Cassels

SCC Opens Door to more Litigation in *Mikisew Cree First Nation v. Canada (Governor General in Council)*

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On October 11, 2018, the Supreme Court of Canada (SCC or Court) found that the duty to consult was not triggered during the "law making process" in its decision *Mikisew Cree First Nation v. Canada (Governor General in Council)*.[1] Each justice of the SCC was in agreement over the dismissal of the appeal. However, the Court's decision was comprised of four separate sets of reasons providing divergent perspectives on the Crown's duty to consult during the legislative process and the applicability of the honour of the Crown to Parliament. By failing to reconcile these divergent perspectives, the SCC's decision will create greater uncertainty for Indigenous peoples and governments.

Facts

The facts date back to 2012, when the Minister of Finance introduced two omnibus bills to Parliament that replaced the *Canadian Environmental Assessment Act* and made significant amendments to the *Fisheries Act*.[2] The Mikisew Cree First Nation (Mikisew), who are situated primarily in northeast Alberta, were not consulted on either of the bills at any stage in their development or prior to the granting of royal assent.[3] Concerned that their interests may be impacted by the resulting legislative change, the Mikisew brought an application for judicial review.[4]

At the Federal Court, the reviewing judge concluded that steps made by Cabinet ministers prior to introducing a bill to Parliament could trigger the duty to consult, and that the Mikisew were entitled to notice and an opportunity to provide submissions.[5]

On appeal, a majority of the Federal Court of Appeal found that 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, separation of powers, and parliamentary privilege.

The SCC's decision was delivered in four parts: two justices (led by Abella J.) suggested that the duty to consult will arise in the creation of legislation; three justices (led by Karakatsanis J.) concluded that the duty to consult did not arise in the creation of legislation, but that it is possible for future action to be available when the honour of the Crown isn't met; and four justices (producing two sets of concurring reasons by Brown J. and Rowe J.) suggested that the legislative function is not subject to a duty to consult, the honour of the Crown, or any similar obligation, in any circumstance.

While the majority of the Court concluded that "the law-making process does not constitute 'Crown conduct' that triggers the duty to consult,"[6] the Court is divided on whether other remedies might exist, and whether the honour of the Crown imposes obligations on legislation and the legislative process. Below is a review of the key principles applied by the Court in determining that the legislative process does not trigger the duty to consult.

Relevant Legal Principles

The decision turned on two distinct principles of law. The first principle is the honour of the Crown, which requires that the Crown (in this case, representing the Government of Canada) act honorably in its dealings with Aboriginal peoples.[7] The second principle is a set of related democratic principles, which include parliamentary sovereignty, the separation of powers, and parliamentary privilege.

i. The Honour of the Crown

"The honour of the Crown is a foundational principle of Aboriginal law that governs the relationship between the Crown and Aboriginal peoples."[8] The honour of the Crown has been described as a constitutional principle that gives rise to different duties in different circumstances, and can impose "a heavy obligation" on the Crown.[9] "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."[10]

a. Perspective of Abella and Marin JJ.

According to the dissenting opinion of Abella and Marin JJ., "the duty to consult itself attaches to **all exercises of Crown power**, including legislative action [*emphasis added*]."[11] Exempting legislative action would reduce the available protection of Aboriginal and treaty rights, potentially creating a loophole for activities that would otherwise require consultation if conducted through executive action.[12] Abella J. argues that allowing the legislature to avoid consultation is contrary to the spirit of earlier jurisprudence that introduced the legal principle of the Crown's duty to consult.[13]

b. Perspective of Brown, Rowe, Moldaver and Côté JJ. (in two parts)

In response, four members of the Court argue that the honour of the Crown (and the resulting duty to consult) is not at stake in the creation of legislation. This technical argument identifies the role of the Crown in Canada as predominantly an executive role, and suggests that "the steps taken as part of the parliamentary process of law-making, including royal assent, are not 'the vehicles through which the Crown acts.'"[14] As a consequence, while the duty to consult may attach to all exercises of Crown power, "the Crown does not enact legislation. Parliament does. The honour of the Crown does not bind Parliament."[15]

c. Perspective of Karakatsanis and Gascon JJ. and Wagner C.J.

The remaining three justices take a less clear approach to the principle of the honour of the Crown. These justices state that "the duty to consult doctrine is ill-suited to be applied directly to the law-making process."[16] However, they also suggest that permitting the Crown to impact Aboriginal rights through legislation without consultation, in a way that would not be possible through executive action, "would undermine the endeavor of reconciliation."[17] To reconcile these conclusions, the three justices propose that **new doctrines**, distinct from the duty to consult, **could yet arise**, which could help "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."[18] Such doctrines could address circumstances where legislative changes would remove regulatory triggers for the duty to consult.[19] Similarly, declaratory relief could be used in cases "where legislation is enacted that is not consistent the Crown's honourable dealings towards Aboriginal peoples."[20]

Between the four sets of reasons, and three distinct perspectives, the majority (represented by Abella and Karakatsanis JJ.'s reasons) found that the honour of the Crown applies to legislation (though only to "enacted legislation" and not the legislative process[21]). The majority (represented by Brown, Rowe and Karakatsanis JJ.'s reasons) also found that the duty to consult does not apply to the legislative process. The suggestion that there could be new doctrines, distinct from the duty to consult, remains a minority position held by three justices and strongly rebutted by four.

ii. Parliamentary and Democratic Principles

The majority of the Court (represented by Brown, Rowe and Karakatsanis JJ.'s reasons) agree that the duty to consult does not apply to the law-making process because of the parliamentary and democratic principles outlined below.

a. Separation of Powers

The separation of powers principle recognizes that each branch of government will be unable to fulfill its role if it is unduly interfered with by the others.[22] In application, it ensures that Parliament's legislative activities can proceed unimpeded by any external body or institution, including the courts.[23]

b. Parliamentary Sovereignty

The principle of parliamentary sovereignty mandates that the legislature can make or unmake any law it wishes, within the confines of its constitutional authority. Parliamentary sovereignty is an important protection for democracy, which is an unwritten principle in the Constitution.[24]

c. Parliamentary Privilege

The principle of parliamentary privilege grants protections to Parliament, the Senate, and provincial

legislatures to discharge their functions. It is for Parliament, not the courts, to determine whether in a particular case, the *exercise* of the privilege is necessary or appropriate.[25] Parliamentary privilege protects debates and proceedings in Parliament, and generally prevents the courts from enforcing procedural constraints on the parliamentary process.[26]

The majority note that imposing the duty to consult on the legislative process would violate or conflict with the parliamentary and democratic principles listed above. Imposing the duty to consult would trespass into the legislatures' domain,[27] would constrain the legislatures' activities and undermine their ability to act as a voice for the electorate,[28] and would be an inappropriate constraint on the legislatures' ability to control their own process.[29]

The decision of Rowe J. highlights specific implementation challenges that would arise if the duty to consult were extended to the legislative process. These outlined challenges suggest that the Court should act prudently before making a decision that could have wide-ranging impacts on Canada's legislatures:

a. Would consultation apply to only legislation which focused on Indigenous peoples, or would it apply to laws of general application?

b. How would Indigenous groups be identified, and in the case of laws of general application, would consultation be required with all Indigenous groups?

c. When (in the 16 stage legislative process) would consultation occur, and could it occur at more than one stage?

d. What would be required in order to satisfy the duty to consult, and who would determine if consultation was satisfied?

e. Would other parliamentary decisions, such as budgets (which arguably could infringe s.35 rights or adversely affect claims to such rights[30]) require consultation?

f. Would the duty to consult extend to the process of considering legislation within Parliament and provincial legislatures (and how would this impact their powers and privileges)?

g. How would the duty to consult impact the operations of Cabinet, and the Prime Minister as the head of Cabinet?[31]

As Rowe J. notes, "imposing a duty to consult ... could effectively grind the day-to-day internal operations of government to a halt.

Abella J.'s dissent provides an ideological basis for applying the duty to consult into the legislative context.

Without addressing the practical concerns raised by Rowe J., Abella J. states: “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.”[32] “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.”[33]

Abella J. suggests that the form of the legislative consultation could be modified to address concerns that the duty to consult may be an unwieldy tool within the context of the legislative process. “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.”[34]

Between the four sets of decisions, a clear majority of the Court identified the importance of parliamentary and democratic principles as a sufficient basis for excluding the duty to consult. The different opinions reflect differing approaches to s. 35 when contrasted with other constitutional principles. Abella J. distinguished s. 35 rights from other constitutional principles, including the separation of powers and parliamentary sovereignty. Her dissent sought to elevate the principle of the honour of the Crown based in *Constitution Act, 1982*, and modify principles of separation of powers and parliamentary sovereignty found in *Constitution Act, 1867*. In contrast, the approach of the majority seems to reflect in Rowe J.’s comment that: “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.”[35]

Conclusions

The majority of the SCC held that “no aspect of the lawmaking process — from the development of legislation to its enactment — triggers a duty to consult.”[36] However the utility of this conclusion is limited as a result of four separate sets of reasons which comprise the Court’s decision.

In her reasons, Karakatsanis J. noted that “the underlying purpose of the honour of the Crown is to facilitate the reconciliation of these [Crown and Aboriginal] interests....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.”[37] By maintaining that the honour of the Crown applies to legislative decisions, Karakatsanis J.’s decision, when read with the dissent by Abella J., will encourage greater litigation in search of the “other doctrines” which Karakatsanis J. suggests may yet be developed “to give full effect to the honour of the Crown through review of enacted legislation.”[38] As noted by Brown J., “[Karakatsanis J.’s reasons] 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. [*emphasis in original*]”

The approach of Rowe J. offers more certainty. His approach would allow Aboriginal peoples in some cases to challenge legislation which infringes established Aboriginal and treaty rights.[39] Rowe J. would also would require consultation where an **executive decision made pursuant to legislative authority** will adversely affect unproven Aboriginal and treaty rights.[40] No duty to consult would arise from legislation or the legislative process.

The fracturing of the Court makes a clear assessment of this decision challenging. Neither the proposals of Karakatsanis nor Rowe JJ. have a clear majority of support. As noted by Brown J., the division of the Court will only encourage greater litigation and is likely to “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.”[41]

At a time of increasing Aboriginal rights litigation, the Court missed an opportunity to create greater certainty and promote alternatives to litigation and judicially imposed outcomes.

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[1] *Mikisew Cree First Nation v. Canada (Governor General in Council)*, 2018 SCC 40 [*Mikisew Cree*].
[2] *Mikisew Cree, supra* at paras 6, 7.
[3] *Mikisew Cree, supra* at para 7.
[4] *Mikisew Cree, supra* at paras 9, 10.
[5] *Mikisew Cree, supra* at para 10.
[6] *Mikisew Cree, supra* at para 2. See also paras 101, 171.
[7] *Mikisew Cree, supra* at para 21.
[8] *Mikisew Cree, supra* at para 21.
[9] *Mikisew Cree, supra* at para 24.
[10] *Mikisew Cree, supra* at para 25.
[11] *Mikisew Cree, supra* at para 75.
[12] See for example *Ross River Dena Council v. Yukon*, 2012 YKCA 14, where the legislation at question allowed mineral claim holders to undertake exploration activities without any regulatory decision which would be subject to the honour of the Crown. 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).
[13] *Mikisew Cree, supra* at para 80.
[14] *Mikisew Cree, supra* at para 132.
[15] *Mikisew Cree, supra* at para 135.
[16] *Mikisew Cree, supra* at para 41.
[17] *Mikisew Cree, supra* at para 44.
[18] *MIkisew Cree, supra* at para 45.
[19] *Mikisew Cree, supra* at para 46.
[20] *Mikisew Cree, supra* at para 47.

[21] *Mikisew Cree, supra* at paras 41, 45.
[22] *Mikisew Cree, supra* at para 35.
[23] *Mikisew Cree, supra* at para 35.
[24] *Mikisew Cree, supra* at para 36.
[25] *Mikisew Cree, supra* at para 37.
[26] *Mikisew Cree, supra* at para 37.
[27] *Mikisew Cree, supra* at para 35.
[28] *Mikisew Cree, supra* at para 36.
[29] *Mikisew Cree, supra* at para 38.
[30] *Mikisew Cree, supra* at para 162.
[31] *Mikisew Cree, supra* at para 165.
[32] *Mikisew Cree, supra* at para 91.
[33] *Mikisew Cree, supra* at para 85.
[34] *Mikisew Cree, supra* at para 92.
[35] *Mikisew Cree, supra* at para 153.
[36] *Mikisew Cree, supra* at para 50.
[37] *Mikisew Cree, supra* at para 22.
[38] *Mikisew Cree, supra* at para 45.
[39] *Mikisew Cree, supra* at para 168.
[40] *Mikisew Cree, supra* at para 159.
[41] *Mikisew Cree, supra* at para 143.
