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Article abstract

In this paper, I aim to advance understanding of the constitutional principle of the honour of the Crown, by evaluating legal and political dimensions of the concept. I seek to demonstrate how the honour of the Crown may obscure but also illuminate legal issues and political challenges that meaningful pursuit of reconciliation involves. I argue that once one starts to ask “Who is to uphold the honour of the Crown?” one observes opaque royal symbolism obscuring, but also framing, contested questions of governance shot through with collective coordination problems. I argue that appreciating the normative potential of the “honour of the Crown” means acknowledging that the concept figures as but one of many communicative forms that may serve to foster a more just arrangement for and among peoples.

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Upholding the Honour of the Crown

Thomas McMorrow*

In this paper, I aim to advance understanding of the constitutional principle of the honour of the Crown, by evaluating legal and political dimensions of the concept. I seek to demonstrate how the honour of the Crown may obscure but also illuminate legal issues and political challenges that meaningful pursuit of reconciliation involves. I argue that once one starts to ask “Who is to uphold the honour of the Crown?” one observes opaque royal symbolism obscuring, but also framing, contested questions of governance shot through with collective coordination problems. I argue that appreciating the normative potential of the “honour of the Crown” means acknowledging that the concept figures as but one of many communicative forms that may serve to foster a more just arrangement for and among peoples.

Dans cet article, je vise à faire mieux comprendre le principe constitutionnel de l’honneur de la Couronne. Je fais ressortir les difficultés qui surgissent si on donne trop d’importance à ce concept — soit comme doctrine du droit, soit comme slogan politique — tout en résistant aux tentatives de rejeter carrément cette idée. Je montre comment l’honneur de la Couronne peut embrouiller, mais aussi éclairer, les questions juridiques et les difficultés politiques que comporte la poursuite sérieuse d’une réconciliation. Je démontre qu’une fois qu’on commence à demander « qui va préserver l’honneur de la Couronne? », on remarque qu’un symbolisme royal opaque obscurcit mais également délimite les questions de gouvernance contestées, qui sont truffées de problèmes collectifs de coordination. Je soutiens que pour bien apprécier le potentiel normatif de l’« honneur de la Couronne », il faut reconnaître que ce concept n’est que l’une des nombreuses formes de communication qui peuvent servir à promouvoir un arrangement plus juste pour les peuples et entre eux.

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I. INTRODUCTION

The Supreme Court's *Haida Nation* trilogy of cases in 2004¹ cemented the principle of “the honour of the Crown” as a constitutional touchstone for Canadian Aboriginal law.² As such, it is worth exploring to what extent it may serve as a fulcrum for leveraging legal, political, and social reform. That involves grappling with Valverde's observation that the “archaic”, “monarchical”, even “mystical”, “pre-modern”, and “quasi-divine” connotations of the phrase render it something of an anachronism in a contemporary liberal democracy.³ It also means acknowledging that in light of the historical record—the grinding pressures of dispossession, assimilation, and marginalization that Indigenous peoples of Canada continue to endure today—the very expression appears a contradiction in terms. The words “honourable Crown” fall on the ears like Mark Antony's “honourable men”, each time amplifying the disjuncture between the representation and the reality.

My aims are to expose what the honour of the Crown has come to mean and why, and to evaluate its salience for advancing reconciliation.⁴ First, I sketch the constitutional principle, highlighting the extent to which the honour of the Crown gives rise to constraint on government action. Mindful that the language

¹ The following series of cases establishing the doctrine of the duty to consult and its foundation in the constitutional principle of the honour of the Crown are often referred to as the ‘*Haida Nation* trilogy’: *Haida Nation v British Columbia (Minister of Forests)* 2004 SCC 73, [2004] 3 SCR 511 [*Haida Nation*], *Taku River Tlingit First Nation v British Columbia (Project Assessment Director)*, 2004 SCC 74, [2004] 3 SCR 550 and *Mikisew Cree First Nation v Canada (Minister of Canadian Heritage)*, 2005 SCC 69, [2005] 3 SCR 388. It was actually in *Wewaykum Indian Band v Canada*, [2002] 4 SCR 245, 220 DLR (4th) 1, however, that the Court began to disentangle the broader more flexible principle of the “honour of the Crown” from the Crown's fiduciary duties. It was following the passage into law of the *The Constitution Act, 1982*, Schedule B to the Canada Act 1982 (UK), 1982, c 11, recognizing and affirming the “aboriginal and treaty rights of the aboriginal peoples of Canada” that the Supreme Court began referring to the “honour of the Crown” in its major Aboriginal rights case; for example: *R v Guerin* [1984] 2 SCR 335; *R v Sparrow*, [1990] 1 SCR 1075; *Delgamuukw v British Columbia* [1997] 3 SCR 1010; and *Manitoba Métis Federation v Canada* (Attorney General), 2013 SCC 14, [2013] 1 SCR 623 [*Métis Federation*]; *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44; *Clyde River (Hamlet) v Petroleum Geo-Services*, 2017 SCC 40 [*Clyde River*]; *Chippewas of the Thames First Nation v Enbridge Pipelines*, 2017 SCC 41 [*Chippewas of the Thames*]; *Mikisew Cree First Nation v Canada (Governor General in Council)*, 2018 SCC 40 [*Mikisew Cree 2018*].

² Jamie Dickson, *The Honour and Dishonour of the Crown: Making Sense of Aboriginal Law in Canada* (Saskatoon: Purich Publishing, 2015); James [Sake'j] Youngblood Henderson, “Dialogical Governance: A Mechanism for Constitutional Governance” (2009) 72 Sask L Rev 29; Brian Slattery, “Aboriginal Rights and the Honour of the Crown” (2005) 29 SCLR (2d) 433 at 434.

³ See Mariana Valverde, “Chapter 5: The non-modern chronotope of the honour of the Crown in contemporary Canadian law” in *Chronotopes of Law: Jurisdiction, Scale and Governance* (New York: Routledge, 2015) 125 [Valverde, *Chronotopes*]; and Mariana Valverde, “‘The Honour of the Crown is at Stake’: Aboriginal Land Claims Litigation and the Epistemology of Sovereignty” (2011) 13 UC Irvine L Rev 955 [Valverde, “Honour of the Crown”].

⁴ Truth and Reconciliation Commission of Canada, *Honouring the Truth, Reconciling for the Future: Summary of the Final Report of the Truth and Reconciliation Commission of Canada* (Executive Summary) (Winnipeg: Truth and Reconciliation Commission of Canada, 2015), online: <http://www.trc.ca/websites/trcinstitution/File/2015/Findings/Exec_Summary_2015_05_31_web_o.pdf>.

of constraint may also double as pretext to (even prophylactic for) domination,⁵ I engage scholarly analyses of the rationale behind the courts' deployment of this doctrine to foster reconciliation. Like reconciliation itself, the honour of the Crown is conceptually complex, and normatively contested. Recognizing the historical and ongoing relevance of the Crown is key to appreciating the currency the honour of the Crown may have. I analyze ways in which the courts have deployed the doctrine. Next, I identify features that contribute to what I describe as the underwhelming honour of the Crown. Lastly, I point to the multiplicity of sovereignties as a fundamental premise, rather than problem, for engaging in the act of honouring.

I attempt to show why, as important as it is, the metaphor of the “honour of the Crown” neither can nor should be expected to accomplish all the work with which it has been tasked. I seek to demonstrate that formulated as both political aspiration and legal duty, the principle of the honour of the Crown reveals the complex interplay of law and politics in the process of reconciliation. The Supreme Court has deployed the fiction of the honour of the Crown to develop a section 35 jurisprudence that offers a more inclusive formal legal framework for First Nations, Inuit and Métis peoples in Canada. So multi-faceted are the legacies and realities of colonialism that the paradox of state governments—no matter what the branch—endeavouring to recognize and respect Indigenous peoples (which must include releasing them from political, legal, social, cultural and economic control) produces a quagmire.

If reconciliation is the North Star,⁶ to what extent may the honour of the Crown serve as a compass? Determining what and who the Crown is, what its honour entails (indeed, requires), and whether the honour of the Crown is being upheld, comports difficulties I aim to illuminate (as opposed to solve). I argue that the coordination, cooperation, solidarity and trust necessary to advance reconciliation are best cultivated and nourished by the continuous opportunity to draw from a multiplicity of experiences, languages, and metaphors to express—and in doing so, call forth—a more just arrangement for and among peoples.

II. CONSTITUTIONAL PRINCIPLE

The “honour of the Crown” is a constitutional principle with instrumental and symbolic significance.⁷ Concretely, it shapes the manner in which the Crown is obligated to discharge its duties, including where

⁵ The fact is one may invoke honour to claim, not just to constrain power—and even to rationalize violence. But when the idea of honour operates as a warrant for force, it merits both a different level of scrutiny and standard of justification from when it is functioning as a check on decision-making authority and use of sovereign power.

⁶ For a critical perspective on settler state reconciliation rhetoric, see Audra Simpson, “Sovereignty, Sympathy and Indigeneity” in Carole Anne McGranaghan & John Collins, eds, *Ethnographies of U.S. Empire* (Durham: Duke University Press, 2018) at 84: “Restoration, repair, reconciliation, ‘I am sorry’ (. . . ‘that I raped you’). This is the gestural architecture of settler states, the idea that repair will allow a joining, a concurrence, an equality, an assimilation (a further swallowing?) For some, that would be really great, really ideal: ‘We said we are sorry—we can now reconcile.’ But what if some things are irreconcilable?” See also Leanne Simpson, *As We Have Always Done: Indigenous Freedom through Radical Resistance* (Minnesota University Press, 2017).

⁷ See Robert Leckey, “Families in the Eyes of the Law: Contemporary Challenges and the Grip of the Past” (2009) 15:8 IRPP Choices 1, online: <<http://irpp.org/wp-content/uploads/assets/research/family-policy/families-in-the-eyes-of-the-law/vol15no8.pdf>> at 3 (contrasting the instrumental and symbolic value that legal recognition of different family forms can have); Roderick A Macdonald, “The Governance of Human Agency” (Background Document for the Special Senate

an Aboriginal people asserts that their interests will be affected by the state's actions and the honour of the Crown gives rise to a duty to consult.⁸ It is these conflicts over land and resources, involving activities such as logging, mining, drilling, fracking, hunting, fishing and constructing roads, pipelines or buildings, that feature most prominently in case law, academic commentary, and public discourse.⁹ The purpose of the duty to consult is to ensure that specific Aboriginal and treaty rights are not diminished prior to their status in Canadian law being recognized. The Court has held, however, that the Crown's duty to consult does not equal an Indigenous right to veto; furthermore, the type of consultation required can vary—from shallow to deep.¹⁰

In *Haida*, the Supreme Court stated that in “cases where the claim to title is weak, the Aboriginal right limited, or the potential for infringement minor... the only duty on the Crown may be to give notice, disclose information, and discuss any issues raised in response to the notice.”¹¹ In cases, however, where a “strong *prima facie* case for the claim is established, the right and potential infringement is of high significance to the Aboriginal peoples, and the risk of non-compensable damage is high... deep consultation, aimed at finding a satisfactory interim solution, may be required.”¹² As the Court stressed in *Ktunaxa*, however, “Section 35 guarantees a process, not a particular result.”¹³

Although invoking the honour of the Crown may be meant to transcend the inertia (and opposition) of government bureaucracy and politics-as-usual, the prospects of success remain far from certain. The institutions, principles, and procedures of Canadian state law circumscribe how the duty to consult and accommodate gets applied. Conversely, beyond its doctrinal weight *ex post facto* in constitutional

Committee on Illegal Drugs, 2002), <<http://www.parl.gc.ca/Content/SEN/Committee/371/ille/library/background-e.htm>> (discussing the role of law in “the symbolic construction of human agency”); Susanne K Langer, *Philosophy in a New Key: a Study in the Symbolism of Reason, Rite, and Art* (Cambridge: Harvard University Press, 1957) (exploring practices of symbolic transformation).

⁸ The other three situations are: when the Crown assumes discretionary control over a specific Aboriginal interest, the honour of the Crown gives rise to a fiduciary duty; when the Crown is making or implementing treaties, it is obligated to negotiate honourably and avoid the appearance of sharp dealing; and the honour of the Crown requires the Crown to act in a way that accomplishes the intended purposes of treaty and statutory grants to Aboriginal peoples; see *Manitoba Métis Federation Inc v Canada (Attorney General)* *supra* note 1 at para 73. See Jula Hughes & Roy Stewart, “Urban Aboriginal People and the Honour of the Crown” (2015) 66 UNBLJ 263 where the authors argue for expansion of situations where the duty to consult may be evoked in order to include urban Aboriginal organizations and rights to services.

⁹ See *Haida Nation* trilogy, *supra* note 1.

¹⁰ *Beckman v Little Salmon/Carmacks First Nation* 2010 SCC 53, [2010] 3 SCR 103 at para 44.

¹¹ *Haida Nation*, *supra* note 1 at para 43.

¹² *Ibid* at para 43-44.

¹³ *Ktunaxa Nation v. British Columbia (Forests, Lands and Natural Resource Operations)*, 2017 SCC 54 at paras 81 and 83. Despite the Ktunaxa First Nation's categorical opposition to the development of a ski resort on lands it held to be sacred, the Court deemed the BC government's efforts at negotiation and accommodation sufficient (*ibid* at 87). From the Ktunaxa's point of view, it is hard to see the government's failure to honour their spiritual claims as honourable. But the Supreme Court, in deferring to the Minister's decision-making authority, concluded there was a reasonable basis to inferring the government had consulted adequately. The Court's interpretation and reasoning centred around the appropriate administrative standard of review, which in turn required a certain level of judicial deference. On this standard, the Court had to be satisfied that the Minister's decision was reasonable—which it did—to conclude the honour of the Crown was upheld.

adjudication, the principle of the honour of the Crown can exert political and administrative pull in a prospective fashion.

Indeed, as Dwight Newman observes, the claim underlying the concept is “that a settler people in ongoing encounter with Indigenous peoples must deal honourably with them, and more generally, act in accordance with the virtue of honour.”¹⁴ Importantly, in establishing this doctrine, the Supreme Court has adopted a new narrative for the nomos of Indigenous-state relations.¹⁵ It is neither the story of non-recognition, nor that of a qualified recognition of Aboriginal rights, which presupposes the legitimate acquisition of Crown sovereignty.¹⁶ The new narrative goes further to take Indigenous perspectives into account. In *Manitoba Métis v Canada*, a majority of the Court expressed it this way:

The honour of the Crown thus recognizes the impact of the “superimposition of European laws and customs” on pre-existing Aboriginal societies...Aboriginal peoples were here first, and they were never conquered...yet, they became subject to a legal system that they did not share. Historical treaties were framed in that unfamiliar legal system, and negotiated and drafted in a foreign language...The honour of the Crown characterizes the “special relationship” that arises out of this colonial practice.¹⁷

While acknowledging colonial law as an imposition, and dispelling the notion of conquest, the story does not go so far as to repudiate the assumption of Crown sovereignty; nor does the story explain or justify Crown “authority to extinguish the distinct rights of another people, without their consent”.¹⁸ Nowhere more so than in the myth of *terra nullius*—and the state legal rules and decisions that myth has been used to legitimate—does the power of narrative to ground normativity manifest so dramatically.¹⁹ An account of the past that effaces the existence of Indigenous peoples, societies, cultures, economies, politics and legal orders is one fitted to particular purposes.²⁰ Evan Fox-Decent points to how the new narrative, which

¹⁴ Dwight Newman, *Revisiting the Duty to Consult Aboriginal Peoples* (Saskatoon: Purich Press Ltd, 2014) at 27.

¹⁵ See Robert Cover, “Nomos and Narrative” (1983) 97 Harv L Rev 4.

¹⁶ Slattery, *supra* note 2 at 434.

¹⁷ *Métis Federation*, *supra* note 1 at para 67. An important, but unelaborated statement follows in the next paragraph, recognizing implicit limits as to the scope of the Crown’s obligation, stating “not all interactions between the Crown and Aboriginal people engage it” (at para 68).

¹⁸ John Borrows, “Sovereignty’s Alchemy: An Analysis of *Delgamuukw v. British Columbia*” (1999) 37:3 Osgoode Hall Law Journal 537 at 588.

¹⁹ See Robert J Miller et al., *Discovering Indigenous Lands: The Doctrine of Discovery in the English Colonies* (Oxford: Oxford University Press, 2010); Kent McNeil, “The Doctrine of Discovery Reconsidered: Reflecting on Discovering Indigenous Lands: The Doctrine of Discovery in the English Colonies, by Robert J Miller, Jacinta Ruru, Larissa Behrendt, and Tracy Lindberg, and Reconciling Sovereignties: Aboriginal Nations and Canada, by Felix Hoehn” (2016) 53:2 Osgoode Hall Law Journal 699.

²⁰ It goes hand-in-glove with efforts to repress political participation. See Trevor Purvis, “Sovereign Authority and the Limits of Constitutional Democracy: The Case of Indigenous Peoples in Canada” (November 20, 2018) Oñati Socio-Legal Series [forthcoming] at 11-12, DOI: <<https://ssrn.com/abstract=3287716>> (stressing the extent to which “new societies invented by liberal democracy...[were] almost invariably premised upon the exclusion or occlusion of indigenous peoples from the foundational myths of ‘the people’.” But see Peter H Russell, *Canada’s Odyssey: A Country Based on Incomplete Conquests* (Toronto: University of Toronto Press, 2017) (where Russell attempts to correct the

still takes “Crown sovereignty...to be an incontestable given”, serves “to legitimize Crown sovereignty in the absence of a compelling narrative of how First Nations lost theirs.”²¹ While recognizing how aspects of the same old story persist, changes to the narrative reflect the potential for ongoing revision, retelling, and re-imagination. Complicate the story, flesh out the characters, layer the plot, multiply the narrative perspectives and the ground starts to shift;²² the legal *status quo* no longer stands on quite the same footing.

III. REFURBISHED AND REPURPOSED RELIC?

As the Supreme Court’s story of Indigenous-Crown relations has developed, so too has its account of the honour of the Crown. After relating it, I explain why Valverde describes the development of the doctrine in such skeptical— at times, even withering—terms. I argue that her skewering of the Crown’s stale symbolism underestimates its enduring significance, while embellishing the eccentricity of the “honour of the Crown”. Both David Arnot²³ and John Ralston Saul,²⁴ meanwhile, offer a more earnest, indeed, enthusiastic take—on both the Crown and its honour. By foregrounding personal responsibility—that of Crown servants as well as members of the public—their accounts render the honour of the Crown at once more tangible and compelling. Nonetheless, they underplay the structural dimensions to the power the Crown symbolizes—that is, structures of thought, interest and authority that may frustrate and distort, as well as give effect to, any one person’s exercise of agency.

Now, Chief Justice McLachlin (as she then was, addressing a conference of the Canadian Bar Association) has said that the story of the relations between Canada’s Indigenous peoples and those who came after is like a river.

It starts with Samuel de Champlain’s collaboration with the people he found in the deep woods of eastern and central Canada in the 17th century. It flows forward with the Royal Proclamation of 1763 and its commitment to treaty-making and fair dealing. It shallows and eddies for a while in the late 19th century and the first half of the twentieth century, a time which Binnie J. recollected in *Mikisew Cree* as a period of a “multitude of smaller grievances created by the indifference of some government officials to aboriginal people’s concerns, and the lack of respect inherent in that indifference”. In the last part of the 20th century the river straightened its course, and now once more flows deep and strong. The river is richly hued, taking its colour from the diverse cultures, ideas and practices of all its tributaries over the centuries. But one stream flows from its beginning to the present — the

unjustifiably diminished role accorded in the popular Canadian consciousness to Indigenous peoples when it comes to the shaping of Canada’s legal, political and constitutional structures).

²¹ Evan Fox-Decent, *Sovereignty’s Promise: The State as Fiduciary* (Oxford University Press, 2011) at 67.

²² See Hester Lessard, Rebecca Johnson & Jeremy Webber, *Storied Communities: Narratives of Contact and Arrival in Constituting Political Community* (Vancouver: UBC Press, 2011).

²³ See David M Arnot, “The Honour of the Crown” (1996) 60 Sask L Rev 339.

²⁴ See John Ralston Saul, *A Fair Country* (Toronto: Penguin Canada, 2008); John Ralston Saul, *The Comeback* (Toronto: Penguin, 2014).

constant stream of the honour of the Crown and its commitment to respect, noble dealing and fair outcomes.²⁵

In other words, the principle of the honour of the Crown may historically have been “more honour’d in the breach than the observance”,²⁶ but the ideals the concept represents (such as “respect for difference, nobility of action, and a commitment to fair dealing and fair outcomes”) bear an enduring significance.²⁷ Contrary to the ancient riparian gloss McLachlin’s extrajudicial remarks offer, attempts by Supreme Court judges to consecrate the “honour of the Crown” as the source of Canadian Aboriginal law are in fact of relatively recent vintage. The concept of the honour of the Crown may have centuries-old origins in pre-contact England. References to it may have subsequently splashed onto the pages of law reports from time to time. It has, however, only been in the last quarter century—and more specifically since the start of the present millennium—that the concept’s current of jurisprudential import and normative value has come to be felt and acknowledged.²⁸

Valverde describes the transition as one without fanfare or footnotes, where “certain truths about the powerful if elusive entity that is ‘the Crown’” are expressed through “semimystical phrases that do the work that might otherwise have been done through rights claims.”²⁹ In effect, she argues, Canadian judges have retrieved, refurbished, repurposed, and elevated the legal doctrine of the “honour of the Crown” from the pre-modern history of the common law to palliate the problems posed by “Western law’s own modernity” today.³⁰ Thus, when Canadian judges use the phrase “the honour of the Crown”, they are recycling and adapting “European medieval notions of the mystical properties of the Crown for the highly

²⁵ Right Honourable Beverley McLachlin, “The Honour of the Crown” (delivered at the CBA National Aboriginal Law Section Annual Conference, Ottawa, 5 May 2016), [unpublished, on file with author] at 13.

²⁶ Dickson CJ and La Forest J stated as much on behalf of the Court in *R v Sparrow*, *supra* note 1 at 1103: “And there can be no doubt that over the years the rights of the Indians were often honoured in the breach (for one instance in a recent case in this Court, see *Canadian Pacific Ltd v Paul*, [1988] 2 SCR 654. As MacDonald J stated in *Pasco v Canadian National Railway Co*, [1986] 1 CNLR 35 (BCSC) at 37: “We cannot recount with much pride the treatment accorded to the native people of this country.”

²⁷ McLachlin, *supra* note 25.

²⁸ As noted, it is just since the *Haida Nation* trilogy of cases, *supra* note 1, that the “honour of the Crown” has emerged as the doctrinal lynchpin of Crown/Aboriginal law. See Dickson’s overview of the jurisprudential history in *The Honour and Dishonour of the Crown*, *supra* note 2 at 24-49; see also James [Sake’j] Youngblood Henderson, “Dialogical Governance”, *supra* note 2. Although its contents are recognized as central to recognition of Aboriginal rights in Canadian law, *The Royal Proclamation 1763* does not contain the phrase “the honour of the Crown”, see “The Royal Proclamation” reproduced in Mary C Hurley & Jill Wherrett, eds, *The Report of the Royal Commission on Aboriginal Peoples: Looking Forward, Looking Back* (Ottawa: Library of Parliament, Research Branch, 1999) at 720 appendix D. References to the “honour of the Crown” lie outside the context of Indigenous-Crown relations, and date to a 17th Century English dispute over how to interpret the ambiguous wording in a royal land grant. Coke CJ wrote that when two constructions are possible, “for the King’s honour, and for the benefit of the subject, such construction shall be made that the King’s charter shall take effect, for it was not the King’s intent to make a void grant”. See *St Saviour’s Southwark (Churchwardens) case* (1613), 10 Co. Rep. 366 at 66b and 67b, 77 ER 1025 [*St Saviour’s*] at 1027.

²⁹ Valverde, “Honour of the Crown”, *supra* note 3 at 956.

³⁰ Valverde, *Chronotopes*, *supra* note 3 at 126.

modern, perhaps postmodern, project of acknowledging and beginning to remedy colonial injustices toward aboriginal people”.³¹

Neither the Court’s aim nor rhetorical strategy is as novel or extraordinary as may appear at first blush, however. Valverde constructs a dichotomy between modern and post-modern, black-letter-law and politics,³² attributes of the sovereign authority and claims of purported legal subjects. This move obscures the extent to which these ideas meld into each other; it also discounts the part that invoking the honour of the Crown actually plays in rights-claiming. Valverde’s statement also implies that myth and mystery are foreign to the foundations and functioning of rights-discourse, but this occludes the contingent nature of all legal frames.³³ First Nations may (for good reason) have more confidence in the doctrine of the honour of the Crown, than in current rights-claim processes to protect their interests. Settling may to some be synonymous with ceding—rights, territory, authority, possibility. Besides, whatever gains one may make on the level of formal state recognition is nonetheless subject to the limitations the state may lawfully impose on them,³⁴ moreover, by not participating in the state law-sanctioned settlement process one may signal one’s refusal to acknowledge the legitimacy of the Canadian state or its so-called lawful infringements of Aboriginal rights.

Indeed, before one infers that rights claims would be a less complicated, more practical way to redress historical injustices, it is important to acknowledge that the language of liberal legalism and its supposedly neutral idiom of rights—as reflected in the 1969 White Paper, for example—have never served as a *lingua franca* of Indigenous peoples and the settler state.³⁵ Justice and injustice—historical and ongoing—may offer a better orientation. In adopting the term “justice claim”, however, one must explicitly eschew privileging the institutions, and law, of the Canadian state as the legitimate validator of such claims. That its validations have real-world consequences for Indigenous and non-Indigenous alike is evident; that the institutions and the law (and therefore the attitudes and commitments of those who make and administer it) must change for those decisions to better approximate justice is implicit in the idea of reconciliation—as goal, as process, as relationship.

In this spirit, Valverde argues, judges have effectively looked “to the most antique and illiberal corners of the common law for a remedy to colonialism’s legal defects”.³⁶ In doing so, they have repurposed the “honour of the Crown” “as a treatment for the very disease that the Crown in question caused”.³⁷ While it may seem ironic to rely on the same historic symbol of imperial power to locate constraints on the exercise of state legal authority, it is no more ironic than every invocation of the law and its authority in pursuit of redress for a legally authorized injustice. Thus, as old-fashioned as the Crown may be, it remains central to the Canadian constitutional order. It is harder to see the Supreme Court as relic hunter, when the Crown adorns the apex of Canada’s constitutional architecture. Moreover, what Valverde dubs “the paternalist,

³¹ *Ibid* at 127.

³² *Ibid* at 150.

³³ See e.g. Samuel Moyn, *Human Rights and the Uses of History* (New York: Verso, 2014).

³⁴ See *R v Sparrow*, *supra* note 1 at 1111-1121 (setting out and applying the test to extinguish Aboriginal title).

³⁵ See Canada, *Statement of the Government of Canada on Indian Policy, 1969*, online: Indigenous and Northern Affairs Canada <<https://www.aadnc-aandc.gc.ca/eng/1100100010189/1100100010191>>; and the trenchant, contemporaneous critique by Harold Cardinal, *The Unjust Society: the Tragedy of Canada's Indians* (Edmonton, MG Hurtig, 1969).

³⁶ Valverde, *Chronotopes*, *supra* note 3 at 127.

³⁷ *Ibid*.

premodern, crypto-Christian logic of ‘the honour of the Crown’ doctrine” nonetheless conjures up an earlier history. The long view reveals the potential for charting a different course of Indigenous-Crown relations both now and in the future;³⁸ for indeed, as Webber affirms, “we are still in the age of encounter”.³⁹ What is noteworthy is not “courts doing politics”, but what courts have to say when explaining why they are declining to do so.

Admittedly, Valverde tempers her disdain for what she describes as the Supreme Court of Canada’s effort to legitimate the “(English) monarchy” by “refurbishing the Crown for a multicultural age”,⁴⁰ by acknowledging certain reasons why Indigenous people may themselves welcome the doctrine of the honour of the Crown.⁴¹ For example, she acknowledges it was the Crown who entered into treaties with Indigenous peoples, while the record of relations with federal and provincial political leadership has often been dismal.⁴² Moreover, she avers, archaic as it may sound, the monarchical concept of the Crown’s honour stands a chance of placing checks on the excesses and injustices of majority rule, in ways the more democratic, contemporary-sounding principle of Parliamentary supremacy does not.⁴³

Nevertheless, Valverde’s more sanguine caveats do not approximate the ardour with which David Arnot, former Saskatchewan treaty commissioner, embraces the honour of the Crown. He writes that the normative weight of the phrase, “the honour of the Crown”, reached its apogee many centuries ago, prior to contact between the Crown and First Nations.⁴⁴ Arnot acknowledges, though, that as the character of societies and governments transformed into much larger, more complex formalized undertakings, the phrase itself became more vulnerable to abuse:

In Anglo-Saxon times, being linked with an act that might harm or humiliate your Chief or King was an extremely serious and dangerous offence, with dreadful consequences to all involved. The personal relationships between sovereigns and their ministers weakened as the medieval state grew more complex and bureaucratic. The sovereign became insulated from personal involvement in the affairs of the state. Although the culture of principle had

³⁸ See Richard White, *The Middle Ground: Indians, Empires, and Republics in the Great Lakes Region, 1650-1815* (New York: Cambridge University Press, 2011).

³⁹ Jeremy Webber, “We Are Still in the Age of Encounter: Section 35 and a Canada Beyond Sovereignty” in Patrick Macklem & Douglas Sanderson, eds, *From Recognition to Reconciliation: Essays on the Constitutional Entrenchment of Aboriginal and Treaty Rights* (Toronto: University of Toronto Press, 2016) at 63.

⁴⁰ Valverde, “Honour of the Crown”, *supra* note 3 at 957. Valverde strikes a more ambivalent, though ultimately skeptical chord in *Chronotopes*, *supra* note 3 at 135: “The neo-medieval doctrine of the Crown’s honour is a more useful tool of legal reform than rights statutes and international conventions, because, thanks to its spatiotemporality [its unboundedness in clock time], it supersedes and trumps the temporal limitations that constitute ordinary law; but, importantly, it does so without turning aboriginal peoples into full-fledged nations exercising their autonomy, an undesired outcome that using international law or even domestic aboriginal rights law would risk.” In relation to Valverde’s latter point, consider the range of symbolic strategies Indigenous Peoples may adopt; see Benedict Kingsbury, “Reconciling Five Competing Conceptual Structures of Indigenous Peoples’ Claims in International and Comparative Law” (2001) 34 NYUJ Intl L & Pol 89.

⁴¹ Valverde, “Honour of the Crown”, *supra* note 3 at 956.

⁴² *Ibid* at 970-71.

⁴³ *Ibid* at 971.

⁴⁴ Arnot, *supra* note 23 at 340.

begun to disappear in deeds, it survived in words. A cynical observer might be tempted to conclude that the language of Crown honour was often deployed to cloak the misconduct of ministers and to reassure British subjects that the power of the state remained in responsible and chaste hands that would not dare to behave selfishly.⁴⁵

Arnot argues that what we should see in the “honour of the Crown” today is an appeal “not merely to the sovereign as a person, but to a traditional bedrock of principles of fundamental justice that lay beyond persons and beyond politics.”⁴⁶ Arnot sees a standard to which all servants of the government must aspire, one consistent with the historically rooted, legitimate expectations of Canada’s Aboriginal peoples:

I would like to propose that ‘the honour of the Crown’ refers to the same essential commitment that First Nations recall when they use the word ‘justice’. In every action and decision, the women and men who represent the Crown in Canada should conduct themselves as if their own personal honour and family names depended on it.⁴⁷

Such a personalized, collective commitment outstrips the limited catchment that royal pomp commands in a liberal, constitutional democracy. Therefore, building on Arnot’s idea, while seeking to popularize the concept of the honour of the Crown, John Ralston Saul writes:

[T]he Honour of the Crown...gradually became an expression of legitimate authority built upon an abstract representation of the land, the place, the people and the obligation of those in authority to the land, place and people— not about obligation to respect formal commitments but the responsibility of the civilization to respect its reality.⁴⁸

Saul characterizes the honour of the Crown as something more than an administrative encumbrance on state officials (or solemn obligation devolving onto servants of Her Majesty).⁴⁹ Indeed, it signals a shared, personal responsibility of all Canadians. Saul is suggesting that ultimately it is Canadians who make up the state; simply put: the Crown is we.

Thus, Arnot’s framing of the honour of the Crown as an ethos for public servants and Saul’s as mantra for all citizens both stress the imperative of personal accountability. The *Truth and Reconciliation*

⁴⁵ *Ibid.*

⁴⁶ *Ibid.* On the way in which the Supreme Court has come to favour the honour of the Crown over the concept of the Crown as fiduciary, see Dickson, *supra* note 2. But compare Fox-Decent, *supra* note 21 at 72 (“the honour of the Crown participates in the same quest for legitimacy that motivates the Court’s imposition of fiduciary duties”). For evidence that the fiduciary framing lingers still, see *Mikisew Cree 2018*, *supra* note 1 at para 153 where Rowe J (Moldaver & Côté JJ, concurring) writes: “The honour of the Crown arises from the fiduciary duty that Canada owes to Indigenous peoples following the assertion of sovereignty.”

⁴⁷ Arnot, *supra* note 23 at 342.

⁴⁸ Saul, *A Fair Country*, *supra* note 24 at 69-71.

⁴⁹ Saul, *The Comeback*, *supra* note 24 at 36, 42, 105, 131; see also Jean Teillet, “Taking Stock After MMF” (speech delivered at Métis Nation of Ontario’s 20th Annual General Assembly, Ottawa, 24 August 2013) reprinted in Saul, *The Comeback*, 254-58.

Commission of Canada has stated that “all Canadians have a critical role to play in advancing reconciliation in ways that honour and revitalize the nation-to-nation Treaty relationship”.⁵⁰ It continues:

Reconciliation must become a way of life. It will take many years to repair damaged trust and relationships in Aboriginal communities and between Aboriginal and non-Aboriginal peoples. Reconciliation not only requires apologies, reparations, the relearning of Canada’s national history, and public commemoration, but also needs real social, political, and economic change.⁵¹

Indeed even the best democratic impulses require institutional bodies to yield legal, political and social realities. Certainly, it is not just the courts—or the government—who are responsible for the project of reconciliation, so neither does the onus just rest on them to uphold the honour of the Crown. And yet, the very same public appeal for personal responsibility among Canadians can blur the lines of official accountability. Then again, the need for there to be an office to turn to can also perpetuate use of the excuse “that’s not my job”. The labyrinthine structures, differentiated functions, and impersonal processes of the state legal system are at once that which render it alienating and efficacious. Buying into the fiction of the Crown’s honour equips it with instrumental power. Many Canadians, Indigenous and non-Indigenous, may be inured to the normative spell that employers of the metaphor of the Crown would seek to cast.

IV. THE ENDURING BUT EVOLVING CROWN

Alternative ways to articulate, inspire and enjoy the kinds of practices that reflect justice, equality, reconciliation, peace, healing, and friendship show the honour of the Crown is by no means the be-all-and-end all, but its particular salience turns on an appreciation of the ongoing significance the Crown bears in relation to Indigenous peoples living in what is called Canada. Recognizing the Crown’s place in Canadian constitutional law, and Indigenous-settlor relations, lends both the concept and the symbol a different register of meaning. Understandably, thanks to the bitter aftertaste of British imperialism, the Crown is not everyone’s cup of tea. If one’s place of origin has a particularly hostile history of British colonialism, the prospect of swearing an allegiance to the Queen may be anathema.⁵² As outdated, even objectionable as it may seem, the Crown endures, while the individuals who wear the physical object change over time. The Crown is an enduring, but also evolving concept—with multiple, variously

⁵⁰ *Truth and Reconciliation Commission of Canada*, *supra* note 4 at 238.

⁵¹ *Ibid.*

⁵² See *McAteer v Canada (Attorney General)*, 2014 ONCA 578, leave to appeal to the SCC refused, 36120 (26 February 2015) (where the appellants argued, unsuccessfully, that the Canadian citizenship oath unjustifiably infringed their ss 2(a) (freedom of conscience and religion), 2(b) (freedom of expression), and 15(1) (equality) under *the Charter of Rights and Freedoms*). Also, see “Hearst Councillor Gaetan Baillargeon Says Province Changing Rules on Pledging Allegiance to the Crown” (10 December 2018) *CBC News*, online: < <https://www.cbc.ca/news/canada/sudbury/gaetan-baillargeon-hearst-council-seat-1.4939808>>.

interconnected significations.⁵³ For example, Philippe Lagassé describes “three prevalent conceptions of the Crown in Canada: the hereditary Crown, the communal Crown, and the constitutional Crown.”⁵⁴ He explains:

The first focuses on familial and British aspects of the Crown. The second stresses the Crown’s role in building a sense of political community and Canadian nationhood. The third is concerned with the Crown as the source of sovereign authority in Canada.⁵⁵

That the Crown has numerous, multi-functional, intersecting dimensions militates against easy dismissal—and is probably a major reason why a strong movement to abolish the monarchy has never gathered steam in Canada.⁵⁶ Whereas the hereditary Crown concerns the nexus with the British Crown—plastered across the glossy pages of *Hello* magazine—the communal Crown is its Canadian incarnation (which is a separate juristic person).⁵⁷ The highest civic awards and most solemn occasions are officiated by the Governor General and his or her provincial homologues. The individual virtues of the person nominated to be Queen Elizabeth II’s representative in Canada may entice those who are less disposed to monarchy in general to embrace the specific communal functions the office performs.

Regardless, the Crown remains central to Canada’s highest law. Not only is the “Executive Government and Authority of and over Canada...vested in the Queen”, the Queen is also, along with the Senate and the House of Commons, an essential element of Parliament.⁵⁸ Indeed, the Crown is not only the main character in Canada’s formal constituting script of 1867; it retains conceptual primacy as the institutional embodiment of state legitimacy. The “monolithic connotation” of “the Crown” belies the specific, distinct juristic person to which the term may refer;⁵⁹ for example, within Canada’s federal system, the Crown may denote the federal government or a provincial government, as indicated by phrases such as the Crown in right of Canada or the Crown in right of Saskatchewan, as the case may be. The idea of the Crown has

⁵³ Philippe Lagassé, “Conclusion: The Contentious Canadian Crown” in D Michael Jackson & Philippe Lagassé, eds, *Canada and the Crown: Essays on Constitutional Monarchy* (Montreal & Kingston, McGill-Queen’s University Press, 2013) [Lagassé, “Conclusion”] at 272. Indeed, English legal historian FW Maitland warned over a hundred years ago about the “Crown” serving as “a convenient cover for ignorance” since “it saves us from asking difficult questions.” FW Maitland, *The Constitutional History of England: A Course of Lectures*, revised ed (Cambridge: Cambridge University Press, 1961) at 418.

⁵⁴ Lagassé, “Conclusion”, *ibid* at 272.

⁵⁵ *Ibid*.

⁵⁶ For recent discussions, see David E Smith, *The Constitution in a Hall of Mirrors: Canada at 150* (Toronto: University of Toronto Press, 2017) at 21-22, 26; Marcella Firmini, “The Crown in Canada” in Peter Oliver, Patrick Macklem & Nathalie Des Rosiers, eds, *The Oxford Handbook of the Canadian Constitution* (New York: Oxford University Press, 2017), 129 at 146-48. Jeremy Webber observes that we have so many real constitutional dilemmas, we have not felt the need to invent one; see Webber, *The Constitution of Canada: A Contextual Analysis* (Oxford: Hart, 2015) at 29.

⁵⁷ See JG Allen, “The Office of the Crown” (2018) 77:2 Cambridge LJ 298 (defending the idea of the Crown as ‘an office’ and arguing that understanding the Crown as ‘plural and divisible’ is integral to understanding the relationship the UK bears to other constitutional orders).

⁵⁸ See *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, App II, No 5: sections 9 and 17, respectively. In addition, s 55 requires every bill passed by Parliament to receive the Queen’s assent before it becomes a law.

⁵⁹ See Peter Hogg, *Constitutional Law of Canada, Student Edition* (Toronto: Carswell, 1977) at 164.

not just survived; it has also evolved—with the concept of the Crown’s unity giving way to recognition of the independence of commonwealth countries, as well as the distinguishability of federal and provincial governments.⁶⁰ Confusion persists because “the Crown” may refer to a particular executive as well as signify “the personification of the state”.⁶¹ Indeed, writes Kent McNeil, “when speaking of the honour of the Crown...the term encompasses the Crown in all its separate manifestations in Canada... [but i]t is those specific, individual Crowns that have legal personality, not the Crown.”⁶²

Thus, Lagassé affirms:

The Crown cannot be reduced to the Sovereign, a symbol, or a source of authority—yet it is each of these things. Canada’s constitutional monarchy is about the Royal Family, the country’s past as part of the British Empire, a sense of community and nationhood, and the fundamental idea and legal foundation that underpins power in the state.⁶³

From the perspective of many Indigenous legal traditions, “both as concept and as person in the form of the Queen” the Crown embodies still more meaning.⁶⁴ The treaties that many of these Indigenous peoples see as serving as the basis of their legal relationship with the Crown were “promises of the monarch” giving rise to “a burden of honour...that should not slide away to an obligation of mere governments, with governments’ inevitable attenuation of promises for reasons of political exigency.”⁶⁵ Do away with the monarchy—not officially, since that is not likely happening any time soon but conceptually, for practical purposes—and you remove the Sovereign’s commitment to the “idea of an Aboriginal peoplehood, separated and protected, that lies behind treaties [and] is the opposite of oppression and colonialism.”⁶⁶

⁶⁰ See *The Queen v. The Secretary of State for Foreign and Commonwealth Affairs, ex parte: The Indian Association of Alberta, Union of New Brunswick Indians, Union of Nova Scotian Indians* [1982] QB 892, [1982] 2 All ER 118, [1982] 2 WLR 641.

⁶¹ Bora Laskin, *The British Tradition in Canadian Law* (London: Stevens & Sons, 1969) at 118.

⁶² Kent McNeil, “The Obsolete Theory of Crown Unity in Canada and Its Relevance to Indigenous Claims” (2015) 20:1 *Rev Con Stud* 1 at 26 [McNeil, “Obsolete Theory”]. One might say, then, that the Crown’s mystical body needs a human, albeit institutional, host.

⁶³ Lagassé, “Conclusion”, *supra* note 53 at 284-5. See also Philippe Lagassé, “The Crown and its capacities” (11 October 2018), online (blog): *In Defence of Westminster* <<https://lagassep.com/2018/10/11/the-crown-and-its-capacities/>>; Philippe Lagassé, “Mikisew, Ministers, and the ‘Revenge of the 1867 Constitution’” (12 October 2018), online (blog): *In Defence of Westminster* <<https://lagassep.com/2018/10/12/mikisew-ministers-and-the-revenge-of-the-1867-constitution/>>; Philippe Lagassé, “Mikisew and the evolution of the Westminster System” (13 October 2018), online (blog): *In Defence of Westminster* <<https://lagassep.com/2018/10/13/mikisew-and-the-evolution-of-the-westminster-system/>>.

⁶⁴ John D Whyte, “A Case for the Republican Option” in Jackson & Lagassé, *supra* note 53 at 132.

⁶⁵ *Ibid* at 133.

⁶⁶ *Ibid*. Amending the constitution to remove reference to the Queen would require “resolutions of the Senate and House of Commons and of the legislative assembly of each province.” See section 41 of *The Constitution Act, 1982*, Schedule B to the *Canada Act 1982* (UK), 1982, c 11. See also Sarah Carter, “‘Your Great Mother across the Salt Sea’: Prairie First Nations, the British Monarchy and the Vice Regal Connection to 1900” (2004-2005) 48 *Manitoba History* at 34 (discussing how subsequent to the establishment of treaties, First Nations have used vice-regal visits “to restate and recommit the equal parties to the treaties, and to remind their treaty partner of their commitments and obligations”) [Carter, “Your Great Mother”]. Indeed, writes Carter: “[f]rom a First Nations perspective these visits ratified and

The Crown and Indigenous peoples entered into treaties -- covenantal relationships, solemnized in writing, but then subsequently dishonoured by the Crown.⁶⁷ Recapturing the symbolism of that moment of promise serves as a visible reminder of those original promises still waiting to be fulfilled. Here the personal renders the political real and meaningful. Indeed, James Miller notes that in the treaties between the European and North American representatives, both sides used the language of kinship reflecting Indigenous protocol.

[But they] used the language of family in the way they understood it from their own cultural background. So, for example, when Europeans used terms like the British “Father” and his North American “children”, it was often with the connotation of subordination... But that was not the case with the familial language that First Nations used, for the simple reason that childhood in their societies was radically different... a time of great freedom during which children had a right to expect protection and assistance from adults.⁶⁸

Aimée Craft observes that because treaties are agreements between two parties, “neither perspective should be privileged over the other”;⁶⁹ accordingly, she offers an account of the “Anishinabe laws, both procedural and substantive, that informed and impacted the treaty negotiations” in southeast Manitoba, which came to be remembered as the Stone Fort Treaty or Treaty 1.⁷⁰ This, and many other treaties, reflected mutual need, individual interests, contrasting cultural assumptions, diverging priorities, and contradictory motives.⁷¹ The societies and respective governance structures they reflected differed,

confirmed their relationship with the Crown, and served as tangible recognitions of their status as sovereign nations who had entered into nation to nation treaties” (*ibid*).

⁶⁷ See John Borrows, “Canada’s Colonial Constitution” in John Borrows & Michael Coyle, eds, *The Right Relationship: Reimagining the Implementation of Historical Treaties* (Toronto: University of Toronto Press, 2017), 17.

⁶⁸ James R Miller, “The Aboriginal Peoples and the Crown” in Jackson & Lagassé, *supra* note 53, 255 at 258. Of course, different Indigenous actors may have deployed such rhetorical devices in different ways at different times. Carter notes, for example, that “while [Chief Peguis] used the term ‘Great Father,’ it is clear that at times he referred, not to the British sovereign, but to the Creator, Great Spirit, or ‘our Great Father’ as the true owner of all of their lands:”, Carter, “Your Great Mother”, *supra* note 66 at 37.

⁶⁹ Aimée Craft, *Breathing Life into the Stone Fort Treaty* (LLM Thesis, University of Victoria) online: <https://dspace.library.uvic.ca/bitstream/handle/1828/4528/Craft_Aimee_LLM_2011.pdf?sequence=3&isAllowed=y> at 10.

⁷⁰ *Ibid* at 45.

⁷¹ Dilys Leman offers an evocative poetic rendering of this searching exasperation that resounds over centuries in the breathless narration of a police informant, reporting back on the leader Big Bear’s address to his people:

He said he speaks for his band/ as a Chief speaks for his People/ He said the White agent isn’t like that—
/there is always someone higher/ whom he never sees/ He said the Governor understood/ that the land is
only borrowed/He said he is trying to grasp the promises/ He said he sees his hand closing again/ and again,
but he can find nothing in it/ He said he is afraid to take a reserve/ He said what he sees is/ the tiny piece of
land/ he is told he must choose/ He said he feels choked/ He said he does not believe/ the Queen wants
them to die/ the way they are/ He said he feels the rope around his neck/ He said it sometimes comes to
him/ that they have been breathed over/ He said it is like the trance/ that falls upon them when Windigo is
coming/ He said they must make one Grand Council/ He said they must speak with one thundering voice.

Dilys Leman, “BIG BEAR’S SPEECH Police Informant, August 1884” in *The Winter Count* (Montréal; Kingston: McGill-Queen’s University Press, 2014) at 36-37.

shaping understandings and expectations of those inter-societal and inter-governmental agreements, as well. Indigenous peoples were inclined (and enticed) to project the image of kinship (and the continuity of relationship and responsibility that such a vision bestowed) onto the canvas of imperial administration. Portraying the formation and solemnization of these treaty relationships as the simple product of either an imperial ruse or Indigenous misunderstanding is an interpretive choice. It is a decision to ignore the considerable and complex historical record in order to render treaty relationships whatever the Crown—effectively, its Ministers and public servants— would deign to make of them now. The technique is not unfamiliar.⁷² In the 1890s, for example, Deputy Superintendent-General of Indian Affairs, Hayter Reed, simply “denied the premise that the Canadian or imperial governments could make morally or legally binding treaties with First Nations.”⁷³ Thus, a revisionist history (in Reed’s case, one “steeped in new forms of racial and social evolutionary thought”)⁷⁴ permits present policy preferences, while perpetuating political power imbalances.

Every official—from an Indian agent, to a prime minister, even the regent herself—always has been able to find cover under the Crown. Without trespassing on the terrain of “sharp dealing”, the Crown’s representative can rely on the fact that he or she is but one actor within a complex, administrative apparatus.⁷⁵ In a democratic constitutional monarchy, the Queen is a formal figurehead; she does not personally follow through on the promises made in her name. Those servants of the state who do have the responsibility to follow through are of course subject to the institutional structures, processes and rules that define and limit their authority. There are many ways to pass the buck. The logic behind upholding the honour of the Crown is to put a stop to this type of evasiveness and to ensure accountability.⁷⁶

⁷² See Evan Fox-Decent & Ian Dahlman, “Sovereignty as Trusteeship and Indigenous Peoples (2015) 16:2 *Theor Inq Law* 507 (pointing out the paradox that in practice the British treated Indigenous peoples as sovereign but in law deemed them incapable of doing what they in fact negotiated with them to do (at 513). The authors also argue that the very idea of sovereignty “was forged only so it could be at once recognized and denied with respect to indigenous nations” (at 512). This drives home how specious and curricular contemporary arguments denying Indigenous sovereignty are, when they simply rely on the definition of the concept itself.

⁷³ See Coel Kirkby, “Reconstituting Canada: The Enfranchisement and Disenfranchisement of ‘Indians’, c. 1837-1900” *UTLJ* [forthcoming] at 30, DOI: <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3290933.

⁷⁴ *Ibid* at 25.

⁷⁵ Lest one infer that the content of policies and the manner of their implementation is inconsequential, there is significant evidence of how the actions and intentions of those from the top to the bottom of the state’s legal hierarchy can have an impact on people’s lives. See Sarah Carter, *Lost Harvests: Prairie Indian Reserve Farmers and Government Policy* (McGill-Queen’s University Press, 1990); see also Shelley AM Gavigan, *Hunger, Horses, and Government Men: Criminal Law on the Aboriginal Plains, 1870-1905* (Vancouver: UBC Press, 2012).

⁷⁶ Thus, signalling a departure from standard canons of treaty interpretations, Crown agents, such as Governors or local military commanders, may bind the Crown, and even absent implementation through statute, such treaty obligations may be enforced against the Crown. See Fox-Decent, *supra* note 21 at 61 (citing *R v White and Bob* (1964) 50 DLR (2d) 613; 52 WWR 193 (BCCA); *aff’d* (1965) 52 DLR (2d) 481n (SCC); *R v Sioui* [1990] 1 SCR 1025; *R v Marshall* [1999] 3 SCR 456; *Simon v The Queen* [1985] 2 SCR 387).

V. DEPLOYING THE HONOUR OF THE CROWN

The British historian Maitland famously observed: “we know that the crown does nothing but lie in the Tower of London to be gazed at by sight-seers.”⁷⁷ While by itself, neither the crown, nor its honour, may do anything at all, the same goes for every social symbol, political idea, and legal concept human beings have invoked to justify what they do. It makes sense to ask how the honour of the Crown is used (rather than what it does) since no legal rule, principle or concept can do anything by itself; it is human beings who do, with and through law. Evoking the honour of the Crown may amount to a fine-sounding rhetorical flourish. Worse, it may constitute a misleading discursive trick. There are times, however, when the words have given expression to an unheeded voice of conscience in the courts.

In 1962, Calvin George, a member of the Chippewa Band residing on the Kettle Point Reserve, was charged under the *Migratory Birds Convention Act*, for hunting two wild ducks. Notwithstanding the *Royal Proclamation* and the Chippewa’s 1827 Treaty with the Crown, which reserved the land for the band’s “exclusive use and enjoyment”, the Crown argued that the 1952 federal statute made it an offence for George to hunt out of season. The magistrate disagreed. The Crown appealed all the way up to the Supreme Court of Canada before its argument finally succeeded. Along the way, McRuer CJHC questioned whether Parliament had the power to simply dispose of George’s treaty rights, stating even if “such legislation, properly framed, might be considered necessary in the public interest...a very strong case would have to be made out that would not be a breach of our national honour.”⁷⁸ The lone voice of dissent on the Supreme Court, Justice Cartwright, quoted McRuer’s statement with approval (as well as Lord Coke’s judgment in the 1601 *Churchwardens* case⁷⁹), noting:

We should, I think, endeavour to construe the treaty of 1827 and those Acts of Parliament which bear upon the question before us in such manner that the honour of the Sovereign may be upheld and Parliament not made subject to the reproach of having taken away by unilateral action and without consideration the rights solemnly assured to the Indians and their posterity by treaty.⁸⁰

The rest of the members of the Supreme Court disagreed; the magistrate’s finding was reversed and George was fined ten dollars for his offence.⁸¹ At tension was what kind of contradiction, what level of dishonour, ought the Court be willing to countenance in the name of the law (or, in other words, on behalf of the Crown). The *Calder* decision in the decade that followed,⁸² and the inclusion of sections 25 and 35

⁷⁷ Maitland, *supra* note 53 at 418.

⁷⁸ McRuer CJHC cited by Cartright J in *The Queen v George*, [1966] SCR 267 at 271.

⁷⁹ See *St Saviour’s*, *supra* note 28.

⁸⁰ *The Queen v George*, *supra* note 78 at 279.

⁸¹ *Ibid* at 281.

⁸² *Calder v British Columbia (AG)* [1973] SCR 313, [1973] 4 WWR 1. For a retrospective on the significance of this case, see Hamar Foster, Heather Raven & Jeremy Webber, *Let Right Be Done: Aboriginal Title, the Calder Case, and the Future of Indigenous Rights* (Vancouver: UBC Press, 2007).

in the *Constitution Act* enacted the decade after that,⁸³ have given an explicit, formal constitutional basis for the courts to enforce limits on government action that impinges on Aboriginal rights. The principle of the honour of the Crown is only implicit in section 35; nowhere is the concept's meaning formulated canonically; it must be gathered through inference.⁸⁴

So, too, must reconciliation, which the Supreme Court has called “the underlying purpose of the honour of the Crown... [and] a first principle of Aboriginal law”.⁸⁵ The term has developed multiple meanings. As Thomas Isaac notes, the Supreme Court of Canada alone has described it in at least three ways:

(a) the Crown reconciling with Aboriginal peoples for historic wrongs; (b) the Crown reconciling and balancing the rights of Aboriginal peoples with the rights of non-Aboriginal peoples and Canadian society at large; (c) reconciling section 35 rights with the reality of Crown sovereignty.⁸⁶

While the purpose of the duty to consult may be to advance reconciliation, the common law proceeds incrementally, and the ramifications of decisions are not controlled by judges any more than the cases that come before them are. Yes, appellate courts may deny leave to appeal, but parties who have been wronged must come to court of their own volition, and the injustice they are facing must be actionable in a court of law. The Federal Court of Appeal decision in *Tsleil-Waututh Nation v. Canada (Attorney General)* speaks to the success of Indigenous communities invoking the doctrine of the honour of the Crown in support of their arguments before the courts.⁸⁷ The Tsleil-Waututh Nation and other First Nations in British Columbia successfully argued that the Governor General's order in council approving the Trans Mountain pipeline expansion proposal should be quashed because the government had not consulted with the affected First Nations in the manner the honour of the Crown constitutionally demands.⁸⁸ Specifically, Canada's representatives failed to meet with the Indigenous applicants, each of which had quite specific concerns,

⁸³ Section 25 states: “The guarantee in this Charter of certain rights and freedoms shall not be construed so as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada including (a) any rights or freedoms that have been recognized by the Royal Proclamation of October 7, 1763; and (b) any rights or freedoms that now exist by way of land claims agreements or may be so acquired.” Section 35(1) states: “The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.” See *Constitution Act, 1982*, *supra* note 1.

⁸⁴ For an elaboration on this distinction of expressive mode, see Roderick A Macdonald, “Pour la reconnaissance d'une normativité juridique implicite et ‘ inférentielle’ ” (1986) 18:1 *Sociologie et Sociétés* 47.

⁸⁵ *Mikisew Cree 2018*, *supra* note 1 at 22.

⁸⁶ Thomas Isaac, “Reconciliation from Principle to Practice” in Dwight Newman ed, *Business Implications of Aboriginal Law* (Toronto: LexisNexis Canada, 2018) 43 at 46. See Kim Stanton, “Reconciling Reconciliation: Differing Conceptions of the Supreme Court of Canada and the Canadian Truth and Reconciliation Commission” (2017) 26 *J L & Soc Pol'y* 21 (urging Canadians and particularly legal professionals to embrace the TRC's more relational and expansive vision of reconciliation than that mooted in the Court's jurisprudence). See also Kirsten Anker, “Reconciliation in Translation: Indigenous Legal Traditions and Canada's Truth and Reconciliation Commission” (2016) 33 *Windsor YB Access Just* 15 (illustrating the interactive and imaginative work required of non-Indigenous people to appreciate and see beyond the borders of a settler standpoint to engage in meaningful reconciliation).

⁸⁷ *Tsleil-Waututh Nation v Canada* (Attorney General) 2018 FCA 153.

⁸⁸ *Ibid.*

right after the National Energy Board released its report.⁸⁹ Moreover, Canada's representatives acted as 'note-takers'⁹⁰ instead of executing "a mandate to engage and dialogue meaningfully".⁹¹

The Supreme Court's subsequent decision in *Mikisew Cree First Nation v. Canada*⁹² illustrates not only the fact that litigation strategies based around this constitutional doctrine, like any legal argument, can prove hit or miss.⁹³ It points to how the various pieces that make the legal system work can be understood in ways that bar claims by First Nations, effectively allowing the system to work against them. Contrast the nature of the claim the Mikisew Cree were making—objecting to the 'omnibudget' legislation of the Conservative government that changed environmental protection laws without consulting any affected Indigenous communities⁹⁴—and the fractured response of the Court, issuing four separate opinions that nonetheless all concurred in the result. There is a dissonance between what the Mikisew Cree First Nation was calling for and the language of justification the Supreme Court used to dismiss its appeal. Even Abella J's judgment (Martin J concurring) which says the honour of the Crown may give rise to a duty to consult in the course of the legislative processes, nevertheless holds that the particular statutory provision on which the party had relied did not apply, so the First Nation's application for judicial review was to be thrown out.⁹⁵

VI. THE UNDERWHELMING HONOUR OF THE CROWN

Evidently, there are inherent limitations to invoking the honour of the Crown. Constitutional dynamics, administrative and governmental complexity, as well as the incomplete nature of both formal rule and procedural remedy, shape the context in which the doctrine is used. First, the honour of the Crown is not all there is to the supreme law of the land; it is but one dimension of the Canadian constitution.⁹⁶

⁸⁹ *Ibid* at para 763.

⁹⁰ *Ibid* at para 575.

⁹¹ *Ibid* at para 763. See Tom Flanagan, "Only Parliament can fix Canada's pipeline impasse" *The Globe and Mail* (10 September 2018), online: <<https://www.theglobeandmail.com/opinion/article-only-parliament-can-fix-canadas-pipeline-impasse/>> (arguing that successful challenges to pipeline approvals are derailing the economic interests behind the projects, while calling on Parliament to redress the "exceptionally vague" duty to consult, arising from an "Honour of the Crown" principle lacking "clear definition"). But see Campbell Clark, "With Trans Mountain, there's no legislating away the duty to consult First Nations", *The Globe and Mail* (4 September 2018), online: <<https://www.theglobeandmail.com/politics/article-with-trans-mountain-theres-no-legislating-away-the-duty-to-consult/>> (noting, matter-of-factly, that governments need to be wise to constitutional constraints): "The duty to consult stems from the notion of the honour of the Crown living up to historical commitments, and it's enshrined in the Constitution. There's no way to legislate it away, or use the notwithstanding clause."

⁹² *Mikisew Cree 2018*, *supra* note 1.

⁹³ See Patrick Macklem, "First Nations Self-Government and the Borders of the Canadian Legal Imagination" (1991) 36 McGill LJ 382 (arguing that the courts' inclination to positively acknowledge Indigenous difference depends on how well it gels with existing legal structures). See also Kent McNeil, *Obsolete Theory*, *supra* note 62 at 28 (arguing that "the unity of the Crown tends to get invoked by the courts when it works against Indigenous claimants but is disregarded when it would assist them", thus rendering the very concept of the Crown contingent on "whose interests are at stake").

⁹⁴ *Mikisew Cree 2018*, *supra* note 1 at para 6.

⁹⁵ *Ibid* at para 54.

⁹⁶ Indeed, as Rowe J (on behalf of Moldaver and Côté JJ) makes explicit in *Mikisew Cree 2018*, *ibid* at para 153, "[s]ection 35 rights are not absolute. Like other provisions of the Constitution Act, 1982, s. 35 is both supported and confined by

Federalism is just one example of another, but it is an important one. *Grassy Narrows*, the Supreme Court's 2014 decision, suggests that not only is the honour of the Crown merely one constitutional principle, it tends not to fare too well when competing with others.⁹⁷ As McNeil notes, in this case the Court broke with precedent and expert opinion by implicitly endorsing the theory of the unity of the Crown stating that "the Crown [is] a concept that includes all government power" as opposed to "a specific juristic person".⁹⁸ While the Court affirmed that the Crown in right of the province of Ontario is obligated to respect the honour of the Crown, the Court decided to interpret the treaty in a way that treated the First Nation's claim as secondary to avoiding any "upset [to] the balance of federalism".⁹⁹

Second, the size and complexity of public administration and government may blur, even truncate, the lines of accountability essential to ensuring the honour of the Crown is upheld. Holding the Crown to account for upholding its honour requires defining the Crown itself. In affirming that the actions of administrative agencies constitute Crown conduct, but the actions of municipal governments and the legislative branch do not, Canadian courts have defined the Crown restrictively. They treat executive, rather than state power as a whole, as clearly constituting Crown conduct, citing reasons of formal principle as well as practicality in justifying the definitional choice.

For example, in the 2017 companion cases, *Clyde River* and *Chippewas* the Supreme Court of Canada re-iterated that ultimate responsibility to uphold its honour always rests with the Crown; however, the actions of administrative agencies like the National Energy Board may not only trigger but discharge the Crown's duty to consult.¹⁰⁰ It is up to the Crown to uphold its honour but it may, and does, rely on the decision-making of independent, administrative agencies to do the Crown's honour-upholding for it. The Court states that these statutorily created, independent bodies are not "agents" but "vehicles" of the Crown.¹⁰¹ Existing at arms-length from the political executive, it is the principle of responsible government that provides the lynchpin of accountability for administrative tribunals. Ministers do not have the authority to influence or interfere with their legislatively mandated authority, but they do have the responsibility before the House and authority in government to enact or amend statutes and subordinate legislation to address deficiencies in their functioning. Due to the size and complexity of the administrative state, plus the nature of the work administrative agencies do (and the myriad ways in which that work engages and affects Indigenous peoples and s 35 rights), Kate Glover Berger describes the administrative state as integral to Canada's constitutional architecture.¹⁰² In other words, the administrative state is not just constitutionally permitted, it is constitutionally necessary.

broader constitutional principles...The current jurisprudence provides for protection and vindication of Aboriginal rights and for upholding the constitutional principles of parliamentary sovereignty and the separation of powers. It is important to continue to do both. This can be done while upholding the honour of the Crown" (emphasis in the original).

⁹⁷ *Grassy Narrows First Nation v Ontario*, 2014 SCC 48, [2014] 2 SCR 447.

⁹⁸ Kent McNeil, "Obsolete Theory," *supra* note 62 at 24.

⁹⁹ *Ibid.* While the Court affirmed once again in *Grassy Narrows* that the Crown in right of the province of Ontario is obligated to respect the honour of the Crown, the Court decided to interpret the treaty in such a way that would leave the federal arrangement, and lawmaking stemming from its two distinct levels, as little disrupted by the First Nation's claim as possible.

¹⁰⁰ See *Clyde River*, *supra* note 1; *Chippewas of the Thames*, *supra* note 1.

¹⁰¹ *Clyde River*, *ibid* at para 29; *Chippewas of the Thames*, *ibid* at para 29.

¹⁰² Kate Glover Berger, "Mixed Messages and Rule of Law Problems after *Clyde River*, *Chippewas of the Thames* First Nation and *Ktunaxa Nation*" (6 April 2018) 2017 Constitutional Cases Conference, Osgoode Hall [unpublished].

One may say the same for the duty to consult, the honour of the Crown, and reconciliation. Each may be necessary, constitutionally, but even upon doctrinal perfection and with judicial enforcement, none is sufficient. Even FPIC (the principle of free, prior and informed consent), praised as a more legally robust and politically powerful concept, is intrinsically reactive. The unequal distribution of political and economic power profoundly shapes what consultation, the honour of the Crown, and reconciliation even mean—let alone what their effects may be. Given the institutional design, competence and authority of courts, there are intrinsic limits on the capacity of the judicial branch to materially alter this allocation by applying these unwritten principles. Disagreement arises, even on the bench itself, about where those limits ought to be drawn.

Indeed, even in situations where the honour of the Crown clearly appears to be at stake, the courts may not see it that way. The Crown is, but it also is not, the state.¹⁰³ The Crown denotes government, but a municipal government, the courts have held, does not constitute the Crown. This has potentially serious implications. Over the years, some of the most highly publicized, contentious and violent conflicts between Indigenous people on the one hand, and non-Indigenous people and the state on the other, have arisen in the municipal planning context; for example, the Oka Crisis in Quebec and the conflict in Caledonia, Ontario.

Notwithstanding the evolving jurisprudence on the honour of the Crown and the duty to consult—and the obvious relevance such concepts bear to municipal-Indigenous relations—the British Columbia Court of Appeal in *Neskonlith* held that municipalities do not have a duty to consult with Aboriginal peoples.¹⁰⁴ Such a proposition may require revisiting in light of the Supreme Court’s decisions in *Clyde River* and the *Chippewas of the Thames*, but the functional analysis the Court deploys in those cases suggests there is likely not a general duty on behalf of municipalities to consult for some of the reasons the BC Court of Appeal enumerated in *Neskonlith*.¹⁰⁵ There the BCCA ruled that unless it is provided for in statute, the Crown’s duty to consult and accommodate does not extend to municipalities.¹⁰⁶ Thus, the municipality of Salmon Arm was under no obligation to consult with the Neskonlith First Nation about the construction of a shopping mall on a flood plain adjacent to the band’s reserve lands. As counsel for the band argued in the case, if delegation of the Crown’s duty to consult does not accompany delegation of the Crown’s decision-making authority, this would allow the Crown to shirk its constitutional obligation to act honourably.¹⁰⁷ Indeed, if “the Crown” is a metaphor for “the state” then why should a principle ordained

¹⁰³ Compare Brown J and Abella J’s analyses in *Mikisew Cree 2018*, *supra* note 1. Brown J (at para 128) insists that the “‘Crown conduct’ triggering the duty to consult must... be understood as excluding the parliamentary (and, indeed judicial) functions of the Canadian state.” Indeed, he writes: “the Crown does not enact legislation. Parliament does. The honour of the Crown does not bind Parliament.” Abella J, meanwhile, argues (at para 79) that to exempt legislative action from Crown conduct would be to endorse a void and leave a gap in the s 35 framework. She affirms (at para 87) that the honour of the Crown “is not only a constitutional imperative, but a recognition of the limits of Crown sovereignty itself” and therefore the judiciary must ensure it is both upheld and enforced.

¹⁰⁴ *Neskonlith Indian Band v. Salmon Arm (City)* [2012] 4 CNLR 218 2012 BCCA 379.

¹⁰⁵ *Clyde River*, *supra* note 1 and *the Chippewas of the Thames*, *supra* note 1. But see Felix Hoehn & Michael Stevens, “Local Governments and the Crown’s Duty to Consult” (2018) 55:4 *Alta L Rev* 971.

¹⁰⁶ *Neskonlith*, *supra* note 104.

¹⁰⁷ *Ibid* at para 61: “[T]he honour of the Crown imposes a constraint on the exercise of authority delegated by the Province. If it were otherwise, the Province would be in a position to eliminate or avoid this core principle by delegating the

by the state's constitution not serve as an operational constraint on that order of government whose decisions have such an impact on Aboriginal peoples?¹⁰⁸ Moreover, the Neskonlith Indian Band stated in the factum it submitted to the court:

Local governments, as the decision-makers regarding land use decisions that could affect the exercise of Aboriginal Title and Rights, are in the best position to engage in the consultation process. They are located in the area where the proposed development is proposed to take place and have a better understanding of the local circumstances than centralized governments.¹⁰⁹

Despite referring to the arguments presented by counsel for the Neskonlith as 'strong', Newbury JA insisted that there are "even more powerful arguments, both legal and practical, that...militate against inferring a duty to consult on the part of municipal governments".¹¹⁰ The unanimous court held "that as creatures of statute, municipalities do not in general have the authority to consult with and if indicated, accommodate First Nations as a specific group in making the day-to-day operational decisions that are the diet of local governments."¹¹¹

Critiquing the judgment, Imai & Stacey argue that the court 'asked the wrong question':

In our view, the results of an inquiry into who has the duty to consult does not also answer the question about whether consultation is necessary before a project can proceed... Irrespective of who must consult, this duty must be met before proceeding with a project that actually or potentially infringes Aboriginal rights.¹¹²

Of course, going through a formal consultation process does not foreclose the possibility of conflict; neither does honourable conduct—although the limits, content and implications of all virtues, including honour are subject to reasonable (and unreasonable) disagreement. Furthermore, one-off consultation is

decision to its statutory creature, a local government. Such avoidance would not be consistent with the honour of the Crown."

¹⁰⁸ As Karakatsanis J (Wagner CJ & Gascon J, concurring) put a parallel point in *Mikisew Cree 2018*, "[i]t is of little import to Aboriginal peoples whether it is the executive or Parliament which acts in a way that may adversely affect their rights. The relationship of Aboriginal peoples 'with the Crown or sovereign has never depended on the particular representatives of the Crown involved'... [T]he honour of the Crown binds the Crown qua sovereign. Indeed, permitting the Crown to do by one means that which it cannot do by another would undermine the endeavour of reconciliation, which animates Aboriginal law. The principle of reconciliation and not rigid formalism should drive the development of Aboriginal law" (at para 44, references omitted). Nevertheless, Karakatsanis J noted that "to date, the duty to consult has only been applied to executive conduct and conduct taken on behalf of the executive" (para 27) and concluded "the duty to consult doctrine is ill-suited to the law-making process" (para 2) and should therefore not apply.

¹⁰⁹ *Neskonlith*, *supra* note 104 at para 64.

¹¹⁰ *Ibid* at para 66.

¹¹¹ *Ibid* at para 70.

¹¹² Shin Imai & Ashley Stacey, "Municipalities and the Duty to Consult Aboriginal Peoples: A Case Comment on *Neskonlith Indian Band v. Salmon Arm (City)*" (2014) 41:1 UBC Law Rev 293 at 294.

no substitute for an ongoing, constructive relationship. Moreover, benefiting from a duty to be consulted differs profoundly from exercising the right to decisional authority.

Whether municipalities have a formally recognized constitutional duty to consult notwithstanding, upholding the honour of the Crown requires provinces to enlist and empower municipal governments to ensure the duty to consult and accommodate is meaningfully fulfilled.¹¹³ Abele et al. note that “Aboriginal rights and entitlements... do not form part of the taken-for-granted governance framework of municipal governments”.¹¹⁴ The question, then, is how to establish the legal framework necessary to uphold the honour of the Crown and to promote reconciliation. This involves allocating authority and responsibility between orders of government in a manner that is clear and effective. Plus, it means providing the educational, temporal and normative resources necessary to inaugurate a shift in municipal planning culture toward timely engagement with Indigenous communities on land use issues affecting them.¹¹⁵

The challenge extends beyond harmonization of levels of government and public administration, though. It presents a complex collective coordination problem, since it is not just a matter of provinces developing and implementing a duty to consult policy for all of the province’s municipalities. It is also a matter of First Nations coordinating interests and forging consensus among themselves. Additionally, concerns that adding a further, formal layer of bureaucratic procedure in planning may only end up paying lip service to the duty to consult might also militate against Indigenous support for particular government policy proposals.

Like the constitution on the whole, the constitutional principle of the honour of the Crown depends to a significant extent on political, social, and economic action, rather than the utterance of fine words. Indeed, the formal constitution is, in the main, secondary.¹¹⁶ Yes, it matters, but to a large degree the very manner in which it can matter has been determined by an alignment of interests and allocation of authority that have come to afford room, only upon being pressed, to redress persistent, historically rooted injustice facing Indigenous peoples.¹¹⁷ For example, the Chippewas of the Thames First Nation lost their case against the Enbridge Pipelines Inc., which wanted to carry heavy crude in (while reversing the flow and increasing the capacity of) the pipeline crossing through their traditional territories.¹¹⁸ The point is that

¹¹³ Incidentally—and perhaps, more consequential to its decision than the court acknowledged in its judgment—they found that, on the facts, the City of Salmon Arm had consulted with the Neskonlith and made material changes to the development plan as a result. See *Neskonlith*, *supra* note 104 at paras 84-90.

¹¹⁴ Frances D Abele et al, “Aboriginal People and Public Policy in Four Ontario Cities” in Evelyn Peters, ed, *Urban Aboriginal Policy Making in Canadian Municipalities* (Montreal & Kingston: McGill-Queen’s University Press, 2011) at 114. But see Christopher Alacantara & Jen Nelles, *A Quiet Evolution: the Emergence of Indigenous-Local Intergovernmental Partnerships in Canada* (Toronto: University of Toronto Press, 2016).

¹¹⁵ See Clara MacCallum Fraser & Leela Viswanathan, “The Crown Duty to Consult and Ontario Municipal-First Nations Relations: Lessons Learned from the Red Hill Valley Parkway Project” (2013) 22:1 *Can J Urban Research* 1 at 16.

¹¹⁶ See Roderick A Macdonald & Robert Wolfe, “Canada’s Third National Policy: the Epiphenomenal or the Real Constitution?” (2009) 59 *UTLJ* 469 (contrasting “the epiphenomenal constitution... [of] the formal institutional arrangements of lawyers and courts” with the “constitutional (constitutive) conversation... among Canadians about how they choose to understand their political community and their collective purposes”) at 523.

¹¹⁷ See Miranda Johnson, *The Land is Our History – Indigeneity, Law, and the Settler State* (London: Oxford University Press, 2016) (comparing histories of Indigenous activism spurring state law change in Canada, New Zealand, and Australia).

¹¹⁸ *Chippewas of the Thames*, *supra* note 1.

the question of having the pipeline cutting through the land of the Chippewa of the Thames in the first place was never open for discussion. Furthermore, recourse to the courts offers a glimmer of hope, but often for marginalized groups, the litigation route turns out to be a blind alley.¹¹⁹ Cases soak up scarce resources and energies, depriving direct social action and progressive coalition politics.¹²⁰ Gerald Rosenberg's study of the counter-intuitive effects of the US Supreme Court's decision in *Brown v Board of Education* on segregation practices in American schools is a cautionary tale for litigation enthusiasts.¹²¹ I pull on these studies not to weave some blanket proposition about litigation and social change but to offer context for the following observation. That Indigenous peoples have had to invest so much time, energy, money and hope seeking redress in the courts highlights the deep deficits in the relationships they bear to the federal and provincial governments.¹²²

VII. THE INSOLUBILITY OF MULTIPLE SOVEREIGNTIES

All public administration, everything the state does or seeks to do that will affect Indigenous peoples, is complicated by a deficit of both *de jure* and *de facto* legitimacy. The Canadian Human Rights Tribunal's declaration that the Canadian government deprived Indigenous children in care of the same funding as non-Indigenous children offers a recent, disturbing example of the lack of *de facto* legitimacy.¹²³ The absence of formal, legal or *de jure* legitimacy lies in a definition of Canadian state legal authority that has either ignored or misrecognized Canada's Indigenous peoples.¹²⁴ And that signals the greatest note of caution when embracing the concept of the honour of the Crown as a legal panacea for colonialism.

In other words, the game may have become more inclusive, even accessible to Indigenous peoples, but the underlying premise remains the same: law's authority resides exclusively in the Crown. But those theorizing—indeed, teaching, learning and practicing Indigenous (as opposed to Canadian Aboriginal

¹¹⁹ Harry Arthurs, "Governing the Canadian State: The Constitution in an Era of Globalization, Neo-liberalism, Populism, Decentralization and Judicial activism" (2003) 13:1 Const Forum Constit 16 at 21.

¹²⁰ *Ibid.*

¹²¹ See Gerald N Rosenberg, *The Hollow Hope: Can Courts Bring About Social Change?* (Chicago & London: University of Chicago Press, 1991).

¹²² Of course, that is not what a losing litigant wants to hear from the very court that has just dismissed their case. And yet, see *Mikisew Cree 2018*, *supra* note 1 at 145 (where Brown states that the conclusion that legislating does not constitute Crown conduct and must not therefore be subject to the duty to consult should not "be seen to diminish the value and wisdom of consulting Indigenous peoples prior to enacting legislation that has the potential to adversely impact the exercise of Aboriginal or treaty rights. Consultation during the legislative process, including the formulation of policy, is an important consideration in the justification analysis under s. 35." Indeed, Brown J argues that the ambiguity of Karakatsanis J's majority opinion (especially at para 46) jeopardizes the interests of Indigenous peoples more than a clear "no" does, since they will be enticed to return to litigate in the courts, "on the faint possibility that they have identified some 'other form of recourse' that this Court finds 'appropriate' (at para 142)."

¹²³ See *First Nations Child and Family Caring Society v Attorney General of Canada* 2016 CHRT 2.

¹²⁴ For a critique of the concept of recognition as a conceptual frame, see Glen S Coulthard, "Subjects of Empire: Indigenous Peoples and the 'Politics of Recognition' in Canada" (2007) 6 Contemporary Political Theory 439, 438. He argues: "the politics of recognition in its contemporary form promises to reproduce the very configurations of colonial power that Indigenous peoples' demands for recognition have historically sought to transcend" since "most involve the delegation of land, capital and political power from the state to Indigenous communities through land claims, economic development initiatives, and self-government processes."

law)—vehemently reject such a proposition.¹²⁵ Indigenous self-government cannot be simply a creature of Canadian state law—nor can it be imagined as a strictly singular order, since there are many different Indigenous political communities.¹²⁶ The notion of a plurality of sovereignties may seem to constitute a “strange multiplicity” but only if one chooses to believe that legal orders and peoples must be implanted within a singular, formal, overarching hierarchy.¹²⁷ Acknowledging multiple sovereignties— and the multiplicity to sovereignty— adds much needed context to such a choice.¹²⁸

Webber unpacks the cross-cutting contentions that lie in the contending sovereignties in Canada to reveal the implicit negotiability of frameworks often presumed to be permanent and inflexible.¹²⁹ Webber presents law as provisional; there is no last word.¹³⁰ Austin famously challenged proponents of natural law to persist in claiming that an “unjust law is not a law” while swinging from the gallows.¹³¹ Undeniable as it may be, the sheer force of the law is neither its only, nor necessarily its most powerful feature. Law operates in the field of pain and death, for that is the plane of human existence.¹³² By dint of imagination or fantasy, naiveté or conviction, thought or belief, risk or resolve neither the life of the mind nor of the law is completely contained therein. Austin may triumphantly assume his to be the definitive rebuttal but it will not resonate for those who define life and law differently than he does.

“The Crown” functions as shorthand for the state, implying it has a unitary character. But we know that the state is not a monolith. The institutions, norms, processes and methodologies that compose state law are multiple and complex; so too are the ways in which constitutional principles must be translated into legal and social realities. As surely as this fact has been used, in a figurative sense, to throw up roadblocks

¹²⁵ See, for example, Hadley Friedland, *The 'Wetiko' Legal Principles: Cree and Anishinabek Responses to Violence and Victimization* (Toronto: University of Toronto Press, 2018); John Borrows, *Canada's Indigenous Constitution* (Toronto: University of Toronto Press, 2010); Antonia Mills, *Eagle Down is Our Law: Witsuwit'en Law, Feasts, and Land Claims* (Vancouver: UBC Press, 1994); Val Napoleon & Hadley Friedland, “An Inside Job: Engaging with Indigenous Legal Traditions Through Stories” (2016) 61:4 McGill LJ 725; Aaron Mills, “The Lifeworlds of Law: On Revitalizing Indigenous Legal Orders Today” (2016) 61:4 McGill LJ 847.

¹²⁶ *Ibid.*

¹²⁷ Tully explains why cleaving to an all-encompassing Crown is not the necessity colonialist logic dictates it to be. James Tully, *Strange Multiplicity: Constitutionalism in an Age of Diversity* (Cambridge; New York: Cambridge University Press, 1995).

¹²⁸ See Jeremy Webber, “Contending Sovereignties” in Peter Oliver, Patrick Macklem and Nathalie Des Rosiers eds, *The Oxford Handbook of the Canadian Constitution* (New York: Oxford University Press, 2017) 281.

¹²⁹ *Ibid.*

¹³⁰ For further discussion of this theme, see Jeremy Webber, “The Grammar of Customary Law” (2009) 54 McGill LJ 579; Jeremy Webber, “Legal Pluralism and Human Agency” (2006) 44 Osgoode Hall LJ167.

¹³¹ John Austin, *The Province of Jurisprudence Determined* (Cambridge University Press, 1995) at 158.

¹³² See Robert Cover, “Nomos and Narrative” (1983) 97 Harv L Rev 4; Mariane Constable, “The ‘Field of Pain and Death’” in *Just Silences: The Limits and Possibilities of Modern Law* (Princeton: Princeton University Press, 2007). For an account of coercion as law’s defining feature, see Frederick Schauer, *The Force of Law* (Cambridge, Massachusetts: Harvard University Press, 2015). To see just how widely scholars of law may disagree about its essential character, contrast: Michael Barkun, *Law Without Sanctions: Order in Primitive Societies and the World Community* (New Haven, Yale University Press, 1968).

to Canada's Indigenous peoples, it is also reflected in the blockades Indigenous peoples have organized, expressing the distinct legalities they view as normative.¹³³

VIII. CONCLUSION

The idea of the Crown as honourable—especially in its dealings with Canada's Indigenous peoples—is, to put it mildly, aspirational. It flies in the face of the historical record. Adoption of the honour of the Crown doctrine is nonetheless significant because it reflects a judicial effort to shift the centre of gravity away from the state's unilateral projection of authority. The courts, though, are only one kind of legal institution and adjudication but a single type of legal process.¹³⁴ Besides, it is not just the courts—or the government—who are responsible for the honour of the Crown or the project of reconciliation.¹³⁵ There are many different roles for law to play in all of this. Upholding the honour of the Crown must not be treated as tantamount to maintaining the *status quo*; if so, its evocative, transformative potential is snuffed out. Nothing short of re-imagining the Canadian constitution and exercising the political will to reshape politics, law, and public administration will make the honour of the Crown real.

So long as reconciliation is narrowly imagined as Indigenous peoples resigning themselves to the reality of colonialism,¹³⁶ the “honour of the Crown” will signal at best an empty nicety, at worst a gross obscenity. The fiction of the Crown's honour and unity give rise to its instrumental potential. Like any story, how compelling that fiction proves to be, however, depends on its success at symbolically rendering the normative reality of those it purports to inscribe. That includes servants of the Crown, as well as the public in whose interest the Crown is meant to serve— Indigenous and non-Indigenous peoples alike.

Insight into the vigour and multivalence that commitment to active honouring entails is reflected in Marilynne Robinson's epistolary novel *Gilead*.¹³⁷ The narrator is an elderly preacher writing to his young son, trying to impart what he has come to learn of life and love—and in this passage— God's law. Thus, reviving the image of kinship, the narrator's remarks demonstrate how even the flattest of injunctions (“honour thy father and mother”) can offer a deep reservoir of reflection.

There's a pattern in these Commandments of setting things apart so that their holiness will be perceived. Every day is holy, but the Sabbath is set apart so that the holiness of time can

¹³³ See Val Napoleon, “Behind the Blockades” (2010) 9:1 *Indigenous Law Journal* 1. Napoleon opens her article by quoting Simone Weil: “No one can love and be just who does not understand the empire of force and know how not to respect it.” Simone Weil, “L'Iliade, ou le poème de la force” (December 1940-January 1941) *Cahiers de Sud* reprinted in George Panichas ed, *The Simone Weil Reader* (Mt. Kisco, NY: Moyer Bell, 1977) at 153. The translation from the original French is James Boyd White's in *Living Speech: Resisting the Empire of Force* (Princeton: Princeton University Press, 2006) at note 1.

¹³⁴ See Jean Leclair, “Nanabush, Lon Fuller, and Historical Treaties: The Potentialities and Limits of Adjudication” in Borrows & Coyle, *supra* note 67, 325.

¹³⁵ See Mark Walters, “The Jurisprudence of Reconciliation: Aboriginal Rights in Canada” in Will Kymlicka & Bashir Bashir, eds, *The Politics of Reconciliation in Multicultural Societies* (Oxford: Oxford University Press, 2008), 165 at 186 (noting that no court “can tell Aboriginal or non-Aboriginal governments to...reconcile” but the courts “can order the Crown...to adopt the attitude of honour that is essential for the reconciliation of peoples to flourish.”)

¹³⁶ *Ibid* at 167.

¹³⁷ Marilynne Robinson, *Gilead* (USA: HarperPerennial, 2005).

be experienced. Every human being is worthy of honor, but the conscious discipline of honor is learned from this setting apart of the mother and father, who usually labor and are heavy-laden, and may be cranky or stingy or ignorant or over-bearing. Believe me, I know this can be a hard Commandment to keep. But I believe also that the rewards of obedience are great, because at the root of real honor is always the sense of sacredness of the person who is its object.¹³⁸

If, as Robinson's narrator suggests, "at the root of real honor is always the sense of sacredness of the person who is its object", it is the challenge of fostering the discipline of honouring as political and administrative, social and cultural (as well as judicial) ethos that lends the question "who is to uphold the honour of the Crown" its utmost salience. Law's role in leveraging the noblest aspirations that the phrase, the "honour of the Crown" represents is pedagogical as well as prescriptive. To understand honour not simply as a noun but as a verb is to reveal honour as a relational activity, as opposed to a thing one possesses. Thereby, one is reminded that honouring happens thanks to people doing it, living it. The late Richard Wagamese wrote: "My spiritual father once told me that 'Nothing in the universe ever grew from the outside in.'" ¹³⁹ As with all living things, honour like reconciliation only grows from the inside out; the same holds true of law. The multiplicity of metaphors, even languages, through which human beings symbolically construct their ideas, ideals, aspirations, and relationships offer seeds of hope. It is through multiple and unified acts of honouring that there can be any honour of the Crown to uphold.

¹³⁸ *Ibid* at 159.

¹³⁹ Richard Wagamese, "My spiritual father once told me that 'Nothing in the universe ever grew from the outside in.' I like that. It..." <http://fb.me/68TxPTFfk>" (23 May 2016 at 6:35), online: *Twitter* <<https://twitter.com/richardwagamese/status/734739529739866112>>.