On His Majesty's Honour:

The Nature of the Crown in Indigenous Relations

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Abstract

The Crown is an essential component in our constitutional order and without understanding its honour the project of reconciliation will falter. Political considerations around a rights-based dialogue have proven to be less effective than hoped. A return to the duty-based and orthodox discourse of the honour of the Crown can provide important insights to strengthen the relationship between the Crown and Indigenous peoples.

The modern doctrine of the honour of the Crown is marked by a revitalization of a feudal conception of the Crown. This conception has been employed to execute the constitutional imperative of reconciliation with Indigenous peoples in Canada through the judicial process. This doctrine forms the core of the judicial system's effort to resolve issues with the integration of Indigenous peoples and cultures into a liberal society, but it has been misunderstood in problematic ways such as with the creation of *sui generis* rights for a specific subset of the population based on ethnicity. A fulsome understanding of the honour of the Crown yields the conclusion that such *sui generis* rights should be abandoned entirely.

The honour of the Crown provides insight to the Court's duty to balance the interests of Indigenous people—as guaranteed through the enactment of s. 35 of the 1982 Constitution Act—and the interests of not only non-Aboriginal persons, but also the Crown-as-state. With a greater appreciation and exploration, the honour of the Crown can serve as a bedrock of Crown-Indigenous relations into the future and provide a lens based on historical doctrine to change the perspective of actors and further the project of reconciliation.

DEDICATION

To His Majesty the King

And

In Memory of Her Majesty Elizabeth II, Queen of Canada

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Table of Contents

I. Introduction

The honour of the Crown is a fundamental and core organizing principle of the Crown itself and therefore to our entire system of justice. However, this thesis will argue that the Supreme Court of Canada's recent approach to the honour of the Crown as a system of *sui generis* fiduciary-like rights that apply only to Aboriginal peoples is a serious erroneous development in Canadian law. The relationship between the Crown and Aboriginal peoples has grown to resemble classical fiduciary relationships where the rights of one group are being preferred to the exclusion of the other—a point made by Jamie Dickson in *The Honour and Dishonour of the Crown.*[1] This project draws upon Dickson's work which traced the trajectory of the development of the *sui generis* nature of the honour of the Crown through its creation, its development, and ultimately a recommendation that the courts abandon the concept entirely. This thesis argues that the doctrine of the honour of the Crown itself does not require legal elaboration of special duties towards Aboriginal peoples to achieve reconciliation.[2] Instead, doctrinal elements of the Crown already provide a framework for reconciliation. In this elaboration, this work agrees with Dickson that the *sui generis* vision of the honour of the Crown should be rejected entirely. While Dickson argues that the Courts misunderstood the law of trusts in creating the honour of the Crown, this thesis argues that a deeper understanding of the Crown solves the very problems that the *sui generis*

[1] Dickson, Jamie D, *The Honour and Dishonour of the Crown: Making Sense of Aboriginal Law in Canada* (Saskatoon, Canada: Purich Publishing Ltd) at 9.

[2] A note on the term reconciliation: In this work, I use it to mean a satisfactory state of an ongoing relationship between Aboriginal peoples and wider Canadian society. It is not a defined end-state or achievement that once completed never has to occur again. Reconciliation is not about building roads to places or about providing jobs to people. It is about treating Aboriginal peoples fairly and with respect in the context of a wider Canadian society and the historical relationships between the Crown and Aboriginal groups. In short, it is a frame of reference or lens in which to view problems and relationships between groups of people in society.

version was created to address. This argument, while reaching the same conclusion as Dickson's, elaborates a different pathway to that conclusion and provides insights along the way that are often neglected by contemporary scholarship in this area of law. The honour of the Crown as an interpretative lens over reconciliation is an underexplored area and this thesis seeks to draw awareness to it to assist in reconciliation and dispute resolutions.

To set out the trajectory of the argument in brief, the remainder of Chapter I offers further introductory contextualization. Chapter II establishes foundations for the main claims by showing how doctrinal elements of the Crown set the stage for them. Chapter III situates within the evolution of Aboriginal law in Canada the creation of the honour of the Crown as a distinct legal concept. The chapter shows that this concept has included attempts to have the honour of the Crown apply to areas outside of Aboriginal law. Considering these arguments together, Chapter IV argues that there is a mismatch between the honour of the Crown as created through Aboriginal law and the Crown as it has traditionally evolved throughout the shared constitutional history of the Commonwealth. Chapter IV concludes that the *sui generis* honour of the Crown should give way to the orthodox honour of the Crown.

In Chapter II's discussion of the historical evolution of the Crown we find that the Crown is an ancient institution of humanity that has evolved from an absolute monarch to the modern parliamentary democracy over the course of centuries. Despite this ancient pedigree the Crown has largely escaped a codification of power in any real sense. The contemporary sensibility of a political office comes close to describing what the Crown is, but even that fails to capture the multitude of unwritten rules and the frame of reference that are necessary to the Crown's construction.

Issues important to Aboriginal people are often framed in terms of rights dialogues and combatting oppression. These are, in turn, often framed within narratives of crime, war, or questions of sovereignty. The language of revolution—of taking back what was stolen, combatting the oppressor, or asserting inherent sovereignty—is often employed by political activists in relation to Aboriginal communities within Canada. Such liberatory language is at odds with the internal language of the Crown which largely views problems in terms of responsibility or duty. Discussions surrounding self-governance by Aboriginal people are often couched in the vernacular of who has *rights* to what rather than who has the *responsibility* to what.[3] As Chapter II highlights, the Crown's essence is one of deeply entrenched duties, which clashes directly with a rights-based rhetoric. It is also worth noting that this fundamental miscommunication is exacerbated by the essential ambiguity of the Crown and the contradiction that is at play between liberalism and a Crown steeped in the history of feudalism, duty, and interdependent roles of responsibility.

As will be discussed in Chapter III, the current state of Aboriginal law[4] is the result of the incremental approach of the common law employed by the courts and the political abdication of responsibility of reconciliation to the courts by the legislatures. This abdication imposes what is an essentially confrontational system of dispute resolution that is the main function of the courts on a responsibility of the Crown to act with honour towards Aboriginal peoples in a wholistic manner. While the common law approach excels at incremental development of the law in line with the major traditions of a society it is weak in what amounts to integration of different cultural

[3] John Borrows, 'Indigenous Legal Traditions in Canada' (2005) 19:1 Washington University Journal of Law & Policy 167.
[4] A brief note on terminology: Aboriginal law is the law of the Crown as it is applied to Indigenous peoples. The law of Indigenous peoples themselves is referred to as Indigenous law.

groups into a cohesive whole.[5] Overlapping legal traditions or legal pluralism was once considered to be an intermediary stage in decolonization efforts, but it has proven to be a more intractable state and is quickly becoming something that will take generations to harmonize with the common law system and the Crown.[6] Just as the modern common law evolved out of customary law in the 1700s, Indigenous legal perspectives are integrated into the common law of Canada from the traditions of the Indigenous peoples of Canada.[7] In hindsight it was presumptuous to assume that Indigenous legal systems and the legal plurality that resulted would disappear in short order and be harmonized by the codification of law as is now common in European nations. This harmonization of law is an important step in reconciliation as the differing legal traditions of differing Aboriginal peoples are often at odds with each other and with the Crown much in the same way that the legal systems of Germany and the United Kingdom are at odds with one another. The necessity to harmonize and agree upon one set of laws that operates within a society is a major step in reconciliation in that it provides a common ground and common frame of reference for everyone to operate under. For example, the Dene traditional justice system does not include a concept of "not guilty" but rather all persons are presumed to be guilty and the question becomes what is to be done about their guilt.[8] This is clearly at odds with the presumption of innocence in modern criminal law and there needs to be a common understanding between these two legal systems to co-exist with one another in a harmonious way. However, the Dene justice system also places a much greater emphasis on rehabilitation and community based dispositions between the

[5] The weakness comes from when these cultural groups disagree on form, but not substance. The classical example used is between the civil law of France and the common law of England. The two systems are broadly similar at first glance, but largely incompatible.
[6] *Legal Pluralism Across the Global South: Colonial Origins and Contemporary Consequences*, by Brian Z (Washington University) Tamanaha, 21-06–01(2021) at 1–3.
[7] Borrows, *supra* note 3 at 189–190.
[8] Joan Ryan, *Doing Things the Right Way: Dene Traditional Justice in Lac La Martre, N.W.T.*University of Calgary Press, 1995) at xxviii.

offender and the victim where the whole community decides the best path forward by consensus.[9] The process of learning from one another in a pluralistic legal environment creates a new form of shared law through synthesis of the prior systems.

Chapter IV makes the argument that a deeper understanding of the nature of the Crown, including placing honour at the centre of any analysis, would yield a more coherent vision of the role of the Crown and ultimately lead to less disruption in the theoretical foundations of Aboriginal law. It would create harmony between the historical and doctrinal elements of the Crown and the development of Aboriginal law. It would also be a more honest and accurate account of legal history and the development of law. The significant advancements in Aboriginal law that have been made without an expansive and systematic discussion on the doctrinal Crown have resulted in a widespread misunderstanding among judges, practioners, and academics on the features of the Crown and its role in a constitutional monarchy. In fairness, the Supreme Court often does not take time to engage in widespread doctrinal reviews of the Crown when deciding what would otherwise be narrow points of law—nor is that the role of a court generally. The nature of the Crown is discussed in only a limited fashion as is required to solve the issue before the court. Reading broadly through decisions then becomes necessary, as this project shows, to understand the Crown and its relationship to the state and people.

Chapter IV concludes by arguing that the attempts by the courts and political actors to fashion a permanent reconciliation between the Crown and Aboriginal people are misguided at best and destructive at worst. The very notion of a permanent reconciliation is flawed; it misunderstands that reconciliation is a relationship and not an achievement. If it is any kind of act,

[9] *Ibid*.

it is one of political and not legal consensus. The Supreme Court, in attempting to articulate a doctrine of Aboriginal land and property rights, has created a problem for the common law understanding of property and a failure to address the deeper constitutional issues. The language used by the Court, such as *sui generis* right or a *fiduciary duty* has specific implications within the paradigm of English law. The Supreme Court has embarked on a process of gradual refinement of these new concepts in developing Aboriginal law. The result has been to use terms of art from other areas of law in a metaphorical way to illustrate a concept of duty from the Crown to Aboriginal peoples. A more explicit understanding of the doctrinal Crown would have yielded more coherent results faster, and with more certainty.[10] In *Haida Nation* the Supreme Court labeled this new concept as the honour of the Crown.[11] Whether this conception of duty has always been a part of the honour of the Crown or whether it represents a new incorporation into that ancient foundation is a matter of debate—the sides of which are largely influenced be the understanding and acceptance of doctrine in the first place. By taking the language of the Court at face value, the Court opted to create a new strain of law instead of working within the boundaries of understanding of the pre-existing system of property law refined for over a thousand years. Predictably such a path has been treacherous.

Overall, this thesis makes a fundamental argument. The customs that govern the Crown are largely unaddressed by actors within the Aboriginal law community including lawyers, activists, jurists, and political leaders. These customary laws or conventions are best understood

[10] I pause here to note that this work does not engage with the work of Professor John Borrows, one of the most notable Indigenous scholars in this area. The reason for that is simple: his work is known for the near complete rejection *ab initio* of the concept of Crown radical title. This work instead focuses internally to the system of common, constitutional and Crown law to suggest solutions and refinements. Professor Borrows' work is largely incompatible with this approach entirely. His work thus offers little to a doctrinal analysis of the Crown or its honour. See, for example: John Borrows, *Recovering Canada: The Resurgence of Indian Law*University of Toronto Press, 2002) at 92.
[11] It might be more accurate to say that the Court discovered the honour of the Crown after struggling to articulate what they meant rather than inventing it wholesale.

collectively as the honour of the Crown and are a less disruptive—less radical—of a jurisprudential tool in resolving disputes around resources, land, and governance. Through this understanding of the Crown and its virtue, the relationship between Aboriginal peoples and the Crown can thrive. The elimination of the *sui generis* fiduciary duty and adversarial context it conveys is favourable to a Crown that acts honourably with all people. A more widespread and thorough understanding of the doctrine of the Crown offers insights into a plausible route to furthering reconciliation. The Crown is an essential component in the relationships formed with Aboriginal peoples in Canada and understanding the fundamental forces which make up the Crown has been neglected in the broader discussion of relationship building and reconciliation. A deeper understanding of the Crown will potentially highlight different policy solutions and different perspectives of problems than would otherwise be apparent without this understanding.

II. Constitutional History and the Formation of the Crown, its Powers, and What Governs Them

The political and legal traditions that comprise the traditional doctrine of the Crown are essential to reconciliation and the context of Crown-Indigenous relations in Canada. This chapter focuses on the Crown and consists of an overview of the doctrinal elements that form the Crown. It is divided into three parts: a description of the structural elements of the Crown, an examination of the Crown prerogative powers, and a discussion on how change occurs in the constitution and in the common law. Understanding the cultural aspects of the Crown is essential to understanding its legal character—the Crown, unlike most other areas of law, operates through conventions which have shifted and changed over time.[12] For example the powers of the executive branch are often vested in the King-in-Council or the Governor-in-Council, but practically they are exercised entirely by Cabinet. As such the legal locus of power is different from the exercise of power practically. There is no provision for the complex interplay between Advice given to the Governor General by the Prime Minister and the exercise of power by the Governor General on that Advice. We rely on conventions to guide us through situations where the Governor General may wish to exercise power differently than the wishes of the government of the day—most famously this occurred during the King-Byng affair where the Governor General denied the Prime Minister's Advice to dissolve Parliament, but instead chose a different member of Parliament to form the Government of the day. Of course, this is not to say that the Crown only acts through these

[12] Customary law could also be used to describe the internal workings of the Crown, however, I hesitate to use it given the implication that the Courts have a more direct hand in the interpretation of these conventions. The conventions exist somewhere between a suggestion and mandate.

conventions, but rather that there is an additional extra-statutory or documented layer to the exercise of Crown power in addition to prescribed statutory powers.

The constitution of the Westminster system is comprised of two halves—the political and the legal. The political constitution is often conceptualized as the unwritten constitution which is made up of a series of political norms and customs that have developed over centuries and bind the Crown into acting in specific ways.[13] The legal constitution is the documents which form the superstructure of our governance such as the *Constitution Act, 1867*. Both the legal and the political constitutions give context to one another which is required for a proper interpretation. Ignoring the historical, political, or legal frameworks in which the Crown operated ultimately invites chaos and disharmony as we will see with the Supreme Court's treatment of Aboriginal title and rights.[14]

The second portion of this chapter discusses the Crown's prerogative powers, which may at first glance seem unrelated to the honour of the Crown. The function of these powers is essential to understanding their limits, which in turn are governed by the same fusion of political, cultural, and legal limits that shape and create the context in which the Crown operates. The limits on the exercise of power—and the philosophical underpinnings behind them—are essential to understanding the foundations of Confederation and the relationship between the Crown and Aboriginal peoples.

The final portion of this chapter discusses the methods by which the law shifts and changes. Once the mechanism of change is understood then it becomes more obvious why adherence to the honour of the Crown and the traditions that surround it are so important both to society and to

[13] Janet McLean, 'The Unwritten Political Constitution and its Enemies' (2016) 14:1 International Journal of Constitutional Law 119 at 120.
[14] Cf. Dickson, Jamie D., *supra* note 1.

reconciliation. The mechanism of change is particularly vulnerable to ignorance of historical and cultural norms and the resulting attempts at re-invention of centuries-old concepts or the misunderstanding of currently employed ones. It is particularly easy to be led astray in a common law system as knowledge of civics and history changes, and as such, it is easy to unintentionally undermine reconciliation due to the lack of institutional knowledge.

II.(a) The Historical Evolution of the Crown from the Divine Right of Kings to Mythology

As a practical matter in a Monarchy the Crown can be used interchangeably with the word "state" in a legal context.[15] However to conceptualize the Crown in such a merely functional fashion discards the historical evolution of the Crown and the Monarchy stripping it of its context. The Crown itself pre-dates the Enlightenment notions of sovereignty and is grounded in the personal relationship between the Monarch and the subject.[16] In a limited context the state is often used to mean government as is the Crown, but the State is also used to mean the entire polity of which the Crown is only a part.[17] There is a clear evolution in the Crown from the Middle Age conceptualization of the Monarch in person being the source of power to the Enlightenment era understanding of the Crown as the sovereign power which is indivisible from the Monarch.[18]

[15] This is a common mistake that is made by nearly everyone. Examples include equating the Governor General in Council with Cabinet. Even though they are practically the same thing, they are notionally different entities. The desire to simplify and reduce things to their essential parts must be resisted. The distinction between the operating mind of the Cabinet and that of the Governor General can be an essential element in decision making as the UK recently found out in *R (on the application of Miller) v The Prime Minister Cherry and others v Advocate General for Scotland 2019 UKSC 41* where the UK government argued that the locus of decision making was in the Prime Minister himself when proroguing parliament and not in the Crown, as is the common Canadian practice (see: 2008 prorogation Crisis or the King-Byng Affair which resulted in Arthur Meighen becoming the 9th Prime Minister of Canada).
[16] Martin Loughlin, 'The State, The Crown, and the Law' in Sebastian Payne & Maurice Sunkin, ed, *The Nature of the Crown: A Legal and Political Analysis* (Oxford: Oxford University Press, 1999) at 39.
[17] Martin Loughlin, 'The State, The Crown, and the Law' in Sebastian Payne & Maurice Sunkin, ed, *The Nature of the Crown: A Legal and Political Analysis* (Oxford: Oxford University Press, 1999) at 40.
[18] *Ibid* at 42.

Despite the similarities in functions, the Anglo legal tradition does not conceptualize the power and function of the Crown in the same fashion as a formalized republican system would conceptualize the power of the executive.[19] As a result, it is often said that the British legal tradition has failed to develop a coherent version of the "state" such as you would find in civil law traditions.[20] The Crown is woven and embedded into every level of government in the Anglo tradition, not as an intentional feature of thinkers creating a new system of government *de novo* as is the case with the American or French Republics, but rather as it evolved over time organically and even in a haphazard fashion.[21] This has largely been a force for good in the collective legal traditions of the Commonwealth. The flexibility of the Crown has allowed it to adapt with the changing socio-political character of society and preserve a pragmatic approach to governance while maintaining a strong shared cultural understanding surrounding the exercise of power. The downside to such a flexible approach is that there must be a class of people in society which can appreciate and contribute to the knowledge and history-based upkeep required.[22] A system with a nebulous Crown is one that can be easily corrupted by simple ignorance and good intentions. Vigilance and the maintenance of democratic norms is even more critical to the Crown than it would be in a more defined system.

For scholars and lawyers comprehending the evolution of the Crown presents a particular problem. It requires familiarity with the history of the Crown, the foundational myths of our society, and the real-world context of developments in the Crown's authority and power along with an appreciation of the more mystical or esoteric aspects of the Crown. To preserve the

[19] *Ibid* at 44.
[20] David E Smith, Christopher McCreery & Jonathan Shanks, *Canada's Deep Crown: Beyond Elizabeth II, The Crown's Continuing Canadian Complexion* (Toronto: University of Toronto Press, 2022) at 71.
[21] Loughlin, *supra* note 16 at 46.
[22] See generally: Liora Lazarus, 'Constitutional Scholars as Constitutional Actors' (2020) 48:4 Federal Law Review.

infallibility of the Crown there is a process of post-facto rationalization that occurs in relation to Crown power as will be illustrated below. The common law method of a symmetric expansion of the law is often insufficient to explain the powers of the Crown due to the heavy knowledge burden required to articulate the Crown. This is especially critical in cases where the Crown itself plays a central role, such as in Aboriginal or Criminal law.

II.(a)(i) Basic Evolution of the Crown

This section sets the scene of the five major doctrines of the Crown. As there is often confusion when we speak of the Crown, we use many different terms for it depending on the context. Government, State, Parliament, People, and the Crown are used interchangeably in some contexts but in others they are separate and distinct. They all refer to the same single Crown, but to figure out what that is, it is necessary to look beyond the metaphors and people to view the organization and collective social practices.[23] The story of the Crown's powers begins with an absolute Monarch who rules entirely through fiat and ends with the largely ceremonial Monarch that we have today. Each stage of development is a story or mythology that we use to understand the exercise of sovereign power and how to employ that same power in an ethical manner for the benefit of all of society.

The *Magna Carta* is often seen as a watershed moment in the decline of the power of the Monarch and a transition point to modern democracies. The Barons at the time of the *Magna Carta* did not see themselves as taking power away from the Crown, but rather they saw themselves as enforcing the law as it already existed.[24] The King was conceptually bound to the private law just as much as anyone else in the Kingdom, for the private law existed separately from the Crown. It

[23] JG Allen, 'The Office of the Crown' (2018) Cambridge Law Journal 298.
[24] Loughlin, *supra* note 16 at 50.

was generated through the interactions of the people and their customs. It was held in common between them and was not the result of the Crown's imperatives.

This raises the question of how the Crown should be interpreted. J.G. Allen argues that the Crown is an office.[25] In doing so he reviews the five traditional doctrines of the Crown:

1. the King has two bodies;
2. the Crown is a corporation sole;
3. public offices are emanations of the Crown;
4. the King is infallible; and
5. the Crown is one and indivisible.[26]

He concludes that the first four of these doctrines can be combined into the notion that the Crown is an office, broadly akin to that of the President in a republican government, but that the final doctrine—indivisibility—should be discarded.[27] The conceptualization of the Crown as an office is an important step in understanding the Crown itself. It provides a tool to communicate the nature of the Crown to individuals and as a pragmatic guide for decision making in society—such as by judges which try and puzzle out the practical realities of litigation. Collapsing the structure of the Crown into an office provides clarity to the law and solves problems surrounding liability, exercise of power, and conceptual understanding of the Crown. While the law could continue forward without the step of recognizing the office-like nature of the Crown, it would be less efficient and contrary to the method of common law refinement—of which this is just another step.

[25] Allen, *supra* note 23.
[26] *Ibid*.
[27] *Ibid*.

The specific content of the office is important. Broadly the Crown-as-Office as suggested by Dr. Allen is a correct one, but the specific content of that office is disputed. Dr. Allen's notion that the indivisibility of the Crown should be discarded is mistaken. To reach this conclusion it is necessary to explore each of the doctrines of the Crown in turn and ultimately, in examination of each of these elements, the indivisible nature of the Crown becomes an important binding agent between them—just as the concept of executive power cannot be discarded from the whole, the unity of the Crown is necessary to maintain doctrinal coherence.

II.(a)(i)(1) The King has Two Bodies

The two-bodies narrative is the idea of the King acting in a public and private capacity and is a precursor to the corporation theory of the Crown.[28] Today we would find this unobjectionable and even obvious given the well-developed private law of corporations. In the *Case of the Duchy of Lancaster*[29] the First Tier Tribunal[30] decided to apply the doctrine of the Queen's two bodies to resolve the question of whether the Duchy of Lancaster was a public authority for the purposes of environmental protections. The Tribunal held that Elizabeth the First held certain rights by virtue of being the Duke of Lancaster and other rights by virtue of being Queen, and the two are separate. Therefore, the Duchy was a private body rather than a public one.[31] This is a good example of the ongoing confusion surrounding the Crown resulting from the common law being a "chop shop, not a design studio."[32]

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[28] *Ibid*.
[29] Case No. EA/2010/0101 (First Tier Tribunal, 21 December 2010)
[30] The First Tier Tribunal is an administrative court in the United Kingdom set out by the Tribunals, Courts, and Enforcement Act 2007. They occupy a position roughly between the Canadian equivalent of a provincial court and a Court of inherent jurisdiction.
[31] Case No. EA/2010/0101 (First Tier Tribunal, 21 December 2010), para 30-43
[32] Allen, *supra* note 23.

The two-bodies confusion displayed by the First Tier Tribunal has been largely solved in Canada by sidestepping the issue entirely with a government actor test developed in response to the *Charter*.[33]

II.(a)(i)(2) The Crown as a Corporation-Sole

The essential aspect of the corporate theory of the Crown is that the role of the Crown is a corporate one. The ministers of the Crown act through the corporate identity of the Crown and the corporate function serves to create an artificial person or ideal repository of capacities and duties.[34] This function of acting through the Crown by many different individual actors can be accomplished through many different frameworks such as trusts, statuses, or offices—each of which are largely distinctions without a difference on a practical level.[35] As Dr. Allen notes, it is preferable to conceptualize the Crown as its corporate entity and not the individuals which act through it from time to time as to do otherwise would understate the endurance of the office of the Crown in its own right.[36]

Individuals operating within this framework can have different roles or offices stacked on top of one another—just as individual persons can sit on multiple corporate boards and have different duties and roles on each.[37] In many ways the doctrine of the corporation-sole is an extension of the two-bodies doctrine which, when taken together, advance the Crown as an office theory of governance.[38]

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[33] *Retail, Wholesale and Department Store Union, Local 580 v Dolphin Delivery Ltd*, [1986] 2 SCR 573.
[34] Allen, *supra* note 23 at 306.
[35] *Ibid*.
[36] *Ibid*.
[37] *Ibid* at 307.
[38] *Ibid*.

II.(a)(i)(3) Public Offices Emanate from the Crown

Traditionally offices were a property right that individuals could possess, trade, leverage on debts, and exchange with one another like any other form of incorporeal property.[39] Over time these offices were abolished and shifted to employees acting with special functions.[40] These special functions, for example lawyers and judges, transform regular employees of a large employer to a form of "secular clergy"[41] due to the delegation of power from the political community to act for the public good.[42] This delegation of sovereign authority to the individual to be exercised for the *benefit* of the public good is the key defining characteristic of an official and an office.[43] How that *benefit* is measured and defined comes to form the honour of the Crown and the infallible nature of the Crown further discussed below.

These delegated sovereign functions of the Crown to individuals in its employ is necessary to understanding our constitutional framework.[44] The offices which rely on the Crown are therefore a pre-requisite to the modern understanding of the constitution.[45] In earlier times this concept was advanced through the lens of property law as an incorporeal hereditament.[46] It is in this way that offices are said to emanate from the Crown in that they are created by the Crown, but they are not part of the Crown itself.[47] The ethics and guiding principles by which these offices are executed for the benefit of the common good of society form the normative values of the honour of the Crown—as is illustrated in the exercise of the prerogative powers.

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[39] *Ibid* at 308; William Blackstone, *Commentaries on the Laws of England* (London: 1825) bk. II:3, 36.
[40] Allen, *supra* note 23 at 308.
[41] This term becomes important later as the Courts conceptualize the duties of the Crown in such quasi-religious terms.
[42] Allen, *supra* note 23 at 309.
[43] Floyd Russell Mechem, *A Treatise on the Law of Public Offices and Officers* (Chicago: Callaghan & Co., 1890) at 5; Allen, *supra* note 23 at 309.
[44] Allen, *supra* note 23 at 310.
[45] *Ibid*.
[46] Blackstone, *supra* note 39 bk. II: 3, 20.
[47] Allen, *supra* note 23 at 314.

II.(a)(i)(4) The King is Infallible

Sovereign functions that flow from the Crown to individuals in its employ carry the feudal immunity of the Crown and therefore immunize the individuals who exercised the sovereign power of the Crown for the public good.[48] Liability of officials came when they acted *ultra vires* of their delegated power, and through developing this doctrine the courts were able to sidestep the notion of an imperfect Crown.[49] The reasoning was that the King can do no wrong and cannot authorize anyone acting in a manner which would be wrong—therefore liability for wrong actions must attach to someone else.[50] The individual who did the wrong was practically indemnified by the government, thereby closing the circle of liability.[51] The imperative to indemnify the employee or official flowed from the precepts of the honour of the Crown discussed further in relation to the exercise of temporal power by a Crown prosecutor.

The most important doctrine of the Crown is infallibility which can be summarized as "the Crown can do no wrong." The infallibility of the Crown is the source of the doctrine of Crown immunity and the governing principle of the honour of the Crown. The infallible nature of the Crown requires it to act in the best interest of Aboriginal peoples, as is shown in chapter III when examining the doctrinal elements of Aboriginal law. The Court of Appeal for England and Wales held that the Crown must act in a way that was imputable to the good of the political community.[52] This links ethical duties to the very nature of the Crown and could have provided a path for the Imperial Crown to act with similar constraints and require it to assist subsidiary units, such as colonies or Crown Possessions, on a path to independence or greater representation within the

[48] *Ibid* at 312.
[49] Loughlin, *supra* note 16 at 72; Allen, *supra* note 23 at 313.
[50] Allen, *supra* note 23 at 313.
[51] *Ibid* citing Harper v Secretary of State for the Home Department (the Times, 18 December 1954).
[52] *R (Bancoult) v Foreign Secretary (No 2)*, [2008] QB 365.

Parliament of the United Kingdom. Instead, it was argued that the interests of the colonial possessions are not relevant, and the Crown must act on advice of the United Kingdom's Parliament.[53] This decision is an example of the critical function that a sense of cultural morality plays in the decision making of the Crown—it was wrong and shows a lack of a nuanced and balanced understanding of the Crown, for the Court fell into the same error that Dr. Allen did. It disregarded the unity of the Crown as a principle in its analysis. The failure to live up to the expectation imposed by an honourable Crown has created the conditions for significant weakening of the Monarch's temporal authority and devolution of that power to the Ministry which governs in their name.

In *This Realm of New Zealand*[54] Dame Alison Quentin-Baxter and Professor Janet McLean lay out the constitutional history of New Zealand. They detail a striking example from New Zealand's earliest forays into Responsible Government where the Governor of New Zealand ceded all executive authority to the colonists save for one area—Aboriginal affairs.[55]

While the colonial office still maintained oversight of the Governor, and therefore provided an additional layer of protection or appeal from colonists, the decision to hold back on an area of authority had a profound impact on the evolving conventions that bind the Crown. The *political* tensions between the Governor in 1856, first Colonel Thomas Gore Browne then Sir George Grey, and their Ministers led to the colonial office recalling the Governors in accordance with the wishes of the Ministers.[56] This led to the slow freezing out of the (now) Governors-General from the day-to-day government of the colonies, even to the point where they were no longer being informed of

[53] Allen, *supra* note 23.
[54] Alison Quentin-Baxter & Janet McLean, *This Realm of New Zealand* (Auckland: Auckland University Press, 2017).
[55] *Ibid*.
[56] *Ibid*.

the day-to-day business of government, as the Monarch traditionally is, by their government of the day.[57] This has had a lasting impact on the constitutional conventions of the (now) Commonwealth Realms—while the King still gets daily briefings from Cabinet, the Governors-General do not.[58] This is despite the resolution of the Inter-Imperial Relations Committee at the Imperial Conference of 1926 where it was "recognized by the Committee… that a Governor-General should be supplied with copies of all the documents of importance and in general should be kept as fully informed as is his Majesty the King in Great Britain of Cabinet business and public affairs."[59] The clear intent from the Imperial government was that the Governors-General could be informed as to advise the Prime Ministers of the Dominion Governments, much as the Monarch advises the Prime Minister of the United Kingdom.[60] Despite this clear *Imperial* directive—which should bind the Dominions—the Governors-General were never kept informed as the Monarch is.[61] This has likely weakened the cultural balances of power between the Governor General and the Government which rules in His Majesty's name—leading to a more deeply centralized and partisan cabinet.

This discussion highlights that the cracks or ignorance of the nature of the Crown and how it fits into the broader system of government can have long-lasting detrimental impacts on society. The slow drift away from the advisory role of the Governor General to the Ministry diminishes a once important source of knowledge, experience, and law to nothing more than elaborate exercises in public relations and pageantry. Over time the reinvention of constitutional conventions tends to centralize power more and more into the hands of the Prime Minister directly—almost returning us to the beginning of the cycle of the Crown where one individual wielded near unlimited power.

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[57] *Ibid*.
[58] *Ibid*.
[59] *Report of the Inter-Imperial Relations Committee of the Imperial Conference of 1926* pt. IVb.
[60] Quentin-Baxter & McLean, *supra* note 54.
[61] *Ibid*.

The next section discusses the use of that unlimited power and the constraints that are placed on it. The prerogative powers of the Crown are necessarily checked by the honour of those who wield them to live up to an impossible ethical standard set by the infallible nature of the King.

II.(a)(i)(5) The Crown is One and Indivisible

Allen argues that "The Commonwealth—embracing the organized political community and all its institutions of government—is too large to fit within the Crown."[62] He prefers that the proper relationship be that the Crown is part of the Government which is then part of a political community that is the Commonwealth.[63] There is no convincing reason for this to be the case other than modern discomfort with our own collective history. There is no reason that the apex political entity of this Commonwealth of Nations cannot be a single Imperial Crown of which the subsequent Commonwealth Crowns are emanations of that Imperial Crown. A unified Imperial Crown is in line with the historical record through, for example, the *Statute of Westminster*.[64] It is peculiar for Allen to dismiss centuries of history and legal theory and development on the basis that it "might lead to confusion."[65] The dismissal of the unity of the Crown is particularly relevant in the context of the colonial Crowns and their relationships to the Indigenous peoples.

The responsibility of the Crown to act upon advice only from the ministers which are responsible to the territorial division that is in question—that the Crown only acts on advice from the Canadian government in issues related to Canada—does not render the unity of the Crown broken. The establishment of notionally separate Crowns for each of the Commonwealth countries does not establish actual separate Crowns that are different than the Imperial Crown—

[62] Allen, *supra* note 23 at 316.
[63] *Ibid*.
[64] *Statute of Westminster* (UK), c 4, reprinted in c.
[65] Allen, *supra* note 23 at 316.

rather it establishes a series of dependents that the Crown must act on behalf of. This conflated responsible government with the establishment of new Crowns.[66] The difficulty is that the Crown has multiple meanings[67] with different outcomes and perspectives. In the case of a federated Commonwealth country like Australia there are multiple bodies politic that could constitute Crowns—one for each state and for the federal government totaling 9.[68] This does not mean that each of the constitute Crowns are independent sovereign nations—but rather Australia itself is the sovereign nation as a whole.[69] In the Canadian context there is the King of Canada, not the King of Saskatchewan.[70]

The argument that the Crown-in-Right-of-Canada can have disagreements with the Crown-in-Right-of-Ontario renders the unity of the Crown incoherent is deeply flawed.[71] It conflates the definition of the Crown and that of a government.[72] If there is only one Imperial Crown and the Crowns beneath it have adverse interests, that is easily understood in the way that two offices might disagree over some issue—that they are both emanations of a single entity does not render the first entity invalid. Allen cites the Court of Appeal of England and Wales' decision in *Bancoult (No. 2)*[73] where the Court decided that it was the United Kingdom that made decisions for a British Indian Ocean Territory, and not the people of that community, as evidence of the failure of the unity of the Crown.[74] If it is accepted that the only entity that can give advice to the King is a responsible minister of the territory, then the decision of the House

[66] Anne Twomey, 'Responsible Government and the Divisibility of the Crown' (2008) Sydney Law School Research Paper No 08/137 742 at 2.
[67] *Ibid* at 7.
[68] *Ibid*.
[69] *Ibid* at 8.
[70] *Ibid* at 9.
[71] Allen, *supra* note 23 at 317.
[72] Twomey, *supra* note 66 at 18.
[73] *R (Bancoult) v Foreign Secretary (No 2)*, *supra* note 52.
[74] Allen, *supra* note 23 at 318.

of Lords in *Bancoult (No. 2)* is not inconsistent with the unity of the Crown as Allen suggests.[75] If the doctrine of responsible government is not required to properly ground advice to the King then the reality is a bit simpler than the failure of a centuries-old Imperial Crown—the Court of Appeal is just wrong. The unity of the Crown and its honour *required* that the Crown act in the interests of those on Chagos Island and not those in the United Kingdom. The failure to execute its duty does not sunder the Crown. It merely proves that those that embody it are fallible.

However, if we proceed on the orthodox opinion that it is only a responsible minister that can provide Advice to the King then a problem—or opportunity—presents itself in the context of the United Kingdom. Scotland, Wales, and Northern Ireland all have responsible ministers which would issue advice to the King as part of the devolved governments. Yet the United Kingdom is a singular Crown in a unitary state—not a collection of Crowns.[76] Clearly there is a distinction between the existence of the Crown itself and the Crown acting in right of a government body. The Crown acting in right of a constitute government either as a federated Crown in the case of Australia or a devolved government in the case of the United Kingdom, does not create separate Crowns. Ministers in the UK are permitted to consider the general welfare of the UK when making decisions that would impact Scotland—something they could not do if they were separate Crowns.[77] The "requirement" of the ultimate divisibility of the Crown is merely the same problem as conflating the creation of separate Crowns for constitute governments in a federal structure. There is no reason that an Imperial Crown—disused as it is—needs to cease existing from the perspective of constitutional theory. It could still have a pragmatic role through the Imperial Treaty power of the Canadian Constitution, or through a revitalized international

[75] Twomey, *supra* note 66 at 19.
[76] *Ibid* at 19–21.
[77] *Ibid* at 25.

body which the Commonwealth may further develop. The only reason advanced for its destruction is that it is old—something that is unconvincing and unprincipled. The growing of new sovereign states from the British colonies and territories does not require the destruction of the Crown.

II.(a)(ii) Unity of the Crown is a Necessary Component to Honour

The Canadian approach supports the idea advanced by Dr. Allen that the Crown is an office, and the agents of the Crown are bound by the same public law restrictions and values that the Crown itself is. The key feature of the Crown is that it is always vacant. Even the King himself is an expendable and interchangeable part of the Crown and is only one of the conduits through which the Crown acts. The terms employed to describe such a relationship are imperfect and changing, but the same core concept of honour, duty, and sacrifice for the greater good are reoccurring themes when discussing the Crown.

Ultimately in the contemporary era the Crown is a symbol of power and justice that is invoked almost ritualistically in the same way that republican governments would invoke "the People." Contributing to the confusion is the notion that the Crown exists across multiple levels of analysis and each level has different rules, symbols, practices, and ontology. We are often accustomed to viewing the Crown as a strictly horizonal creation and limiting our analysis to one level. For example, some would say that the Crown is just a hunk of metal and carbon that sits in the Tower of London—its power is only derived from the fictions that we create about it. On another level the Crown is an abstract concept embodying Justice and Duty. What seems to cause most difficulty is that these levels or states of the Crown are true at the same time, but they also can contradict one another. The messy solution to this is to dispense with the old language and to begin to view the Crown, broadly, as an enduring office that people occupy for life, and not merely

from time to time.[78] The Crown does not change upon the ascension of each Monarch, but rather it is the Monarch that changes beneath the Crown.

The holder of the office of the Crown—and those that act on its will—are bound by an ideal set of propositions forming collectively the honour of the Crown. These propositions guide the use of what is near-absolute power for the benefit of all of society and not individuals in it. The power of the Crown is only loaned to the functionaries that exercise it and therefore that imposes upon them a duty of care to use that power only for the benefit of the people from which it ultimately flows. This contrasts with executive positions that have their own democratic mandate directly—the power is truly invested in them as a decision maker to impact and influence the world around them. The specific propositions and contours of how this power should be exercised is explored further below when discussing the use of prerogative powers of the Crown in prosecutions and other executive functions. Ultimately, the trust-based, or office-based version of the Crown seeks to enshrine a fictional benevolent powerful sovereign into an enduring framework for the benefit of society and use a culture of honour to restrain the worst excesses of humanity.

II.(a)(iii) The Crown and the Common Law

The Crown and the common law are symbiotic to one another. It is the responsibility of the Crown to administer justice within the realm, and the appointment of judges is an example of the exercise of this responsibility. The judges in turn have an impact on the development of the common law, including how the common law contours and defines the Crown. This process reflects the inherent contradiction that has evolved between the Monarch and the Crown. They are separate but indivisible entities that are bound together in a complete way such that the Crown is

[78] Allen, *supra* note 23.

impossible to separate from the Monarch. Just as it is impossible to separate the delegated functions of the Monarch—such as the judge, the prosecutor, or the legislator—from each other as functions of sovereign authority. This symbiosis is often imperfectly conceptualized in analogously to a corporation and its officers, where the corporation is a distinct legal person but has no operating mind of its own and relies on functionaries to act.[79]

At first glance the sovereignty of the Crown would conflict with the now axiomatic sovereignty of Parliament. The sovereignty of parliament is pragmatically rooted in the popular will of the people as expressed through elections and democracy.[80] A. V. Dicey is often credited with elucidating the doctrine of parliamentary sovereignty and revolutionizing the structure of political order. This popular statement of parliamentary sovereignty is a result of a popular distortion of history. Parliament, as a body, was born out of an exercise of the Royal prerogative power and it is intimately entwined with the Crown.[81] Parliament draws its authority from the Crown. It is the King-in-Parliament that holds sovereignty, not the House of Commons or Senate, or both together. It is the Crown that then subsequently draws its own authority from a combination of the consent of the governed, historical momentum, and the divine right of kings—the primacy of each factor waxing and waning throughout history as the society around it changed in tandem.

As is the way of the common law, a lot of these problems are practically solved in a general sense. The modern administrative state moves much faster than the slow wheels of constitutional theory, and the Crown has become a *de facto* network of offices and delegations of authority.[82]

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[79] Loughlin, *supra* note 16 at 34.
[80] This is not really at odds with the Crown because a core feature of the Crown itself is consent of the governed which is obtained both popularly and expressed through Parliament.
[81] Loughlin, *supra* note 16 at 47.
[82] Bradley Selway, 'Of Kings and Officers: The Judicial Development of Public Law' (2005) 33:2 Federal Law Review 187 at 192.

The office of the Crown begets other offices and subservient powers such as the Minister of National Defense, or Parliament itself. These secondary institutions further create more offices below them and empower individuals to act and administer. We often refer to these structures of delegated authority of the government and attach special meaning to the government as if it was created *ex nihilo*, but it is important to remember that it is not, and everything in public law uses the Crown as a keystone. Like roads and Rome, all things flow back to the Crown.

A singular Crown generating offices beneath it for the administrative state makes sense and is reasonable. There is a difficulty however when discussing the Commonwealth which Dr. Allen insists is enough to require the destruction of the indivisibility of the Crown. With great respect, this is both unnecessary and historically incorrect. The Commonwealth is the remainder of the British Empire in the wake of the world wars. However, when examining the history of the former colonies it becomes clear that, in the ones that did not separate by armed rebellion, that they each attained their independence through evolution and a gradual process of decolonization. What unites each of the Commonwealth countries is not a shared *British* Crown headed by the King of *England* but rather it is a shared *Imperial* Crown which has exercised its power to create new states. The fingerprints of the *Imperial* Crown are present in nearly every document in the Canadian constitution for instance. The 1982 Constitution Act was passed by the Parliament in London acting as the general *Imperial* parliament for the British Empire—now Commonwealth. This is also reflected in the language that is used as well. There is no Federal or Provincial Crowns in Canada, there is merely the Crown-*in-right-of*-the-Province or the Crown-*in-right-of*-Canada.[83]

[83] See for example the preamble to the Statute of Westminster, 1931, 22 Geo. V, c. 4 (U.K.)

When viewed in the context of Aboriginal law the necessity of an indivisible Crown is even more stark and apparent, the next chapter deals with this topic more in depth, but to encapsulate the argument briefly, the indivisibility of the Crown is necessary for Aboriginal treaties both in terms of adhesion and effectiveness.[84] Further, the structure of the 1867 Constitution Act presumes and requires that there be an *Imperial* Crown to which the Canadian Crown is subservient.[85] This continues in line with the theme that the Office of the Crown merely created new sub-offices beneath it from which the Canadian Crown is one. There has been no real transition from imperial to post-imperial as Dr. Allen suggests—merely a rhetorical one.[86]

II.(b) Principles Governing the Temporal Power of the Crown - The Royal Prerogative as a Case Study

II.(b)(i) The Form, Content, and Restrictions on the Prerogative Power

Traditionally the Crown does not have the ability to act through the law; instead it acts through the royal prerogative power which, like the Crown itself, exists outside of law but is contoured by it.[87] In *Black v Chretien (Prime Minister)*, Laskin J opined that the scope and application of Crown prerogatives are determined by the judiciary and not the executive because it is the decisions of the Court that determine its existence and extent.[88] The prerogative powers are not law in the same way that the common law is. They are not created through the decentralized decision making and knowledge aggregation that underlies the development of the common law, but they do respond to change in the same way that the common law does—through the

[84] While this is not strictly the only route, there is an argument available that the Canadian Crown inherited the role and responsibilities from the British Crown at the moment of independence, but this is not an automatic or set position in law.
[85] See Constitution Act, 1867 s. 132
[86] Allen, *supra* note 23.
[87] Sebastian Payne, 'The Royal Prerogative' in Sebastian Payne and Maurice Sunkin, eds, *The Nature of the Crown: A Legal and Political Analysis* (Oxford: Oxford University Press, 1999) at 79.
[88] *Black v Chretien (Prime Minister)*, 147 OAC 141 at para 26.

incremental nature of judicial decision making. Royal prerogative powers have evolved over the centuries as the law and society of which they are symbiotically part has evolved. The prerogative power stems from the Crown's inherent and constitutional authority to govern, and it is a necessary condition of the Crown's very existence.[89]

Whether the power itself is a singular power to govern being manifested in a myriad of different ways or if it is a collection of powers bundled together is an open question and usually an irrelevant one. There is no agreed upon definition of the content of the prerogative powers of the Crown, and it is constantly shifting depending on interpretation over intervening decades.[90] Noted British constitutional scholar (and non-lawyer) A. V. Dicey wrote that the prerogative power is simply the residual authority of the Crown that has yet to be stamped out by Parliament.[91] This definition is echoed by the Canadian Privy Council office itself where it noted that "the history of parliamentary government has been a process of narrowing the exercise of the prerogative authority by subjecting it increasingly to the pre-eminence of the statutory authority, substituting the authority of the Crown in Parliament for the authority of the Crown alone."[92] Professor Hogg contributed by adding that the automatic displacement of the prerogative power by statutory authority has had the effect of "shrinking the powers of the Crown to a very narrow compass".[93]

While this is a serviceable enough definition of the prerogative power, as Lord Reid opined in *Burmah Oil Company v The Lord Advocate*, it is insufficient to capture the totality of

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[89] Sebastian Payne, 'The Royal Prerogative' in Sebastian Payne & Maurice Sunkin, ed, *The Nature of the Crown: A Legal and Political Analysis* (Oxford: Oxford University Press, 1999) at 78; Dennis Baker, *Not Quite Supreme: The Courts and Coordinate Constitutional Interpretation* (Montreal and Kingston: McGill-Queen's University Press, 2010); Philippe Lagassé, 'Parliamentary and judicial ambivalence toward executive prerogative powers in Canada' (2012) 55:2 Canadian Public Administration 157 at 159.
[90] Payne, *supra* note 89 at 79.
[91] *Ibid*.
[92] *Responsibility in the Constitution*, by Privy Council Office (Ottawa: 1993).
[93] Peter Hogg, *Constitutional Law of Canada*, student ed (Scarborough, Canada: Thompson, 2003) at 16–17; Lagassé, *supra* note 89 at 158.

the Crown's prerogative power.[94] Instead, he wrote that the prerogative power is both the ancient powers of the Crown that have not been abrogated by statute, but also any necessary action taken by the executive branch. The Supreme Court in *Ross River Dena Council Band v. Canada* took a narrower view of the prerogative power as one that is encroached and eliminated by statutory enactments.[95] A modern understanding should include any powers assigned to the Crown by statute. The use of statutory enactments by parliament is like using an ice cube tray to make ice—the tray gives the water form and allows it to solidify in the same way that the statute merely freezes the use of the prerogative.[96] The focus of analysis by the courts is typically on the relationship of the prerogative power and statutory power and the degree to which the Crown is required to act in accordance with a statutory path in contrast to their more free-ranging discretion offered by the catch-all prerogative.[97] While this is an important analysis, it misses the point in that the free-wheeling power of the prerogative is entirely constrained by the honour of the Crown and the trust placed in the individuals to wield that power in the name of the King. Parliament codifying that power should not remove the ethical constraints and duty of good faith as mandated by the honour of the Crown from the exercise of that same power.

The Crown commands extensive practical power through prerogative powers. The power of appointment is critical to the maintenance of the civil service and by extension the operation of the modern administrative state.[98] The power over foreign affairs gives the executive branch discretion over nearly all decisions and actions of an international character.[99] The prerogative in

[94] *Burmah Oil Company v The Lord Advocate*, [1965] AC 75, at 99.
[95] *Ross River Dena Council Band v Canada*, 2002 SCC 54 at para 54.
[96] Payne, *supra* note 89 at 92; Smith, McCreery & Shanks, *supra* note 20 at 67.
[97] Smith, McCreery & Shanks, *supra* note 20 at 64–66.
[98] Lagassé, *supra* note 89 at 161.
[99] *Ibid* at 162; Heather Olson & Paul Lordon, 'Crown Prerogatives' in Paul Lordon, ed, *Crown Law* (Toronto: Butterworths, 1991) at 75.

support of the defense of the realm permits the Crown nearly unfettered discretion to deploy and use the military and to establish defense intelligence agencies.[100] A more mundane example of the use of the prerogative power is by the prosecution service to maintain the justice system through their near absolute discretion to commence or terminate a prosecution.[101] The use of the prerogative power was subsequently confirmed by the judiciary in *Vancouver Island Peace Society v Canada (T.D)*[102] and *Operation Dismantle v The Queen.*[103] Far from being obsolete and vestigial, the Crown's prerogative power is woven into the very substance of society and the machinery of day-to-day governance.[104]

To prevent abuse of the power by the executive branch of the Crown, the courts act as a check by defining the contours of the prerogative power.[105] Modern states have afforded the executive branch of government tremendous power generally, but due to the nature of responsible government, this is even more keenly felt in Canada and other Westminster democracies where the executive has control of the legislature as a necessary condition of governance. The test of the power of the executive is often manifested through judicial review of executive decisions in which the court will review decisions made by the executive independent of the prerogative or statutory source of that power.[106] Parliament, being bound to the will of the executive, from time to time has instituted legislation to prevent the judiciary from reviewing the decisions of the executive—the so-called privative clauses.

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[100] Craig Forcese, *National Security Law: Canadian Practice in International Perspective* (Toronto: Irwin Law, 2007) at 177–78; Irvin Studin, 'Constitution and strategy: Understanding Canadian power in the world.' (2010) 28:1 National Journal of Constitutional Law 1 at 17; Lagassé, *supra* note 89 at 162.
[101] *Kreeger v Law Society of Alberta*, 2002 SCC 65.
[102] *Vancouver Island Peace Society v Canada (TD)*, [1994] 1 FC 102.
[103] *Operation Dismantle v The Queen*, [1985] 1 SCR 441.
[104] David E Smith, Christopher McCreery & Jonathan Shanks, *Canada's Deep Crown: Beyond Elizabeth II, The Crown's Continuing Canadian Complexion* (Toronto: University of Toronto Press, 2022) at p 48
[105] Smith, McCreery & Shanks, *supra* note 20 at 67.
[106] *Ibid* at 68.

In *Operation Dismantle v the Queen*, Dickson J held that cabinet decisions are reviewable by the courts for constitutional compliance.[107] This is atypical in the Westminster parliamentary democracy as the decisions of the Crown are not reviewable at common law.[108] The entrenchment of the supremacy of the constitution through the enactment of the *Constitution Act, 1982* has had a profound effect on the development of Canadian law as opposed to other Commonwealth countries. This entrenchment has ensured that the power of the executive is met by the moderating influence of the courts and is free from being abused without careful consideration. Ultimately the legislative branch[109] can have the final say through the operation of the amending formula present in the *Constitution Act, 1982* and through the operation of s. 33 of the *Charter*, colloquially known as the notwithstanding clause. Prerogative powers exercised at the level of the civil servant—such as the prosecuting Crown's discretionary decision making—are supervised through the abuse of process doctrine and are a fundamental aspect of the rule of law.[110]

The moderating influence of executive power through the twin prisms of the system of federalism and through the *Charter* specifically is not present in the United Kingdom. In *Hanratty v Lord Butler* the court was asked to review the exercise of the prerogative of mercy in relation to Hanratty's pending execution.[111] Lord Denning, M.R., held that the court *could not inquire* into the exercise of the high prerogative of mercy—for it was beyond their powers.[112] This absolute bar to the review of the prerogative power rested on immense historical weight had become a

[107] *Operation Dismantle v The Queen*, *supra* note 103 at para 28.
[108] *Ibid*
[109] Note: There is a bit of unwieldly execution to this due to the division of powers between provincial and federal authorities. The amending formula can require the co-operation of multiple legislatures. This is a byproduct of the federal structure of Canada and the unitary nature of the Crown.
[110] *Kreeger v Law Society of Alberta*, *supra* note 101 at para 32; *Re Hoem and Law Society of British Columbia*, [1985] 1 WWR 1 at 254.
[111] *Hanratty v Lord Butler*, [1971] 115 SJ 382.
[112] Ibid.

problem for the contemporary administrative state that the United Kingdom has become. Subsequently in *Council of Civil Service Unions v Minister for the Civil Service [GCHQ]* the House of Lords held that the decisions of the Minister in banning the formation of unions in the civil service would be a reviewable decision even though the maintenance of the civil service is a prerogative power of the Crown.[113] The Court ultimately rested its decision on the notion that the old law protecting the Crown's prerogative had been overwhelmed by the recent weight of authorities on the reviewability of decisions of statutory boards and tribunals.[114] This is often expressed as the "political questions" doctrine of review.

The Canadian courts have taken an interesting and compelling approach to the prerogative power which is contrary to the established wisdom of Professor Dicey noted above. Professor Lagassé wrote that the ambivalence that permeates executive power in modern liberal democracies creates a situation where the executive branch is formally weak, but informally strong.[115] He cites the doctrine of Parliamentary Supremacy which would, at first glance, imply that the executive branch is subordinate to the legislative branch.[116] Parliamentary Supremacy combined with the requirement to maintain the confidence of the house in accordance with Responsible Government, provides the executive with much more power in Westminster systems than is apparent. With the rise of the administrative state and the abdication of most decision making to a specialized and appointed civil service, and the once weak executive is now at the pinnacle of its power in the modern age.

[113] *Council of Civil Service Unions v Minister for the Civil Service [GCHQ]*, [1984] 3 All ER 935, at 946.
[114] *Ibid* 948.
[115] Lagassé, *supra* note 89 at 157.
[116] *Ibid*.

Parliament's formal power to bind the Crown and displace its prerogative power has been sharply curtailed by the judiciary interpreting the statutory bounds strictly. The requirement to bind the Crown (and therefore its exercise of prerogative powers) must be explicit.[117] The *Interpretation Act*[118] sets the default position and expectation that the Crown is not bound by Parliamentary enactments unless the act specifically outlines such[119] or through necessary implication from the statutory authority.[120] The Judicial Committee of the Privy Council, the *de facto* highest court of appeal in the British Empire,[121] declared that "it must always be remembered that, if it be the intention of the legislature that the Crown shall be bound, nothing is easier than to say so in plain words."[122] The resort to the doctrine of necessary implication is the last option.

In *Khadr v Canada (Attorney General)*[123] Justice Phelan held that "[o]nce a statute occupies ground formerly occupied by the prerogative, the prerogative goes into abeyance."[124] This orthodox position was demonstrated by the Supreme Court in *Canada (Prime Minister) v Khadr*[125] when the Court held that the Crown's prerogative power over foreign affairs was not displaced by the *Department of Foreign Affairs and International Trade Act*[126] by virtue of s. 10 of the Act which sought to bind the Crown.[127] The prerogative power is strengthened by this

[117] Lynda J Townsend, 'Crown immunity from statute' in Paul Lordon, ed, *Crown Law* (Toronto: Butterworths, 1991) at 116.
[118] *Interpretation Act*, RSC 1985.
[119] *Ibid* s 17.
[120] *Ibid*.
[121] The JCPC is not technically a court in that the members of the committee are providing advice to the Monarch who exercises their discretionary powers to make a ruling. Technically this would put the JCPC outside of the realm of stare decisis, but in practice every court has treated the JCPC as a binding appellate authority.
[122] *Province of Bombay v City of Bombay* [1947] A.C. 58 (P.C.) at 63.
[123] *Khadr v Canada (Attorney General)* (F.C.), [2007] 2 F.C.R. 218
[124] *Khadr v Canada (Attorney General)* (F.C.), [2007] 2 F.C.R. 218 at 88
[125] *Canada (Prime Minister) v Khadr* [2010] 1 S.C.R. 44
[126] *Department of Foreign Affairs and International Trade Act*, R.S.C. 1985 c. E-22
[127] *Canada (Prime Minister) v Khadr* [2010] 1 S.C.R. 44 at 35

judicial vagueness on the topic, and by the fact that the Crown is able to decide what the content of the prerogative is, subject to the pushback from the Court.[128]

Further weakening Professor Dicey's interpretation of the prerogative power is modern authority in *R v Secretary of State for the Home Department ex parte Northumbria Police Authority*[129] where the Court of Appeal for England and Wales was asked to decide if the Crown prerogative to keep the peace was repealed by statute in the Police Act.[130] Lord Justice Croom-Johnson, writing for the Court, held that the power was still in operation in addition to the powers prescribed by the Act—implying that even where the prerogative power has been displaced by statute, it continues to operate in parallel.[131] This would be contrary to the established orthodoxy, where "Parliament can take away any prerogative and has frequently done so," and "where a prerogative power has been regulated or defined by statute the statute in effect displaces the prerogative and the Crown must act on the basis of statutorily defined powers."[132] Professor Lagassé was correct to argue that while Parliament and the courts have the power to check the executive power of the state they have not done so—they have permitted a vagueness to arise surrounding the exercise of the prerogative powers and as such have strengthened their practical power instead of weakening them as conventional wisdom has suggested.[133]

On a practical level the prerogative power fills in the gaps that the legislature is unable to foresee when drafting legislation. For example, the Prime Minister can issue orders to the armed

[128] Lagassé, *supra* note 89 at 166.
[129] *R v Secretary of State for the Home Department ex parte Northumbria Police Authority* [1989] 1 Q.B. 26 (C.A) (Court of Appeal for England and Wales)
[130] 1964 c-48
[131] *R v Secretary of State for the Home Department ex parte Northumbria Police Authority* [1989] 1 Q.B. 26 (C.A) at 44.
[132] Patrick J Monahan, *Constituional Law* (Toronto: Irwin Law, 2006) at 59–60.
[133] Lagassé, *supra* note 89.

forces even though the *National Defense Act*[134] vests that power in the Minister of National Defense and cabinet generally.[135] This allows the Crown to act in the absence of explicit direction from statute and provides freedom of interpretation for the Crown in the absence of contravening judicial authority.[136]

Outside the realm of statutory restrictions—or guides depending on perspective—on the Crown's prerogative power there is the undocumented realm of the political constitution and the associated constitutional conventions that arise. Ultimately conventions are ineffective in controlling the Crown's use of the prerogative power as they are comprised entirely of political restrictions. The conventions are only as strong as the political will that backs them, and they fall into disuse and are revived at the whim of the politician. Conventions are also uniquely impacted by popular ignorance insofar as a politician is only bound by conventions that they know about and consider themselves bound to.[137] Additionally conventions contribute to the ambiguity that surrounds the prerogative power and only allows the executive further opportunity to exploit the status quo.[138] The conventions present in our unwritten constitution control the behaviour of the executive, and therefore the use of the prerogative powers. It is in this realm of conventions that the honour of the Crown operates and where it is so critical.

Further contributing to the degradation of the unwritten principles of the Crown is the unwillingness of the court to grant meaningful remedies for misuse of the prerogative powers. For example, in *Canada (Prime Minister) v Khadr*[139] the Supreme Court found that while the

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[134] *National Defense Act*, RSC 1985, c N-5.
[135] *Accountability for national defence: Ministerial responsibility, military command and Parliamentary oversight*, by Philippe Lagassé (Montreal: 2010) at 41–42.
[136] Lagassé, *supra* note 89 at 168.
[137] *Conacher v Canada (Prime Minister)* [2010] 3 F.C.R. 411 at 2.
[138] Lagassé, *supra* note 89 at 169.
[139] *Canada (Prime Minister) v Khadr* [2010] 1 S.C.R. 44

government did violate the rights of Mr. Khadr, the remedy was left to the discretion of the executive under the exercise of the prerogative power. This signaled to the wider judiciary that any oversight of the executive was to be minimal when it came to the exercise of the prerogative powers—and even then, they can only be reviewed on constitutional grounds.[140] The unwillingness of the courts to enforce the honour of the Crown in the general use of the prerogative has led to a weakening of the discipline of the executive in exercising the prerogative.

II.(b)(ii) The Constitutional Conscience

Now that there is a basic understanding of what the prerogative powers of the Crown are, how they operate, and what constraints can be imposed upon them by the court and by Parliament it is necessary to turn to the principles that govern their exercise and the implications of these principles. The clearest case is found in the use of the Crown prosecutor's discretion.

Baron Gurney in *R v Thursfield* held that it is the duty of the Crown prosecutor to assist the court in the furtherance of justice and not to act as counsel for any particular person or party.[141] They are to regard themselves as Ministers of Justice and not to struggle for convictions—they are not to be betrayed by feelings of rivalry or questions of skill and preeminence.[142] It is this strident impartiality of the Prosecution service that creates an essential protection against the tyranny of overzealous excesses of state power.[143] This independence and overriding duty to justice has become a principle of fundamental justice and is constitutionally protected.[144] The use of discretion by a Prosecutor is so well protected that it is not justiciable by the court,[145] save for an allegation

[140] Lagassé, *supra* note 89 at 171.
[141] *R v Thursfield*, [1838] 8 C&P 269.
[142] *R v Ruddick*, [1865] 4 F&F 497.
[143] *R v Regan*, 2002 SCC 1 at para 157.
[144] *R v Cawthorne*, 2016 SCC 32 at para 24.
[145] *R v Ng*, 2003 ABCA 1 at para 34.

of an abuse of process where the burden to prove such an allegation is on the accused.[146] This incredibly high standard flows from the Prosecutors' exercise of the sovereign power of the Crown to embody justice. The protections afforded to the Crown are the result of the overriding duty that they seek justice in all things, and not for a particular client.[147] This immunity and power afforded to prosecutors is a manifestation of the office of the Crown and the doctrine of the infallibility of the Crown. The weakening of the infallible Crown would inevitably lead to a weakening of the protections of the Prosecutor and therefore their temporal power. The net effect would be the politicization of the exercise of power due to a now fallible Crown.

Underlying these powers is an overriding ethical and moral responsibility of the prosecution in the exercise of its function. This duty to act for the benefit of others—of society generally—is present in all aspects of the Crown and especially in Aboriginal law. Once understood, this responsibility should obviate the need for any *sui generis* duties upon the Crown.

The next section discusses the manner of change that the constitution undertakes both written and unwritten. This is critical to the survival of the Crown and how it is fulfills its functions in society—including reconciliation.

II.(c) How our Constitution Changes and the Unspoken Conventions that Govern Us

Change in the political constitution is far easier and far more dynamic than changes to the legal constitution. It is in the political constitution that the honour of the Crown finds its home. The ethical, moral, and cultural duties that make up the honour of the Crown—such as what justice means—are fluid and change with the political constitution. By contrast, the legal constitution is changed, in Canada, through two methods: the operation of the amending formula in the

[146] *Krieger v Law Society of Alberta*, 2002 SCC 65.
[147] *R v Hillier*, 360 APR 27 at 38.

Constitution Act, 1982 and through the interpretation of constitutional norms by the courts. Actual amendment often requires consent of multiple provinces to achieve any significant amendment and interpretive changes often require protracted legal battles through multiple different courts. Changes to the political norms that govern the Crown are much more flexible and easier to implement—and to take away. For example, the Canadian constitution provides for the Governor General in Council to reserve or disallow provincial legislation—a power that was commonly used in the early portions of the 20th century but has since fallen out of use. The power fell into disuse, not because of a decision by a court, but instead due to political considerations between the provinces and the federal government.[148] It is in changes to the political constitution where influences on the nature of the state and governance are most keenly felt.

Outside the rigid formality brought by the court and through jurisprudence is the unwritten realm where it is tradition and convention that reign supreme. Changes in these traditions of governance may seem to be well intentioned or seemingly benign in nature, but they can have profound impacts on the constitutional order. In Canada, where the written constitution provides structure to our politics, the ephemeral nature of the unwritten constitution is less obvious than in New Zealand or the United Kingdom—both of which are unitary states without a documented constitution. All states have some unwritten space around the documents that form their constitution, even if their documents are not collected into specific enactments such as they are in Canada.[149] This kind of constitutionalism is understood in a different fashion; instead of the supreme law which provides structure for the operation of the state, the unwritten constitution is a cultural artefact that develops from the national spirit.[150] In Canada, the courts enforce the

[148] Albert, Richard, 'Constitutional Amendment by Constitutional Desuetude' (2014) 62 American Journal of Comparative Law.
[149] McLean, *supra* note 13 at 120.
[150] *Ibid.*

constitutional norms through necessary implication arising from the division of powers in a federal structure, and through the *Constitution Act 1982*, which provides that any law which is inconsistent with the Constitution is of no force or effect.[151]

However, in the United Kingdom, where there is no documented constitution the ultimate enforcers of the constitutional order are political actors—this is also true in terms of the Canadian political constitution where the issues are ultimately decided by politics and not by law.[152] In such a system the use and exercise of power is both ordinary and exceptional, for example, the use of the powers of reservation and disallowance by the Canadian federal government has fallen out of political favour in preference to a doctrine of co-operative federalism. The change did not occur through a constitutional amendment process, or due to legal challenges to the use of the twin powers. Instead, they just faded into the background as the politics of the time made their use less palatable. Another example is the political agreement between the Senate and the House of Commons that the Senate will not delay bills unnecessarily that come from the Commons. In the United Kingdom this practice was codified through the Parliament Acts of 1911 and 1949[153] which allows the Commons to pass legislation that the Lords would ordinarily block and go directly to Royal Assent without the Lords being able to provide input. This same basic structure which entrenches the supremacy of the Commons is a political convention in Canada and does not enjoy the status of a constitutional statute.[154]

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[151] *Constitution Act* 1982, s. 52. There are also other constitutional documents which are not expressly mentioned such as the natural resources transfer agreement between the federal government and the then newly created provinces of Manitoba, Saskatchewan, and Alberta.
[152] McLean, *supra* note 13 at 120.
[153] 12, 13 & 14 Geo. 6 c. 103
[154] It is worth noting that the notion of Parliamentary Supremacy is different in the United Kingdom where, in theory, all acts of Parliament are constitutional in the Canadian understanding of the term. The 1911 and 1949 Acts which hamper the House of Lords could be repealed tomorrow. The legitimacy flows from the political status of the United Kingdom, and not from the Constitution itself.

Contributions of more than just politicians and the electorate are responsible for this kind of change. The actions, political beliefs, and ideological biases of government lawyers and civil servants play a large role in how issues are framed, and therefore how they are addressed by those who wield power.[155] Small and seemingly innocent changes to the framework of government can have profound effects on the exercise of power.[156] In short, symbols matter.

There are forces that bind the hands of political actors in terms of legitimacy. The ultimate safeguard is the electorate itself, but the opinions of key government advisors such as the Deputy Ministers of each department, the opinions of lawyers from Justice, or the opinions of the armed forces will interpret and define the areas of power as much as the courts themselves will.[157] Sir John Salmond, a former New Zealand lawyer and Solicitor General, said that a constitution was not simply a hard set of rules enforced through courts, but a form of vigilance requiring ethical integrity and bureaucratic rigor and propriety.[158]

Taking a step back this discussion highlights how the continuity of the King and the Crown as a form of framing obscures the fact that these short-hand or placeholders for a State can comprehend different political relationships between the State and the people. The modern discourse seeks to resolve this deliberate ambiguity by reducing the Crown to a legal form of which politics is the animation—the legal constitution is subordinate to the political conventions that frame its interpretation.[159] For example, fixed election laws cannot override the doctrine of responsible government—a conventional or political doctrine of constitutional interpretation.

[155] McLean, *supra* note 13 at 120–121.
[156] *Ibid* at 121.
[157] *Ibid* at 122.
[158] *Ibid* at 124.
[159] Janet McLean, 'Crown Him with Many Crowns: The Crown and the Treaty of Waitangi' (2008) 6 NZJPIL 35 at 37.

While one might argue that the conventional constitution is grounded through the "similar in principle to that of the United Kingdom" clause in the constitution renders the conventional constitution part of the legal constitution it places too much emphasis on what is effectively a bridge between the two realms. The ability to exercise reserve powers—such as the Crown's ability to dissolve the legislature upon Advice from the Prime Minister—undermines the legislated intent of Parliament due to the constitutional nature of the convention. Codification of the convention into a documented form would require a constitutional process and not a legislative one. The consequences of violation of some legal norms are entirely political and by giving primacy to these political consequences it is the political constitution which ultimately retains power.

This modern approach to interpretation has had the unintended but likely foreseen problem of allowing the Crown to hold many different—and often contradictory—political meanings at the same time.[160] The multifaceted nature is a result of the evolutionary or iterative process of the common law as applied to the Crown, and is largely to be expected and resolution of this will have the added effect of settling the law, but also of settling socio-political issues in the greater society.

However, the common law has its own political pre-conceptions of what the Crown is and is not. The common-law Crown, meaning the Crown as viewed from the common law is usually understood to mean the centre of sovereignty—the King-in-Parliament.[161] While this is acceptable for the Crown in London, it is less acceptable for the colonial Crowns in the other parts of the British Empire which often relied upon feudal interpretations of the Crown.[162] This flexibility of reviving ancient interpretations of the Crown to be of political use in the colonial period is a pattern

[160] *Ibid.*
[161] *Ibid.*
[162] This is not a position which is impossible to resolve, as the colonial Crowns are bound to the Crown in London as per the indivisibility of the Crown doctrine.

that has been revived in the modern context of Aboriginal law.[163] Professor McLean writes that the "idea of the Crown as fiduciary partner with the Māori in the contemporary common law constitution is a good example of the revivified common law's efforts to give new priority to the legal constitution over the political constitution".[164] This revivification is largely seen as legitimate and necessary even though this version of the Crown is squarely at odds with the contemporary constitutional ideas of the people being the source of power.[165] The Crown as a corporation-sole would have achieved the status of a legal person which duties could attach to. The Crown as an office subsumes this "hook" for legal duties to adhere to as part of its formation, but as explored above, the Crown is more than just an office. It is the infallible nature of the Crown that causes it to take on the character of an office—to allow itself to be bound and have the character of a legal person. This broadly accords with the Crown's antecedent nature as the constitutional element of society—it precedes law and provides a framework.

The separation of the constitutional law from other types of law is not just a separation of degree, but also in *kind.* The constitution must logically be an antecedent to the law and exist in the realm of extra-legal politics. There can be no talk of law until some form of constitution has already been *de facto* established by actual usage and operation.[166] The constitutional law is often changed through the practical working of the constitute institutions of the Crown.[167] There are no legislative changes or orders-in-council that change the form of the Crown—things are just done differently the next day. One of the most profound changes in our structure of government occurred this way sometime after 1714 when King George I ascended to the throne and the Crown ceased

[163] McLean, *supra* note 159 at 37–38.
[164] *Ibid* at 38.
[165] *Ibid.*
[166] *Ibid* at 40.
[167] *Ibid.*

governing through its Ministers, but instead the Ministers governed through the instrumentality of the Crown.[168] To this day the details of the practical workings of government are entirely part of this political constitution, and not the form of the legal constitution.[169] The separation of the King from his office has not occurred in *form*, but rather through incremental changes to the practice of the administration of his office.[170] For example, the *National Defense Act*, does not make changes to the King's office, but rather makes changes to the administration that sits below it.

As the British Empire spread at the same time these legal revolutions were occurring, the colonial Crowns were still clinging on to the feudal notions of the Crown.[171] The settlers flowing out of Britain to the far-flung colonies were able to take their law with them due to this feudal understanding of the Crown and the relationship that it had with its subjects.[172] The source of the law was not the territorial jurisdiction of the state in the contemporary fashion as "the citizens of the state are not fellow-members of one body politic and corporate, but fellow-subjects of one sovereign lord."[173] Salmond later clarifies that the Crown or sovereign lord in this context is the King in the public capacity and that the "reference to the Crown is a mere figure of speech, and not recognition by the law of any new kind of legal or fictitious person. The Crown is not in itself a person in the law. The only legal person is the body corporate constituted by the series of persons by whom the Crown is worn.[174]

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[168] *Ibid*.
[169] *Ibid* at 41.
[170] *Ibid* at 42.
[171] *Ibid* at 43.
[172] *Ibid* at 44, 49.
[173] *Ibid* at 47.
[174] John W Salmond & P J Fitzgerald, *Salmond on Jurisprudence*, 12th ed (London: Sweet & Maxwell, 1966) at 364–365.

The maintenance of the feudal forms of the Crown in the colonial period was likely due to political convenience as it allowed for any conflicts between the Empire and its colonies to be resolved politically rather than legally.[175] It also had the benefit of requiring that any *moral* issues be resolved through moral and political means and not juridical ones.[176] If the King was just a placeholder for property ownership and did not have additional moral functions then there would not be any grounding for arguments flowing from any kind of fiduciary duty to other groups. Such a duty could not attach to the Crown, for it would not have any kind of mind to attach to. The contemporary Crown is viewed as uniting the will of the people and the Crown and restoring congruence between the common law and political philosophy.[177] The feudal conception of the Crown imposes the notion of trusteeship upon the Crown which in turn requires specific duties upon the public character of the Crown for the betterment of the realm.[178]

While these seem like perhaps arcane differences in how power is expressed, they do have practical consequences. Under the feudal understanding of the Crown, the subjects of the Monarch do not—and never have had—the right to self-government.[179] The only form of government that could be established in a colony is through the Crown and with its authority. This relationship was extended to cover Aboriginal peoples through the treaty process by making them equal subjects to the same Crown—part of this treaty process extended the obligations of fealty to Aboriginal peoples.[180] The feudal interpretation of the Crown viewed the Treaties as the source of the political and moral claims for Aboriginal rights, and the common law was incapable of governing

[175] Paul McHugh, 'Sir John Salmond and the Moral Agency of the State' (2008) 38 VUWLR 743 at 760.
[176] McLean, *supra* note 159 at 47.
[177] *Ibid* at 48.
[178] *Ibid.*
[179] *Ibid* at 49.
[180] *Ibid* at 50.

Aboriginal rights.[181] This view was held in New Zealand until 2003 when the Court of Appeal held in *Ngati Apa* that Crown property was held *subject to* Māori customary title.[182] The Canadian case law mirrors this development as well with the establishment of Aboriginal Title—with the slight difference that Aboriginal Title was seen in the early days as an encumbrance on Crown title underlying it.

The use of fiduciary and trust-like language (later mixing with the honour of the Crown) by the courts in Aboriginal law cases modifies the relationship between the Crown and its Aboriginal subjects by creating a special set of considerations that are not present with other groups in society.[183] This is a choice by the Crowns to give legal and political priority to Aboriginal groups and remove them from the usual process of political brokerage common to democracies.[184]

The honour of the Crown is fundamentally an interpretive doctrine of political constitutionalism—of vigilance, of ethics, and of rigour (to paraphrase Sir John Salmond). Political constitutionalism is not a document or a collection of documents, but what guides public power and how it is exercised.[185] When the constitution is understood in this way the law does not dominate the day-to-day function of government but rather the rules which are authoritative in practice are created by an elite who know the right customs.[186] This allows for rapid adjustment and flexibility, but at the cost of placing a lot of trust into these elites to execute their duties in accordance with a constitutional range of norms. In the realm of the unwritten constitution, and by extension the honour of the Crown, the most important elements are the institutions and their norms

[181] *Ibid*.
[182] *Attorney General v Ngati Apa*, 3 NZLR 643 at paras 26–27.
[183] McLean, *supra* note 159 at 53.
[184] *Ibid* at 54.
[185] McLean, *supra* note 13 at 125.
[186] *Ibid*.

rather than case law, regulations, and statutes.[187] The ideology that the actors in public law profess or use to justify actions will shape and limit the lines of action that can be successfully pursued.[188]

The vulnerabilities of such a system are apparent; it relies on an elite group that upholds the institutional cultures of which they are a part. Institutional change, neglect, or the presence of influential personalities can massively change the operation of the unwritten constitution.[189] A proper understanding of the honour of the Crown and what it aspires to be is necessary to combat and shore up some of these vulnerabilities. It should be apparent that this system is inherently conservative in its nature due to the profound reliance on established norms and customs from elite groups.[190] If we accept that culture and personality are important factors in the exercise of power within the domain of constitutional conventions then the role of advisors, the civil service, who is consulted, when they are consulted, and the use of contractual arrangements, especially in resource exploitation efforts, move from the periphery of government and directly into what is constitutional and what is not.[191]

If the feudal conception of the Crown is the correct one, and the Crown does owe duties to various groups in society then the honour of the Crown is not just an arcane doctrine stemming from constitutional law. Instead, it is a central organizing principle for public law. It is dangerous to ride the fence between a feudal Crown that has ethical duties and a contemporary Crown that does not. From a theoretical perspective this halfway point is unstable as it is not clear who the partners are in any kind of Aboriginal-Crown agreement. It both refers to the constituent power of Indigenous people at the time of contact but ignores the difficulty in conceptualizing the authority

[187] *Ibid* at 126.
[188] *Ibid* at 127.
[189] *Ibid.*
[190] *Ibid* at 128.
[191] *Ibid.*

of the Crown that would be consistent with Indigenous power at the time of contact. In essence the notion that the Crown has paternalistic duties to its subjects (Aboriginal people) due to the formation of treaties is fundamentally incompatible with any notions of inherent self-governance rights.[192]

[192] McLean, *supra* note 159 at 54.

III. Doctrinal overview of Aboriginal law and the formation of the *sui generis* honour of the Crown

This chapter surveys the development of the case law surrounding the honour of the Crown and how it has been applied by the courts. An initial review of the doctrinal development of Aboriginal title and right is necessary to understand the development and source of the honour of the Crown in Aboriginal law. The developments in Aboriginal law—particularly surrounding the *sui generis* fiduciary doctrine—are at odds with the structure of the Crown as expressed in the previous chapter, but the basic understanding of the development that the courts have undertaken in relation to Aboriginal peoples in Canada is first necessary to appreciate the divergences and differences. Ultimately, this chapter advances the argument that the same considerations in property and land law in relation to Aboriginal peoples are being considered in the interpretation of s. 718.2(e) of the Criminal Code—the so called Gladue principles.

In addition to covering the articulation of the honour of the Crown in land and property law, this chapter also details some of the attempts at expanding these same principles to other areas of law not dealing directly with aboriginal peoples, such as through administrative law and through civil law. The development of jurisprudence—although inconsistently successful—is that the honour of the Crown is a set of general duties upon the Crown that apply to non-aboriginal peoples as well. Key to this discussion are cases such as *Scott v Canada*[193] and *Altalink Management*[194] where attempts were made to extend the doctrine outside of their traditional spheres.

[193] *Scott v Canada (Attorney General)*, 2017 BCCA 422.
[194] *AltaLink Management Ltd v Alberta (Utilities Commission)*, 2001 ABCA 342.

III.(a) Original Manifestation in Property and Land

Property rights in the form of Aboriginal title are the most developed and obvious manifestation of the special nature of rights in Aboriginal law contexts that would later become developed into the honour of the Crown. The *sui generis* concept of Aboriginal title was first recognized in *Calder v British Columbia*[195] in 1973. The case arose when Frank Calder, a band councilor for the Nishga Nation sued for a declaration that the Aboriginal title of the Nishga Nation had never been extinguished by the Crown lawfully.[196] The Court was divided as to the outcome of the case, but six of the seven judges recognized the concept of Aboriginal title existed at common law. The Court held that Aboriginal title and rights survived assertion of sovereignty by the Crown unless they were incompatible with the Crown's assertion, they were surrendered voluntarily via a treaty process, or the government expressly extinguished them.

The law languished until the patriation of the *Constitution Act, 1982*[197] and the Supreme Court's decision is *R v Sparrow*[198] where the Court created the justified infringement test in the context of Aboriginal rights to hunting and fishing. Sparrow was charged under the *Fisheries Act*[199] for using a fishing net larger than was permitted under the band's license for food fishing. Sparrow admitted the facts presented would constitute a breach of the *Act* but defended the claim that his rights under s.35(1) of the *Constitution Act, 1982* invalidated the restriction on the net size listed in the band's license. The Court held that the *Fisheries Act* did not extinguish the Aboriginal right to fish and provided a detailed test to determine if there has been an

[195] *Calder v British Columbia*, [1973] SCR 313.
[196] *Ibid* at 315.
[197] Constitution Act, 1982.
[198] *R v Sparrow*, [1990] 1 SCR 1075.
[199] *Fisheries Act*, RSC 1970, c F-14, ss 34, 61(1).

infringement and when that infringement is permissible by law. The test was outlined in two parts:

> (1) Does the federal or provincial legislation have the effect of significantly interfering with an existing Aboriginal right such that it constitutes a *prima facie* infringement of s. 35(1)?
>
> (2) Was the infringement justified?[200]

The second branch of the test is further broken into two sub-questions to consider:

> (a) was the Crown pursuing a valid legislative objective? and;
>
> (b) given the trust relationship and responsibility towards Aboriginal peoples, has the honour of the Crown been upheld?[201]

The onus is on the Crown to prove the second branch of the test. The compelling and valid legislative objective is further broken down. For the objective to be valid it must be (a) compelling and substantial, and (b) aimed at reconciliation or recognition of Aboriginal rights in accordance with the purpose of s. 35 rights. The requirement to uphold the honour of the Crown established the legitimacy and justification of the Aboriginal right. The key aspects here are whether (a) the right has been given adequate priority; (b) whether here has been a minimal infringement of the right; (c) whether there has been adequate consultation with Aboriginal peoples; and (d) whether fair compensation was available if the right was infringed.

The themes present in the *Sparrow* decision are repeated in the subsequent case law on Aboriginal rights and are rethought and re-articulated several times. The Court in *R v Van der*

[200] *R v Sparrow*, *supra* note 198 at 1078–1079.
[201] *Ibid* at 1079–1080.

Peet[202] added a two-stage analysis to determine the existence of an Aboriginal right. The first stage is to precisely determine the right in question. This involved repeating the test found in *Sparrow* but adding a third factor: the pre-contact practice, custom, or tradition being relied upon to establish the right in question. The Court held that the applicant must prove the pre-contact right with reference to nine factors, summarized as:

(1) That the practice, custom, or tradition was a defining feature of the culture.[203]
(2) That the right existed in the period prior to European contact, and that there is continuity to the present time. This is understood in a flexible manner to allow for evolution of that customary practice.[204]
(3) Evidentiary demands for proving Aboriginal rights must be considered in the broader perspective given their special nature and inherent difficulties of proving practices prior to contact.[205]
(4) Aboriginal rights must be dealt with on a case-to-case basis, and a one-size-fits all approach in inappropriate.[206]
(5) The right must exist independently and cannot be incidental to another practice, custom or tradition.[207]
(6) The right must be distinctive, but not distinct. Meaning that the right has to be distinguishable, but not unique.[208]
(7) European influence on Aboriginal culture is only relevant where the right is only integral because of such influence.[209]
(8) The Court must consider both the relationship of Aboriginal people to the land and their distinctive cultures and societies.[210]
(9) Aboriginal perspectives must be taken into account.[211]

After the right has been established the test on infringement from *Sparrow* continues unabated—the Crown must then justify the infringement. The *Sparrow* test further has the effect of

[202] *R v Van der Peet*, [1996] 2 SCR 507.
[203] *Ibid* at para 54.
[204] *Ibid* at para 59.
[205] *Ibid* at para 67.
[206] *Ibid* at para 68.
[207] *Ibid* at para 69.
[208] *Ibid* at para 70.
[209] *Ibid* at para 72.
[210] *Ibid* at para 73.
[211] *Ibid* at para 48.

constitutionalizing a right to compensation for an infringement upon the Aboriginal right—a constitutional protection that the courts have declined to extend towards other groups.

The Supreme Court of Canada's decisions in *Delgamuukw v British Columbia*[212] and *Tsilhqot'in Nation v British Columbia*[213] are the current leading cases on Aboriginal title claims. In *Delgamuukw* the Court held that Aboriginal title is a special kind of Aboriginal right and applied a modified form of the *Van der Peet* test above. The appellants, who were all hereditary chiefs of their people, claimed Aboriginal title over 58,000 square kilometers of British Columbia, and their claim was based on use and ownership of the territory as supported through their sacred oral histories.[214] The Court was asked to define, among other things, the content of Aboriginal title and the requirements necessary to prove it.[215] The majority of the Court held that Aboriginal title was a *sui generis property interest* and restricted in several ways:[216]

(1) title cannot be alienated to anyone other than the Crown;[217]

(2) title is held communally;[218] and

(3) the use of the title is restricted in such a way that any use of the title land cannot be irreconcilable with the nature of the group attachment to the land.[219]

The source of Aboriginal title comes from two sources: the *Royal Proclamation, 1763*,[220] which recognized Aboriginal title, and the common law—which recognized occupation as proof of

[212] *Delgamuukw v British Columbia*, [1997] 3 SCR 1010.
[213] *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44.
[214] *Ibid* at para 7.
[215] *Ibid* at para 1.
[216] *Ibid* at para 190.
[217] *Ibid*.
[218] *Ibid* at para 196.
[219] *Ibid* at para 111.
[220] *Ibid* at para 114.

possession and title pre-assertion of sovereignty by the Crown.[221] This assertion of the Royal prerogative power to ground Aboriginal title adds another layer of protection and complexity to the property interests of Aboriginal peoples. Even though Aboriginal title is a form of Aboriginal right, title to land is not restricted to the traditional uses of the land that established the title originally—any uses merely cannot be irreconcilable with the nature of the attachment. Land held by Aboriginal tile is distinct from land held in *fee simple*[222] in that Aboriginal title land includes mineral rights and sub-surface rights capable of exploitation even though such exploitation would not have formed part of pre-contact or pre-assertion of sovereignty traditions.[223]

The inherent limit upon Aboriginal title lands is based on the relationship between the Aboriginal community and the land with a requirement not to damage the relationship between Aboriginal people and the land for future generations.[224] The limitation is further justified on the notion that occupation of the land generates a special connection between Aboriginal people and the land and forms an integral part of the group's distinctive culture.[225] From this springs the restriction on alienation which underlines the inherent and unique value of the title itself which is shared amongst the community, and the prohibition of the community from developing the land in such a way that it would destroy that value, or diminish the non-economic values of that land. Any community that wishes to use the lands in a way that would violate these restrictions on the

[221] *Ibid* Note: This is potentially confusing as the sui generis right springs from an act of the royal prerogative (the Proclamation) and the Common Law. That would make this right not sui generis, but rather something entirely justiciable.
[222] *Ibid* at para 124.
[223] *Ibid* at para 175. Lamer J in Delgamuukw advanced that traditionally the Crown withheld individual mineral rights from fee-simple owners and reserved them for the Crown itself.
[224] *Ibid* at para 112.
[225] *Ibid* at paras 16, 66.

land must surrender the land to the Crown first, and then receive non-title lands in *fee simple* which could then be developed.[226]

This reading of *Delgamuukw* was affirmed in *Tsilhqot'in* by the Supreme Court. *Tsilhqot'in* was the first time that the Supreme Court recognized a claim of Aboriginal title. It was a case where the six bands of the Tsilhqot'in sought a declaration of Aboriginal title over an extended area in British Columbia.[227] The difficulty for the Tsilhqot'in people was that their traditional use of the land was semi-nomadic in nature[228] and the Court had previously cast doubt on the ability for a nomadic or semi-nomadic people to have a valid claim to Aboriginal title when the Court decided *R v Marshall and R v Bernard.*[229] At the heart of the *Tsilhqot'in* decision was the requirement of sufficient occupation and the evidentiary requirement to establish such occupation.[230] The Crown's assertion at the trial level of the decision that for Aboriginal title to be found the land must be intensively and exclusively occupied was a misunderstanding of the previously established case law.[231] The fact that the Tsilhqot'in people were nomadic was not sufficient to abrogate a title claim. The trial judge found that they routinely used the same land for the same activities, even though they did not have fixed communities.[232] The repeated use of the area was enough to ground the title claim in the judgment of the Supreme Court. The *Tsilhqot'in* decision provided an avenue for the Court to refine the test for justifiable infringement upon Aboriginal title. The test now rests on three factors:

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[226] An interesting question which then flows from this is whether the fee-simple lands returned would be absent mineral rights or if they *could* be absent mineral rights if the Crown so chose? This of course, leaves aside, the worry that Aboriginal title itself might not permit such alienation to the Crown in the first place as it would definitively impact the future uses of the land for the communally held title.
[227] *Tsilhqot'in Nation v British Columbia*, *supra* note 213 at paras 3–7.
[228] *Ibid* at para 29.
[229] *R v Marshall and Bernard*, [2005] 2 SCR 220.
[230] *Tsilhqot'in Nation v British Columbia*, *supra* note 213 at paras 33–40.
[231] *Ibid* at para 59.
[232] *Ibid* at para 57.

> …Implicit in the Crown's fiduciary duty to the Aboriginal group is the requirement that the **incursion is necessary to achieve the government's goal** (rational connection); that the **government go no further than necessary to achieve it** (minimal impairment); and that the **benefits that may be expected to flow from that goal are not outweighed by adverse effects on the Aboriginal interest** (proportionality of impact). The **requirement of proportionality is inherent in the Delgamuukw process of reconciliation and was echoed in Haida's insistence that the Crown's duty to consult and accommodate at the claims stage** "is proportionate to a preliminary assessment of the strength of the case supporting the existence of the right or title, and to the seriousness of the potentially adverse effect upon the right or title claimed"[233]
>
> [Emphasis added]

The test for justification is remarkably akin to the second branch of the *Oakes* test in which proportionality of an infringement on a *Charter* right is governed by a minimally impairing rational connection that is proportionate to the infringement and the objective sought by government.[234] This is likely not a coincidence as s. 35 is beyond the *Charter* and is therefore not bound by the saving provision in s. 1 of the *Charter*. To incorporate the same substantive test into s. 35 ensures a maximum amount of flexibility is present.

The test to establish Aboriginal title is akin to the test to establish an Aboriginal right to a specific practice or resource with two modifications. First, the distinctive culture requirement is subsumed into the requirement that the group have exclusively occupied the land in question.[235] Second, Aboriginal rights are established as of time of *contact* whereas Aboriginal title is established as of the time of the assertion of sovereignty by the Crown over the land. Since Aboriginal title is a burden upon sovereign Crown title underlying the land, it would be theoretically difficult to peg the title claim to the time of contact rather than the time of the

[233] *Ibid* at para 87.
[234] *R v Oakes*, [1986] 1 SCR 103.
[235] There is some fuzzy boundaries in the notion of "exclusively" occupied in that nomadic groups with sometimes overlapping territory can be said to have exclusively occupied the area as was the case before the Court. The extent to which Aboriginal title would be shared amongst different groups (for example the Cree and the Dene) is unclear in case law.

assertion of sovereignty as the Crown would not have asserted underlying title for Aboriginal title to subsequently burden.[236]

On a more practical level the date of sovereignty is a more certain date than that of first contact. The requirement of occupation for land, while subsuming the distinctive culture test, will often use elements of the distinctive culture test above to prove occupation. Hunting and fishing patterns of the Aboriginal people are relevant to proving occupation in addition to cultural activities taken on the land.[237] No one factor is determinative, and they each form part of the evidentiary record used to establish occupation at the time of the assertion of sovereignty. Present occupation of the land can be used as evidence of occupation on the land at time of assertion, but there must be a continuity to the occupation between the two-time periods. Such occupation does not need to be established in strict terms due to the reality of the difficulties in evidence.[238] The changing nature of occupation on the land is only relevant insofar as the Aboriginal people have used the land in a way that it inconsistent with future generations' use of the land. Finally, the occupation of the land must be exclusive to the Aboriginal group seeking to assert title. It is possible for Aboriginal title to be granted jointly if the exclusive occupation of the land was shared between the groups seeking to establish title and no others. This requirement of occupation, land use, and continuity is an important factor in Chapter IV below when discussing the doctrine of discovery.

Once there has been a claim made for either Aboriginal right or Aboriginal title any administrative decision made by the government that could potentially impact that Aboriginal right or title requires the government to consult with the Aboriginal people on the impact on the

[236] *Tsilhqot'in Nation v British Columbia*, *supra* note 213 at para 12.
[237] *Ibid* at para 42.
[238] *Tsilhqot'in Nation v British Columbia*, *supra* note 213.

right and the extent to which any concerns can be addressed and mitigated. In 2004 the Supreme Court decided *Haida Nation v British Columbia (Minister of Forests),*[239] the cornerstone case on the duty to consult. The case arose out of the Province of British Columbia issuing a license for commercial activity on territory that has been claimed by the Haida people for more than a century.[240] The Haida challenged the issuance of the license as they were not consulted in the process and have been objecting to the forestry practices since 1994.[241]

The Court held that the duty upon the Crown to consult and accommodate the concerns of the Haida people was grounded in the principle of the honour of the Crown and such a principle must be understood generously.[242] Such an obligation flows from the nature of the Crown itself but has been constitutionalized with s. 35 of the *Charter*. The obligation upon the Crown to consult and accommodate with Aboriginal groups is triggered when the Crown has knowledge—actual or constructive—of the potential existence of a claim for Aboriginal right or title.[243] The scope of the duty to consult is proportionate to the preliminary assessment of the strength of the claim, and the seriousness of adverse effects upon that claim.[244] Both factors are weighed against one another to determine the degree of consultation required by the Crown to the Aboriginal people.

The Crown and the Aboriginal group are required to meet in good faith and discuss and attempt to resolve issues impacting the claimed title—but there is no requirement for the Crown to reach an agreement.[245] This is a key factor as it means that the First Nation is not required to

[239] *Haida Nation v British Columbia (Minister of Forests)*, [2004] 3 SCR 511.
[240] *Ibid* at para 1.
[241] *Ibid* at para 4.
[242] *Ibid* at para 10.
[243] *Ibid* at para 37.
[244] *Ibid* at para 36.
[245] *Ibid* at paras 41–42.

consent to measures affecting title. The duty is focused on fairness, flexibility, and an individually tailored approach to each case that the duty is triggered with the controlling question being how to maintain the honour of the Crown at all times.[246] On the low end of the duty, where the claim to title or right is weak the Crown may only be bound by a duty to give notice and information to the Aboriginal group with a following obligation to discuss any concerns that arise. A strong case on the spectrum, however, will attract much different consultation requirements. The Crown will be required to undertake deep consultation efforts including providing the Aboriginal group the opportunity to make submissions, to make it part of the formal decision-making process, and to provide written reasons specifically addressing the concerns of the Aboriginal group.[247] The Crown will be expected to provide funding for Aboriginal groups to receive independent counsel and conduct their own assessments in addition to the mandatory ones required by legislation. As the duty is fundamental to the nature of the Crown itself, the duty to consult can never be delegated to another party and the Crown maintains responsibility for discharging the duty.[248]

III.(b) Administrative Impacts

The Alberta Court of Appeal in *AltaLink Management Ltd v Alberta (Utilities Commission)*[249] addressed the honour of the Crown in the context of a regulatory action by the Alberta Utilities Commission against two limited partnerships controlled by the Piikani Nation and the Blood Tribe.[250] AltaLink Management had transferred electrical transmission infrastructure to the partnerships and part of that transfer was an ongoing cost of approximately

[246] *Ibid* at para 45.
[247] *Ibid* at para 37.
[248] *Ibid* at para 53.
[249] *AltaLink Management Ltd v Alberta (Utilities Commission)*, *supra* note 194.
[250] *Ibid* at para 1.

$60,000 in fees to auditors—to be passed on to the consumers.[251] The commission denied the application to pass on the costs and the matter was brought before the court to determine if the Commission must take into account the honour of the Crown when making its decision.[252]

The Court of Appeal held that when the Commission made its decision whether the sale was in the public interest it failed to consider the broader public interest.[253] In applying the no-harm test the Commission did so narrowly and did not consider the benefits of integrating First Nations economic interests into the test. The Court held that economic development of reserves ought to be encouraged and is in the public interest as it contributes to prosperity for First Nations members and the cause of reconciliation.[254] Given that the majority of the Court of Appeal declined to address the constitutional questions the utility of the decision remains highly limited.[255]

In a concurring opinion Justice Feehan addressed the constitutional elements of the impact of the honour of the Crown and the principle of reconciliation when Indigenous collectives are involved as private parties in energy transmission.[256] Despite extensive oral argument before the court and much focus on the constitutional dimension neither the Attorney General of Canada nor the Attorney General of Alberta were parties before the Court in any capacity—which further weakens the practical value of Justice Feehan's opinion.[257] There are however some key concepts to draw from the decision. The opinion highlighted expressly that the honour of the Crown was not itself a cause of action, but rather an interpretation of how the

[251] *Ibid* at para 2.
[252] *Ibid* at paras 4–10.
[253] *Ibid* at para 11.
[254] *Ibid* at paras 56–69.
[255] *Ibid* at para 79.
[256] *Ibid* at para 83.
[257] *Ibid* at para 85.

Crown must conduct itself in fulfilling its obligations and duties.[258] This core constitutional concept must be interpreted and applied generously to fully promote the process of reconciliation and governs any interactions with Indigenous peoples.[259] The decision also opened the door to the idea that concerns surrounding the honour of the Crown could be subsumed into a broader public interest analysis instead of being their own distinct category of analysis. If taken a step further the same factors that inform the honour of the Crown in the relationship with Aboriginal people could be applied to everyone.

The honour of the Crown attaches to administrative and regulatory agencies created by statute and brings with it a spectrum of duties such as the requirement to undertake consultations by the tribunal or to decide if consultations undertaken were adequate.[260] This also includes considering the honour of the Crown generally when applying tests such as the public interest test.[261] Justice Feehan underscored that reconciliation underlies the honour of the Crown and section 35 rights which are distinct.[262] Given the scope and dimensions presented by the honour of the Crown as well as how the honour of the Crown is an essential element to the Crown itself, Justice Feehan is respectfully incorrect in this assertion that the honour of the Crown flows from reconciliation. As Jamie Dickson astutely observed, the special duties owed to Aboriginal peoples by the Crown evolved into a *sui generis* fiduciary right, and then into the more generalized duty of the honour of the Crown.[263] The project of reconciliation exists due to the

[258] *Ibid* at para 88.
[259] *Ibid* at paras 90–91 citing Beckman v Little Salmon First Nation 2010 SCC 53 para 42, R v Badger 1996 1 SCR 771 at 41, Taku River Tlingit First Nation v British Columbia (Project Assessment Director) 2004 SCC 74 at 24.
[260] Ibid at 95-99, citing Rio Tinto Alcan Inc v Carrier Sekani Tribal Council 2010 SCC 43 at 55-56, 69-74, Clyde River (Hamlet) v Petroleum Geo-Services Inc 2017 SCC 40 at 21, 29.
[261] *AltaLink Management Ltd v Alberta (Utilities Commission)*, *supra* note 194 at paras 95–99 citing Rio Tinto Alcan Inc v Carrier Sekani Tribal Council 2010 SCC 43 at 55-56, 69-74, Clyde River (Hamlet) v Petroleum Geo-Services Inc 2017 SCC 40 at 21, 29. .
[262] *Ibid* at para 113.
[263] Dickson, Jamie D., *supra* note 1 at 145.

honour of the Crown and it does not depend on it—without reconciliation there would still be an honour of the Crown as the prior chapter has shown, but without the honour of the Crown there would not be reconciliation.[264]

III.(c) Legislative Actions

In 2018 the Supreme Court decided *Mikisew Cree First Nation v Canada (Governor General in Council),*[265] a case in which the Mikisew Nation *argued* that the duty to consult was triggered when ministers of the Crown created legislation and thus that the legislative process required consultation. The Court was split on its reasoning, but it unanimously dismissed the appeal for lack of jurisdiction of the Federal Court to review the legislative decisions of the Ministers. The further issues, which the Court pronounced with no clear majority, is an example of the underlying structural challenges facing Aboriginal law. Justice Karakatsanis, writing for herself, Chief Justice Wagner, and Justice Gascon held that the duty to consult is an obligation upon the Crown that flows from the honour of the Crown. It governs the relationship between Aboriginal people and the Crown. This legal construct does not extend to legislative functions of the Crown—effectively binding it only to the Crown-in-Council, and not the Crown-in-Parliament.[266] This is a significant narrowing of the doctrine of the honour of the Crown to the executive branch rather than the Crown at large[267]—although to be charitable, the Crown is an ambiguous term and the Court could have always intended the executive branch solely. There is

[264] Interestingly, Justice Feehan cites the Truth and Reconciliation report for the proposition that reconciliation underlies the concept of the honour of the Crown. He also cites Haida Nation at paragraphs 43-45, but the quotation discusses the Crown "effecting" reconciliation as an outcome with a defined end—that is reconciliation is something that can be achieved. Given that the honour of the Crown pre-dates contact with Indigenous groups, it would seem difficult logically for the honour of the Crown to require reconciliation as an underlying concept.
[265] *Mikisew Cree First Nation v Canada (Governor General in Council)*, 2018 SCC 40.
[266] *Ibid* at paras 26–29.
[267] No mention has been made at the extent that the honour of the Crown would bind the Crown-on-the-Bench. It is unlikely to ever actually come up as the Court does not consider itself bound by the Charter or many other constitutional considerations.

an internal inconsistency present that Justice Karakatsanis does not address in her opinion—the Crown-in-Parliament was created through the exercise of the Crown's prerogative power and is, in some senses, an outgrowth of the executive branch as was explored in chapter II.

The comments of Justice Karakatsanis can be construed as another blow to the doctrine of the unity of the Crown—a point raised by Justice Abella who wrote for herself and Justice Martin. She held that the honour of the Crown is always at stake in dealing with Indigenous peoples whether that be legislatively or through executive authority.[268] The question for Justice Abella was whether the decision being made is one that triggers the duty to consult. Justice Abella held that: "[t]he honour of the Crown arises from the Crown's de facto control over land and resources previously in the control of Aboriginal peoples, and its asserted sovereignty over those peoples"[269] and "English policy was to acknowledge and respect certain rights of occupation for Indigenous inhabitants, the underlying premise was that sovereignty and legislative power, and indeed the underlying title, to such lands vested in the Crown."[270] With the assertion of sovereignty, the Crown bound itself with the obligation to treat Aboriginal people honourably.[271]

Justice Abella is expressing the orthodox view that the Crown took sovereignty from Aboriginal peoples and that the treaties that arose are the crystallization of the corresponding duty of care on behalf of the Crown and the duty of fealty on behalf of Aboriginal people. This duty is so critical that it has co-equal footing with Parliamentary Sovereignty and the two concepts must be balanced.[272] Part of this balance between the sovereignty of parliament—the

[268] *Mikisew Cree First Nation v Canada (Governor General in Council)*, *supra* note 265 at paras 54–55.
[269] *Ibid* at para 57.
[270] *Ibid.*
[271] *Ibid.*
[272] *Ibid* at paras 84, 94.

Westminster system of governance—and Aboriginal rights is in fashioning a remedy. Justice Abella held that the legislative actions of Parliament do trigger the duty to consult, but that the remedy for a failure to consult is obtained by challenging the resulting legislation through the infringement tests set out in *Sparrow* or *Haida Nation* and not through challenging the inner workings of Parliament.[273]

Justice Brown, writing for himself, held that the entire law-making process is immune from any sort of judicial interference and the question of if the duty to consult triggers is not relevant.[274] While this is sufficient to determine the outcome of the appeal, Justice Brown sidesteps the interpretational conflict that the Crown presents. By not taking a stance on this point directly, Justice Brown's opinion supports Justice Abella in that he agrees that the only remedy can be applied after legislation is passed through the proper procedure. He does touch, obliquely, on the principle that no section of the constitution can override another by the focus of his argument being on the separation of powers and how the honour of the Crown cannot be read in a way to override this fundamental structural aspect of the constitution.[275]

Justice Rowe, in writing for Justices Côté and Moldaver, agrees with Justice Brown's opinion, but grounds his opinion in more pragmatic considerations. He recognizes that judicial supervision of the legislative process would make it functionally impossible to legislate as the problem becomes finding a principled place within the legislative process to allow intervention and judicial oversight.[276] He concludes that because of this frustration of the legislative process,

[273] *Ibid* at paras 96–98.
[274] *Ibid* at para 103.
[275] *Ibid* at paras 104, 116–121.
[276] *Ibid* at paras 161 – 165, 169–170.

the honour of the Crown could not apply to the legislative branch and limits its function to the executive branch.[277]

Out of the nine justices of the Supreme Court it is only Justices Abella and Martin that hold that the honour of the Crown infuses all aspects of Crown conduct in its unitary form. The other seven justices of the Court hold that the honour of the Crown, as manifested through the duty to consult, only applied to executive conduct, and that any legislative changes are resolved through the usual course of Aboriginal law.[278] The other seven justices were silent regarding Justice Abella's assertion of the paternalistic and feudal interpretation of the Crown and did not speak to the matter holistically. Given the Supreme Court's decision in *R v Prokofiew*[279] holding that all obiter dicta from the Supreme Court should presumptively be followed,[280] the decision in *Mikisew* could be read in such a way to revitalize this colonial construct and repurpose it for modern reconciliation between the Crown and Aboriginal people. This would not be a difficult reading of the case as it would be consistent with prior Supreme Court decisions, such as *Manitoba Metis Federation*,[281] where the Court held that a purpose of the honour of the Crown was to facilitate reconciliation.[282]

III.(d) The Same Honour Underpins the Criminal law and Seeks to Expand into Civil law

The honour of the Crown takes on more subtle dimensions in the context of criminal and civil law. In criminal law the honour of the Crown is conceptualized through the duties of the

[277] *Ibid* at paras 121, 129, 140.
[278] Justices Karakatsanis Wagner, and Gascon did leave open the door that the honour of the Crown more generally could be applicable to future legislative action. To speculate, the doctrines of Ministerial Responsibility would be fertile ground for such a discussion.
[279] *R v Prokofiew*, 2012 SCC 49.
[280] *Ibid* at para 55.
[281] *Manitoba Metis Federation Inc v Canada (Attorney General)*, 2013 SCC 14.
[282] *Ibid* at paras 66–67.

Crown in prosecutions and through the approach taken to sentencing Aboriginal offenders by the court. In civil law the honour of the Crown is at its weakest as an interpretive doctrine grounded in common sense reasoning that the government should act with integrity.

The criminal law is often at the forefront of Aboriginal-Crown interactions in the public perception due to the significant number of Aboriginal offenders and victims engaged with the justice system.[283] The honour of the Crown is baked into the special duties that the Crown Prosecution Service must abide by as it is their role to assist the court in the furtherance of Justice and not to act as counsel for any person or party.[284] The prosecuting Crown is to regard itself as a Minister of Justice and conduct prosecutions dispassionately.[285] To quote the Supreme court in *R v Boucher* "The role of the prosecutor excludes any notion of winning or losing; his function is a matter of public duty than that which in civil life there can be none charged with greater responsibility."[286] The public duties of the Crown in prosecution stems from ethical obligations of the Crown to act with honour and to seek justice.

At the centre of the legislative response to incarceration of Indigenous persons is s. 718.2(e) of the *Criminal Code* which provides that:

> "(e) all available sanctions, other than imprisonment, that are reasonable in the circumstances and consistent with the harm done to victims or to the community should be considered for all offenders, with particular attention to the circumstances of Aboriginal offenders."[287]

[283] Government of Canada, 'Indigenous Overrepresentation in the Criminal Justice System' (2017) JustFacts.
[284] *R v Thursfield*, *supra* note 141.
[285] *R v Ruddick*, *supra* note 142; *Nelles v Ontario*, [1989] 2 SCR 170.
[286] *R v Boucher*, [1955] SCR 16; Recognized as a Constitutional imperitative in *R v Cawthorne*, *supra* note 144.
[287] *Criminal Code*, RSC 1985, c C–46, s 718.2(e).

The Supreme Court considered this provision of the *Code* most famously in *R v Gladue*[288] in 1999, and *R v Ipeelee* in 2012.[289] In *Gladue* the accused, a 19-year-old Aboriginal woman, pleaded guilty to manslaughter of her common law husband and was sentenced to 3 years imprisonment. She was intoxicated at the time, with a blood alcohol content of approximately 160 milligrams of alcohol in 100 milliliters of blood and had stabbed her common law husband after an argument about infidelity. The sentencing judge, in interpreting 718.1(e) of the *Code*, determined that there were no special circumstances arising from her Aboriginal ancestry, and they were living off reserve in an urban area. Gladue appealed her sentence to the British Columbia Court of Appeal, which dismissed it, and then to the Supreme Court of Canada, which also dismissed it, but not before setting out the guidelines for consideration of Aboriginal offenders.[290]

Justices Cory and Iacobucci delivered the opinion of the court and described the substance of the appeal as an interpretation of just nine words in the criminal code. What is meant by "with particular attention to the circumstances of Aboriginal offenders" in s. 718(2)(e)?[291] Prior to *Gladue* the provincial Courts of Appeal had held that the purpose of the provision was a mere codification of existing sentencing principles into statute for easier and clearer direction to trial courts.[292] The Supreme Court found this to only be partially true, and held that while the provision did not change the fundamental duties on a sentencing judge to find the fit and proper sentence for the individual before the court, it did alter the method of analysis

[288] *R v Gladue*, [1999] 1 SCR 688.
[289] *R v Ipeelee*, [2012] 1 SCR 433.
[290] *R v Gladue*, *supra* note 288 at paras 1–13.
[291] *Ibid* at para 29.
[292] *R v McDonald*, [1997] 113 CCC (3d) 418 at 460–464.

that the sentencing judge should be using to arrive at that conclusion.[293] These *Gladue* principles applied to all those who were captured by s. 35 of the Constitution Act, 1982.[294]

It is worth noting that the section does not exclusively apply to Aboriginal offenders and it is unreasonable to assume that Parliament intended to create different categories of offenders based on ethnicity.[295] Prison is to be used only as a last resort where there is no other sanction or combination of sanctions available.[296] The provision indicates to the judiciary that the circumstances of Aboriginal offenders are unique from the circumstances of non-Aboriginal offenders and these unique circumstances make imprisonment less appropriate when sentencing them compared to other offenders.[297] The Crown argued that the amendment in s. 718 merely codified the general principle of restraint into statute, and they were only partially successful in such an argument. The Supreme Court held that s. 718 was more than that. It forced the judiciary to place greater emphasis on restorative justice, as opposed to the prior sentencing aims of denunciation, deterrence, separation of offenders from society, and rehabilitation.[298] It introduced an element of healing to both the offender and the community to the sentencing paradigm. Parliament fundamentally shifted the weights assigned to these values, but it did not create new values out of nothing.

The historical treatment of aboriginal offenders before the courts and in the justice system spurred this interpretation of s. 718.2(e).[299] Redressing—or reconciling—these historical wrongs is why the Supreme Court interpreted the section to mandate a judicial duty giving

[293] *R v Gladue*, *supra* note 288 at para 33.
[294] *Ibid* at para 88.
[295] *Ibid* at paras 36–37; *R v Anderson*, 2021 NSCA 62; *R v Morris*, 2021 ONCA 680.
[296] *R v Gladue*, *supra* note 288 at para 36.
[297] *Ibid* at para 37.
[298] *Ibid* at para 43.
[299] *Ibid* at para 34.

remediation real force in sentencing law.[300] Justice Karakatsanis, writing for the dissent in *R v Sharma,*[301] linked reconciliation even more expressly with the principles articulated in *R v Gladue*.[302] She finds that the overrepresentation that *Gladue* was to combat is part of the constitutional imperative of reconciliation.[303] A failure to connect these two together has been held to be an error of law meriting reversal upon appeal by the British Columbia Court of Appeal in *R v Kehoe*.[304] Given the constitutional imperative of reconciliation and the underlying purpose of s. 718(2)(e) of the *Code* to advance reconciliation it is clear that the honour of the Crown is made manifest in the criminal law through *Gladue* principles.

In quoting the Canadian Sentencing Commission report entitled *Sentencing Reform: A Canadian Approach*[305] and the Standing Committee on Justice and Solicitor General report *Taking Responsibility,*[306] the Court in *Gladue* gave judicial weight and binding precedent to restorative justice as a penological[307] philosophy. In paragraph 67 the Court highlighted that the "[y]ears of dislocation and economic development have translated, for many Aboriginal peoples, into low incomes, high unemployment, lack of opportunities and options, lack or irrelevance of education, substance abuse, loneliness, and community fragmentation."[308] Further the Court quotes the Royal Commission on Aboriginal Peoples[309] in identifying "the principal reason for this crushing failure is the fundamentally different world views of Aboriginal and

[300] *Ibid*.
[301] *R v Sharma*, 2022 SCC 39.
[302] *Ibid* at paras 120–142.
[303] *Ibid* at para 114.
[304] *R v Kehoe*, 2023 BCCA 2 at paras 53–61.
[305] *Sentencing Reform: A Canadian Approach*, by Minister of Supply and Services (Ottawa: 1897).
[306] *Taking Responsibility*, by Standing Committee on Justice and Solicitor General (Ottawa: 1988).
[307] Penological used here to mirror the term used in the report for consistency in referencing.
[308] *R v Gladue*, *supra* note 288 at para 67.
[309] *Bridging the cultural divide: a report on Aboriginal people and criminal justice in Canada*, by Royal Commission on Aboriginal Peoples (Ottawa: 1996) at 309.

non-Aboriginal people with respect to such elemental issues as the substantive content of justice and the process of achieving justice."[310]

The purpose of these amendments to the criminal code was, and is, to try to heal the divide and the relationship between the Crown and Indigenous Canadians[311]—the amendments to the *Code* and interpretation of those amendments in *Gladue* are the manifestation of the duty, dignity, and honour of the Crown without using those terms.[312] It is a similar pattern to the development of the honour of the Crown as a legal doctrine in respect of land development and sovereignty issues noted above. With the linkage between *Gladue* principles and the imperative of reconciliation, as the Court found in *Sharma* and *Kehoe,* the circle is as complete as it can get without the Supreme Court outright saying it. Some lower Courts have made the connection, such as the Ontario Superior Court in *R v Dantimo*[313] and *R v Paibomsai*.[314] However, explicit consideration of the connection remains rare. The courts that have recognized it held that all of the factors as to why reconciliation is a constitutional imperative under s. 35 apply equally to the execution of that imperative that is found in *Gladue*. If it is the honour of the Crown that provides the moral imperative of reconciliation, then it is that same moral and constitutional imperative that shapes the interpretation of *Gladue* principles.

Decided 13 years after *Gladue*, *Ipeelee* is another seminal case interpreting s 718(e) of the *Code*. The central issue of *Ipeelee* was deciding how s. 718(e) of the *Code* applied to Long Term Supervision Orders (LTSO). The purpose of a LTSO is to protect the community and to

[310] *R v Gladue*, *supra* note 288 at para 62.
[311] The divide in context being the Supreme Court's findings in R v Gladue, supra
[312] Michelle Mann, *Sentencing Aboriginal Offenders: The Honour of the Crown, Reconciliation and Rehabilitation of the Rule of Law* Queen's, 2012) [unpublished] at 8, 92.
[313] *R v Dantimo*, 2009 CanLII 6627 (ON SC) at para 29.
[314] *R v Paibomsai*, 2006 CanLII 42594 (ON SC).

rehabilitate the offender so that they can be successfully reintegrated into society. The Court of Appeal held that the protection of the public was the primary concern of the LTSOs and that Mr. Ipeelee's Aboriginal heritage under s. 718.2(e) of the *Code* was of diminished importance.[315]

At paragraph 36 the Court indicated that the fundamental principles of sentencing did not come from the 1996 amendments to the *Code* but have long been a central tenet of the sentencing process and even have constitutional aspects through s. 7 and s. 12 of the *Charter*.[316] The Ontario Court of Appeal in *R v Wilmott* held that the fundamental principles and purpose of sentencing included reforming and rehabilitating the offender under the overall mandate to protect society.[317] These factors have a long history in jurisprudence and were not cut from whole cloth by Parliament.

Returning to *Ipeelee,* the Supreme Court reiterated that the purpose of the Aboriginal sentencing provision in 718.2(e) of the *Code* was an attempt to cure the overrepresentation of Aboriginal persons in the justice system.[318] In the Prairie provinces, Aboriginal persons account for over 32 percent of prisoners compared to 5 percent of the population.[319] In Saskatchewan, the numbers were even higher, with 60 percent of prisoners in provincial jails identifying as Aboriginal.[320]

The Court itself recognizes that simply altering the sentences of Aboriginal people in Canada will not address the issue of Aboriginal incarceration in Canada. Absent addressing the

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[315] *R v Ipeelee*, *supra* note 289 at para 15.
[316] *Ibid* at para 36.
[317] *R v Wilmott*, [1996] 49 CR 22.
[318] *R v Ipeelee*, *supra* note 279 at para 59 An interesting question posed in follow up then is whether the so-called Gladue factors disappear if Aboriginal people became incarcerated at the same rate as their proportion to the electorate. Likely not.
[319] *Ibid* at para 57.
[320] *Ibid*.

root causes of anti-social behavior and crime, there will be no change.[321] The Court lacks the tools to be able to alter the pre-conditions of Crime. Such tools belong, more properly, to the other branches of government and not to the court. The duty that has been assigned to the judiciary from the legislative branch by way of s. 718.2(e) is only part of a larger and more sophisticated response. The Court notes that the optimism shown by Justices Cory and Iacobucci in *Gladue* was misplaced, and in the intervening years the situation has only degraded further.[322] The Court in *Ipeelee* therefore set out to clarify *Gladue* in hopes of bettering the situation in some small way.

The Court makes it clear that the *policy* prescription is to reduce the number of Aboriginal offenders in correctional institutions and that s. 718.2(e) of the *Code* is designed to be a remedial provision with the central aim of addressing this overrepresentation.[323] The Supreme Court held that the judiciary *must* take judicial notice of the negative history of colonialism, displacement, and residential schools.[324] It held that the judiciary *must* take judicial notice that these factors translate into lower educational attainment, lower incomes, higher unemployment, and higher rates of substance abuse.[325] It is in this context that the honour of the Crown is expressed and operates within the criminal law as a form of policy prescription to achieve a political aim. The same underlying issues that the Supreme Court in *Gladue* requires lower courts to take judicial notice of are the same issues that animate the honour of the Crown in executing the constitutional imperative of reconciliation.[326]

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[321] *Ibid* at para 61.
[322] *Ibid* at para 62.
[323] *Ibid* at para 59.
[324] *Ibid* at para 60.
[325] *Ibid*.
[326] *Sentencing Aboriginal Offenders: The Honour of the Crown, Reconciliation and Rehabilitation of the Rule of Law*, *supra* note 312 at 9–13.

The logic of the connection becomes clear when we ask ourselves the following questions: Why *must* the Court do these things? Because the project of reconciliation demands that they do so. Why must we even reconcile at all? Because the honour of the Crown compels us to. And why does the honour of the Crown compel us? Because of the trust and responsibility relationship that was created at the assertion of sovereignty[327] through the Royal Prerogative powers.

The British Columbia Court of Appeal was fortunate enough to dig into the doctrine of the honour of the Crown in a civil law context in *Scott v Canada (Attorney General).*[328] The case dealt with an application by several veterans alleging that the compensation provided to wounded veterans is inadequate and violates a "social covenant" which binds the federal government by virtue of the doctrine of the honour of the Crown.[329] The British Columbia Supreme Court held that the "honour of the Crown" predates its application in Aboriginal law and has a long and storied history in law with decisions referencing the honour of the Crown pre-dating confederation.[330] The Court of Appeal examined the conclusions of the trial judge and concluded that the Court below was incorrect as to the scope of the doctrine. The Court of Appeal held that the doctrine as outlined by the trial Court has not been used as a doctrine or constitutionalized concept, but rather that prior courts have adopted the honour of the Crown to interpret contracts and legislation based on the common-sense idea that the government intends to act honourably in its dealings.[331] The Appellate Court further clarified that the honour of the Crown as articulated in Aboriginal law cases is a distinct concept from the honour of the Crown

[327] *Calder v British Columbia*, *supra* note 195.
[328] *Scott v Canada (Attorney General)*, *supra* note 193.
[329] *Ibid* at para 23.
[330] *Ibid* at para 65.
[331] *Ibid* at para 66.

anywhere else in law and stems from the assertion of sovereignty over North America by the Crown resulting in unique duties forming the honour of the Crown.[332] The Court continued by holding that the honour of the Crown is not a paternalistic concept, but rather it is rooted in the recognition of the strength of Indigenous societies pre-contact.[333] The difficulty with this assertion by the Court of Appeal is the unanswered and unexplored questions as to why this assertion of sovereignty over North America was special. Surely the British Crown asserted the same sovereignty over England, Wales, Scotland, Ireland, India, Australia, and New Zealand to name a few.

The Court of Appeal expresses several potentially conflicting ideas in quick succession. The trial Court held that the honour of the Crown pre-dated Aboriginal law as we understand it today and required the Crown to act with honour towards its servants. The Court of Appeal agrees broadly that there is a common-sense approach that the Crown is intended to act honourably in all its dealings, but that this common-sense approach does not rise to the level as it does in Aboriginal law.[334] In quoting Brian Slattery the Court is endorsing a tactical and mercenary interpretation of the honour of the Crown. The Court holds that the Crown only embraced the fiction of honour to achieve military gains with the Aboriginal groups present in North America at the time. This approach ignores centuries of history and writings on the nature of the Crown and constitutional and political theory. The Court held that the honour of the

[332] *Ibid* at para 67.
[333] *Ibid* at para 68 Similarly to the prior assertions by the Court, the notion that the honour of the Crown comes from the strength of the societies present presents an interesting question. Should the level of honour be determined by the relative historical strength of the community when contact occurred or across societies elsewhere in the then British Empire?
[334] The idea that the government will act honourably and in good faith is a modern invention and a recasting of history. One only must look to the master-servant dichotomy in employment law of the 19th century to clearly highlight that this is not true. Even the at-pleasure appointments today do not require the Crown to act with honour in the employment relationship.

Crown thus recognizes the impact of the superimposition of European laws and customs on pre-existing Aboriginal societies that were never conquered through force of arms.[335]

The Crown's approach, in the face of complete and total domination of Aboriginal peoples, was to bind itself with a special relationship and additional chains of equitable duties. This makes little sense from the previously mercenary and militaristic Crown that the Court of Appeal has endorsed. If this is true, then why bother to maintain the fiction once the Crown was in a better military position? A better interpretation is that the honour of the Crown is more intrinsic to the operation of the Crown itself and that the Court of Appeal's decision should be rejected as untenable on this point:

> [68] The concept of "honour of the Crown" as a constitutional doctrine in Aboriginal law, then, arises from unique circumstances. **It is important to recognize that it is not a concept that serves to override the Constitution of Canada. Rather, it predates the Constitution Act, 1867 and exists as part of Canada's unwritten constitution, now read in to s. 35 of the Constitution Act, 1982**. It applies to First Nations in order to reconcile their status as original (and unconquered) occupants of the land with the assertion of Crown sovereignty.[336]
>
> [Emphasis added]

The Court in *Scott* held that the honour of the Crown in reference to Aboriginal peoples was an entirely new concept that was distinct from prior uses of the term.[337] The law as it has been articulated in reference to Aboriginal people to date would clearly show that there is this amorphous new type of duty on the Crown that just so happens to share a name and a lot of fundamental characteristics as the foundations of the Crown's authority and power itself. A preferable explanation is that the power and duty of the Crown as expressed through the honour of the Crown has been given additional stature through s. 35 and the incorporation of the honour

[335] *Scott v Canada (Attorney General)*, *supra* note 193 at para 67.
[336] *Ibid* at para 68.
[337] *Ibid* at para 67.

of the Crown into the constitution—at least as it applies to Aboriginal-Crown relations. The decision that the honour of the Crown has no real force prior to the enactment of s. 35 of the *Charter* fails to stand up to anything but a more cursory glance. The underpinnings of the honour of the Crown were explored in chapter II previously, but the principles that became incorporated into Aboriginal law flow from the assertion of sovereignty itself as an exercise of the Royal Prerogative power of the Crown and not of the 1982 Constitution Act. Even if it had, though, the act of legislating itself is an act of the Royal Prerogative. All roads must lead back to the Crown itself, and dressing up the division between Aboriginal law and other law is a misunderstanding of the nature of the Crown itself.

IV. A S*ui Generis* Honour of the Crown is Corrosive to Constitutional Norms and Unnecessary to Achieve Reconciliation

The prior two chapters established an understanding of the doctrine of the honour of the Crown and of Aboriginal law in Canada. This chapter takes that understanding and uses it to support the argument that the *sui generis* conception of the honour of the Crown is corrosive to our shared constitutional norms and represents a roadblock to reconciliation. While the *results* of some of the landmark cases such as *Haida Nation* might not have changed under the proper approach, the reasoning behind such decision is critical to the functioning of the law. The subcategories of this chapter consider three things:

1. The development of the *sui generis* duty and how it has shifted and still creates confusion amongst the Supreme Court.
2. The subtle development in the case law of a recognition of honour as a centralizing organizing principle.
3. The duty to Negotiate and Accommodate as advanced in contemporary scholarship, such as by Professor Hoehn in *The Duty to Negotiate and the Ethos of Reconciliation*, has been based on inadvertently skewed understandings of established doctrine.

Once considered the chapter makes the argument that the confused nature of the honour of the Crown as it currently stands serves to undermine our constitutional understanding which has a corrosive impact on reconciliation. The positions advanced in scholarship, such as with Professor Hoehn, or in the judiciary such as by the Yukon Territorial Court of Appeal in *Dickson*

v Vuntut Gwitchin First Nation 2021 YKCA 5 [338] rely on a skewed vision of doctrine and are subsequently led down the wrong path. Conversely, as Jamie Dickson highlighted[339], the *sui generis* fiduciary relationship used by the courts serves to muddy the waters of analysis and confused and conflated issues between traditional conceptions of trust relationships in English law and the more esoteric considerations of the honour of the Crown.

Once the language surrounding the honour of the Crown is teased apart, there is an overlapping and often contradictory set of principles that govern the honour of the Crown and those that are common to trust relationships. The following subsections separate this out and argue that once separated into a more analytical basis the benefits of the honour of the Crown—in a non trust sense—become clear, and the often-mistaken analysis that does not take this step is flawed on a fundamental level, and therefore not suitable for use. Beginning with the separation of the honour of the Crown from the *sui generis* trust relationships in the part entitled *Shifting Sands* the chapter moves on to argue for the content of the honour of the Crown based on teasing out factors in case law throughout the decades and across sub-disciplines of law in the part entitled *Subtle Recognition*. Finally, it argues that in applying this new understanding to contemporary scholarship in the part entitled *Duties to Negotiate and Accommodate,* scholars went down an incorrect path that ignores the deeper aspects of the Crown and therefore reconciliation.

IV.(a) – The Shifting Sands of *Sui Generis* reasoning

This subsection builds on the work of chapter III in separating the *sui generis* fiduciary conception of the honour of the Crown from the contemporary understanding of the honour of

[338] *Dickson v Vuntut Gwitchin First Nation*, 2021 YKCA 5.
[339] Dickson, Jamie D., *supra* note 1.

the Crown and argues that the two concepts are blended as a result of insufficient analytical rigour by the courts. This results in the situation where the honour of the Crown—which has universal application—is blended with specific trust-like relationships with Aboriginal peoples that flow from the treaty process. Once these two things are separated it is possible, as the next section argues, to flesh out the content of the honour of the Crown and apply it as a constitutional principle generally when the Crown is involved. Of import to this argument is the writing of Jamie Dickson,[340] judicial decisions such as *Mikisew Cree Nation*[341] which highlight that the assertion of sovereignty by the Crown brought with it special duties and considerations to the Aboriginal peoples in Canada.

Justices Abella and Martin in *Mikisew Cree Nation* held: "While English policy was to acknowledge and respect certain rights of occupation for Indigenous inhabitants, the underlying premise was that 'sovereignty and legislative power, and indeed the underlying title, to such lands vested in the Crown' […] With this assumed sovereignty, arose the obligation to treat Aboriginal peoples fairly and honourably."[342] The exchange being made here is the title and authority for the duty to treat Aboriginal peoples fairly and honourably—a duty that the Crown undertakes generally.

The high point of the fiduciary-like obligations upon the Crown came in *Sparrow* and the Court was of the predominant view that the Crown must act as a special kind of fiduciary towards Aboriginal peoples due to the assertion of sovereignty.[343] The Court then backed away from this highly formulaic and restrictive form of interpreting Aboriginal law in *Haida Nation*

[340] *Ibid.*
[341] *Mikisew Cree First Nation v Canada (Governor General in Council), supra* note 265.
[342] *Ibid* at para 57 internal citations omitted.
[343] Dickson, Jamie D., *supra* note 1 at 9–10.

where they held that the purpose of Aboriginal law was to hold the Crown to account for its failings of honour.[344] As Dickson correctly states, there is an ongoing pattern in the courts to try to paper over the cracks between the Crown-as-fiduciary model and the honour-of-the-Crown model that the Court moved to in *Haida Nation.*[345] The Court continues to reference this fiduciary-like obligation of the Crown post-*Haida Nation* in cases such as *Tsilhqot'in* and *Mikisew Cree Nation*.[346] The ongoing shifting language of fiduciary is unhelpful to the development of the law in that it blurs the foundational aspects of Aboriginal Law and leads to situations, such as in *Mikisew Cree Nation*, that resulted in a fragmented bench on some of the very core aspects of Aboriginal and Constitutional law. As Justice Abella highlighted, if the fiduciary model of Aboriginal law is correct, then there is no way to avoid the doctrines that flow from it, such as the duty to consult, from applying to the legislative process in its entirety.[347]

This confusion between the pillars of Aboriginal law has impacts outside of the direct realms relating to Aboriginal peoples and begins to impact the Crown's ability to balance social interests generally, and creates a different set of rules, expectations, and privileges for one group over others.[348] The entanglement of the honour of the Crown with fiduciary obligations created a snarl in the law and more broadly echoes throughout society generally.[349] Instead, even without resorting to legal philosophy, it is possible to simply untangle the case law through the view of the Crown articulated previously in Chapter II. A proper understanding of the Crown and how it operates is sufficient to jettison the entire notion of fiduciary obligations to Aboriginal people

[344] *Ibid* at 11.
[345] *Ibid*.
[346] *Ibid*; *Mikisew Cree First Nation v Canada (Governor General in Council)*, *supra* note 265; *Tsilhqot'in Nation v British Columbia*, *supra* note 213.
[347] *Mikisew Cree First Nation v Canada (Governor General in Council)*, *supra* note 265 at para 54.
[348] Dickson, Jamie D., *supra* note 1 c 4.
[349] *Ibid* at 103.

and instead ground the exercise in the honour of the Crown and the constitution similar in principle to that of the United Kingdom.

As Jamie Dickson argues in Chapter V of his book, the Supreme Court committed a technical mistake in conceptualizing a fiduciary duty as being able to bear the weight of a consistent mode of conduct or interaction between Aboriginal groups and the Crown.[350] While Dickson is correct, the mistake is more fundamental than the construction of fiduciary law. The technical mistake that the Court made was in its conception of the Crown itself and the deep history and tension at its very core as was articulated in Chapter II above. The partial remedy found in the Court's backing away from the fiduciary structure in *Haida Nation* was immediately undermined by *Mikisew* when members of the Court clung back to the fiduciary structure. The essence of the content of the honour of the Crown is what eludes the Court's treatment of Aboriginal law, and until that essence is understood and accounted for by the Court then it is unlikely, if not impossible, that the Court will be able to resolve its technical mistake of doctrine when it crafted Aboriginal law around modern fiduciary obligations. Superficially the obligations between Monarch and Subject are ones of duty and fidelity, but they are not the same obligations as between the fiduciary and the beneficiaries. The honour of the Crown gives life to the former, but not the latter.

IV.(b) – The Subtle Recognition of Honour

The recognition of the honour of the Crown is most obvious in Aboriginal law. The core concept identified in the trust relationship between Aboriginal peoples and the Crown identified in *Sparrow*[351] is the starting point for such an analysis. Added to this are the comments by the

[350] *Ibid* at 106–107.
[351] *R v Sparrow*, *supra* note 198 at 1079–180.

British Columbia Court of Appeal in *Scott v Canada*[352]and those of Justice Feehan's concurring opinion in *AltaLink Management*[353] which result in creeping understanding of the honour of the Crown being used as an interpretive aid and foundation for government action. The same public interest analysis highlighted by Justice Feehan in *AtlaLink* echoes the same considerations discussed in *R v Gladue*[354] and *R v Ipeelee.*[355]

As Dickson notes, the Supreme Court's assertion that the assertion of sovereignty triggered a fiduciary duty to act in the best interests of Aboriginal peoples is incorrect and backwards.[356] The requirement is—and always has been—that a fiduciary relationship can only be formed once the duty to act honourably is identified.[357] What the Court was apparently grappling with instead was the notion that the Crown is to provide for its subjects and act in their best interests. This historical and quasi-feudal duty that applied throughout history was incorrectly used by the Court to create a general fiduciary obligation to Aboriginal peoples. This mistake sent the case law—and the relationship between the Crown and Aboriginal peoples—lurching from point to point without a coherent foundation. The Court begins to pick up on this problem in *Haida Nation* where the Court moves to a more principled application in that the honour of the Crown means that the Crown must incorporate the interests of Aboriginal peoples when making decisions and balancing those interests against non-Aboriginal interest.[358]

[352] *Scott v Canada (Attorney General)*, *supra* note 193 at paras 66–83.
[353] *AltaLink Management Ltd v Alberta (Utilities Commission)*, *supra* note 194 at paras 88–126.
[354] *R v Gladue*, *supra* note 288.
[355] *R v Ipeelee*, *supra* note 289.
[356] Dickson, Jamie D., *supra* note 1 at 107.
[357] *Alberta v Elder Advocates of Alberta Society*, 2011 SCC 24 at para 36.
[358] Dickson, Jamie D., *supra* note 1 at 110.

Unfortunately the touchstone of the fiduciary framing was continued to be used by the Court after *Haida Nation* in *Mikisew Cree Nation*.[359]

It is worth noting the incorrect assertion in that case that "[t]he honour of the Crown arises from the fiduciary duty that Canada owes to Indigenous peoples following the assertion of sovereignty; it is an overarching guide to Canada's dealings with Indigenous peoples."[360] As has been demonstrated in chapter II previously, the honour of the Crown long pre-dates the discovery of North America. The content of this ancient honour of the Crown is what the court is trying to grapple with. The fiduciary-but-not-fiduciary duty of the Crown to consider and account for the interests of Aboriginal peoples involves the same duties that the King has to his subjects generally—and the duty of Parliament and the executive council which advise the King on the exercise of sovereign power. As many scholars have pointed out, this fundamental failing of jurisprudential foundations is confusing and harmful to Aboriginal interests.[361] The superior interpretation available is to return to our shared history in the Crown and the thousand plus years of legal development around the Crown and its duties that have built the liberal democracy that we live in today.

The next section discusses how the ancient honour of the Crown doctrine impacts the duty to negotiate and accommodate and how the *sui generis* fiduciary relationship is a problem as it leads to a skewed interpretation of rights and duties along ethnic lines—a concept which is abhorrent in a liberal democracy. The next section discusses recent scholarship surrounding the doctrine of discovery and how that historically highly contentious doctrine is inapplicable to the

[359] *Mikisew Cree First Nation v Canada (Governor General in Council)*, *supra* note 265 at paras 65, 141–143, 153–154.
[360] *Ibid* at 153.
[361] Dickson, Jamie D., *supra* note 1 at 112–113.

Canadian context in specific, but more widely, the Anglo experience. The foundation of the doctrine is—like the version of the honour of the Crown articulated by the Supreme Court—based on a mistake of doctrine.

IV.(c) The Duties to Negotiate and Accommodate

The honour of the Crown can give rise to additional duties, some of which have been considered in contemporary scholarship in partly problematic ways. For example, let us consider carefully what Professor Felix Hoehn in *The Duty to Negotiate and the Ethos of Reconciliation* argues, the idea that, there is an affirmative legal duty upon the Crown to negotiate with indigenous peoples in Canada where there are no land succession treaties.[362] The Supreme Court has long remarked that the preferential method of resolving Aboriginal title claims is through the process of negotiation and not through litigation.[363] As can be expected there has been significant litigation around the content of such a duty to negotiate which has resulted in the refinement of the doctrine of the honour of the Crown and the role it plays in negotiations. The honour of the Crown impels the Crown to negotiate in good faith to resolve land claims of Aboriginal title.[364] The role of the courts, in the words of Chief Justice Lamer, reinforced this extra-judicial duty.[365]

In *Delgamuukw v British Columbia* the British Columba Court of Appeal held, unanimously, that there was no jurisdiction of a court to force the Crown to negotiate with Aboriginal peoples:

> 18 All of the other declarations that are sought flow from Number 1. If the plaintiffs are successful then it would follow without more that they would have the right to negotiate a land claims agreement with respect to the territory. **I can find no jurisdiction in law and, in my view, the Supreme Court has no jurisdiction to declare that the defendants are obligated to negotiate.** No one doubts, however, that must of necessity be done. **Still less has the**

[362] Hoehn, Felix, 'The Duty to Negotiate and the Ethos of Reconciliation' 2020 CanLIIDocs 692 at 74–76.
[363] *Mikisew Cree First Nation v Canada (Governor General in Council)*, *supra* note 265 at para 142.
[364] *Tsilhqot'in Nation v British Columbia*, *supra* note 213 at para 74.
[365] *Delgamuukw v British Columbia*, *supra* note 212 at para 186.

> **Supreme Court the power to direct the defendants to meet with the plaintiffs and negotiate in good faith as sought in paragraph 15 of the prayer for relief**.[366]
>
> [Emphasis added]

More recently the Ontario Court of Appeal in *Chippewas of Sarnia Band v. Canada (Attorney General)* addressed the same issue briefly:

> [282] Assuming, without deciding, that such an order could be made, **an order requiring the Crown to enter negotiations with the Chippewas would be a novel remedy, not readily classified in conventional terms. Such an order would have a mandatory aspect and would require the ongoing involvement and supervision of the court. An order having these features plainly could not be available as of right.** However, **such a remedy should be classified in the traditional terms of law and equity;** its award must therefore necessarily be subject to the discretion of the court.[367]
>
> [Emphasis added]

Professor Hoehn is correct when he asserts that the duty to negotiate should play a more prominent role in defining the relationship between Indigenous and non-Indigenous Canadians.[368] The courts have repeatedly commented in agreement but have not been willing to extend that desire into a legal requirement. Professor Hoehn asserts that the barrier to reconciliation is the use of the doctrine of discovery[369] in the assertion of sovereignty of the Crown over Canada.[370] This claim is inconsistent with the prevailing narratives at the time of the assertion of sovereignty by the Crown. The doctrine of discovery is not, and was never, the basis of Crown title over Canada. In 1763 King George III issued a Royal Proclamation in the wake of the victory in the Seven Years War decreeing:

> And whereas it is just and reasonable, and essential to our Interest, and the Security of our Colonies, that the several Nations or Tribes of Indians with whom We are connected, and who live under our Protection, should not be molested or disturbed in the Possession of such Parts of Our Dominions and Territories as,

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[366] *Delgamuukw v British Columbia*, 1986 CarswellBC 1196 at para 18.
[367] *Chippewas of Sarnia Band v Canada (Attorney General)*, 139 OAC 201 at para 282.
[368] Hoehn, Felix, *supra* note 362 at 4.
[369] Doctrine of Discovery and Terra Nullius in this context refer to the same thing and are used interchangeably.
[370] Hoehn, Felix, *supra* note 362 at 5.

> **not having been ceded to or purchased by Us**, are reserved to them, or any of them, as their Hunting Grounds.[371]
>
> [Emphasis added]

The argument that the doctrine of discovery was invoked to ground sovereign title must fail. The doctrine of discovery is incompatible with the notion that Aboriginal groups would need to cede or have their territories purchased by the Crown at all. This was recognized by the Australian High Court in *Mabo v Queensland (No 2)*[372] and the Court went to explain that the assertion of sovereignty in Australia was based on the modified doctrine of *terra nullius* which enabled sovereignty to be acquired via settlement and working the land.[373] Our own Supreme Court echoes this rejection that the doctrine of discovery had anything to do with Anglo legal traditions in *Mikisew Cree Nation* where it held that "English policy was to acknowledge and respect certain rights of occupation".[374] The assertion of sovereignty did not remove title from the Aboriginal inhabitants of Australia; it merely transformed it into an encumbrance upon the new sovereign title asserted by the Crown. This was echoed by our Supreme Court in *Tsilhqot'in*.[375] As the High Court pointed out the only valid mechanisms of land acquisition are displacement of prior sovereignty or ceding of that sovereignty to the Crown voluntarily.[376] It is plainly obvious that there is a contradiction present between the need to entreat with Indigenous peoples flowing from the Royal Proclamation and the issuance of a modified *terra nullius* or the doctrine of discovery.

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[371] Royal Proclamation 1763
[372] *Mabo v Queensland (No 2)*, [1992] HCA 23 at para 41.
[373] *Ibid* at paras 33, 36.
[374] *Mikisew Cree First Nation v Canada (Governor General in Council)*, *supra* note 265 at para 57.
[375] *Tsilhqot'in Nation v British Columbia*, *supra* note 213 at para 114.
[376] *Mabo v Queensland (No 2)*, *supra* note 372 at para 33.

The assertion of sovereignty by the Royal Proclamation in 1763 provided for the legal mechanism for the Crown's control of the land. In the preceding decades various groups signed treaties with the Crown in which they agreed to become subjects under the protection of the Crown—such as in 1759 and 1761 when the Mi'kmaq entered into treaty with the Crown during the 7 years' war.[377] Attempts at challenging the base sovereignty of the Crown were met with violence and force of arms by the Crown—as was the case against Louis Riel during the North-West resistance. In exchange for the assertion of sovereignty the Crown took upon itself duties towards aboriginal peoples through the creation of reserves and through the establishment of Aboriginal title.

The pre-existing Aboriginal title encumbrances on the Crown's radical title were well founded in law across the entire Empire (now Commonwealth) from an early period in modern history.[378] This was addressed by Canadian Courts through *Guerin* and *Calder* and confirmed by subsequent decisions of the Supreme Court of Canada.[379] Since the essence of Aboriginal title is that of un-ceded land then the only logical conclusion is that the Crown's radical title was acquired through a unilateral declaration of sovereignty backed by the force of arms. Professor Hoehn's assertion that it is the doctrine of discovery which is to blame for the lack of progress on reconciliation is unhelpful as the courts do not operate off the doctrine in any event.[380] This was confirmed expressly by the Supreme Court of Canada in *Tsilhqot'in* where the Court held that "[t]he doctrine of terra nullius (that no one owned the land prior to European assertion of sovereignty) never applied in Canada, as confirmed by the Royal Proclamation of 1763."[381] By

[377] *R v Bernard*, 2003 NBCA 55 at para 188.
[378] *Amodu Tijani v Southern Nigeria (Secretary)*, [1921] 2 AC 399 at 403.
[379] *Calder v British Columbia*, *supra* note 195; *Guerin v The Queen*, [1984] 2 SCR 335.
[380] Hoehn, Felix, *supra* note 362 at 6.
[381] *Tsilhqot'in Nation v British Columbia*, *supra* note 213 at para 69.

attempting to frame the doctrine of discovery as the problem rather than the unilateral displacement of aboriginal sovereignty by the Crown, Professor Hoehn misses a fruitful line of inquiry. Even if couched in the language of discovery it is plain in the jurisprudence that the land was never empty—not even metaphorically.[382] In examining our own case law in this area it becomes obvious that the main issue is not one of legal theory, but rather of evidence. Who occupied what and what evidence was acceptable to prove occupation was the central issue to resolve in *Tsilhqot'in*[383] on a community level, and before that in *Marshall and Bernard* on an individual level.[384]

The relationship between the Crown and Aboriginal peoples is founded through this assertion of sovereignty.[385] As explored earlier, it is the Monarch-subject relationship which creates the duties placed upon the Crown which flow from equity and the infallible nature of the Crown itself. While J.G. Allen was correct that the four traditional pillars of the Crown can be collapsed into the modern understanding of an office—the critical role of infallibility in guiding the Crown has not been as urgent as in Aboriginal law.[386] The responsibilities upon the Crown—its honour—flow from the infallible nature of the Crown and it is therefore necessary to maintain that infallibility in the context of reconciliation.

[382] Leaving aside for a moment that the Papal Bulls, such as *Dum Diversas* (1452), had in mind the conquest of people in Africa and not North America as the Bull was issued pre-Discovery of the Americas. The validity of the doctrine has been hotly contested, such as when Grotius wrote in *Mare Liberum* "The Portuguese Have No Right by Title of Discovery To Sovereignty Over The East Indies To Which The Dutch Make Voyages." In 1537 Pope Paul III issued a Papal Bull, *Sublimis Deus*, which revoked the prior *Inter Caetera*, which had divided the world between the Spanish and the Portuguese. The Indigenous peoples of South American were formally made into subjects of the Spanish Crown in 1542 by the New Laws issued by Charles V (see: Parker, G. Emperor: A New Life of Charles V. 2019. Yale University Press.)
[383] *Tsilhqot'in Nation v British Columbia*, *supra* note 213 at paras 33–40.
[384] *R v Marshall and Bernard*, *supra* note 229.
[385] Loughlin, *supra* note 16 at 39.
[386] Allen, *supra* note 23.

Similar issues to those identified in Hoehn affect others scholars too. In "The Tin Ear of the Court*"* Professors Hamilton and Nichols argue that the Court has "promulgat[ed] constitutional interpretations that entrench unilateral Crown authority" and "maintained a hierarchical ordering of legal systems […] that has reduced Aboriginal claims to contingent, Charter-analogous rights."[387] This is broadly correct and aligns with the foundation of the Crown's authority in the relationship between the King and his subjects. Professors Hamilton and Nichols further contend that this distribution of power between the Crown and Aboriginal people through the Duty to Consult has been unequal and as a result will doom the project of reconciliation to a failure.[388] It is evident here that an understanding of the honour of the Crown that flows from the ancient traditions of an infallible Crown is necessary to the project of reconciliation. The relationship between the Crown and Aboriginal peoples in Canada is unequal, and to pretend otherwise is to divert resources away from the realities facing Aboriginal Canadians and into well-intentioned, but ultimately wasteful diversions. The relationship between the Crown and any of its subjects is an unequal one. It is an inherent function of the Crown to execute power in society—*any* equals that the Crown has are foreign states and not constituent ones. Any project that requires a complete re-tooling of the Constitutional order and re-negotiation of the very foundational principles of society, as is suggested by Professors Hamilton and Nichols, is unrealistic and doomed to failure.[389] Instead, a theory of honour as advanced in this project would be in line with the pronouncements of the Courts of Appeal of British Columbia and Ontario in *Delgamuukw (1986)* and *Chippewas of Sarnia* above.

[387] Robert Hamilton & Joshua Nichols, 'The Tin Ear of the Court: Ktunaxa Nation and the Foundation of the Duty to Consult' (2019) 56:3 Alberta Law Review 729 at 750.
[388] *Ibid.*
[389] *Ibid* at 752.

Ryan Beaton in "De facto and de jure Crown Sovereignty: Reconciliation and Legitimation at the Supreme Court of Canada" traces the history of the development of the duty to negotiate from a moral duty to one steeped in the honour of the Crown, and finally to a legal duty.[390] Much like the Crown itself all three of these stages are true at the same time. The moral duty of the Crown to clear the encumbrance of title upon the sovereign title is present through the honour of the Crown, which manifests legally as the duty to consult—a duty which it must undertake in good faith due to the honour of the Crown. The difficulty present in the discourse is that there is an understandable desire to search for a unifying system that incorporates all aspects of this duty together in one cohesive form. However, as mentioned previously—the Crown and Anglo-law generally resists such a characterization of the Crown and has for over a thousand years.

The doctrine of the honour of the Crown is a relatively recent legal development in Canadian history when considered in express terms. Courts for centuries have hinted and explained portions of it through the incremental approach of the common law, but it was only through the court's attempts to reconcile property rights that it began to take on a distinctive coherence. The deep ethical implications of the honour of the Crown have been drawn primarily from the criminal law—which is fitting considering the importance of criminal justice and the disparity of power between the Crown and the accused. The use of power through the Royal Prerogative is an important component to the honour of the Crown where lessons should be drawn from. This work has canvassed two important areas—the structure of the Crown and the developments of Aboriginal law in our jurisprudence. The argument is straightforward—an

[390] Beaton, Ryan, 'De facto and de jure Crown Sovereignty: Reconciliation and Legitimation at the Supreme Court of Canada' 27:1 Constitutional Forum 25 at 28–29.

appreciation of the structure of the Crown and its honour renders the creation of new systems of laws for the special relationship between the Crown and Aboriginal peoples unnecessary and even harmful to the project of reconciliation.

The framing of the Crown's obligations toward Aboriginal people in Canada as *sui generis* has been unnecessary and serves to cloud and distort issues. Resorting to the traditional doctrine of the Crown can resolve the question of obligations on its own and expansion is unnecessary. The elucidation of the doctrine of the honour of the Crown by the courts has been helpful only insofar as it raises awareness of these deeper constitutional issues, but it has not been as helpful when the court tries to recreate what already works. The solution is evident—the notion of the Crown as a fiduciary must come to an end and the court should return to the historical role of the Crown-subject relationship framed around the overriding ethical obligations to all persons flowing from the honour of the Crown—in other words the infallibility of the Crown should return to the spotlight.[391] A key part of this solution, as Jamie Dickson notes, is that the judiciary would be relegated to policing Crown misconduct from its current role of paving the way forward on reconciliation.[392] This is an appropriate role for the judiciary to undertake as the pathway forward to reconciliation should be led by the legislative—and only democratic—branch of government.

Fundamentally the project of reconciliation is a political and social project and not a legal one. In this sense, understanding the Crown and its parameters is a necessary part of that project as political actors are unable to achieve objectives of their offices if they are ignorant of the duties, history, and responsibilities of their stations. Where the legislative and executive branches

[391] Dickson, Jamie D., *supra* note 1 c 6.
[392] *Ibid* at 22.

of government have abdicated their roles to the judiciary to solve there has been an error on their part. Such an error does not create jurisdiction for the judiciary to undertake such tasks. The entrenchment of Aboriginal rights through s. 35 of the Constitution Act, 1982 was an important step that required leadership and perseverance from the executive and legislative branches. Instead, the matter was left to the courts to decide in a haphazard fashion through the developments in the law such as *Haida Nation*, *Gladue*, and *Scott* which have not yielded a coherent unified framework to guide reconciliation.[393]

As J.G. Allen noted in "The Office of the Crown," the English conception of the Crown does not include a defined conception of a State in the same way that the American or French Republics do.[394] It has evolved to suit the needs of the moment through political negotiation and as a convenient way to assign powers and functions without having to worry about the larger implications of a defined power structure.[395] This diverse characterization of the Crown resists attempts to define it as a coherent whole and benefits from the ambiguities inherent in that. The downside of this is that for actors operating at the behest of the Crown there must be an understanding of the history of the Crown as well as the ethical obligations of the Crown—a mundane example of this is the special ethical considerations inherent in the Crown prosecution service.[396]

To paraphrase Professor Dwight Newman in *Revisiting the Duty to Consult Aboriginal Peoples*, there is a duty for the Crown generally to act in accordance with the virtue of honour and it is this virtue that fundamentally characterizes the Crown's obligation to Aboriginal

[393] *R v Desautels*, 2021 SCC 17 at paras 84–91.
[394] Allen, *supra* note 23.
[395] *Ibid* at 50.
[396] *R v Boucher*, *supra* note 286.

peoples.[397] This virtue of honour is applicable generally to all interactions that the Crown undertakes and it is unnecessary to limit it to Aboriginal peoples; to do so would be dishonourable itself. The creation of the *sui generis* fiduciary duty with an unconventional Crown at the core was unnecessary and distracting from this realization. The Crown is required by its honour to reconcile with Aboriginal peoples in Canada, and in doing so it is required to treat them honourably and in good faith—no special doctrines are required to achieve this aim.[398]

The Supreme Court noted that the Crown is required to act with purpose and diligently when discharging constitutional obligations towards Aboriginal peoples in *Manitoba Metis Federation*,[399] but this has always been the case throughout history that the Crown has been ethically bound by the virtue of honour to act in that way—not to say that it always or even mostly has. The tragedy is that it took the Court so long to rediscover this, and that it is applying the purpose and diligence requirement narrowly. Upholding the infallibility in the Crown requires an ongoing act of vigilance, ethical conduct, and rigour by those acting in the Crown's name in all matters not just those related to Aboriginal peoples.

Modern academic commentary falls short of this realization and instead largely seeks to change the foundation of the system by denying the sovereignty of the Crown, distorting history to conceal acts of sovereignty displacement of Aboriginal peoples by the Crown and occluding the realities of power-dynamics in a modern state. Exploration of the old paths of traditional power and governance inherent in the Crown is missing from the academic commentary, and a

[397] Newman, Dwight, *Revisiting the Duty to Consult* (Saskatoon: Purich, 2014) at 27.
[398] Dickson, Jamie D., *supra* note 1 at 115.
[399] *Manitoba Metis Federation Inc v Canada (Attorney General)*, *supra* note 281 at para 74.

renewed focus on tradition and doctrine could be a less disruptive method of repairing a relationship with Aboriginal peoples and with each other.

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