to be curtailed" and that in order to get the treaty signed, they had to provide solemn reassurances that no such laws would be made. This, too, the Court had previously discussed in a prior *Treaty 8* case, *R v Horseman*, *supra* note 85 per Cory J for the majority at 929, per Wilson J at 910.

their new treaty partners that "only such laws as to hunting and fishing as were in the interest of the Indians and were found necessary in order to protect the fish and fur-bearing animals would be made, and that they would be as free to hunt and fish after the treaty as they would be if they never entered into it."[91]

The wording of this assurance is significant as it speaks directly to the legislative amendments in issue, i.e. changes to environmental protection regulations. The omnibus bills went to the core of this treaty promise. Further, the commissioners assured the Indigenous *Treaty 8* signatories that laws would be restricted to those that were "in the interest of the Indians." The Aboriginal rights jurisprudence is clear on the importance of the Indigenous perspective of the rights in question, and the duty to consult is an important mechanism for ensuring that the interests and preferences of Indigenous Peoples are heard.[92] Based on the language of *Treaty 8*, it is impossible to imagine that Canada could determine whether proposed legislation is "in the interests of the Indians" without first hearing from the First Nations affected. The treaty context therefore strongly supports a duty to consult with respect to legislative action. Yet, this context was not considered by the Supreme Court.

Finally, the Supreme Court's treaty interpretation jurisprudence sheds some light on whether a duty to consult is owed when legislation is proposed that may impact upon Aboriginal or treaty rights. The Court has articulated a typology of different types of treaties, each of which attracts somewhat different interpretive approaches.[93] In *Beckman v Little Salmon/Carmacks First Nation*, the Supreme Court distinguished between historical and modern treaties, noting that historical "treaties were the means by which the Crown sought to reconcile the Aboriginal inhabitants of what is now Canada to the assertion of European sovereignty over the territories traditionally occupied by First Nations."[94]

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91. *Badger*, *supra* note 9 at para 39 [emphasis in original].

92. *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44, [2014] 2 SCR 257 at para 35; *Drake*, *supra* note 78 at 187; *Carrier Sekani Tribal Council v British Columbia (Utilities Commission)*, 2009 BCCA 67 at para 65.

93. For example, *Badger*, *supra* note 9; *Simon v R*, [1985] 2 SCR 387, 1985 CanLII 11 (SCC); *Sioui*, *supra* note 88.

94. *Beckman v Little Salmon/Carmacks First Nation*, 2010 SCC 53, [2010] 3 SCR 103 at para 8 [*Beckman*] [emphasis added].

The Court went on to say that "[u]nlike their historical counterparts, the modern comprehensive treaty is the product of lengthy negotiations between well-resourced and sophisticated parties."[95]

However, not all historical treaties fit the description in *Little Salmon/ Carmacks*. The numbered treaties occupy a particular place in treaty history: they are not historical treaties in the sense of the Maritime Peace and Friendship Treaties, entered into in the context of military conflict between competing colonial powers, or even the named treaties of the pre-Confederation period. While post-Confederation, pre-modern numbered treaties share the power imbalance and resource problems of their historical antecedents, they involve Canada as a treaty partner, and may better be understood as examples of settler colonialism. As post-Confederation treaties, they involve Canada as a persisting contemporary legal entity rather than a successor to the British Crown. Obligations Canada incurred in the process of entering into *Treaty 8* undoubtedly remain Canada's obligations. At the same time, they are clearly not like modern comprehensive treaties.

In terms of interpretive method, the Supreme Court has therefore generally and rightly treated the numbered treaties as historical treaties. Thus, as discussed above, the historical treaty text is not read as a complete code, and the interpretation of the treaty text will routinely require recourse to contextual extrinsic aids, including any reported oral terms.[96] A significant power and resource imbalance is presumed, as the Indigenous treaty partner may have relied on interpreters, would not have had access to legal advice, and the government controlled the drafting of the written text. Consistent with this approach, in its first *Treaty 8* case, the Court recognized that the treaty text should be "liberally construed and doubtful expressions resolved in favour of the Indians."[97]

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95. *Ibid* at para 9.

96. On interpretive canons and principles regarding treaties more generally and the importance of careful attention to context, see Gordon Christie, "Justifying Principles of Treaty Interpretation" (2000) 26 Queen's LJ 143; Leonard I Rotman, "Taking Aim at the Canons of Treaty Interpretation in Canadian Aboriginal Rights Jurisprudence" (1997) 46 UNBLJ 11; Michael Coyle, "As Long as the Sun Shines: Recognizing that the Treaties Were Intended to Last" in John Borrows and Michael Coyle, eds, *The Right Relationship: Reimagining the Implementation of Historical Treaties* (Toronto: University of Toronto Press, 2017) 39.

97. *Horseman*, *supra* note 85, citing *Nowegijick v R*, [1983] 1 SCR 29, 1983 CanLII 18 (SCC) at 36 and *Simon*, *supra* note 93 at 402.

Yet in other ways, the post-Confederation treaties are closer to modern treaties than pre-Confederation treaties. Canadian government officials negotiated these treaties understanding that their marching orders came from Ottawa and no longer from London. The Indigenous treaty partners had more experience with settlers and their laws and modes of governance than would have been the case when the Atlantic Peace and Friendship Treaties were signed. Again, the Supreme Court speaks to this in its earlier *Treaty 8* jurisprudence.[98] The treaty text and context reflect this greater familiarity, addressing issues the Indigenous signatories knew were likely to be the source of ongoing concern. Reading the treaty text in its context makes it clear that the Indigenous signatories saw government regulation of hunting and fishing as a core concern. The signatories of *Treaty 8* could not have anticipated that more than a century later, consultation and accommodation were going to become key mechanisms for treaty implementation. Modern treaties include express consultation obligations on the very questions that have given rise to *Treaty 8* cases, including taking up land and the regulation of hunting.[99] It is evident from *Mikisew Cree* 2005 that a duty to consult may arise in the treaty context under section 35 where the historical treaty is silent on consultation.[100] Even in modern treaties, as the Court indicated in *Beckman v Little Salmon/Carmacks First Nation*, the Supreme Court will not interpret the treaty text as a complete code and require section 35 consultation in addition to consultation contemplated in the treaty text if the honour of the Crown demands it.[101]

In short, beginning with the Treaty is both supported by the jurisprudence and sheds considerable light on the duty to consult claim raised by Mikisew Cree First Nation. In the section that follows, we shift our attention to a critical conclusion a majority of the Supreme Court reached on its way to finding that no duty to consult was owed: that everything that occurs as part of the pre-legislative process is legislative, rather than executive in character.

98. *Badger*, *supra* note 9 at para 53.

99. *Beckman*, *supra* note 94 at para 9.

100. *Mikisew Cree* 2005, *supra* note 9.

101. *Ibid* at para 38.

III. EXECUTIVE VS LEGISLATIVE

The majority's conclusion that the legislative process extends as far back as the most embryonic of policy discussions had significant consequences for Mikisew Cree First Nation's duty to consult claim. As the case law currently stands, some Crown conduct must be identified before a duty to consult can be recognized, because the duty to consult is an obligation owed by the Crown.[102] In three separate opinions, neither Justice Karakatsanis, Justice Brown nor Justice Rowe was able to locate any. Instead, they concluded that everything that occurs during the pre-legislative phase is legislative rather than executive in character.

In this section we delve more deeply into this aspect of the Court's reasoning. We suggest that the majority's conclusion could have better accounted for the realities of the policy process, in which legislation is ever only one option for pursuing a policy goal. We note that the majority's characterization of the pre-legislative process is at odds with the jurisprudence of courts in other jurisdictions on this issue. And we suggest that the majority's conclusion might have been different if it had considered *Treaty 8* in more detail. In our view, had the Court's analysis been grounded in *Treaty 8*, the Court would likely have concluded that *some* institution—be it the executive or the legislature—had a duty to consult Mikisew Cree First Nation prior to enacting legislation that could impact upon its treaty rights.

It is important to begin this discussion by acknowledging that the roles of the three branches of state are not, and have never been, "pure."[103] As Justice Karakatsanis noted in her opinion in *Mikisew Cree* 2018, "[t]here 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.'"[104] While the executive may be engaged primarily in the implementation of law, its role is not thus confined. It performs a legislative function when it promulgates

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102. *Rio Tinto*, *supra* note 56 at paras 1, 42–44.

103. See e.g. *Doucet-Boudreau*, *supra* note 15 at para 56, noting that there is not "a bright line separating these functions [executive, legislative and judicial] in all cases."

104. *Mikisew Cree* 2018, *supra* note 4 at para 33, citing *Reference re Canada Assistance Plan (BC)*, [1991] 2 SCR 525, 1991 CanLII 74 (SCC) at 559 [*Assistance Plan (BC)*], quoting Walter Bagehot, *The English Constitution* (London: Henry S King, 1872) at 14 [emphasis in original].

regulations, for example.[105] Some administrative decision-makers, who are part of the executive, operate in much the same way as courts.[106] The functions of the other branches of state are similarly mixed. Legislatures sometimes act in an adjudicative capacity. When the Speaker is required to make an important decision on a matter of parliamentary procedure, for example, they typically deliberate and produce a written decision, which serves as a precedent in future cases. Committees of the House of Commons and the Senate are responsible for implementing the financial and human resources rules of the chambers, thus acting in an executive, and sometimes also in an adjudicative, capacity.[107] The courts regularly engage in an incremental form of law-making through the development of the common law and through statutory interpretation.

Given the overlapping functions of the branches of state, it is somewhat surprising that the majority concluded that the pre-legislative process was purely legislative in character. The policy process (which may or may not result in legislation being proposed) unfolds within the executive and is managed by public servants who report to the political executive.[108] Legislative functions are not sealed off from the policy-making and program implementation aspects of the executive's role. On the contrary, law-making, policy-making and program implementation tend to be intertwined. To give just one example, new laws are sometimes the product of executive actors identifying deficiencies in how existing schemes operate. In searching for a solution to such deficiencies, various options are typically considered, only some of which may involve new legislation.

In the context of the Court's own acknowledgment that these roles are not pure, relying on an essentialized view of the roles of each of the branches of state to rule out a duty to consult is problematic. Lest it be thought that this view of the pre-legislative process is inevitable, moreover, it is perhaps helpful to note that Australian courts have adopted the opposing view. In *Sportsbet P/L v NSW*,[109] the Federal Court

105. We are grateful to Ted Livingstone for pointing this out.

106. Comment by Aileen Kavanagh, Comparative Constitutional Roundtable, University of New South Wales, December 12, 2019.

107. See House of Commons, "Board of Internal Economy," online: <www.ourcommons.ca/boie/en>; Senate of Canada, "Standing Committee on Internal Economy, Budgets and Administration," online: <sencanada.ca/en/committees/ciba/>.

108. Keyes, *supra* note 12; Böhret and Konzendorf, *supra* note 12.

109. *Sportsbet Ply Ltd v State of New South Wales (No 3)*, [2009] FCA 1283 [*Sportsbet*].

of Australia was asked to conclude that parliamentary privilege protected certain documents produced in connection with the drafting of legislation from disclosure in litigation.[110] These documents included: "(i) documents constituting or recording communications with Parliamentary Counsel for the purpose of preparing a draft bill; (ii) documents created for the purpose of a Minister's use in Parliament; and (iii) documents relating to the preparation of a draft bill."[111] The Court held that with the exception of a single document intended for the Minister's use in Parliament, the materials were not protected by parliamentary privilege. Justice Jagot explained:

> I do not accept the State's proposition that every document concerning the preparation of draft legislation is protected by parliamentary privilege because of the fact that, ultimately, Parliament makes legislation. The proposition depends on a connection with the business of Parliament far more distant and tenuous than that accepted as founding the privilege in *Rowley v O'Chee* [the leading Australian case on parliamentary privilege].[112]

Finally, as we explain in further detail below, the effect of the majority's reasoning in *Mikisew Cree* 2018 is to release Canada from its treaty obligations, something the Supreme Court could not have intended. The majority's conclusion that there is no Crown conduct at the pre-legislative stage means that no duty to consult is triggered prior to legislation being introduced, nor is it engaged during the legislative process. In other words, despite an explicit provision in *Treaty 8* imposing constraints on federal law-making in relation to hunting, trapping and fishing, and despite the fact that the duty to consult is recognized by the Supreme Court as an important component of treaty implementation, the majority concluded that there was no duty to consult Mikisew Cree First Nation prior to enacting the environmental legislation in question. This means that the First Nation is prevented from raising concerns about how new laws could affect their treaty rights until after a law is enacted. At that point, a violation of those rights may have crystallized, and the question is not whether

110. See Gabrielle Appleby, "The Voice to Parliament, the Parliament and the Courts" (2018) (unpublished; copy on file with authors).

111. *Sportsbet*, *supra* note 109, at para 15.

112. *Ibid* at para 21.

rights might still be respected but rather whether the violation is justified.[113] This is similar to the type of situation the duty to consult was designed to prevent.[114] In this respect, it is difficult to square *Mikisew Cree* 2018 with the Court's broader jurisprudence on Aboriginal and treaty rights, which strongly discourages unilateralism and seeks to promote consensus-based decision-making between Indigenous peoples and the federal government.[115]

IV. LIMITED SOVEREIGNTY AND THE SEPARATION OF POWERS

Mikisew Cree 2018 heralds the return of a muscular conception of parliamentary sovereignty that seemed to have disappeared with the entry into force of the *Constitution Act, 1982*. In the *Secession Reference*, the Supreme Court explained that "with the adoption of the Charter, the Canadian system of government was transformed to a significant extent from a system of Parliamentary supremacy to one of constitutional supremacy."[116] By adopting a constitutional bill of rights and Aboriginal and treaty rights enforced through judicial review, the 1982 constitutional reforms discarded each of the three tenets of parliamentary sovereignty as described by Albert V Dicey: (1) that Parliament has "the right to make or unmake any law whatever;" that (2) "no person or body" is authorized "to override or set aside the legislation of Parliament;"[117] and (3) that parliamentary sovereignty is "absolute and continuing,"[118] meaning that a parliament cannot bind future parliaments either substantively or procedurally.[119] To the extent

113. Williams, *supra* note 26.

114. *Haida Nation*, *supra* note 74 at para 33.

115. The *locus classicus* is Lamer's CJ oft-quoted observation in *Delgamuukw* that we are all here to stay, noting that Indigenous and governmental parties should seek to find consensus through negotiation rather than litigation. *Delgamuukw*, *supra* note 88.

116. *Secession Reference*, *supra* note 13 at para 72. See generally Vincent Kazmierski, "Draconian but not Despotic: The 'Unwritten' Limits of Parliamentary Sovereignty in Canada" (2010) 41:2 Ottawa L Rev 245. For a comprehensive explanation of how the Supreme Court's jurisprudence related to Indigenous peoples is inconsistent with the *Secession Reference*, *supra* note 13, see Jeffrey Hewitt, "We Are Still Here," Presentation given at Conference Reflecting on the Legacy of Chief Justice McLachlin, 11 April 2018, Ottawa, Ontario.

117. Albert V Dicey, *Introduction to the Study of the Law of the Constitution*, 10th ed (London: Macmillan, 1965) at 39–40.

118. Peter C Oliver, "Sovereignty in the Twenty-First Century" (2003) 14:2 King's College LJ 137 at 148.

119. Dicey, *supra* note 117 at 64–65; Oliver, *supra* note 118 at 153.

that parliamentary sovereignty retains its status as a constitutional principle in the post-1982 era, then, it is necessarily diminished, and susceptible to being either reconciled with or superseded by other constitutional imperatives.[120] As the Supreme Court has repeatedly held, moreover, "[o]ne part of the Constitution cannot abrogate another part of the Constitution."[121] Instead, "[…] the Constitution is to be read as a unified whole."[122] It is therefore somewhat surprising that in *Mikisew Cree* 2018, parliamentary sovereignty was relied upon as a basis for refusing to recognize a duty to consult where proposed legislation could impact upon the Mikisew Cree's rights under *Treaty 8*.

Three observations are relevant in positioning parliamentary sovereignty and the related principle of parliamentary privilege relative to the other constitutional rights and principles engaged in the case.[123] The first is that in *Mikisew Cree* 2018, the principle of parliamentary sovereignty gained much of its salience from the majority's conclusion that everything that occurred during the pre-legislative phase was legislative, rather than executive, in character. In addition to prompting the conclusion that there was no relevant Crown conduct to which the duty to consult could attach, this characterization amplified the conceptual space occupied by parliamentary sovereignty and rendered a non-invasive, executive-driven pre-legislative duty to consult unavailable.

The second is that of the justices in the majority, only Justice Rowe expressed concern that implementation of the duty to consult *by legislators* would interfere with parliamentary sovereignty. Justices Karakatsanis and Brown had a different concern: they worried that *judicial enforcement*

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120. See *Mikisew Cree* 2018, *supra* note 4 at para 70, *Secession Reference* (Abella J), *supra* note 3; *Babcock v Canada (AG)*, 2002 SCC 57, [2002] 3 SCR 3 [*Babcock*]; *New Brunswick Broadcasting Co v Nova Scotia (Speaker of the House of Assembly)*, [1993] 1 SCR 319, 1993 CanLII 153 (SCC); *Ref re Remuneration of Judges of the Prov Court of PEI; Ref re Independence and Impartiality of Judges of the Prov Court of PEI*, [1997] 3 SCR 3, 1997 CanLII 317 (SCC) [*Judges Remuneration Reference*]; *Newfoundland (Treasury Board) v NAPE*, 2004 SCC 66, [2004] 3 SCR 381; Vanessa MacDonnell, "The New Parliamentary Sovereignty" (2016) 21:1 Review of Constitutional Studies 13; Oliver, *supra* note 118; Jean Leclair, "Canada's Unfathomable Unwritten Constitutional Principles" (2002) 27:2 Queen's LJ 389; Gabrielle Appleby, "The 2018 Australian High Court Constitutional Term: Placing the Court in its Inter-Institutional Context" (2021) 44:1 UNSWLJ 267.

121. *Canada (House of Commons) v Vaid*, 2005 SCC 30, [2005] 1 SCR 667 at para 30 [Vaid]; see also *Adler v Ontario*, [1996] 3 SCR 609, 1996 CanLII 148 (SCC) at para 38 and *Reference re Bill 30, An Act to amend the Education Act (Ont)*, [1987] 1 SCR 1148, 1987 CanLII 65 (SCC) at 1206.

122. *Judges Remuneration Reference*, *supra* note 120 at para 107.

123. On the importance of contextual interpretation, see *Edmonton Journal v Alberta (AG)* [1989] 2 SCR 1326, 1989 CanLII 20 (SCC).

of the duty to consult would violate parliamentary sovereignty. In other words, they were concerned that courts might violate parliamentary sovereignty if they were to adjudicate the sufficiency of the duty to consult in the legislative context. This is better understood as a separation of powers concern.

The third is that even on the settler colonial account of things, parliamentary sovereignty is limited by treaty rights.[124] The constitutional entrenchment of existing treaty rights in section 35 of the *Constitution Act, 1982* removed the legislature's ability to enact laws that interfere with these rights unjustifiably.[125] This limit sits alongside other well-recognized constraints on parliamentary sovereignty, some of which have existed since 1867, and others which are more recent.[126] The division of powers constrains both the federal and provincial governments in the types of laws they may enact, as does the *Canadian Charter of Rights and Freedoms*.[127] In short, even without considering the role treaties play in structuring the relationship between co-existing sovereignties, a matter to which we turn shortly, as a matter of settler law, the Parliament of Canada does not, and has never enjoyed, "complete" parliamentary sovereignty.[128]

The Supreme Court has relied on the principle of parliamentary sovereignty in a handful of decisions since 1982. In those cases, the Court invoked the principle to resist attempts to impose limits on Parliament's sovereign law-making sphere, usually through ordinary or quasi-constitutional law. In *Reference re Canada Assistance Plan (BC)*,[129] an opinion repeatedly cited by the Court in *Mikisew Cree* 2018, the Court referred to the principle of parliamentary sovereignty in

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124. Jacinta Ruru and Jacobi Kohu-Morris, "'*Maranga Ake Ai*' The Heroics of Constitutionalising *TeTiriti O Waitangi*/The Treaty of Waitangi in *Aotearoa* New Zealand" (2020) 48:4 Federal L Rev 556. See also Ryan Beaton, "The Crown Fiduciary Duty at the Supreme Court of Canada: Reaching Across Nations, or Held Within the Grip of the Crown?", *Canada in International Law at 150 and Beyond*, Paper No 6 (Waterloo (ON): Centre for International Governance Innovation, 2018), at 1: "[O]ne might say that the nation-with-nation vision is currently ascendant at the level of political and judicial rhetoric, while the vision of unilateral Crown sovereignty continues to govern in practice."

125. *R v Sparrow*, [1990] 1 SCR 1075, 1990 CanLII 104 (SCC) [*Sparrow*]; *Van der Peet*, *supra* note 86.

126. We are grateful to Peter Oliver for reminding us of this point.

127. Anne Bayefsky, "Parliamentary Sovereignty and Human Rights in Canada: The Promise of the Canadian Charter of Rights and Freedoms" (1983) 31:2 Political Studies 239; Janet Hiebert, "*Charter* Evaluations: Straining the Notion of Credibility" (June 2015) (unpublished; copy on file with author) at 3.

128. See generally Oliver, *supra* note 118.

129. *Assistance Plan (BC)*, *supra* note 104.

declining to recognize a requirement (derived from the doctrine of legitimate expectations in administrative law) that Canada obtains the consent of the province of British Columbia before proposing legislation that modified Canada's obligations under the *Canada Assistance Plan*, an agreement entered into by Canada and British Columbia as well as other provinces. Imposing such a requirement would exceed the "manner and form" requirements of the legislative process, the Court concluded, and interfere with parliamentary sovereignty.

The Supreme Court reached a similar conclusion in its unanimous decision in *Authorson*, though it did not explicitly invoke parliamentary sovereignty.[130] There, a group of veterans argued that under subsection 1(a) of the *Canadian Bill of Rights*, which secures "the right […] to life, liberty, security of the person and enjoyment of property, and the right not to be deprived thereof except by due process of law," they were entitled to notice and hearing before Parliament enacted legislation stripping them of their right to collect interest on funds the federal government had been administering on their behalves for decades. The Court concluded that the procedural rights the veterans sought were inconsistent with "[l]ongstanding parliamentary tradition," which "makes it clear that the only procedure due any citizen of Canada is that proposed legislation receives three readings in the Senate and House of Commons and that it receives Royal Assent".[131] To recognize further procedural requirements would represent a significant departure from this tradition and from the case law. It would also be inconsistent with Article 9 of the *Bill of Rights of 1689* ("Proceedings in Parliament ought not to be impeached or questioned in any Court or Place out of Parliament") and the preamble of the *Constitution Act, 1867*, which states that Canada is to have a Constitution "similar in principle to that of the United Kingdom."[132] The UK Constitution, the Court noted, did not limit Parliament in this way, nodding implicitly but unmistakeably to the principle of parliamentary sovereignty.

Parliamentary sovereignty also proved to be a decisive factor in *Babcock*, a challenge to provisions of the *Canada Evidence Act* which limited disclosure of cabinet confidences in ongoing litigation.[133] Babcock argued that these limits violated the rule of law, judicial independence

130. *Authorson v Canada (AG)*, 2003 SCC 39, [2003] 2 SCR 40 [*Authorson*].

131. *Ibid* at para 37 and headnote.

132. *Ibid* at paras 38–41 and headnote.

133. *Babcock*, *supra* note 120.

and the separation of powers. Invoking parliamentary sovereignty to reject the challenge, the majority explained that "[t]he[se] unwritten principles must be balanced against the principle of Parliamentary sovereignty,"[134] and concluded: "It is well within the power of the legislature to enact laws, even laws which some would consider draconian, as long as it does not fundamentally alter or interfere with the relationship between the courts and the other branches of government."[135] There had been no such interference in the case before the Court.

Finally, in *Imperial Tobacco*, the Court rejected a constitutional challenge brought by several tobacco companies to British Columbia legislation which made it easier for the province to recoup health care costs associated with tobacco consumption.[136] The legislation had retroactive effect and lowered the Crown's evidentiary burden in litigation. The tobacco companies argued that these aspects of the legislation undermined the rule of law and judicial independence. The Court rejected the claim, concluding that the law complied with the essential elements of the rule of law and judicial independence. In declining the invitation to interpret the rule of law to impose additional requirements on the law-making process over and above the existing manner and form requirements for the enactment of valid legislation, the Court stated that while the rule of law is a principle of constitutional significance, "several constitutional principles other than the rule of law that have been recognized by this Court—most notably democracy and constitutionalism—very strongly favour upholding the validity of legislation that conforms to the express terms of the Constitution."[137] While the Court did not speak in terms of parliamentary sovereignty, the implications for the protection of parliamentary sovereignty were again clear.

At first glance, the precedential value of *Assistance Plan (BC)*, *Authorson*, *Babcock*, and *Imperial Tobacco* appears to be that in each of them, the Court was asked, but declined, to recognize new limits on parliamentary sovereignty. However, all four cases can be distinguished from *Mikisew Cree* 2018 on the basis that no competing constitutional demand was engaged in those cases.[138] Although *Babcock* and *Imperial*

134. *Ibid* at para 55.

135. *Ibid* at para 57.

136. *British Columbia v Imperial Tobacco Canada Ltd*, 2005 SCC 49, [2005] 2 SCR 473.

137. *Ibid* at paras 60–66.

138. See *Mikisew Cree* 2018, *supra* note 4 at para 88 (Abella J). In *Assistance Plan (BC)*, *supra* note 104, the separation of powers was also at stake, but it leaned in the same direction as parliamentary sovereignty.

Tobacco seem to involve a clash between conflicting constitutional principles, a close reading of those decisions shows that the Court was not persuaded that other principles were engaged.[139] With no competing constitutional right, principle or interest to contend with, the Court was able to make easy work of the claim that additional limits should be imposed on parliament's sovereign law-making authority. In *Mikisew Cree* 2018, by contrast, more than one constitutional demand was engaged. We would argue that the relevant line of cases is therefore not the *Babcock* and *Imperial Tobacco* jurisprudence, but the authorities which establish that the different elements of Canada's constitution must be read together.[140] The source of the alleged duty to consult is the text and context of *Treaty 8*, a treaty that is constitutionally protected by virtue of section 35 of the *Constitution Act, 1982*. A review of the text and context of *Treaty 8* shows that the Government of Canada promised the Indigenous signatories that it would refrain from enacting laws that could negatively impact their hunting, trapping and fishing rights. Introducing legislation that could violate these rights would therefore give rise, at a minimum, to a duty to consult. While fulfilling the duty to consult in this context might limit parliamentary sovereignty, the precise nature and extent of this limitation requires further analysis. Moreover, it bears noting that Canada voluntarily assumed this limit on parliamentary sovereignty when it entrenched existing treaty rights in the constitution.[141] To interpret *Treaty 8* other than as imposing a limit on parliamentary sovereignty would release Canada from its treaty obligations.

One of the difficulties that arises in working through the legal issues in *Mikisew Cree* 2018 is that there is some uncertainty about who owes these obligations to Mikisew Cree First Nation in the present. The Supreme Court's Aboriginal law jurisprudence generally treats the Crown as the inheritor of treaty obligations. But this approach is an awkward fit when the promise relates to the legislative process, to laws that will or will not be enacted, and to the process to be followed prior to the enactment of particular laws. In these circumstances, courts ought to interpret these obligations in a manner that permits their meaningful

139. While it is possible that the rule of law was interpreted more narrowly as a result of the competing principle of parliamentary sovereignty, even this conclusion is dubious, given that the Court's decision adhered to the dominant interpretation of the rule of law.

140. See *supra* note 121.

141. For an analogous argument in the *Charter* context, see *Re BC Motor Vehicle Act*, [1985] 2 SCR 486, 1985 CanLII 81 (SCC).

fulfillment. In *Mikisew Cree* 2018, by contrast, the majority's reasoning had the effect of defeating constitutionally entrenched treaty obligations. This approach is difficult to reconcile with existing principles of treaty interpretation.

The Supreme Court was no doubt correct in stating in *Wells v Newfoundland* that "[l]egislatures are subject to constitutional requirements for valid law-making, but within their constitutional boundaries, they can do as they see fit."[142] But while this may have provided a full answer to the arguments advanced by the veterans in *Authorson* and the Province of British Columbia in *Re Canada Assistance Plan*, Mikisew Cree First Nation was arguing that the text and context of *Treaty 8* imposed an additional constitutional requirement for valid law-making. This argument was supported by the text and context of *Treaty 8* as well as by the Court's existing Aboriginal law jurisprudence. As Justice Abella noted in dissent in *Mikisew Cree* 2018:

> [i]n *Sparrow*, the Court found it impossible to conceive of s 35 as anything other than a constitutional limit on the exercise of parliamentary sovereignty. It seems to me quite ironic that parliamentary sovereignty would now be used as a shield to prevent the Mikisew's claim for consultation.[143]

This suggests that not only is parliamentary sovereignty not a limit on recognizing a duty to consult in relation to proposed legislation, but the opposite is true: the duty to consult, derived from constitutionally protected treaty rights, constrains parliamentary sovereignty.[144]

Jacinta Ruru and Jacobi Kohu-Morris reach a similar conclusion in relation to *Te Tiriti o Waitangi*, the *Treaty of Waitangi*. In urging New Zealand courts to enforce a bounded conception of parliamentary sovereignty, the authors explain that "parliamentary supremacy must be read as subject to Māori sovereignty to enable the intent of *teTiriti*: bicultural power sharing in a relationship of equals."[145] In other words, in *Mikisew Cree* 2018, the pre-existing sovereignty of Mikisew Cree First Nation should have been considered, and the Court ought to have recognized that *Treaty 8* provided the mechanism for reconciling

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142. *Wells v Newfoundland*, [1999] 3 SCR 199, 1999 CanLII 657 (SCC) at para 59, cited in *Authorson*, *supra* note 130 at para 39.

143. *Mikisew Cree* 2018, *supra* note 4 at para 86 (Abella J) [internal citations omitted].

144. *Ibid* at para 88 (Abella J).

145. Ruru and Kohu-Morris, *supra* note 124 at 569.

competing sovereignties.[146] Reconciling the competing sovereignties at stake in the case required the executive or the legislature to consult Mikisew Cree First Nation before legislation was enacted that could impact upon its treaty rights to hunt, trap and fish.[147] Given that the executive performs both executive and legislative functions, and that it is responsible for the development of legislation, it makes sense to conclude that the executive branch should fulfill this obligation prior to the introduction of legislation, and throughout the legislative process as required.

Turning to the question of judicial enforcement, it is clear that the majority's conclusion that the Crown does not owe a duty to consult was heavily influenced by its sense that courts cannot and should not adjudicate the sufficiency of what occurs during the legislative process. As we explain now, however, in the *Sparrow* decision, the Supreme Court sanctioned the very type of inquiry it rejected in *Mikisew Cree* 2018. Moreover, the Court has in numerous instances recognized the existence of a constitutional obligation but then concluded that judicial enforcement of that obligation would need to be attentive to separation of powers concerns.

The separation of powers is a long-standing principle of Canadian constitutional law. It operates, for example, to prevent a claimant from challenging a law on constitutional grounds until that law has been duly enacted.[148] In *Mikisew Cree* 2018, the majority assumed that recognizing a duty to consult in relation to legislation would violate the separation of powers and parliamentary sovereignty. However, it is difficult to see how the mere recognition of a constitutional duty to consult could raise separation of powers and parliamentary sovereignty concerns, particularly since this duty flows from the text and

146. See *Haida Nation*, *supra* note 74 at para 20: "Treaties serve to reconcile pre-existing Aboriginal sovereignty with assumed Crown sovereignty." See also Kent McNeil, "The Doctrine of Discovery Reconsidered: Reflecting on Discovering Indigenous Lands: The Doctrine of Discovery in the English Colonies, by Robert J Miller, Jacinta Ruru, Larissa Behrendt, and Tracey Lindberg, and Reconciling Sovereignties: Aboriginal Nations and Canada by Felix Hoehn" (2016) 53:2 Osgoode Hall LJ 699 at 700, 718–19; James Tully, *Strange Multiciplicity: Constitutionalism in an Age of Diversity* (Cambridge: Cambridge University Press, 1995); Joshua Nichols, "Claims of Sovereignty – Burdens of Occupation: William and the Future of Reconciliation" (2015) 48:1 UBC L Rev 221. For a discussion of "section 35 as jurisdictional in nature," see Joshua Nichols and Robert Hamilton, "In Search of Honourable Crowns and Legitimate Constitutions: *Mikisew Cree First Nation v Canada* and the Colonial Constitution" (2020) 70:3 UTLJ 341 at 357.

147. *Mikisew Cree* 2018, *supra* note 4 at para 87 (Abella J, dissenting).

148. *Assistance Plan (BC)*, *supra* note 104.

context of *Treaty 8* and from section 35 of the *Constitution Act, 1982* itself. In short, the majority did not do enough to distinguish the question of whether the Crown owes a duty to consult from the questions of how and when courts ought to review the adequacy of consultation[149]. This failure had a significant impact on its analysis, placing the majority judges in a position in which the recognition of a duty to consult also meant sanctioning judicial intrusion into a sphere long considered to be the domain of Parliament rather than the courts. Had the majority distinguished the question of whether such a duty existed from questions of enforcement, as Justice Abella did in dissent, it would have realized that the intrusion it feared was not inevitable.

The jurisprudence contains examples of courts reviewing the sufficiency of what occurs during the legislative process and of recognizing the existence of constitutional obligations that are only partially justiciable. With respect to the former, there are notable instances of courts inquiring into what transpired during the legislative process in both the UK and Canada.[150] Aileen Kavanagh suggests that this practice is much more common than is generally acknowledged.[151] In *Sparrow* itself, the justification analysis developed by the Court explicitly incorporated an assessment of whether consultation had preceded enactment of the legislation, thus mandating a judicial inquiry into the legislative process.[152]

With respect to the latter, in *Vaid*, the Supreme Court concluded that while the House of Commons was required to comply with human rights legislation, parliamentary privilege precluded human rights tribunals and courts from adjudicating human rights claims that flowed from the employment relationship between an employee of the House of Commons and the Chamber.[153] The Court distinguished between the recognition of a legal duty and the enforcement of that duty, concluding that it falls within its powers to recognize such a duty but not to supervise its enforcement. Similarly, in the *Secession Reference*, the

149. See generally Frank Michelman, "The Protective Function of the State in the United States and Europe: The Constitutional Question" in Georg Nolte, ed, *European and US Constitutionalism* (Cambridge: Cambridge University Press, 2005).

150. See Aileen Kavanagh, "Proportionality and Parliamentary Debates: Exploring Some Forbidden Territory" (2014) 34:3 Oxford J Leg Stud 443 [Kavanagh, "Forbidden Territory"]; see MacDonnell, *supra* note 120.

151. Kavanagh, "Forbidden Territory", *supra* note 150.

152. *Sparrow*, *supra* note 112; *Mikisew Cree* 2018, *supra* note 4 (Abella J).

153. *Vaid*, *supra* note 121.

Court concluded that a series of unwritten constitutional principles governed the question of whether the constitution permitted Québec to secede unilaterally. Taken together, these principles suggested a requirement of sufficient consent among the partners to Confederation for secession to be effective. The Court went on to explain, however, that the courts would not adjudicate the sufficiency of such consent. Rather, these were matters to be regulated by the political process.

There are good reasons for courts to delay reviewing the adequacy of consultation until after the legislative process has concluded. Beyond the parliamentary sovereignty, parliamentary privilege and separation of powers considerations, there are also practical reasons why reviewing the adequacy of consultation in the middle of the legislative process would be challenging. The content of legislation is not fixed until the moment it is enacted, and thus the scope of consultation required may also be uncertain. Reviewing the adequacy of consultation *post hoc* would permit the Court to review the sufficiency of consultation on a complete record (both in terms of the actual legislation enacted and the consultation conducted), while also responding meaningfully to the parliamentary sovereignty and separation of powers issues. This type of review would not interfere with parliamentary sovereignty or the separation of powers any more than the application of the *Sparrow* test.

The same cannot be said of merely recognizing a duty to consult, however. It may well be important for the courts to make a ruling during the legislative process that a duty to consult is owed. Merely recognizing the existence of the duty does not significantly impair parliamentary sovereignty and the separation of powers but is essential to ensuring proper consultation and treaty implementation.

In sum, the majority's application of the principles of parliamentary sovereignty and the separation of powers is not persuasive. In giving full effect to parliamentary sovereignty at the expense of the duty to consult, the Court did more than fail to reconcile competing constitutional imperatives. It protected a zone of law-making on parliamentary sovereignty grounds in which Parliament is not, in fact, sovereign. This conclusion follows, not because of some abstract theorizing, but because the Crown negotiated a treaty with the ancestors of the present-day

Mikisew Cree, a sovereign people, in which the Crown agreed to this (now constitutionalized) limitation on its sovereignty in circumstances in which the Crown was the primary beneficiary.[154]

The better view of the parliamentary sovereignty issues raised in *Mikisew Cree*, then, is that, as expressed by Justice Abella in her concurring reasons, "[a]s a constitutional imperative, the honour of the Crown cannot be undermined, let alone extinguished, by the legislature's assertion of parliamentary sovereignty."[155]

CONCLUSION

It is generally uncontroversial that where an alleged duty to consult arises from a treaty, courts should begin their analysis by considering whether the treaty gives rise to such a duty, expressly or contextually. As we have seen, in *Mikisew Cree* 2018, the Court's majority instead chose to proceed with barely a nod to the existence of *Treaty 8*, preferring to focus on high-level constitutional principles and doctrines to categorically rule out a duty to consult in the context of proposed legislation.

Whether the door is considered firmly closed on a duty to consult in this context, as Brown and Rowe JJ held, or whether the honour of the Crown may ultimately demand some alternative mechanism for addressing these issues *post hoc*, as Karakatsanis J suggests, the result is difficult to reconcile with the specific promises made by Canada to the Mikisew Cree in *Treaty 8*.

We agree that it is not obvious how the duty to consult would best be integrated into the legislative process. We also agree that there are normative and pragmatic limits on the role of the courts. But we conclude that *Treaty 8* would have offered an ideal, discrete context for developing the doctrine of the duty to consult with respect to legislation in a manner that reconciles it with the separation of powers and parliamentary sovereignty, rather than treating the latter doctrines as a trump card to oust the duty to consult.[156]

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154. In the New Zealand context, see Dame Sian Elias, "Sovereignty in the 21st Century: Another Spin on the Merry-Go-Round" (2003) 14:3 Public L Rev 148.

155. *Mikisew Cree* 2018, *supra* note 4 at para 55.

156. Abra Martin, "Mikisew Cree: A Lost Opportunity for Doctrinal Clarity on Constitutional Principles" (2021) 52:2 Ottawa L Rev 1.