File No. 37441

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE FEDERAL COURT OF APPEAL)

BETWEEN:

CHIEF STEVE COURTOREILLE ON BEHALF OF HIMSELF AND THE MEMBERS OF THE MIKISEW CREE FIRST NATION

Appellants

- and -

THE GOVERNOR GENERAL IN COUNCIL, MINISTER OF ABORIGINAL AFFAIRS AND NORTHERN DEVELOPMENT, MINISTER OF FINANCE, MINISTER OF THE ENVIRONMENT, MINISTER OF FISHERIES AND OCEANS, MINISTER OF TRANSPORT AND MINISTER OF NATURAL RESOURCES

Respondents

- and -

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Interveners

FACTUM OF THE INTERVENER
MANITOBA METIS FEDERATION INC.
(Pursuant to Rules 37 and 42 of the *Rules of the Supreme Court of Canada*)

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TABLE OF CONTENTS

PART I: OVERVIEW AND FACTS

1. This appeal is about whether one branch of government—the branch that has been responsible for some of the most devastating and destructive acts against Indigenous peoples throughout Canada's history—is wholly exempt from "one of the best available legal tools"[1] for advancing reconciliation with Indigenous peoples. Based on the constitutional principles engaged, as well as the authorities of this Court, neither Parliament nor the legislatures are exempt from the national project of reconciliation. Parliamentary sovereignty cannot trump the dictate of the Constitution. The duty to consult must apply to legislative action.

2. The Manitoba Metis Federation ("MMF") adopts the facts as set out by the Appellants and adds the following:

(a) This appeal will impact *all* of the "aboriginal peoples of Canada" included in section 35(2) of the *Constitution Act*, *1982*—Indians, Inuit and Métis alike. It is not a case that will only affect the "Indian peoples" and their governments (*i.e.*, First Nations).

(b) The Manitoba government already recognizes that the Crown's duty to consult "applies when any proposed provincial law, regulation, decision or action may infringe upon or adversely affect the exercise of a treaty or aboriginal rights."[2] There is also a history in Manitoba of consultation and co-development of various legislative and regulatory initiatives with Indigenous peoples, including with the MMF.[3]

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[1] *Ktunaxa Nation v British Columbia*, 2017 SCC 54 at para 86 [*Ktunaxa*].

[2] Government of Manitoba, *Interim Provincial Policy for Crown Consultations with First Nations, Métis Communities and Other Aboriginal Communities*, 4 May 2009 (emphasis added).

[3] See *The Child and Family Services Authorities Act*, CCSM c C90 that includes legislative devolution to a Métis as well as First Nation authorities; Manitoba Government-Manitoba Metis Federation Points of Agreement on Métis Harvesting in Manitoba (29 September 2012) (*Manitoba-MMF Harvesting Agreement*), s. 7.

PART II: ISSUES

3. The MMF will address the first issue in this appeal: does the duty to consult apply to legislative action? As detailed further below, the MMF makes submissions that it does.

PART III: ARGUMENT

A. Section 35 Requires All Branches of Government to Advance Reconciliation—Legislative Action Cannot Be Immune from the Duty to Consult

4. Section 35 of the *Constitution Act, 1982* is unique in the world. No other nation-state has fettered its sovereignty—through the constitutional protection and recognition of Aboriginal and treaty rights—in the same way. In 1982, Canada—as a country from coast to coast to coast—agreed to begin to shake off the shackles of colonialism and start the long journey of reconciliation with Indigenous peoples. This process is anchored on: (1) section 35's constitutional base; (2) legally enforceable and constitutionally protected Aboriginal and treaty rights; and, (3) constitutional duties and obligations to guide and smooth the way forward.

5. Section 35 binds *all* of the branches of government in Canada—the executive branches, Parliament and the legislatures, as well as the judiciary—to work together to advance the national project of reconciliation within their respective spheres and jurisdictions. Reconciliation is "a process flowing from rights guaranteed by s. 35(1) of the *Constitution Act*, *1982*."[4] In order for reconciliation to be advanced, neither Parliament[5] nor the legislatures can be insulated from section 35's constitutional imperative or the constitutional principles that animate its operation, including the procedural protections provided through the duty to consult.[6]

6. An affirmative answer to the fundamental question underlying this appeal—whether the duty to consult applies to legislative action—is required in order to fulfill section 35's promise. The national project of reconciliation would be severely undermined if "consultation free zones"

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[4] *Haida Nation v British Columbia* (*Minister of Forests*), 2004 SCC 73 at para 32 [*Haida*].

[5] *Daniels v Canada* (*Indian Affairs and Northern Development*), 2016 SCC 12 at para 37: "Reconciliation with *all* of Canada's Aboriginal peoples is Parliament's goal."

[6] *Reference re Secession of Quebec*, [1998] 2 SCR 217 at para 48; *Beckman v Little Salmon/Carmacks First Nation,* 2010 SCC 53 at para 42).

could be arbitrarily established by members of the executive or bureaucrats, who could simply claim their policy related work is "legislative in nature"[7] in order to evade the duty or if the "consultation patchwork" that already exists (where some jurisdictions already recognize that the duty applies to the development of laws that impact Aboriginal and treaty rights while Parliament and other legislatures do not) becomes a race to the bottom.[8] These results would thwart reconciliation, not support or advance it.

7. Moreover, contrary to the Respondents' submissions, parliamentary sovereignty has never been absolute in Canada. Legislation that is adopted in a "manner and form" that is inconsistent with the Constitution will be found to be invalid.[9] In these situations, the legislation at issue is not declared invalid because an underlying breach of a constitutional right has been established or because the legislation is *ultra vires*. The legislation is invalidated because procedural protections or processes—mandated by the Constitution—have not been met.[10]

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[7] *Canada v Mikisew Cree First Nation*, 2016 FCA 311 at para 30 [*Mikisew FCA*].

[8] Consultation on proposed legislation that may adversely impact Aboriginal and treaty rights is not an impossible task, and is in fact already undertaken by several provinces and territorial governments as a matter of policy. For a review of existing provincial and territorial approaches see: Zachary Davis, *The Duty to Consult and Legislative Action*, Saskatchewan Law Review 2016 Vol 79 at pp 19–20 [MMF Book of Authorities, Tab 1].

[9] Peter W Hogg, *Constitutional Law of Canada,* Looseleaf (Scarborough: Carswell, 2016-R1) at 12-11; *Bribery Commissioner v Ranasinghe*, [1964] All ER 785 at 7; *Gallant v The King*, [1949] 2 DLR 425 at 431; *Re Manitoba Language Rights*, [1985] 1 SCR 721 at 747.

[10] For example, section 23 of the *Manitoba Act, 1870* (a constitutional provision) requires that the Province's statutes be enacted in both English and French, making bills passed by the legislature in only one of these languages invalid (see *Re Manitoba Language Rights* at para 45). Or, no bill passed by a legislature can have force of law unless it is assented to by the Lieutenant Governor, as royal assent is required by the Constitution (*Constitution Act*, *1867*, 30 & 31 Vict, c3 at ss 55, 90).

8. In the same way, the duty to consult—as "a constitutional imperative"[11] and "a procedural duty that arises from the honour of the Crown"[12]—applies to legislative action. While Parliament and the legislatures reign supreme over their own internal processes, they cannot be immune to the dictates of the Constitution, which require that the procedural protections afforded to Aboriginal peoples—based on the honour of the Crown and section 35— are met prior to the passage of legislation.

9. In the same way that the executive branch or an administrative decision-maker needs to ensure that the "constitutional imperative" of the duty has been met or risk having their decision declared invalid,[13] so too must Parliament and the legislatures. The courts—as the "guardians of the Constitution"[14]—must ensure that legislation is adopted in "manner and form" that is consistent with the requirements of the Constitution, including the procedural requirements of the duty to consult. If the duty is not met, legislation should be invalidated. This is what is required in the age of reconciliation.

10. Similar to how the duty is determined and assessed in other circumstances, consultation requirements will vary depending on the rights and claims at stake and the potential for adverse impacts. At the very least, Parliament and the legislatures will need to ensure that government or private members demonstrate consultation has taken place where Aboriginal and treaty rights are adversely impacted by proposed legislation. This is not an impossible task. As noted above, many governments already ensure compliance with this "constitutional imperative" prior to introducing legislation. Moreover, legislatures may provide opportunities for impacted Aboriginal groups to be heard to ensure the duty is met. Section 35 fettered Parliamentary sovereignty; prior to enacting legislation, it must ensure the duty has been discharged.

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[11] *Clyde River* (*Hamlet*) *v Petroleum Geo-Services Inc*, 2017 SCC 40 at paras 19, 24: "The duty to consult…has both a constitutional and a legal dimension…its constitutional dimension is grounded in the honour of the Crown. This principle is in turn enshrined in s. 35(1)…."

[12] *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44 at para 78.

[13] *Clyde River* at para 24.

[14] *Manitoba Metis Federation Inc v Canada*, 2013 SCC 14 at para 135, 140 [*MMF*].

11. As this Court has recently acknowledged, these constitutionally-mandated procedural protections do not guarantee a "particular outcome," however, they ensure Parliament and the legislatures are both informed about the scope of the effects of the legislation on Aboriginal and treaty rights prior to enacting a law, and are not free to ignore one of "the best available legal tools in the reconciliation basket."[15]

B. A Purposive and Contextual Interpretation of Section 35 Leads to the Application of the Duty in Relation to Legislative Action

12. A purposive and contextual interpretation of section 35 also leads to the application of the duty to consult to legislative action. As it has done in the past,[16] the Court's interpretation of section 35—based on the unique fact situation in this appeal—must be informed by the honour of the Crown, a "generous" and "purposive" reading of the provision[17] and be consistent with the linguistic, philosophical, and historical context of section 35.[18]

13. Section 35 comes out of an era where *any* government legislation trumped Aboriginal rights, including those rights expressly protected within treaties or other agreements (*i.e.*, the *Natural Resources Transfer Agreements*).[19] Even Indian harvesting rights—being exercised on reserve lands—were not protected.[20] It arose from a time when proposed legislative amendments to the *Indian Act*—which controlled almost every aspect of Indian peoples' lives from cradle to grave—still represented a "dialogue of the deaf" between legislators and First Nations.[21]

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[15] *Ktunaxa* at para 86.

[16] *R v Sparrow*, [1990] 1 SCR 1075 at 1102–1105 [*Sparrow*]; *R v Powley*, 2003 SCC 43 at para 13 [*Powley*]; *MMF* at paras 75–77.

[17] *MMF* at paras 73, 76.

[18] *Reference re Supreme Court Act*, 2014 SCC 21 at para 19; *Reference re Senate Reform*, 2014 SCC 32 at para 25 [*Senate Reference*].

[19] *Sparrow* at 1103: "We cannot recount with much pride the treatment accorded to the native people of this country."

[20] *R v White* (1964), 50 DLR (2d) 613 (BCCA), affirmed by Supreme Court of Canada at (1965), 52 DLR (2d) 481; *Daniels v White*, [1968] SCR 517.

[21] *Report of the Royal Commission on Aboriginal Peoples*, Volume 1: Looking Forward, Looking Back (Canada, October 1996) at 237 ("RCAP").

14. For the Métis, section 35 arose from an era where they existed in a "legal lacuna" with no protection for their rights or interests: "[a]lthough widely recognized as a culturally distinct Aboriginal people living in culturally distinct communities, the law remained blind to the unique history of the Métis and their unique needs." [22]

15. Simply put, legislative action—through its all-encompassing presence or complete absence—represented one of the greatest harms to Indigenous peoples within Canada. This is the historic context that informed the negotiation and adoption of section 35. The proposition that legislative action would escape scrutiny going forward ignores this history and is antithetical to reconciliation.

16. While section 35 constitutionally protects "Aboriginal and treaty rights," it also fetters, and builds in procedural protections (*i.e.*, the duty to consult) against, future legislative reach into the lives of Indigenous peoples and the internal affairs of their communities and governments, which was so destructive in the past. This is why it was heralded as a "turning point," and a "political watershed" that did "away with the paternalism that [Aboriginal peoples] have often felt relative to other Canadians and Canadian institutions."[23] This is why section 35 rights are uniquely beyond the reach of the "notwithstanding clause" in Canada's Constitution.[24] Unilateral and indifferent legislative action, *without any consultation*, was to be a thing of the past.

17. In *Sparrow*, this Court first acknowledged that legislative action, post-1982, must uphold the honour of the Crown and respect the modern era of Crown-Indigenous relations.[25] This Court

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[22] *Alberta* (*Aboriginal Affair) v Cunningham*, 2011 SCC 37 at para 7-8 [*Cunningham*].

[23] See Canada, *Debates of the Senate*, 32nd Parl, 1st Sess, No 3 (7 December 1981) at 3317–3318 (Jean Marchand, P.C); Canada, *House of Commons Debates*, 32nd Parl, 1st Sess, No 7 (20 February 1981) at 7520–7521.

[24] Section 33 of the *Canadian Charter of Rights and Freedoms* does not apply to the rights protected by section 35 of the *Constitution Act*, *1982*. See *Sparrow* at 1101–1102.

[25] *Sparrow* at 1110.

has further recognized that the honour of the Crown requires Ministers and government officials to "conduct themselves with honour when acting on behalf of the sovereign."[26]

18. A refusal to consult on contemplated legislation that adversely affects constitutionally-protected Aboriginal or treaty rights is not honourable. It is these types of decisions—made in secret or "behind closed doors"—that have "engendered deep suspicions on the part of [Aboriginal] people about the ultimate intentions of Canadian policy makers towards them."[27] This type of approach undermines the very purpose of section 35 as well as reconciliation's most important and practical work: building trust and renewing Crown-Indigenous relationships.[28] Consultation on these issues must be confirmed as legally enforceable.

19. In *Haida Nation*, this Court first recognized the duty to consult as an effective and durable constitutional tool to balance the honour of the Crown, future Crown-Indigenous relations, and Crown conduct in order to advance section 35's purpose.[29] This appeal requires this Court to now apply the duty to contemplated legislative action that adversely impacts Aboriginal and treaty rights. This is a modest task, necessary to ensure no branch of government is exempt from the national project of reconciliation. As noted above, many jurisdictions already acknowledge this constitutional requirement.

20. While the parties may not agree with respect to what legislative action should ultimately be taken,[30] legislative action by ambush—as seen in this appeal—has no place in the era of reconciliation.

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[26] *MMF* at para 65.

[27] RCAP, Volume 1 at 237.

[28] *Taku River Tlingit First Nation v British Columbia* (*Project Assessment Director*), 2004 SCC 74 at para 24: "In all its dealings with Aboriginal peoples, the Crown must act honourably, in accordance with its historical and future relationship with the Aboriginal peoples in question" [emphasis added].

[29] *Haida Nation v British Columbia* (*Minister of Forests*), 2004 SCC 73 at para 38 [*Haida*].

[30] *Haida* at para 48.

C. An Illusory View of the Separation of Powers Cannot Cloak the Executive from Crown Consultation

21. Conceiving of the separation of executive and legislative powers as water-tight compartments, as urged by the Respondents, distorts how government in Canada actually works: "[t]he separation of powers is not a rigid and absolute structure. The Court should not be blind to the reality of Canadian governance that, except in certain rare cases, the executive frequently and *de facto* controls the legislature."[31]

22. In Canada, "true executive power lies in the Cabinet"[32] and "legislative bodies have little real influence in policy-making."[33] Indeed, making the policy decisions that lie behind the government's legislative agenda is among the executive's most important functions. An approach that allows the executive to potentially insulate itself against the duty by deeming all policy development work that may adversely impact Aboriginal or treaty rights as "legislative in nature"[34] is unworkable and runs the risk of allowing the executive to unilaterally neuter the duty—with no judicial supervision.

23. The executive must not be allowed to cloak its actions in legislative cloth to evade its constitutional responsibilities to Aboriginal people. "All executive powers, whether they derive from statute, common law or prerogative, must be adapted to conform with constitutional imperatives."[35] Once triggered, the duty to consult must be discharged[36]—even by Cabinet, and even when Cabinet's decisions are upstream in the legislative process.

D. Legislative Recognition and Implementation of Aboriginal Self-Government Requires Crown Consultation

24. While the MMF recognizes that this appeal is not about Aboriginal self-government, the Court should be aware that a complete denial of the duty to consult in relation to proposed

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[31] *Wells v Newfoundland*, [1999] 3 SCR 199 at para 54 [*Wells*].

[32] *Reference Re Canada Assistance Plan*, [1991] 2 SCR 525 at 547 as cited in *Wells* at para 53.

[33] Hogg at 5-47 to 5-48 [Hogg].

[34] *Mikisew FCA* at para 30.

[35] *Air Canada v British Columbia* (*Attorney General*), [1986] 2 SCR 539 at para 12.

[36] *Tsilhqot'in* at para 78; see also *Clyde River* at para 39.

legislative action will have negative implications on ongoing self-government negotiations as well as the future implementation—through legislation—of these negotiated agreements.

25. This Court, as well as the federal government, has recognized that Aboriginal peoples have an inherent right to self-government, though the contours of this right require definition on a case-by-case basis.[37] Some courts have also recognized that Aboriginal self-government is "akin to a legislative power to make laws, survived as one of the unwritten 'underlying values' of the Constitution outside of the powers distributed to Parliament and the legislatures in 1867"[38] and that "[t]hese subsisting [self-government] rights curtailed the powers of colonial governments, just as they later curtailed the powers of Parliament and the legislative assemblies."[39]

26. Despite varying interpretations on the legal basis and scope of Aboriginal self-government rights, it is common ground that these issues are ideally dealt with through negotiations. Modern-day treaty or self-government agreement negotiations provide the necessary space for the recognition of Indigenous jurisdictions and governance. Such arrangements, however, ultimately require legislative action to give them full legal force and effect. In order to maintain trust and good faith, consultation on implementation legislation is commonplace and even built into many agreements. Given the issues at stake, however, consultation on this type of legislation cannot be discretionary or merely good policy practice.

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[37] Canada, *Government of Canada's Approach to Implementation of the Inherent Right and the Negotiation of Aboriginal Self-Government* at 4; *R v Pamajewon*, [1996] SCR 821 at para 26.

[38] *Campbell v British Columbia* (*Attorney General*), 2000 BCSC 1123 at para 81 [*Campbell*].

[39] *Campbell* at para 93.

It is constitutionally required based on the honour of the Crown, section 35, and the fact that modern-day Aboriginal self-government arrangements weave together federal, provincial, and Indigenous jurisdictions.[40]

27. The history and legacy of the *Indian Act* provides the cautionary tale on why consultation on Aboriginal self-government legislation is required. Section 35 must act as a shield to protect Aboriginal self-government during the legislative process, not merely a sword to challenge parts of legislation 'after-the-fact.' The recognition of the duty in this context is fundamental to the continuing the advancement of Aboriginal self-government and modern day treaty-making. While at this moment in time, it would be unthinkable to many that a replication of an *Indian Act*-like piece of legislation could occur, without legal certainty and protection to this effect—which the recognition of the duty in the context of proposed legislative action would provide—section 35's constitutional promise could ring hollow in the future.

PART IV: COSTS

28. The MMF does not seek costs and asks that costs not be awarded against it in this appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 14th day of November 2017.

JASON T. MADDEN

[40] Canada, Report of the Royal Commission on Aboriginal Peoples, Volume 5: Renewal: A Twenty-Year Commitment (Canada, October 1996) at 150: "The enactment of section 35 of the *Constitution Act*, *1982* has had far-reaching significance…It provides the basis for recognizing Aboriginal governments as one of three distinct orders of government in Canada: Aboriginal, provincial and federal. The governments making up these three orders are sovereign within their several spheres and hold their powers by virtue of their inherent or constitutional status rather than by delegation. They share the sovereign powers of Canada as a whole, powers that represent a pooling of existing sovereignties."

PART VI: TABLE OF AUTHORITIES

JURISPRUDENCE	
Item	**Paragraph(s)**
Air Canada v British Columbia (Attorney General), [1986] 2 SCR 539	23
Alberta (Aboriginal Affairs and Northern Development) v Cunningham, 2011 SCC 37	14
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Item	**Paragraph**
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Canada, *Federal Policy Guide, Aboriginal Self-Government: The Government of Canada's Approach to the Implementation of the Inherent Right and the Negotiation of Aboriginal Self-Government*. Minister of Indian Affairs and Northern Development, Ottawa, 1995	25
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PART VII: STATUTES

Constitution Act, 1867, 30 & 31 Vict, c3

35. Until the Parliament of Canada otherwise provides, the Presence of at least Fifteen Senators, including the Speaker, shall be necessary to constitute a Meeting of the Senate for the Exercise of its Powers.

35. Jusqu'à ce que le parlement du Canada en ordonne autrement, la présence d'au moins quinze sénateurs, y compris l'orateur, sera nécessaire pour constituer une assemblée du Sénat dans l'exercice de ses fonctions.

55. Where a Bill passed by the Houses of the Parliament is presented to the Governor General for the Queen's Assent, he shall declare, according to his Discretion, but subject to the Provisions of this Act and to Her Majesty's Instructions, either that he assents thereto in the Queen's Name, or that he withholds the Queen's Assent, or that he reserves the Bill for the Signification of the Queen's Pleasure.

55. Lorsqu'un bill voté par les chambres du parlement sera présenté au gouverneur-général pour la sanction de la Reine, le gouverneur-général devra déclarer à sa discrétion, mais sujet aux dispositions de la présente loi et aux instructions de Sa Majesté, ou qu'il le sanctionne au nom de la Reine, ou qu'il refuse cette sanction, ou qu'il réserve le bill pour la signification du bon plaisir de la Reine.

90. The following Provisions of this Act respecting the Parliament of Canada, namely, — the Provisions relating to Appropriation and Tax Bills, the Recommendation of Money Votes, the Assent to Bills, the Disallowance of Acts, and the Signification of Pleasure on Bills reserved, — shall extend and apply to the Legislatures of the several Provinces as if those Provisions were here re-enacted and made applicable in Terms to the respective Provinces and the Legislatures thereof, with the Substitution of the Lieutenant Governor of the Province for the Governor General, of the Governor General for the Queen and for a Secretary of State, of One Year for Two Years, and of the Province for Canada.

90. Les dispositions suivantes de la présente loi, concernant le parlement du Canada, savoir: les dispositions relatives aux bills d'appropriation et d'impôts, à la recommandation de votes de deniers, à la sanction des bills, au désaveu des lois, et à la signification du bon plaisir quant aux bills réservés, — s'étendront et s'appliqueront aux législatures des différentes provinces, tout comme si elles étaient ici décrétées et rendues expressément applicables aux provinces respectives et à leurs législatures, en substituant toutefois le lieutenant-gouverneur de la province au gouverneur-général, le gouverneur-général à la Reine et au secrétaire d'État, un an à deux ans, et la province au Canada.

Manitoba Act, 33 Vict, c3

23. Either the English or the French language may be used by any person in the debates of the Houses of the Legislature, and both those languages shall be used in the respective Records and Journals of those Houses; and either of those languages may be used by any

person, or in any Pleading or Process, in or issuing from any Court of Canada established under the British North America Act, 1867, or in or from all or any of the Courts of the Province. The Acts of the Legislature shall be printed and published in both those languages.