Honour of the Crown

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The honour of the Crown is a constitutional principle that is fundamental to Aboriginal Law, the branch of Canadian constitutional law that deals with the constitutional rights of Indigenous peoples and their relationship with the Crown.[1] The concept of the honour of the Crown has its roots in British traditions, but has taken on new significance since the passage of the *Constitution Act, 1982*, which recognizes and affirms the "existing [A]boriginal and treaty rights of the [A]boriginal peoples of Canada."[2]

Where Does the Honour of the Crown Come From?

The honour of the Crown is not a written rule, but rather a concept developed by the judiciary based on British notions of noblesse.[3] According to the Supreme Court of Canada, the concept's role in Aboriginal law dates back to the *Royal Proclamation of 1763*,[4] which states that Indigenous peoples "live under … [the Crown's] protection."[5] The concept then took on new life via the Canadian courts' interpretations of section 35 of the *Constitution Act, 1982*, which recognizes and affirms the constitutional status of "existing [A]boriginal and treaty rights of the [A]boriginal peoples of Canada."[6] Over time, it has evolved into a foundational principle of Aboriginal law.[7]

The Supreme Court of Canada stated that "[t]he duty of honour derives from the Crown's assertion of sovereignty in the face of prior Aboriginal occupation."[8] This refers to an underlying tension in Crown/Indigenous relations, a tension that stems from the fact that Indigenous peoples occupied the land we now call Canada long before European settlers arrived, and lived in organized, autonomous societies according to their own systems of law.[9] When the Crown asserted its sovereignty over these lands, it unilaterally imposed its own laws and customs upon those preexisting Indigenous societies.[10] "The honour of the Crown characterizes the 'special relationship' that arises out of this colonial practice."[11]

The honour of the Crown also seeks to further reconciliation. The Supreme Court of Canada has used the term "reconciliation" in a number of ways. For example, in *R v Desautel*, it specified that the "honour of the Crown looks back to the historic impact … [of European settlement and] also looks forward to reconciliation between the Crown and Aboriginal peoples in an ongoing, mutually respectful long-term relationship."[12]

What Obligations Arise From the Honour of the Crown?

The relationship between the Crown and Aboriginal peoples is unique: it is of a *sui generis* nature.[13] In law, this *sui generis* relationship is sometimes characterized as "fiduciary," a type of legal relationship where one party (Aboriginal peoples) is effectively at the mercy of the other (the Crown).[14] The imbalanced nature of this relationship gives rise to an obligation on the part of the Crown "to treat [A]boriginal peoples fairly and honourably, and to protect them from exploitation."[15] This obligation applies equally to the federal,

provincial and territorial governments.[16] As the Supreme Court of Canada stated in its *Haida* judgment:

> *In all its dealings with Aboriginal peoples, from the assertion of sovereignty to the resolution of claims and the implementation of treaties, the Crown must act honourably.[17]*

This principle, the honour of the Crown, gives rise to different obligations under different circumstances.[18] The Supreme Court of Canada has listed the following circumstances in which the honour of the Crown is engaged:[19]

- Control Over Aboriginal Interests: When the "Crown assumes discretionary control over a specific Aboriginal interest."[20] For example, the creation of a reserve imposes a duty on the Crown to preserve the lands and protect them from exploitation on the band's behalf.[21]
- Constitutional, Treaty and Statutory Interpretation: Where a section 35 Aboriginal or treaty right is concerned, the Crown must interpret its constitutional obligations broadly and purposively, and act diligently to fulfil them.[22] This includes the interpretation of modern treaties[23] and statutory grants to Aboriginal peoples.[24]
- Duty to Consult: When the Crown contemplates an action or decision that has the potential to adversely affect a proven or credibly asserted section 35 Aboriginal or treaty right, the Crown has a duty to consult the rightsholders and, where appropriate, to accommodate the Aboriginal interest.[25]
- Treaty-making and Implementation: In the context of treaty-making[26] or implementation,[27] the Crown has a duty to negotiate honourably and to avoid "the appearance of sharp-dealing" with Aboriginal peoples.[28] This applies to the negotiation and interpretation of modern-day treaties as well as historic ones.[29]

The particular obligations that stem from the honour of the Crown can vary depending on the circumstances.[30] For example, the depth of the Crown's duty to consult is proportionate to the strength of the Aboriginal or treaty right claimed and the seriousness of the potential adverse effects on that right.[31]

How Has the Honour of the Crown Principle Been Critiqued?

Thomas McMorrow criticizes the honour of the Crown in two ways: (1) for failing to reject the imposition of Crown sovereignty over Aboriginal peoples; and (2) for failing to explain or

justify how the Crown has any right to extinguish Aboriginal rights.[32] That said, James (Sa'ke'j) Youngblood Henderson notes that it should not be up to the judiciary to resolve the structural and institutional problems that give rise to these historic injustices.[33] Rather, the courts' role is to uphold the Constitution and the rule of law, which includes the Crown's treaty obligations and, similarly, the honour of the Crown.[34] As such, the courts may invoke the honour of the Crown to redescribe and reorient existing laws concerning how governments interact with Aboriginal peoples, but cannot reject these laws outright.[35]

On the other hand, Justice Slatter of the Alberta Court of Appeal has criticized the term "honour of the Crown" for being imprecise and so vague as to have no real legal meaning.[36] Professor Mariana Valverde echoes this criticism, arguing that the honour of the Crown is a "mystical legal tradition" that defies clear definition.[37] Justice Slatter frames it as having "an absolute, moralistic and inflexible connotation … [which] can lead to conclusory reasoning and results oriented jurisprudence if applied directly to legal issues."[38] In other words, if a party argues that the Crown failed to act honourably, the courts have no meaningful yardstick for measuring what "honourably" means. For these critics, judges have too much discretion on how to use and apply the "honour of the Crown" in their decision-making.

[1] See Thomas McMorrow, "Upholding the Honour of the Crown" (2018) 35 Windsor YB Access to Justice 311 at 313 ["McMorrow"]. See also James Youngblood Henderson, "Dialogical Governance: A Mechanism of Constitutional Governance" (2009) 72:1 Sask L Rev 29 at 53 ["Youngblood Henderson"].

[2] *Constitution Act, 1982*, s 35, being Schedule B to the Canada Act 1982 (UK), 1982, c 11 at s 35 .

[3] See *Manitoba Metis Federation Inc v Canada (Attorney General)*, 2013 SCC 14 (CanLII) at para 65 ("The phrase 'honour of the Crown' refers to the principle that servants of the Crown must conduct themselves with honour when acting on behalf of the sovereign") . See also McMorrow, *supra* note 1 at 319-21 and 326-27; and Youngblood Henderson, *supra* note 1 at footnote 115. The concept of "honour" is grounded in the idea that each person has a place in British social hierarchy, which entitles them to privileges but also burdens them with duties and obligations. These duties and obligations are tied to virtue and to distinct notions of "the good, the beautiful, and the sacred."

[4] See *Manitoba Metis*, *supra* note 3 at para 66 (citing George R, Proclamation, 7 October 1763, reprinted in RSC 1985, App II, No 1). See also Brian Slattery, "The Aboriginal Constitution" (2014) 67 Supreme Court L Rev 319 at 322 ["Slattery"].

[5] *Royal Proclamation of 1763*, RSC 1970, Appendix II, No 1.

[6] Slattery, *supra* note 4 at footnote 1 (citing *Constitution Act, 1982*, *supra* note 2 at s 35(1)). See also McMorrow, *supra* note 1 at 316-17 (citing the Right Honourable Beverley McLachlin, "The Honour of the Crown" (delivered at the CBA National Aboriginal Law Section Annual Conference, Ottawa, 5 May 2016) [unpublished]).

[7] See *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73 (CanLII) at para 16 ; *Taku River Tlingit First Nation v British Columbia (Project Assessment Director)*, 2004 SCC 74 (CanLII) ; and *Mikisew Cree First Nation v Canada (Minister of Canadian Heritage)*, 2005 SCC 69 (CanLII) at paras 51 and 57 (these three cases are often referred to as the "Haida trilogy" and are best known for establishing the duty to consult doctrine and exploring the principle of the honour of the Crown in some depth). See also *Manitoba Metis*, *supra* note 3 at paras 68-72 ("not all interactions between the Crown and Aboriginal people engage" the honour of the Crown, but it is certainly engaged where section 35 of the *Constitution Act, 1982* is at issue); and *R v Van der Peet*, 1996 CanLII 216 (SCC), at para 31 ("[section 35(1) is] the constitutional framework through which the fact that aboriginals lived on the land in distinctive societies … is acknowledged and reconciled with the sovereignty of the Crown") .

[8] *Taku River*, *supra* note 7 at para 24. See also *Manitoba Metis*, supra note 3 at para 66.

[9] See *R v Desautel*, 2021 SCC 17 (CanLII) at paras 24 (citing *R v Sparrow*, 1990 CanLII 104 (SCC) at 1094) and 26 (citing *Van der Peet*, *supra* note 7 at para 43) . See also Slattery, *supra* note 4 at 326-28 (Slattery describes King George's vision that the Crown would assert its sovereignty over Indigenous peoples, neither conquering them nor subjecting them to British rule, but rather through agreement in treaty or *de facto* control on the ground).

[10] See *Manitoba Metis*, *supra* note 3 at para 67.

[11] *Ibid* at para 67 (internal quotations and notations omitted).

[12] *Desautel*, *supra* note 9 at para 30 (citing *Beckman v. Little Salmon/Carmacks First Nation*, 2010 SCC 53 at para 10 (internal quotations removed)).

[13] See *R v Badger*, 1996 CanLII 236 (SCC) at para 78 .

[14] See *Guerin v The Queen*, 1984 CanLII 25 (SCC) at 377, 383-89.

[15] *Mitchell v MNR*, 2001 SCC 33 (CanLII) at para 9.

[16] See *Grassy Narrows First Nation v. Ontario (Natural Resources)*, 2014 SCC 48 (CanLII) at paras 50-51 (the Government of Ontario may take up lands under Treaty 3, but must do so honourably) ; and *First Nation of Nacho Nyak Dun v Yukon*, 2017 SCC 58 (CanLII) at para 52 (the Yukon Territory's modern treaty negotiations with its First Nations must be conducted "in good faith and in accordance with the honour of the Crown") .

[17] *Haida*, *supra* note 7 at para 50.

[18] *Ibid* at para 18.

[19] *Manitoba Metis*, *supra* note 3 at para 73. See also Slattery, *supra* note 4 at 332.

[20] *Manitoba Metis*, *supra* note 3 at para 73(1).

[21] See *Wewaykum Indian Band v Canada*, 2002 SCC 79 (CanLII) at paras 86 and 98-100.

[22] See *Manitoba Metis*, *supra* note 3 at paras 75-82.

[23] See *Nacho Nyak Dun*, *supra* note 16 at paras 36-38.

[24] See *Manitoba Metis*, *supra* note 3 at paras 91-94.

[25] See *Haida*, *supra* note 7 at paras 35 and 49-50.

[26] See e.g. *Nacho Nyak Dun*, supra note 16 at para 52. The Yukon government made a significant and unilateral modification to a term in an agreement with its First Nations partners, which was such a departure from its previous position that the Court found that it was not made in good faith, and that the Yukon government therefore failed to uphold the honour of the Crown.

[27] See e.g. *Grassy Narrows*, *supra* note 16 at paras 50-51 (the Crown's treaty right to take up lands must be carried out honourably and is subject to the duty to consult doctrine).

[28] See *Badger*, supra note 13 at para 41; *Manitoba Metis*, *supra* note 3 at paras 73 and 79; and *Haida*, *supra* note 7 at para 19.

[29] See *Nacho Nyak Dun*, *supra* note 16 at paras 52 and 57. See also *Little Salmon/Carmacks*, *supra* note 12.

[30] See *Haida*, *supra* note 7 at para 38; *Taku River*, *supra* note 7 at para 25; and *Mikisew Cree*, *supra* note 7 at paras 34 and 63.

[31] See *Haida*, *supra* note 7 at paras 39 and 43-45.

[32] See McMorrow, *supra* note 1 at 315-16. See also Youngblood Henderson, *supra* note 1 at 51 (Youngblood Henderson calls the honour of the Crown "constitutional therapy" which accounts for, amongst other things, the harm colonization caused to Indigenous peoples).

[33] Youngblood Henderson, *supra* note 1 at 55-56.

[34] *Ibid*.

[35] *Ibid* at 56-57.

[36] See *R v Lefthand*, 2007 ABCA 206 (CanLII) at para 75 .

[37] See Mariana Valverde, "'The Honour of the Crown is at Stake': Aboriginal Land Claims Litigation and the Epistemology of Sovereignty" (2011) 1:3 UC Irvine L Rev 555 at 969. See also 957 and 973-74.

[38] *Lefthand*, *supra* note 36 at para 75.