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The Aboriginal Constitution

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The Aboriginal Constitution

Brian Slattery*

I. INTRODUCTION

In a remarkable series of cases over the past decade, from *Haida Nation*¹ to *Manitoba Metis*² the Supreme Court of Canada has highlighted three basic elements of Aboriginal law: the honour of the Crown, the *Royal Proclamation, 1763*,³ and Aboriginal Treaties. In this paper, I argue that these form the framework of the Aboriginal Constitution, which parallels the federal pact between the provinces in the *Constitution Act, 1867*⁴ and provides the Constitution of Canada with its most ancient and enduring roots.

The Supreme Court's recent decision in *Manitoba Metis*⁵ makes a significant contribution to the subject. The Court holds that the honour of the Crown was breached by its failure to implement diligently the constitutional obligations undertaken toward the Métis people in section 31 of the *Manitoba Act, 1870*,⁶ in which the Crown promised to distribute 1.4 million acres of land to the children of Métis families in Manitoba when it entered Confederation.

The decision stands for several basic points. Chief Justice McLachlin and Karakatsanis J. hold for a strong majority⁷ that the principle of the

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¹ *Haida Nation v. British Columbia (Minister of Forests)*, [2004] S.C.J. No. 70, [2004] 3 S.C.R. 511 (S.C.C.) [hereinafter "*Haida Nation*"].

² *Manitoba Metis Federation Inc. v. Canada (Attorney General)*, [2013] S.C.J. No. 14, [2013] 1 S.C.R. 623 (S.C.C.) [hereinafter "*Manitoba Metis*"].

³ Reprinted in R.S.C. 1985, App. II, No. 1 [hereinafter "*Royal Proclamation*"]. A more accurate text of the *Proclamation* is found in Clarence S. Brigham, ed., *British Royal Proclamations Relating to America* (Worcester, MA: American Antiquarian Society, 1911), at 212. The original handwritten text, entered on the Patent Roll for the regnal year 4 Geo. III, is located in the United Kingdom Public Record Office: c. 66/3693 (back of roll).

⁴ (U.K.), 30 & 31 Vict., c. 3 [reprinted in R.S.C. 1985, App. II, No. 5].

⁵ *Supra*, note 2.

⁶ S.C. 1870, c. 3 (reprinted in R.S.C. 1985, App. II, No. 8).

⁷ The majority comprised six members of an eight-judge panel: McLachlin C.J.C. and LeBel, Fish, Abella, Cromwell and Karakatsanis JJ., with Rothstein and Moldaver JJ. dissenting.

honour of the Crown extends to all explicit constitutional obligations undertaken by the Crown to Aboriginal peoples and generates a duty of diligent, purposive fulfilment.⁸ This duty has two aspects: first, the Crown must take a broad purposive approach to the *interpretation* of its constitutional obligations; and second, it must *act diligently* to fulfil them.⁹ The courts have the power to determine whether the Crown has met this standard and to issue appropriate declarations to enforce it. A claim that the Crown has violated its constitutional obligations cannot be time-barred. Neither statutes of limitations nor the common law doctrine of laches can prevent courts from issuing declarations on the constitutionality of the Crown's conduct in this context.¹⁰

The ruling is of historic significance in its own right, as official recognition of long-standing Métis grievances over the way in which section 31 was implemented. However, the broader principles endorsed by the Court lend it added weight, making it one of the most meaningful Aboriginal rulings to be handed down in recent times.

In this paper, I offer some thoughts on the decision's import for the Aboriginal Constitution, focusing on the three cornerstones identified at the start: the honour of the Crown, the *Royal Proclamation* and Aboriginal Treaties. I close with a discussion of the Crown's duties of diligent performance and negotiation.

II. THE HONOUR OF THE CROWN

The Crown and its servants must conduct themselves with honour in their dealings with Aboriginal peoples.¹¹ This principle is a grounding postulate of Canadian constitutional law — a “core precept” that gives rise to an array of substantive obligations.¹² The principle lies at the base

⁸ *Manitoba Metis*, *supra*, note 2, at paras. 68-83 and 91-94.

⁹ *Id.*, at para. 75.

¹⁰ *Id.*, at paras. 133-153.

¹¹ *Id.*, at para. 65.

¹² *Haida Nation*, *supra*, note 1, at paras. 16 and 18; *Manitoba Metis*, *supra*, note 2, at para. 73; *Beckman v. Little Salmon/Carmacks First Nation*, [2010] S.C.J. No. 53, [2010] 3 S.C.R. 103, at para. 42 (S.C.C.) [hereinafter “*Beckman*”]. For discussion of the principle, see David Arnot, “The Honour of First Nations — the Honour of the Crown: The Unique Relationship of First Nations with the Crown” in Jennifer Smith & Michael Jackson, eds., *The Evolving Canadian Crown* (Montreal: McGill-Queen's University Press, 2012) 155; Jamie Dickson, “The Honour of the Crown: Making Sense of Crown Liability Doctrine in Crown/Aboriginal Law in Canada”, LL.M. Thesis, College of Law, University of Saskatchewan, 2014; Sébastien Grammond, *Terms of Coexistence: Indigenous Peoples and Canadian Law*, trans. Jodi Lazare (Toronto: Carswell, 2013), at 132-35, 265; James

of the Canadian constitutional order and governs the actions of the Crown from the initial assertion of sovereignty onward.¹³ Although the honour of the Crown has been incorporated into a number of constitutional documents, in essence it is a matter of common law.¹⁴

In *Manitoba Metis*, the Court traces the doctrine to the early periods of European exploration and settlement, when the British Crown launched claims to vast tracts of North America that were actually subject to pre-existing Aboriginal sovereignty and territorial rights.¹⁵ The tension between these conflicting claims gave rise to a special relationship between the Crown and Aboriginal peoples, which required

(Sa'ke'j) Youngblood Henderson, *Treaty Rights in the Constitution of Canada* (Toronto: Thomson Carswell, 2007), at 25-26, 92-96, 829-31, 887-944; Felix Hoehn, *Reconciling Sovereignities: Aboriginal Nations and Canada* (Saskatoon: University of Saskatchewan Native Law Centre, 2012); Peter Hogg & Laura Dougan, "The Honour of the Crown: Reshaping Canada's Constitutional Law", paper prepared for the conference "Treaty Implementation: Honouring the Duty to Implement in Good Faith" hosted by the Pacific Business & Law Institute, June 17 & 18, 2014, Vancouver, B.C. [hereinafter "Hogg & Dougan"]; Timothy Huyer, "Honour of the Crown: The New Approach to Crown-Aboriginal Reconciliation" (March 2006) 21 W.R.L.S.I. 33; Kent McNeil, "The Crown's Fiduciary Obligations in the Era of Aboriginal Self-Government" (2009) 88 Can. Bar Rev. 1; Dwight Newman, *Revisiting the Duty to Consult Aboriginal Peoples*, rev. ed. (Saskatoon: Purich Publishing, 2014), at 23-35; Guy Régimbald & Dwight Newman, *The Law of the Canadian Constitution* (Markham, ON: LexisNexis Canada, 2013), at 804-10; Timothy McCabe, *The Honour of the Crown and its Fiduciary Duties to Aboriginal Peoples* (Markham, ON: LexisNexis Canada, 2008); Brian Slattery, "Aboriginal Rights and the Honour of the Crown" (2005) 29 S.C.L.R. (2d) 433 [hereinafter "Slattery, 'Aboriginal Rights'"]; Brian Slattery, "First Nations and the Constitution: A Question of Trust" (1992) 71 Can. Bar Rev. 261 [hereinafter "Slattery, 'First Nations and the Constitution'"]; Mark Walters, "The Jurisprudence of Reconciliation: Aboriginal Rights in Canada" [hereinafter "Walters, 'The Jurisprudence of Reconciliation'"] in Will Kymlicka & Bashir Bashir, eds., *The Politics of Reconciliation in Multicultural Societies* (Oxford: Oxford University Press, 2008) 165.

¹³ See *Haida Nation*, *supra*, note 1, at para. 17: "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." See also, *id.*, at para. 32.

¹⁴ Justice Rothstein points this out in his dissent in *Manitoba Metis*, *supra*, note 2, at para. 156; see also paras. 204, 205, 212, and 267. For fuller consideration, see Hogg & Dougan, *supra*, note 12, at 4-8; Slattery, "Aboriginal Rights", *supra*, note 12, at 443-45.

¹⁵ *Manitoba Metis*, *supra*, note 2, at paras. 66-67, quoting *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, [2004] S.C.J. No. 69, [2004] 3 S.C.R. 550, at para. 24 (S.C.C.), and *Haida Nation*, *supra*, note 1, at para. 32. See also *Haida Nation*, *id.*, at para. 20, where the Court says: "Treaties serve to reconcile pre-existing Aboriginal sovereignty with assumed Crown sovereignty ...". For a review of early European claims, see Brian Slattery, "Paper Empires: The Legal Dimensions of French and English Ventures in North America" in John McLaren, A.R. Buck & Nancy Wright, eds., *Despotic Dominion: Property Rights in British Settler Societies* (Vancouver: UBC Press, 2005) 50; Brian Slattery, *The Land Rights of Indigenous Canadian Peoples* (Doctoral Dissertation, Oxford University, 1979), at 66-125, online: <http://works.bepress.com/brian_slattery/24> [hereinafter "Slattery, *Land Rights*"].

the Crown to deal honourably with them.¹⁶ The doctrine found expression in the *Royal Proclamation*, which refers to “the several Nations or Tribes of Indians with whom We are connected, and who live under our Protection”. The Court notes that the “Protection” proffered by the Crown did not arise from a paternalistic desire to protect Indigenous Nations; rather, it was a recognition of their military strength and the need to persuade them that their rights would be better protected by peaceful relations than force of arms.

The ultimate purpose of the honour of the Crown, says the Court, is the *reconciliation* of pre-existing Aboriginal societies with the assertion of Crown sovereignty. The doctrine has been enshrined in section 35(1) of the *Constitution Act, 1982*,¹⁷ which recognizes and affirms existing Aboriginal rights and envisages the negotiation of just settlements of Aboriginal claims. In all its dealings with Aboriginal peoples, the Crown must act honourably, in accordance with its historical and future relationship with Aboriginal peoples.

This account prompts several fundamental questions. How precisely does the honour of the Crown stem from the tension between Crown claims and pre-existing Aboriginal sovereignty? What role is played by the *Royal Proclamation*, and how do the Treaties with Aboriginal peoples figure in the process? More broadly, what does the notion of “honour” actually require, and what sort of “reconciliation” does the Court envisage?

These are difficult questions, which do not allow for simple answers. Nevertheless, some markers are provided by the *Royal Proclamation* and its historical context.

III. THE *ROYAL PROCLAMATION*, 1763

The *Royal Proclamation* was drafted to deal with the aftermath of the Seven Years’ War and the cession of New France to Great Britain in 1763.¹⁸ It is a patchwork of a document, which cobbles together topics as

¹⁶ Quoting Slattery, “Aboriginal Rights”, *supra*, note 12, at 436.

¹⁷ Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11. Section 35(1) provides: “The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.”

¹⁸ For detailed legal analysis of the *Royal Proclamation*, see Slattery, *Land Rights*, *supra*, note 15, at 191-361. For a brief account, see Brian Slattery, “The Hidden Constitution: Aboriginal Rights in Canada” (1984) 32 Am. J. Comp. Law 361, at 368-72. For Aboriginal perspectives on the *Royal Proclamation*, see the thoughtful discussion in John Borrows, “Constitutional Law from a First Nation Perspective: Self-Government and the Royal Proclamation” (1994) 28 U.B.C. L. Rev. 1

diverse as the boundaries of new British colonies and land grants to disbanded soldiers. The final Part of the *Royal Proclamation* contains detailed measures concerning Indigenous peoples and their lands — measures of profound constitutional importance.

The provisions reflect several factors. From early times, the British Crown cultivated relationships with powerful Aboriginal nations living in the territories adjacent to the British settlements on the Atlantic seaboard — the Micmac, the Iroquois Confederacy, the Cherokee, and many others.¹⁹ These relations took many forms — from Treaties of peace and friendship to seasonal parleys, from military alliances to trading partnerships, from land cessions to mutual guarantees of rights. Over time, these exchanges gave rise to a diffuse body of customary law and practice that was neither wholly Indigenous nor European but a form of intersocietal law that bridged the gulf between Aboriginal and English legal systems. This body of customary law provides the foundation for the *Royal Proclamation* and remedies some of its gaps and ambiguities.²⁰

The second major factor influencing the *Royal Proclamation* was the French Crown's departure from the imperial field of contest, leaving behind an extensive network of Indigenous allies and trading partners stretching westward into the heart of the continent.²¹ The character of French-Indigenous relations was described in the landmark case of *Connolly v. Woolrich*, decided by Monk J. in 1867:

[The French] entered into treaties with the Indian tribes and nations, and carried on a lucrative and extensive fur trade with the natives.

[hereinafter "Borrows, 'Constitutional Law'"], and John Borrows, "Wampum at Niagara: The Royal Proclamation, Canadian Legal History, and Self-Government" [hereinafter "Borrows, 'Wampum at Niagara'"] in Michael Asch, ed., *Aboriginal and Treaty Rights in Canada: Essays on Law, Equality, and Respect for Difference* (Vancouver: UBC Press, 1997) 155. For the broader historical context, see Colin G. Calloway, *The Scratch of a Pen: 1763 and the Transformation of North America* (New York: Oxford University Press, 2006) [hereinafter "Calloway, *The Scratch of a Pen*"]; Richard White, *The Middle Ground: Indians, Empires, and Republics in the Great Lakes Region, 1650-1815* (Cambridge: Cambridge University Press, 1991); Lawrence Gipson, *The Triumphant Empire: New Responsibilities within the Enlarged Empire, 1763-1766* (New York: Alfred A. Knopf, 1968).

¹⁹ See, e.g., Francis Jennings, *The Ambiguous Iroquois Empire: The Covenant Chain Confederation of Indian Tribes with English Colonies from Its Beginnings to the Lancaster Treaty of 1744* (New York: W.W. Norton, 1984).

²⁰ For a fuller account, see Brian Slattery, "The Metamorphosis of Aboriginal Title" (2006) 85 Can. Bar Rev. 255; Brian Slattery, "Understanding Aboriginal Rights" (1987) 66 Can. Bar Rev. 727, especially at 745-46.

²¹ See, e.g., Gilles Havard, *The Great Peace of Montreal of 1701: French-Native Diplomacy in the Seventeenth Century*, trans. Phyllis Aronoff & Howard Scott (Montreal: McGill-Queen's University Press, 2001).

Neither the French Government, nor any of its colonists or their trading associations, ever attempted, during an intercourse of over two hundred years, to subvert or modify the laws and usages of the aboriginal tribes, except where they had established colonies and permanent settlements, and, then only by persuasion ...²²

Many of these Indigenous nations had little love for the British Crown and were deeply suspicious of its overall intentions. As the Chippewa leader, Minivavana, told an English trader:

Englishman, although you have conquered the French, you have not yet conquered us. We are not your slaves. These lakes, these woods and mountains, were left to us by our ancestors. They are our inheritance; and we will part with them to none.²³

Similar views were expressed by some Wabash River Indians:

[Y]ou tell us, that when you Conquered the French, they gave you this Country. That no difference may happen hereafter, we tell you now the French never conquered, neither did they purchase a foot of our Country, nor have [they a right] to give it to you, we gave them liberty to settle for which they always rewarded us and treated us with great Civility.²⁴

Aboriginal discontent came to a boiling point in the spring of 1763. War belts circulated from village to village, and the Ottawa war chief, Pontiac, gave voice to the underlying anger:

It is important for us, my brothers, that we exterminate from our lands this nation which seeks only to destroy us. You see as well as I that we can no longer supply our needs, as we have done, from our brothers, the French.²⁵

In May, a coalition of Aboriginal nations launched the armed conflict known as Pontiac's War, which quickly spread across an enormous territory from the Great Lakes south to the Ohio Valley. One after another, British forts in the western interior fell to Indigenous forces, leaving only Fort Pitt, Detroit and Niagara. Five hundred British soldiers

²² [1867] C.C.S. No. 32, 17 R.J.R.Q. 75, at 82 (Que. S.C.).

²³ Alexander Henry, *Travels and Adventures in Canada and the Indian Territories between the Years 1760 and 1776* (1809), at 44; quoted in Dorothy Jones, *License for Empire: Colonialism by Treaty in Early America* (Chicago: University of Chicago Press, 1982), at 71.

²⁴ George Croghan, "Journals", *Illinois Historical Collections*, Vol. 11, at 47-48; quoted in Jones, *License for Empire*, *id.*, at 73. The statement was made in 1765, but it reflects earlier attitudes.

²⁵ Quoted in Calloway, *The Scratch of a Pen*, *supra*, note 18, at 70.

and numerous settlers lost their lives in the conflagration, and Detroit itself was under siege for six months.²⁶

Even before the outbreak of war, the British government had been formulating a plan to assure Indigenous nations of the Crown's good intentions. This appears from a letter written in January 1763 by Lord Egremont²⁷ to the Commander in Chief in North America, Sir Jeffrey Amherst. Egremont refers to the threat of an Indian war erupting over settlements made on Indian lands near the Susquehannah River and states that the King had it "much at heart to conciliate the Affection of the Indian Nations, by every Act of strict Justice, and by affording them His Royal Protection from any Incroachment on the Lands they have reserved to themselves, for their hunting Grounds, & for their own Support & Habitation".²⁸

In March 1763, Egremont followed this up with a circular letter to the Governors of Virginia, North Carolina, South Carolina and Georgia, as well as the Superintendent for Southern Indians. He notes that the departure of the French and the Spaniards will "undoubtedly alarm, & increase the Jealousy of the Neighbouring Indians". He speaks of the need to gain their confidence and goodwill, and to dispel the false notion that "the English entertain a settled Design of extirpating the whole Indian Race, with a View to possess & enjoy their Lands". Egremont orders the officials to call a joint meeting with the chiefs of all the major southern tribes, so as to reassure them of Britain's good intentions and to promise "a continual Attention to their Interests, & ... a Readiness upon all Occasions to do them Justice".²⁹

News travelled slowly in that era, and it was only in July that the first reports of Pontiac's War reached England. The news confirmed the British government's fears and gave greater urgency to the plans already underway, resulting in the issue of the *Royal Proclamation* on October 7, 1763.³⁰

²⁶ *Id.*, at 66-91.

²⁷ Lord Egremont was the British Secretary of State for the Southern Department.

²⁸ "Fitch Papers", *Collections of the Connecticut Historical Society* (Hartford, CT: Connecticut Historical Society, 1860-1967), Vol. XVIII, at 224; quoted in Slattery, *Land Rights*, *supra*, note 15, at 192.

²⁹ William Saunders, ed., *The Colonial Records of North Carolina* (Raleigh, NC: P.M. Hale, 1886-90), Vol. VI, at 974-76; quoted in Slattery, *Land Rights*, *id.*, at 192-93.

³⁰ For a detailed account of the *Royal Proclamation*'s drafting, see Slattery, *Land Rights*, *id.*, at 191-203.

The Indian provisions of the *Royal Proclamation* are introduced by a preamble that sets out the overall vision of the Crown:

And whereas it is just and reasonable, and essential to Our Interest and the Security of Our Colonies, that the several Nations or Tribes of Indians, with whom We are connected, and who live under Our Protection, should not be molested or disturbed in the Possession of such Parts of Our Dominions and Territories as, not having been ceded to, or purchased by Us, are reserved to them, or any of them, as their Hunting Grounds. ...

This preamble has several striking features. First, the Crown acknowledges that the *Royal Proclamation* is prompted not simply by considerations of justice but also by military necessity. Unless the British are able to maintain peaceful relations with neighbouring Indian nations, the security of the American colonies would be at risk. Peace is “essential” to British interests.

Second, the Crown asserts ultimate sovereignty over extensive regions in the American interior, styling them “Our Dominions and Territories”. But the Crown also recognizes that these territories are actually in the possession of numerous Indian nations, which are “connected” with the Crown and live under British “Protection”. The connections to which the text alludes presumably consisted of the long-standing ties of treaty, alliance and trade between Indigenous nations and English colonies, and the similar network of links that the Crown had hopefully inherited from the French — now in a state of shambles due to the war.

Third, the Crown tacitly acknowledges the autonomy of the “Nations or Tribes of Indians”, as distinct political entities with their own political structures and laws. It recognizes their rights to the territories in their possession and undertakes to prevent them from being molested or disturbed. The *Royal Proclamation* goes on to lay down strict limits on land grants and settlements in Indian territories. It outlaws the private purchase of Indian lands and puts in place a regime requiring the public cession of such lands to the Crown — a regime reflecting established law and practice in many colonies.³¹ The Crown confirms that Aboriginal peoples have rights not only to their village sites and cultivated fields but also to the “Hunting Grounds” from which they draw their sustenance and support — in Lord Egremont’s phrase “the Lands they have reserved

³¹ See Slattery, *Land Rights*, *id.*, at 112-25.

to themselves, for their hunting Grounds, & for their own Support & Habitation”.

Overall, then, the *Royal Proclamation* contemplates a quasi-federal structure in which a protective shield of imperial rule is extended over a host of autonomous Indian nations, living within their own territories, with their own internal governments and laws. These nations are not conquered peoples nor are they subject to direct British rule — rather their connections with the Crown take the form of Treaties periodically negotiated and renewed, often in annual sessions. The Treaties form the main supporting columns and beams of the structure, which otherwise might collapse like a house of cards, as Pontiac’s War demonstrated.

Of course the *Royal Proclamation* reflects an expansionist imperial perspective, one more optimistic than the facts warranted. A better understanding of the situation may be gleaned from the Treaty of Niagara, concluded the following year, in the summer of 1764.³² The Treaty was negotiated in an immense gathering of Indigenous peoples — the largest ever seen in the northeast to that date — including representatives of nations as far west as the Mississippi, as far north as Hudson Bay, and perhaps even east to Nova Scotia.³³ There were some 2,000 chiefs in attendance and over 24 Aboriginal nations represented. In the course of the negotiations, the British representative, Sir William Johnson, presented the great belt of the Covenant Chain, stating:

Brothers of the Western Nations, Sachims, Chiefs and Warriors;

You have now been here for several days, during which time we have frequently met to renew and Strengthen our Engagements and you have made so many Promises of your Friendship and Attachment to the English that there now only remains for us to exchange the great Belt of the Covenant Chain that we may not forget our mutual Engagements.

I now therefore present you the great Belt by which I bind all your Western Nations together with the English, and I desire that you will take fast hold of the same, and never let it slip, to which end I desire that after you have shewn this Belt to all Nations you will fix one end of it with the Chipeweighs at St. Mary’s whilst the other end remains at

³² See the pioneering work of Paul Williams, *The Chain* (LL.M. Thesis, Osgoode Hall Law School, York University, 1982), at 72-94 [hereinafter “Williams”], and the detailed discussion in Borrows, “Constitutional Law”, *supra*, note 18, and Borrows, “Wampum at Niagara”, *supra*, note 18.

³³ Williams, *id.*, at 79; Borrows, “Constitutional Law”, *id.*, at 22.

my house, and moreover I desire that you will never listen to any news which comes to any other Quarter. If you do it, it may shake the Belt.

I exhort you then to preserve my words in your Hearts, to look upon this Belt as the Chain that binds you to the English, and never to let it slip out of your hands.

Gave the Great Covenant Chain, 23 rows broad and the year 1764 worked upon it, worth about 30 pounds.³⁴

The spirit of equality and fair dealing that informs this Treaty is quite palpable. Indeed in a subsequent letter, Sir William Johnson expressly quashes any notion that the Treaty involved the subjection of the Aboriginal nations concerned.³⁵

We need to draw a basic distinction, then, between the *constitutional structure* envisaged in the *Royal Proclamation* and its *application* to particular Aboriginal nations. From the perspective of the British Crown, the *Royal Proclamation* constituted a constitutional template designed to govern and regularize its relations with Indigenous nations — not only for the present but also for the future.³⁶ However, the application of the template to specific nations depended on two factors: whether those nations had entered into Treaties that *acknowledged* or *consented* to the Crown's protective role; or whether, in the absence of such consent, they had *factually* come under British rule. In other words, the constitutional structure envisaged in the *Royal Proclamation*, might come into effect either *de jure*, through Treaties, or *de facto*, through the actual imposition of British governmental authority.

As the Crown's power and influence grew over the next century and the tide of British rule spread steadily westward, the *Royal Proclamation* became a kind of Magna Carta that applied presumptively to Aboriginal peoples falling under the Crown's sway, whether by way of treaty or through factual processes.³⁷ When the Crown entered into relations with new Aboriginal nations and assumed governmental responsibility for

³⁴ Quoted in Williams, *id.*, at 82-83.

³⁵ *Id.*, at 83, and Borrows "Constitutional Law", *supra*, note 18, at 24-25.

³⁶ The legal arguments for the continuing application of the *Royal Proclamation* are considered in Slattery, *Land Rights*, *supra*, note 15, at 329-49.

³⁷ See *Calder v. British Columbia (Attorney General)*, [1973] S.C.J. No. 56, [1973] S.C.R. 313, at 395 (S.C.C), where Hall J. stated: "[The *Royal Proclamation*'s] force as a statute is analogous to the status of Magna Carta which has always been considered to be the law throughout the Empire. It was a law which followed the flag as England assumed jurisdiction over newly-discovered or acquired lands or territories."

them, it did so against a backdrop of fundamental constitutional norms flowing from the *Royal Proclamation* and the body of intersocietal law that it reflected.

What does the Supreme Court have to say about this complex sweep of historical events, and the contrasting roles played by Treaties and power politics? And, how does all this relate to the honour of the Crown?

IV. TREATIES AND THE NEGOTIATED CONSTITUTION

In *Manitoba Metis*, the Supreme Court stresses the contractual and consensual nature of the process that gave rise to the Confederation of Canada.³⁸ The Court notes that Canada is a young nation with ancient roots. The country was born in 1867 with the “consensual union” of three colonies — United Canada, Nova Scotia and New Brunswick. Soon after, the Canadian government embarked on a policy to bring the territories west of Ontario within the boundaries of Canada and to open them up to settlement. This meant dealing with the Indigenous peoples living there, which consisted mainly of two groups — the First Nations and the Métis.

The Court recounts that the government’s policy regarding the First Nations was “to enter into treaties with the various bands, whereby they agreed to settlement of their lands in exchange for reservations of land and other promises”.³⁹ The policy with respect to the Métis population was less clear. Settlers began pouring into the region that is now Manitoba, displacing Métis social and political control and leading to resistance and conflict. To resolve the conflict and assure peaceful annexation of the territory, the Canadian government entered into negotiations with representatives of the Métis-led provisional government of the territory. The result was the *Manitoba Act, 1870*, which made Manitoba a province of Canada.

In a significant passage, the Court states that the promises made in this Act “represent the terms under which the Métis people agreed to surrender their claims to govern themselves and their territory, and become part of the new nation of Canada”.⁴⁰ In essence, the case involves “a collective claim of the Métis people, based on a promise

³⁸ *Supra*, note 2; the following account is drawn from paras. 1-5.

³⁹ *Id.*, at para. 3.

⁴⁰ *Id.*, at para. 5.

made to them in return for their agreement to recognize Canada's sovereignty over them".⁴¹

In effect, the Court's account draws parallels between the process whereby the provinces entered the federal union, and that whereby Aboriginal peoples became partners in Confederation. In both cases, the Crown usually proceeded by way of negotiation and agreement, a route not without its difficulties and conflicts. In both cases, it made solemn promises in order to secure the other party's agreement to enter Canada. In both cases, the resulting pact was embodied in fundamental constitutional accords — termed "Constitution Acts" in the case of the provinces,⁴² "Treaties" in the case of First Nations.⁴³

As the Supreme Court says in *Haida Nation*, Treaties serve to reconcile pre-existing Aboriginal sovereignty with assumed Crown sovereignty.⁴⁴ It goes on to explain:

Put simply, Canada's Aboriginal peoples were here when Europeans came, and were never conquered. Many bands reconciled their claims with the sovereignty of the Crown through negotiated treaties. Others, notably in British Columbia, have yet to do so. The potential rights embedded in these claims are protected by s. 35 of the *Constitution Act, 1982*. The honour of the Crown requires that these rights be determined, recognized and respected. This, in turn, requires the Crown, acting honourably, to participate in processes of negotiation. ...⁴⁵

In these passages, the Court highlights the need for Aboriginal consent — not simply as a matter of justice, but as a matter of constitutional duty, impelled by the honour of the Crown. Reconciliation cannot be achieved by governmental or judicial fiat, but only through genuine negotiations leading to Treaties. In the process, the prior sovereignty of Aboriginal peoples is reconciled with Crown claims of

⁴¹ *Id.*, at para. 44.

⁴² This, of course, is the modern terminology laid down in the Schedule to the *Constitution Act, 1982*, replacing the old "British North America Acts".

⁴³ See the interesting remarks of Deschamps J. in *Beckman*, *supra*, note 12, at para. 97, where she suggests that three basic compacts underpin the Canadian Constitution: "(1) one between the Crown and individuals with respect to the individual's fundamental rights and freedoms; (2) one between the non-Aboriginal population and Aboriginal peoples with respect to Aboriginal rights and treaties with Aboriginal peoples; and (3) a 'federal compact' between the provinces." For a parallel view, see Slattery, "First Nations and the Constitution", *supra*, note 12, at 268-76.

⁴⁴ *Haida Nation*, *supra*, note 1, at para. 20.

⁴⁵ *Id.*, at para. 25.

sovereignty. The result is *something new* — arguably a form of shared sovereignty.⁴⁶

The fundamental kinship between Treaties and Constitution Acts is emphasized in *Manitoba Metis*, where the Court discusses section 31 of the *Manitoba Act, 1870*. The passage merits reproduction at length.

To understand the nature of s. 31 as a solemn obligation, it may be helpful to consider its *treaty-like history and character*. Section 31 sets out solemn promises — promises which are no less fundamental than treaty promises. Section 31, like a treaty, was adopted with “the intention to create obligations ... and a certain measure of solemnity” ... It was intended to create legal obligations of the highest order: no greater solemnity than inclusion in the Constitution of Canada can be conceived. Section 31 was conceived in the context of negotiations to create the new province of Manitoba. And all this was done to the end of reconciling the Métis Aboriginal interest with the Crown’s claim to sovereignty.⁴⁷

In essence, then, the Supreme Court presents the vision of a *negotiated Constitution* — a federal union knit together with the consent of the peoples affected, both Aboriginal and non-Aboriginal. In the past, this process took place in a wide variety of contexts — ranging from the seminal conferences at Quebec and Charlottetown, to the negotiations with Métis leaders, to the solemn Treaties concluded with Aboriginal nations under the auspices of the *Royal Proclamation*.

Most of these historical negotiations took place in an imperial context, at a time when the British Crown still claimed authority over Canada. Canada is now, of course, an independent state, even if its independence was achieved by stealth — gradually and quietly — such that scholars debate when it actually occurred. Nevertheless, the legal effects of independence are profound.⁴⁸ In Canadian fashion, we have gradually been divesting ourselves of the last vestiges of our imperial past. The British Crown is now the Crown of Canada, and the Governor General has an important role in ensuring the integrity of the Constitution and the pacts and Treaties that make it up.

⁴⁶ See the insightful remarks of Binnie J. in *Mitchell v. M.N.R.*, [2001] S.C.J. No. 33, [2001] 1 S.C.R. 911, at paras. 125-137 (S.C.C.), and the excellent discussion in Walters, “The Jurisprudence of Reconciliation”, *supra*, note 12.

⁴⁷ *Supra*, note 2, at para. 92 (emphasis added).

⁴⁸ For discussion, see Brian Slattery, “The Independence of Canada” (1983) 5 S.C.L.R. 369.

Just as the Constitution Acts — mostly enacted by the British Parliament — are interpreted in a fashion that befits Canada’s independence, so also another set of imperial instruments — the *Royal Proclamation* and the historical Treaties — must be interpreted in a way that takes account of the post-colonial character of Canada and the basic status of First Peoples as partners in Confederation.⁴⁹

V. THE DUTY OF DILIGENT PERFORMANCE

As seen earlier, *Manitoba Metis* holds that the principle of the honour of the Crown is engaged by all constitutional obligations undertaken by the Crown to Aboriginal peoples.⁵⁰ Two basic duties arise in this context. The Crown is required, first, to take a broad purposive approach to the interpretation of the constitutional obligations. Second, the Crown must act diligently to fulfil them.⁵¹ For convenience, we will refer to these requirements globally as “the duty of diligent performance” or simply “the constitutional duty”.

The first branch of the constitutional duty — that of broad purposive interpretation — has long been recognized in the jurisprudence.⁵² More novel is the second branch, which requires diligent fulfilment. The Court cites a number of precedents in support of this branch,⁵³ but the cases cited deal mainly with matters of interpretation, and it seems clear that the Court is breaking new ground here.

The Court remarks that the honour of the Crown imposes a heavy obligation, so that not all interactions between the Crown and Aboriginal peoples engage it. In the past, the constitutional duty has been found to exist in two main instances. The first is Aboriginal Treaties, “where the Crown’s honour is pledged to diligently carrying out its promises”.⁵⁴ The second is section 35(1) of the *Constitution Act, 1982*, where the Crown must act honourably in defining the rights it guarantees.⁵⁵

⁴⁹ See Canada, Royal Commission on Aboriginal Peoples, *Partners in Confederation: Aboriginal Peoples, Self-Government, and the Constitution* (Ottawa: Minister of Supply and Services, 1993).

⁵⁰ *Supra*, note 2, at paras. 68-83, 91-94.

⁵¹ *Id.*, at para. 75.

⁵² *Id.*, at para. 76.

⁵³ *Id.*, at para. 73.

⁵⁴ *Id.*, at para. 79.

⁵⁵ *Id.*, at para. 69.

Nevertheless, holds the Court, these are not the only cases in which the constitutional duty exists. Reviewing the precedents — and in particular those dealing with Treaties — the Court extracts a set of general propositions. The duty of diligent performance arises when four elements are present: (1) an intention to create obligations; (2) a certain measure of solemnity; (3) an overarching purpose of reconciling Aboriginal interests with the Crown's sovereignty; and (4) a promise explicitly owed to an Aboriginal group.⁵⁶ In some instances, observes the Court, the constitutional obligation may arise after a course of consultation similar to treaty negotiations. Nevertheless, it seems clear that the Court does not view this as a necessary element.

Where a Crown undertaking to Aboriginal peoples meets these four criteria, the honour of the Crown is engaged, giving rise to the constitutional duty of diligent performance. The Court goes on to apply these criteria to section 31 of the *Manitoba Act, 1870* and holds that it satisfies all four.⁵⁷

It is worth noting that the *Royal Proclamation* also meets these conditions. As seen earlier, the *Proclamation* makes explicit undertakings to Indian nations to shield their territories from unlawful settlement, with the overall purpose of reconciling them to the Crown's assertions of sovereignty. As Binnie J. observes in *Beckman*:

The obligation of honourable dealing was recognized from the outset by the Crown itself in the *Royal Proclamation of 1763* ..., in which *the British Crown pledged its honour to the protection of Aboriginal peoples from exploitation by non-Aboriginal peoples*.⁵⁸

The same conclusion holds true of Aboriginal Treaties, as *Manitoba Metis* makes clear. The Court observes that the duty of diligent performance “has arisen largely in the treaty context” and concludes that the duty exists “whether the obligation arises in a treaty, as in the precedents outlined above, or in the Constitution, as here”.⁵⁹ Indeed, it would be strange if Aboriginal Treaties did not meet the conditions set out by the Court, which are drawn mainly from treaty case law.

⁵⁶ *Id.*, at paras. 71-72.

⁵⁷ *Id.*, at paras. 91-94.

⁵⁸ *Beckman*, *supra*, note 12, at para. 42 (emphasis added).

⁵⁹ *Supra*, note 2, at paras. 78-79. See also para. 92, quoted *supra*, at note 47.

VI. THE DUTY TO NEGOTIATE

We saw that the Supreme Court emphasizes the role of negotiations and consent in the formation of Canada. But it also recognizes that in some instances the consent of Aboriginal peoples was lacking or tainted. In such cases, the Crown is required to engage in good faith negotiations with the peoples affected, in order to achieve a just settlement of their claims.⁶⁰ This duty has two aspects. First, the Crown has a positive legal duty to do all that is reasonably possible to initiate the negotiating process and to carry it through to a successful conclusion. Second, in the process of negotiations, it has the obligation to conduct itself with honour and integrity, avoiding even the appearance of sharp dealing.⁶¹

It could be argued that the Crown's legal duties in this context are confined to the second aspect. While there may be a *moral* or *political* obligation on the part of the Crown to engage in negotiations, there cannot be a *legal* obligation. It takes two parties to negotiate — and the participation of both sides must be voluntary. How can the Crown be legally bound to do something which it cannot bring about on its own? A second problem relates to the enforcement of such an obligation. Unless judges are willing to take on the role of actively supervising the Crown's conduct, how can they ensure that the Crown actually engages in substantive negotiations, as opposed to merely showing up at the table? Thus, according to this argument, the Crown's legal duties are necessarily limited to the manner in which it conducts itself once substantive negotiations get underway.

These are strong arguments, but they are not decisive. First, the Supreme Court has gone out of its way to indicate that the Crown is under a substantive legal duty to engage in negotiations and not merely to conduct itself honourably in any negotiations that take place. Consider the Court's words in the *Haida Nation* case:

Where treaties remain to be concluded, *the honour of the Crown requires negotiations* leading to a just settlement of Aboriginal claims. ...

The potential rights embedded in these claims are protected by s. 35 of the *Constitution Act, 1982*. *The honour of the Crown requires that these rights be determined, recognized and respected. This, in turn, requires the Crown, acting honourably, to participate in processes of negotiation.*⁶²

⁶⁰ *Haida Nation*, *supra*, note 1, at para. 20.

⁶¹ *Id.*, at para. 19; confirmed in *Manitoba Metis*, *supra*, note 2, at para. 73.

⁶² *Haida Nation*, *id.*, at paras. 20 and 25 (emphasis added).

As the Court reiterates in the recent *Tsilhqot'in Nation* decision, governments are “under a legal duty to negotiate in good faith to resolve claims to ancestral lands”.⁶³

In effect, then, the Court holds that the Crown’s obligations spring from its broader duty to determine, recognize and respect Aboriginal rights. This duty is constitutional in nature and finds a place in section 35 of the *Constitution Act, 1982*. As *Haida Nation* explains:

Section 35 represents a promise of rights recognition, and “[i]t is always assumed that the Crown intends to fulfil its promises” (*Badger*, *supra*, at para. 41). This promise is realized and sovereignty claims reconciled through the process of honourable negotiation. It is a corollary of s. 35 that the Crown act honourably in defining the rights it guarantees and in reconciling them with other rights and interests.⁶⁴

Thus, this constitutional promise is violated not only when the Crown fails to negotiate *honourably*, but also (and more fundamentally) when it refuses to negotiate *at all* or places unwarranted obstacles in the path of negotiations.

Of course, as with the tango, it takes two to negotiate, and the Crown cannot be held responsible for the actions of an unwilling partner. Moreover, the distinction between the duty to negotiate and the duty to negotiate honourably can be a fine one. But these factors do not relieve the Crown of its duties in this area. The Crown is bound to take all reasonable measures within its power to initiate and successfully pursue negotiations, and to conduct itself honourably in the process.

The question arises how the duty to negotiate may be enforced. The answer flows from the fact that the Crown has a constitutional duty under section 35(1) to engage in honourable negotiations to determine Aboriginal rights.⁶⁵ If it fails to perform this duty diligently, a court may issue declarations to this effect.⁶⁶

⁶³ *Tsilhqot'in Nation v. British Columbia*, [2014] S.C.J. No. 44, 2014 SCC 44, at para. 18 (S.C.C.). See also para. 17: “The Court in *Haida* stated that the Crown had not only a moral duty, but a legal duty to negotiate in good faith to resolve land claims (para. 25).”

⁶⁴ *Haida Nation*, *supra*, note 1, at para. 20.

⁶⁵ *Id.*, at para. 20.

⁶⁶ For an example of a court declaration enforcing the Crown obligation to negotiate honourably, see *Mohawks of the Bay of Quinte v. Canada (Minister of Indian Affairs and Northern Development)*, [2013] F.C.J. No. 741, 2013 FC 669, at paras. 40-67 (F.C.T.D.). However, the decision is confined to the manner in which the negotiations are conducted.

VII. CONCLUSION

The Aboriginal Constitution forms a vital part of the Constitution of Canada — as significant in its own way as the federal pact between the provinces, and the individual guarantees in the *Canadian Charter of Rights and Freedoms*. Section 35(1) of the *Constitution Act, 1982* recognizes and affirms important elements of the Aboriginal Constitution, but that section is not its source. The roots of the Aboriginal Constitution lie in the ancient relations between Aboriginal peoples and the Crown going back to the earliest days of European settlement — relations recognized in the *Royal Proclamation* and given concrete form in Treaties between the Crown and Aboriginal peoples.

In 1698, the Onondaga sachem, Sadeganaktie, stated in the course of negotiations with the English at Albany:

... all of us sit under the shadow of that great Tree, which is full of Leaves, and whose roots and branches extend not only to the Places and Houses where we reside, but also to the utmost limits of our great King's dominion of this Continent of America, which Tree is now become a Tree of Welfare and Peace, and our living under it for the time to come will make us enjoy more ease, and live with greater advantage than we have done for several years past.⁶⁷

This Tree of Welfare and Peace is neither Indigenous nor British, but a joint creation which encompasses both Indigenous and non-Indigenous peoples and territories. As the sachem remarks, all of us sit in its shadow.

⁶⁷ Quoted in Donald Grinde, Jr. & Bruce Johansen, *Exemplar of Liberty: Native America and the Evolution of Democracy* (Los Angeles: University of California American Indian Studies Center, 1991), at 11-12.