

2020

Consultation, Cooperation and Consent in the Commons' Court: "Manner and Form" after Mikisew Cree II

Craig M. Scott

Osgoode Hall Law School of York University, cscott@osgoode.yorku.ca

Follow this and additional works at: <https://digitalcommons.osgoode.yorku.ca/sclr>

 Part of the [Law Commons](#)



This work is licensed under a [Creative Commons Attribution-Noncommercial-No Derivative Works 4.0 License](#).

Citation Information

Scott, Craig M.. "Consultation, Cooperation and Consent in the Commons' Court: "Manner and Form" after Mikisew Cree II." *The Supreme Court Law Review: Osgoode's Annual Constitutional Cases Conference* 94. (2020).

DOI: <https://doi.org/10.60082/2563-8505.1379>

<https://digitalcommons.osgoode.yorku.ca/sclr/vol94/iss1/6>

This Article is brought to you for free and open access by the Journals at Osgoode Digital Commons. It has been accepted for inclusion in The Supreme Court Law Review: Osgoode's Annual Constitutional Cases Conference by an authorized editor of Osgoode Digital Commons.

Consultation, Cooperation and Consent in the Commons' Court: “Manner and Form” after *Mikisew Cree II*

Craig Scott*

I. INTRODUCTION

In *Mikisew Cree II*, a large majority of the Supreme Court of Canada took the view that the *Constitution Act, 1982*, section 35 duty to consult and accommodate cannot constrain the legislative process, and that the legislative process includes bill preparation activities carried out by Ministers and by officials in the executive.¹ My limited purpose in this article is to show how the question of participatory constraints on legislative processes that affect Indigenous legal interests has more been deflected than resolved by this ruling — at the same time as this deflection has productive potential by virtue of how it has served the ball into Parliament’s court. This is due to the Court recognizing in very general terms the availability to Parliament of a little-discussed doctrine of Westminster constitutionalism — *self-imposed* “manner and form” legislative constraints on parliamentary sovereignty — notwithstanding the Court declining to interpret section 35 as *externally imposing* the duty to consult on the legislative process as a constitutional manner and form requirement.²

* Professor of Law, Osgoode Hall Law School. The author expresses appreciation for the incisive editorial suggestions of Professor Sonia Lawrence and helpful insights offered by external reviewers.

¹ *Mikisew Cree First Nation v. Canada (Governor General in Council)*, [2018] S.C.J. No. 40, [2018] 2 S.C.R. 765 (S.C.C.) [hereinafter “*Mikisew Cree I*”]. The “duty to consult and accommodate” will generally be rendered in shorthand as the “duty to consult”.

² Brief reference will also be made to a fleeting recognition, a month after *Mikisew Cree II*, of the manner and form doctrine’s existence in another major judgment when it comes to understanding the evolving shape of Westminster parliamentary sovereignty in Canada, namely the *Reference re Pan-Canadian Securities Regulation*, [2018] S.C.J. No. 48, 2018 SCC 48 (S.C.C.). However, a detailed discussion of the implications of this reasoning in that case is left to a parallel article that will explore the theory and doctrinal scope of the manner and form doctrine.

In discussing the four opinions in *Mikisew Cree II*, I address the possibility that at least some members of the Court may have been aware of one or more elements of co-evolution — beyond the judicial sphere — of the constitutional framework with respect to Indigenous peoples. Most particularly, notwithstanding that none of the opinions referenced, let alone discussed, the adoption by the UN General Assembly of the *United Nations Declaration on the Rights of Indigenous Peoples* (“UNDRIP”),³ it is reasonable to assume that all members of the Court were cognizant of this key development in the international normative sphere — and indeed also of the House of Commons’ adoption in May 2018 of a government-supported private member’s business bill (Bill C-262) designed to integrate UNDRIP into both federal executive decision-making and federal legislative process.⁴ In the optic of UNDRIP and UNDRIP-embracing legislation, the current constitutional standards of consultation (whether with respect to executive decision-making through the “duty to consult” or with respect to legislation through consultation as a factor of some sort in justification-of-infringement analysis) must be supplemented not only through extension to primary law-making but also by layering onto “consultation” more demanding standards related to “cooperation” and “consent”. Ultimately, an amalgam of consultation, cooperation and consent standards has the potential to bring about an approach to legislative process, as well as to parliamentary sovereignty writ large, that reworks our normative order. Such an approach would embrace a framework of transnationalized sovereignty to help inform Indigenous-Crown interjurisdictional constitutionalism and a form of co-governance within a new Parliamentarianism.⁵ The Court appears to want Parliament

³ *United Nations Declaration on the Rights of Indigenous Peoples*, Resolution adopted by the General Assembly, UNGA Res. 61/295 (13 September 2007).

⁴ Bill C-262, *An Act to ensure that the laws of Canada are in harmony with the United Nations Declaration on the Rights of Indigenous Peoples*, First Reading, April 21, 2016, First Session, 42nd Parliament, 64-65 Elizabeth II, 2015-201, online: <<https://www.parl.ca/DocumentViewer/en/42-1/bill/C-262/first-reading/EH0>>. The bill was introduced by MP Romeo Saganash.

⁵ A quarter-century ago, I attempted to set the scene for such complex new horizons with an experimental conceptual paper: Craig Scott, “Dialogical Sovereignty: Preliminary Metaphorical Musings”, in Canadian Council of International Law, ed., *State Sovereignty: The Challenge of a Changing World -- Proceedings of the Twenty-first Annual Conference of the Canadian Council on International Law*, 1992 (Ottawa: CCIL, 1993) 267-293. Available online via Osgoode Digital Commons: Scott, Craig M., “Dialogical Sovereignty: Preliminary Metaphorical Musings” (1992). All Papers, online: <https://digitalcommons.osgoode.yorku.ca/all_papers/191>. See also, and more recently, three chapters on such boundary-crossing constitutionalism in Peter Oliver, Patrick Macklem and Nathalie Des Rosiers, eds., *The Oxford Handbook of the Canadian Constitution* (Oxford: Oxford University Press, 2017); John Borrows, “Indigenous Constitutionalism: Pre-existing Legal Genealogies in

to step up to the plate first by legislating manner and form requirements for Indigenous participation in primary law-making, even as at least two judgments (comprising five members of the Court) also signal that the Court may not be willing to wait long before imposing some form of constitutional duty through an evolving interpretation of section 35 and/or unwritten principles of the Constitution.

1. The Treatment of Consultation in *Mikisew Cree II*: An Overview

The major issue presented to the Supreme Court of Canada in *Mikisew Cree II* was whether there is an enforceable constitutional obligation for government officials (e.g., Ministers) or institutional entities (e.g., Parliament) participating in the legislative process to consult Indigenous peoples prior to the introduction of — or at least before the enactment of — a bill.⁶ Previous Court interpretations of section 35 of the *Constitution Act, 1982*, had held that such a duty flowed from a general principle of the honour of the Crown and related conceptions of fiduciary relationships. However, no previous case had determined whether this section 35 duty was limited to executive actors engaging in administrative decision-making or whether it also constrained the legislative process.

This issue arose in the context of a challenge brought against the Crown by the Mikisew Cree First Nation, framed as an application for constitutional review of Cabinet as a whole and as a claim that the duty to consult had been breached because the relevant Ministers had introduced two bills that made major changes in federal environmental law without any pre-tabling input from the Mikisew Cree nor any specific consultation after the bills were introduced and prior to Royal Assent. The Mikisew Cree argued that these bills were known by the Crown to have likely negative impacts on section 35-protected interests related to fisheries, hunting, water use, and so on.⁷ The lead argument

Canada;” Jeremy Webber, “Contending Sovereignties;” and Sébastien Grammond, “Treaties as Constitutional Agreements” (no serial chapter page numbering in online edition).

⁶ While the *Constitution Act, 1982*, refers to “Aboriginal peoples”, I will use this term interchangeably with “Indigenous peoples”, consistent with this latter term’s employment in evolving international law as well as with the distinction between “Indigenous law” (the law of Indigenous peoples) and “Aboriginal law” (the Canadian state’s law about Indigenous peoples).

⁷ Once enacted in 2012, the two omnibus amending bills (Bills C-38 and C-45) made significant changes to environmental protection — lowering standards for the most part — through amendment of a variety of statutes, such as the *Canadian Environmental Assessment Act*, the *Department of the Environment Act*, the *Department of Fisheries and Oceans Act*, the *Species at Risk Act*, and the *Navigable Waters Protection Act* (re-named as the *Navigation Protection Act*).

appeared to be that pre-tabling work on bills should be characterized as an executive activity; if so, it is already covered by existing Court jurisprudence that recognized a duty to consult for executive conduct (albeit, in previous cases, only conduct of a statutorily-authorized administrative nature had been decided and no case had addressed pre-tabling executive conduct).⁸ Additionally, it was argued that, in any case, “the Crown” encompassed the whole of government and not simply the executive branch, such that the Crown’s duty to consult also attached to legislature activity.

In the result, a unanimous Court dismissed the case on jurisdictional grounds. Each opinion held that the *Federal Courts Act* does not contain a specific grant of statutory authority to review legislative activity, with all the judges agreeing that, in our fused Westminster parliamentary system, ministerial bill preparation is legislative activity carried out pursuant to powers under Part IV of the *Constitution Act, 1867*, and not statutorily-constituted administrative power of the sort the *Federal Court Act* permits the Federal Court to review.⁹

However, every judge then went on to address the substance of the case, with their views distributed over four opinions. While technically *obiter*, it is clear the Court intended their reasons to be treated as dispositive.¹⁰ A 7-2 majority of the Court ruled, first, that the duty to consult did not extend to legislative activity and, second, that bill preparation by government is part of legislative and not administrative activity.

Justice Karakatsanis (Wagner C.J.C. and Gascon J. concurring) ruled that all bill preparation constituted legislative activity and that the section 35 duty to consult did not apply to such activity, only to executive

⁸ Three Supreme Court of Canada cases — *Delgamuukw v. British Columbia*, [1997] S.C.J. No. 108, [1997] 3 S.C.R. 1010 (S.C.C.) and the companion cases of *Haida Nation v. British Columbia (Minister of Forests)*, [2004] S.C.J. No. 70, [2004] 3 S.C.R. 511 (S.C.C.), and *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, [2004] S.C.J. No. 69, [2004] 3 S.C.R. 550 (S.C.C.) — provide the foundations of s. 35 duty-to-consult-and-accommodate case law. See four subsequent Court cases refining the duty to consult prior to *Mikisew Cree II: Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, [2010] S.C.J. No. 43, [2010] 2 S.C.R. 650 (S.C.C.); *Tsilhqot’in Nation v. British Columbia*, [2014] S.C.J. No. 44, [2014] 2 S.C.R. 257 (S.C.C.); *Clyde River (Hamlet) v. Petroleum Geo-Services*, [2017] S.C.J. No. 40, [2017] 1 S.C.R. 1069 (S.C.C.); and *Chippewas of the Thames First Nation v. Enbridge Pipelines Inc.*, [2017] S.C.J. No. 41, [2017] 1 S.C.R. 1099 (S.C.C.). While *Delgamuukw* was not a challenge to any specific state conduct, whether legislative or executive, but a claim seeking declaration of Aboriginal title, each post-*Delgamuukw* case involved statutorily authorized executive decisions.

⁹ See s. 17(1) of the *Federal Courts Act*, R.S.C. 1985, c. F-7, as the jurisdictional basis invoked by the Mikisew Cree. This section of the *Federal Courts Act* does permit review of both statutorily-granted and prerogative-based executive activity.

¹⁰ The *dicta/ratio* distinction could arguably come up should the Mikisew Cree now turn to the superior courts of Alberta on the basis that the SCC had ruled the Federal Court lacked jurisdiction.

conduct. However, Karakatsanis J. commented that the principle of the “honour of the Crown” could yet yield a new doctrinal basis for (it would seem) *ex post facto* challenging legislative process in the future. Justice Brown arrived at the same result as Karakatsanis J., with some emphasis on the semantics of what the “Crown” means in “honour of the Crown”. However, Brown J. took issue with Karakatsanis J., gesturing toward an unclear future doctrinal basis for legislative-process accountability. Justice Rowe (Moldaver and Côté JJ. concurring) adopted Brown J.’s reasons and then went on to add extensive commentary on how unfeasible and far-reaching the effects would be if the duty to consult were to be constitutionally required by section 35. Justice Abella (Martin J. concurring) held that the honour of the Crown applies to the Canadian state in all its government dimensions, which includes the legislature. Principles of parliamentary sovereignty, separation of powers and parliamentary privilege cannot be treated as absolutes when they interact with other constitutional principles, such as the honour of the Crown. As such, normatively speaking, the duty to consult, as a progeny of the principle of the honour of the Crown, applies to the legislative process while, institutionally speaking, traditional court non-intervention in the legislative process means that a “duty to consult” claim can only be brought after legislation is adopted and not in the midst of the legislative process. Once the legislation passes, it can be challenged for failure of the legislative process to respect the duty to consult, not simply for breaches of section 35 caused by the legislation itself.

However, a 5-4 majority reasoned in such a way that it is tolerably clear that a future case could see recognition that the constitutional principle of the honour of the Crown does generate some kind of constraint on legislative process, even if not formally in the name of the duty to consult. Noting that the honour of the Crown could generate a variety of duties, and not simply that of the duty to consult, Karakatsanis J. signalled future constitutional-law evolution in the following oblique terms:

Even though the duty to consult does not apply to the law-making process, it does not necessarily follow that once enacted, legislation that may adversely affect s. 35 rights is consistent with the honour of the Crown. The constitutional principles — such as the separation of powers and parliamentary sovereignty — that preclude the application of the duty to consult during the legislative process do not absolve the Crown of its duty to act honourably or limit the application of s. 35. While an Aboriginal group will not be able to challenge legislation on

the basis that the duty to consult was not fulfilled, other protections may well be recognized in future cases. Simply because the duty to consult doctrine, as it has evolved to regulate executive conduct, is inapplicable in the legislative sphere, does not mean the Crown *qua* sovereign is absolved of its obligation to conduct itself honourably.¹¹

As such, a five-judge majority appeared to believe that either a “duty to consult and accommodate” (Abella and Martin JJ.) or an “obligation to conduct itself honourably” (Karakatsanis and Gascon JJ., and Wagner C.J.C.) can be invoked, once legislation passes, to attack the process itself.

In addition, all four opinions took pains to emphasize that the law as it already stands allows legislative process to be scrutinized as part of a substantive challenge to legislation. Each judgment reminded that, from the first section 35 case of *Sparrow* onward, the existence or extent of consultation is a factor that courts are to consider when moving to the second stage of section 35, namely the post-infringement justification analysis that the Court read into section 35.¹²

The uninitiated would be forgiven for leaving the case thinking that the Court had done indirectly what it refused to do directly — in the guise of challenging legislation itself versus the process directly. Yet this would be a mistaken impression. As noted by Richard Ogden in his article in this volume, it can be argued that the Court actually took a step back from the received law on the consultation component of the *Sparrow* justification test.¹³ Initially, consultation was framed by Dickson C.J.C. and La Forest J. in *Sparrow* as, seemingly, a contextually applicable but non-dispositive factor in a multi-factor obstacle course of factors. After first discussing the role of fiduciary obligation analysis in allocation decisions involving conservation goals, they wrote:

Within the analysis of justification, there are further questions to be addressed, depending on the circumstances of the inquiry. These include the questions of whether there has been as little infringement as possible in order to effect the desired result; whether, in a situation of expropriation, fair compensation is available; and, whether the

¹¹ *Mikisew Cree First Nation v. Canada (Governor General in Council)*, [2018] S.C.J. No. 40, [2018] 2 S.C.R. 765, at para. 52 (S.C.C.).

¹² *R. v. Sparrow*, [1990] S.C.J. No. 49, [1990] 1 S.C.R. 1075 (S.C.C.).

¹³ Richard Ogden, “*Williams Lake and Mikisew Cree: Update on Fiduciary Duty and the Honour of the Crown*” (2020) 94 S.C.L.R. (2d) at 216.

aboriginal group in question has been consulted with respect to the conservation measures being implemented.¹⁴

Not quite a decade later in *Delgamuukw*, one reading of the Court, writing through Lamer C.J.C., was that it confirmed that consultation was a factor and not a threshold requirement when he wrote that the existence of consultation was “*relevant* to determining whether the infringement ... is justified”.¹⁵ However, read in its entire context, he may have been saying that lack of consultation itself leads to non-justification, with only the extent of consultation varying within that overall requirement that there be at least some consultation:

There is always a duty of consultation. Whether the aboriginal group has been consulted is relevant to determining whether the infringement of aboriginal title is justified, in the same way that the Crown’s failure to consult an aboriginal group with respect to the terms by which reserve land is leased may breach its fiduciary duty at common law: *Guerin*. The nature and scope of the duty of consultation will vary with the circumstances.¹⁶

Subsequent case law over the next decade and a half appeared to have been reaching towards consultation being a mandatory, threshold factor — something that the Abella and Martin JJ. judgment in *Mikisew Cree II* seemed to have taken as given in contrast to the other three opinions. Ogden perceives a clear shift having occurred in 2014 in *Tsilhqot’in Nation* with the majority in *Mikisew Cree II* then engaging in a retrenching shift.¹⁷

Ogden is correct that McLachlin C.J.C. in *Tsilhqot’in Nation* appeared to express consultation in the *Sparrow* justificatory framework in universally applicable terms as a mandatory requirement, creating a full

¹⁴ *R. v. Sparrow*, [1990] S.C.J. No. 49, [1990] 1 S.C.R. 1075, at para. 82 (S.C.C.).

¹⁵ *Delgamuukw v. British Columbia*, [1997] S.C.J. No. 108, [1997] 3 S.C.R. 1010, at para. 168 (S.C.C.) (Author emphasis).

¹⁶ *Id.*

¹⁷ Richard Ogden, “*Williams Lake and Mikisew Cree: Update on Fiduciary Duty and the Honour of the Crown*” (2020) 94 S.C.L.R. (2d) at 216 et seq. In *Tsilhqot’in Nation v. British Columbia*, [2014] S.C.J. No. 44, [2014] 2 S.C.R. 257 (S.C.C.), McLachlin C.J.C. wrote for the Court at para. 77: “To justify overriding the Aboriginal title-holding group’s wishes on the basis of the broader public good, the government must show: (1) that it discharged its procedural duty to consult and accommodate; (2) that its actions were backed by a compelling and substantial objective; and (3) that the governmental action is consistent with the Crown’s fiduciary obligation to the group: *Sparrow*.” At para. 125, she reproduces almost the same passage but with greater specification in one respect when she writes “the infringement is backed by a compelling and substantial legislative objective in the public interest”.

circle between *Sparrow* consultation and the duty to consult. Indeed, Abella J. reads McLachlin C.J.C. exactly that way when she writes in *Mikisew Cree II* the following:

Sparrow provides a framework for determining whether government action, including the exercise of legislative or executive authority, constitutes an infringement of s. 35 rights, and whether that infringement can be justified. *Haida Nation*, on the other hand, obliges the government to consult when it contemplates action that has the potential to adversely affect those same rights and claims. Together, these complementary obligations ensure that the honour of the Crown is upheld throughout all actions which engage its special relationship with Aboriginal peoples. The coextensive nature of these two duties was confirmed in *Tsilhqot'in Nation v. British Columbia*, [2014] 2 S.C.R. 257 (per McLachlin C.J.). As this case makes clear, the procedural duty to consult applies *in addition to* the government's substantive obligation to act in a way that is consistent with Aboriginal and treaty rights guaranteed by s. 35 (para. 80). To justify an infringement, the Crown must demonstrate that it complied with its procedural duty at the time that the action was contemplated, that the infringement is backed by a compelling and substantial objective, and that the public benefit achieved is proportionate to any adverse effect on the Aboriginal interest (*Tsilhqot'in*, at para. 125). The same analysis applies whether the infringing action is legislative or executive in nature (paras. 77 and 125).

Because the rationale for the duty to consult applies equally as in the executive context, it would make little sense to adopt a different analytical approach where legislative action is impugned.¹⁸

It may be that the Court will tell us in future that, in *Mikisew Cree II*, the judges other than Abella and Martin JJ. read (without telling us at the time) McLachlin C.J.C. in *Tsilhqot'in Nation* as only talking about administrative action because at issue in the case was not the *vires* of the *Forest Act* but the *vires* of licences granted pursuant to its authority.¹⁹ As well, they might point out that *Sparrow* was itself not about primary legislation but about delegated law (fisheries regulations) and then draw attention to Karakatsanis J. in *Mikisew Cree II* expressly holding that the

¹⁸ *Mikisew Cree First Nation v. Canada (Governor General in Council)*, [2018] S.C.J. No. 40, [2018] 2 S.C.R. 765, at paras. 77 and 78 (S.C.C.).

¹⁹ *Tsilhqot'in Nation v. British Columbia*, [2014] S.C.J. No. 44, [2014] 2 S.C.R. 257 (S.C.C.) might also be distinguishable on the basis that Aboriginal title is a distinct form of Aboriginal right that builds in the necessity for consent to interference as part of the norm itself. Thus, requiring at least consultation to justify infringement would seem to be a conceptual *sine qua non*.

duty to consult does apply to regulations precisely because statutory instruments are secondary law-making by the executive.²⁰

The point I have made above illustrates that *Mikisew Cree II* is not just a case where the Court refused to extend the existing duty-to-consult-and-accommodate case law to legislative process. It is also a case in which the Court blinked and appears to have cut back on its own case law regarding the constitutionality of legislation — or, at the very least, the trajectory as represented by the unqualified statements in *Tsilquot'in Nation*.

2. Beyond the General Holdings in *Mikisew Cree II*: Bringing “Manner and Form” into Focus

This article seeks to explain how and why the judgment of the Court in *Mikisew Cree II* has — alongside the parallel process of debating Bill C-262 — set the table for a future Parliament, starting with the House of Commons, to legislate Indigenous participation procedures to channel and constrain the federal legislative process in ways that respect section 35 rights.²¹ There is no small irony in claiming the Court set the table given the silence of every one of those judgments about the current and evolving relevance of UNDRIP, including the stipulation in article 19 of UNDRIP that:

States shall consult and cooperate in good faith with the Indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed *consent before adopting* and implementing *legislative* or administrative *measures* that may affect them.²²

²⁰ *Mikisew Cree II Mikisew Cree First Nation v. Canada (Governor General in Council)*, [2018] S.C.J. No. 40, [2018] 2 S.C.R. 765, at para. 51 (S.C.C.): “Finally, my conclusions respecting the duty to consult do not apply to the process by which subordinate legislation (such as regulations or rules) is adopted, as such conduct is clearly executive rather than parliamentary (see N. Bankes, ‘The Duty to Consult and the Legislative Process: But What About Reconciliation?’ (2016) (online), at p. 5).”

²¹ I say “a future Parliament...to legislate” because Bill C-262 was, in the end, not adopted by the House of Commons but was still in the Senate when the Senate rose for the summer recess. As Parliament did not return before the October 2019 election, Bill C-262 died on the order paper as a result of deliberate obstruction tactics of some Conservative Party of Canada Senators.

²² Emphasis added. The text of UNDRIP is reproduced as a Schedule to Bill C-262, *An Act to ensure that the laws of Canada are in harmony with the United Nations Declaration on the Rights of Indigenous Peoples*, First Reading, April 21, 2016, First Session, 42nd Parliament, 64-65 Elizabeth II, 2015-201, online: <<https://www.parl.ca/DocumentViewer/en/42-1/bill/C-262/first-reading#EH0>>. In contrast to the Court’s silence, for a leading general discussion of the section 35 duty to consult that recognizes that this duty cannot be interpreted without accounting for the norms

A related goal of this work is to explain why such an “over to you, Parliament” dynamic will necessitate that government, Parliament, Indigenous peoples, Canadian society at large, the legal profession and the academy come to grips with a primordial question of constitutional theory — namely, the effect of legislated “manner and form” requirements in Westminster parliamentary orders. By “manner and form” requirements, I am referring to statutory requirements that one legislature seeks to impose on future legislatures in the form of either inhibitory preconditions or facilitative permissions for the enactment, amendment or repeal of statutes or provisions within statutes.²³ Although an overly stylized framing, this question depends on how one’s constitutional theory, or to be more positivistic about it, one’s legal system, answers the question “Can Parliament bind itself?” The classic

in UNDRIP, see Dwight Newman, “The Section 35 Duty to Consult” in Oliver, Macklem and Des Rosiers, eds., *Oxford Handbook*, *supra* note 5 (no online pagination).

²³ See Henri Brun et Guy Tremblay, *Droit constitutionnel* 4^e édition (Éditions Yvon Blais, 2002), at 651-58; Peter Hogg, *Constitutional Law of Canada*, 5th ed., Supplemented (Thomson Reuters, 2007, 2016), notably sections 12.3 and 35.3(c). See also the discussion in Jeremy Webber, *The Constitution of Canada: A Contextual Analysis* (Hart/Bloomsbury, 2015), 60-63. Apart from Peter Oliver’s discussion of the specific questions around parliamentary sovereignty in the context of Westminster purporting to bind itself (in the *Canada Act, 1981*) never again to legislate on behalf of Canada — Peter Oliver, *The Constitution of Independence: The Development of Constitutional Theory in Australia, Canada and New Zealand* (Oxford: Oxford University Press, 2005) — there has not been extensive writing in constitutional theory focused on this doctrinal issue in the specific context of Canadian law (even before the advent of the *Charter of Rights and Freedoms*), with the last major forays specifically on manner and form seeming to be Robin Elliott, “Rethinking Manner and Form: From Parliamentary Sovereignty to Constitutional Values” (1991) 29 *Osgoode Hall Law Journal* 215-251, and almost two decades later, John Lovell, “Legislating Against the Grain: Parliamentary Sovereignty and Extra-Parliamentary Vetoes” (2008) 224 *NJCL* 1. That said, several very recent pieces on parliamentary sovereignty more broadly and on the interconnected issue of unilateral (federal or provincial) constitutional amendment also contain important insights relevant to manner and form: see Warren J. Newman, “Constitutional Amendment by Legislation” and Emmanuelle Richez, “The Possibilities and Limits of Provincial Constitution-Making: The Case of Quebec” in Emmett Macfarlane, ed., *Constitutional Amendment in Canada* (Toronto: University of Toronto Press, 2016) 100 and 164, respectively, and John Lovell, “Parliamentary Sovereignty in Canada” in Oliver, Macklem and Des Rosiers, eds., *Oxford Handbook*, *supra*, note 5. Finally, because the greater focus in Quebec on provincial constitutionalism (*i.e.*, *la constitution nationale*) tends to generate a more active and persistent interest in the intersection of parliamentary sovereignty and provincial legislative jurisdiction, it is important to engage also with such work as Daniel Turp : « Le pouvoir constituant et la constitution du Québec » in Patrick Taillon, Eugénie, et Amélie Binette, dir., *Un regard québécois sur le droit constitutionnel : mélanges en l’honneur d’Henri Brun et de Guy Tremblay* (Éditions Yvon Blais, 2016) 677-702 and Daniel Turp, *La Constitution québécoise : essais sur le droit du Québec de se doter de sa propre loi fondamentale* (Éditions JFD, 2013). As well, for an insightful recent inquiry into the state of parliamentary sovereignty as it interacts with federalism, see Johanne Poirier, « Souveraineté parlementaire et armes à feu: le fédéralisme coopératif dans la ligne de mire » (2015) 45 *Revue de droit de l’Université de Sherbrooke* 47-131.

Westminster theory of (absolute) “continuing sovereignty” — according to which no previous legislature can tie the hands of a future legislature, even with process requirements — is associated, correctly or incorrectly with Dicey, while the classic “manner and form” counter-theory — whereby a subsequent legislature is bound to procedural dictates of a prior legislature — is usually associated with Jennings.²⁴ That said, these are not the only choices: it is possible to defend as a general Westminster theory and, depending on the jurisdiction, to expound as the current state of the law a full “self-embracing sovereignty” position, whereby — in specified circumstances — a Westminster legislature can abdicate its authority to legislate on a certain subject-matter (and courts can enforce that abdication).²⁵

Generally speaking, to qualify as “manner and form”, such constraints must not purport to bar a future legislature from substantive areas for either new enactments or amendments of existing law. “Substantive” can be approached by seeking to conceptually distinguish “substance” from “manner and form” (broadly understood as “procedural” or “process-related”) — a tendency more in evidence in more dated discussions.²⁶ Or, “substantive” can be interpreted as (or as also) a question of whether *de facto* effects of a requirement make it unacceptably difficult to amend or repeal a statute or part of a statute; the latter sort of inquiry is more contemporary not just in being more usual but also in that it necessarily requires the articulation of theoretical foundations if one is to illustrate the over-protection of substantive change by a given manner and form requirement.

²⁴ Albert Venn Dicey, *Introduction to the Study of the Law of the Constitution*, 10th ed. (Toronto: Macmillan, 1961); Ivor Jennings, *The Law and the Constitution* (London: University of London Press, 1959, 5th edition) and Ivor Jennings, *The British Constitution* (Cambridge: Cambridge University Press, 1966, 5th edition).

²⁵ See the enlightening exchange on “continuing” and “self-embracing” parliamentary sovereignty — and points in between — of Jeffrey Goldsworthy, “Abdicating and Limiting Parliament’s Sovereignty” (2006) 17 K.C.L.J. 255 and Peter C. Oliver, “Abdicating and Limiting Parliament’s Sovereignty - Reply to Goldsworthy, (2006) 17 K.C.L.J. 281. The immediate context for the exchange was the publication of Peter Oliver’s, *The Constitution of Independence*, *supra*, note 23, while a leading book by Goldsworthy on parliamentary sovereignty was part of the frame that preceded the Oliver book: Jeffrey Goldsworthy, *The Sovereignty of Parliament: History and Philosophy* (Oxford University Press, 1999). A few years following the exchange, Goldsworthy published *Parliamentary Sovereignty: Contemporary Debates* (Cambridge University Press, 2010).

²⁶ But see Brown J. in *Mikisew Cree First Nation v. Canada (Governor General in Council)*, [2018] S.C.J. No. 40, [2018] 2 S.C.R. 765 (S.C.C.), who appears to put much stock in a conceptual approach to determining what counts as manner and form, as Abella J. also appears to do to some extent: text at *infra* notes 36 and 38, respectively.

Generally speaking, the question raised here is, where a statute provides that future legislation concerning specified subject-matter may only be enacted or take effect via special procedure “X”, can a future legislature use its regular legislative procedure to enact a law related to this subject-matter and expect the courts to recognize the new statute notwithstanding lack of compliance with procedure “X”? Consider just a few examples. A provincial legislature provides in a statute that the statute, or specified provisions in it, may not be amended or repealed unless a specified super-majority (*e.g.*, two-thirds) of a later legislature votes in favour. Parliament passes a statute that provides that it will sunset at a specified date and that its re-enactment requires certain procedural conditions to be fulfilled (*e.g.*, a review and report by a legislative committee on how the Act has functioned). A national assembly of a province passes a law that conditions the amendment or repeal of a law or parts of a law on conducting a referendum on the text of a proposed law, with the law providing that the assembly *may* enact the law if a majority votes in favour and *must* not enact the law if a majority votes against.²⁷ A statute provides that certain legislated rights may not be curtailed by a future statute unless that statute explicitly states that intention.²⁸ Legislation provides that no statute of that legislature is to take effect until three months after the end of the session in which it was passed, unless the Act has been declared to be an emergency measure in a statute’s preamble and has been voted for by two-thirds of the members voting.²⁹

²⁷ From the perspective of how manner and form limits on sovereignty interact with pressures for more participatory and/or “populist” approaches to democracy, a case decided exactly a century ago will loom large in working through what Canadian law currently is and how it should evolve: *In re Initiative & Referendum Act (Manitoba)*, 1919, [1919] A.C. 935, 48 D.L.R. 18 (binding referendums that result from popular initiatives).

²⁸ One of two foci in the discussion of manner and form in Jeremy Webber, *The Constitution of Canada*, *supra*, note 23, 60-63.

²⁹ Oddly specific as such a hypothetical is, to the point it may seem a matter of pure imagination, it may interest the reader to know that precisely such a temporal manner and form constraint was legislated by the legislature of Manitoba a century ago: see reference to it (different in kind from the rest of the provisions of the legislation, which concern citizen initiatives and referenda) by the Privy Council in *In re Initiative & Referendum Act*, 1919, [1919] A.C. 935, 48 D.L.R. 18. This appeal came directly to the Privy Council, bypassing the Supreme Court of Canada, from the Manitoba Court of Appeal: [1916] M.J. No. 56, 32 D.L.R. 148, [1917] 1 W.W.R. 1012, 27 Man. R. 1 (Man. C.A.): see Perdue J.A.’s exposition of this provision, s. 12 of the *Initiative and Referendum Act*.

Legislatures across the Commonwealth/Westminster world have legislated various kinds of procedural safeguards. Usually they make it more difficult to change the law, as in the examples in the preceding paragraph.³⁰ That said, it is important to note that manner and form doctrine, being about a legislated change of existing legislative process, is not limited to making future legislating more onerous; rather, it can also seek to make future legislating easier. Such was the case when the United Kingdom Parliament modified Parliament itself in 1911 by allowing for the House of Lords to be cut out of the legislative process after a certain period of time and effort by the House of Commons and then, in 1949, used this modified procedure to make it even easier to legislate without the House of Lords.³¹ Such was also *a fortiori* the case when each Canadian province abolished its Senate-like second legislative chamber, leaving all the provinces unicameral.³²

³⁰ Of all the Westminster jurisdictions, it appears to be Australia that has produced the longest-standing and widest academic interest in manner and form legislation, usually in the context of state-level law and concrete disputes that have ended up in court. See chronologically, for example, the early George Winterton, “Can the Commonwealth Parliament Enact Manner and Form Legislation” (1980) 11 Fed. L. Rev. 167 and the more recent Peter Congdon and Peter Johnston, “Stirring the Hornet’s Nest: Further Constitutional Conundrums and Unintended Consequences Arising from the Application of Manner and Form Provisions in the Western Australian Constitution to Financial Legislation (2013) 36 U.W. Austl. L. Rev. 297.

³¹ This double conditioning of the exercise of parliamentary sovereignty in the 1911 and 1949 Parliament Acts was never challenged in court for over a half-century (in the case of the 1949 amendments) or almost a century (in the case of the 1911 amendments), until this millennium when a fox-hunting abolition statute was challenged as not having been validly enacted because, it was contended, Parliament never had the power to bind itself to new procedures that effectively redefined what Parliament was. For judicial rejection of the challenge, see, in the English Court of Appeal, *R. (Jackson) v. Att. Gen* [2005] Q.B. 579 (C.A.) and, in the House of Lords, *Jackson v. Her Majesty’s Attorney General*, [2005] UKHL 56. See the discussion of the significance of this case for the state of U.K. law (and related constitutional theory) on manner and form in Michael Gordon, *Parliamentary Sovereignty in the UK Constitution: Process, Politics and Democracy* (Hart/Bloomsbury, 2015); Alison Young, *Parliamentary Sovereignty and the Human Rights Act* (Hart/Bloomsbury, 2018); Han-Ru Zhou, “Revisiting the ‘Manner and Form’ Theory of Parliamentary Sovereignty” (2013) 126 L.Q.R. 610-637; and Stuart Lakin, “The Manner and Form Theory of Parliamentary Sovereignty: A Nelson’s Eye View of the UK Constitution” (2018) 38 *Oxford Journal of Legal Studies* 168-189.

³² Such radical change of legislative procedure through radical reshaping of a two-chambered Parliament is, of course, not open to the federal Parliament given the provincial interests at stake. By virtue of Senate abolition being viewed as amending amendment-procedures Part IV of the *Constitution Act, 1982*, itself, the Supreme Court of Canada ruled in the *Reference re Senate Reform*, [2014] S.C.J. No. 32, [2014] 1 S.C.R. 704 (S.C.C.), that unanimous consent of Parliament and all the provinces was required, per s.41(e) which requires unanimity for “an amendment to this Part”.

3. The Manner and Form Signals from the *Mikisew Cree II* Judgments

(a) *Silence on Article 19 of UNDRIP*

The Mikisew Cree had pleaded in their factum the interpretive relevance for the meaning of section 35 of the United Nations Declaration on the Rights of Indigenous Peoples (“UNDRIP”) as follows: “UNDRIP can be used as a guide to the courts as to how the duty to consult should evolve. Article 19 of UNDRIP clearly articulates an expectation that states such as Canada will consult with Indigenous peoples concerning legislative matters that may affect them.” However, none of the four opinions referenced, let alone engaged with, article 19 of UNDRIP — notwithstanding that British Columbia also argued in its intervenor factum:

36. AGBC agrees with the Respondents that the United Nations Declaration on the Rights of Indigenous Peoples (“UNDRIP”) “sets out international standards and principles that may be used as a contextual aid in interpreting domestic law where there is ambiguity”. While UNDRIP on its own “cannot be used to displace Canadian jurisprudence or laws regarding the duty to consult,” advancing reconciliation with Indigenous peoples is a priority for BC, and the Province is taking steps to implement UNDRIP.

37. Each cabinet minister has been mandated to review policies, programs and legislation to determine how to bring the principles of UNDRIP into action in the Province. Consistent with UNDRIP’s principles, implementation will involve engagement with Indigenous peoples, changes to policy and legislation, and treaties and other constructive arrangements between the Province and Indigenous groups. The Province is committed to working with Indigenous groups to transform the treaty process and sees modern treaties as a way of implementing UNDRIP’s principles, *including consultation on legislative measures*, in a manner consistent with Canada’s constitutional framework.³³

As for the government of Canada, its factum did not directly respond to the specific invocation, and the clear wording, of UNDRIP article 19’s

³³ Factum of the Intervener, Attorney General of British Columbia, in *Mikisew Cree First Nation v. Canada (Governor General in Council)*, [2018] S.C.J. No. 40, [2018] 2 S.C.R. 765 (S.C.C.), November 2017, available via the SCC Registry for Case No. 37441, online: <[https://www.scc-csc.ca/ WebDocuments-DocumentsWeb/37441/FM105_Intervener_Attorney-General-of-British-Columbia.pdf](https://www.scc-csc.ca/WebDocuments-DocumentsWeb/37441/FM105_Intervener_Attorney-General-of-British-Columbia.pdf)> (emphasis added). Note, by way of update just before going to press, that, on November 26, 2019, the Legislative Assembly of British Columbia adopted Bill 41, *Declaration on the Rights of Indigenous Peoples Act*, modeled on Romeo Saganash’s federal Bill C-262. Section 3 of Bill 41 reads: “In consultation and cooperation with the Indigenous peoples in British Columbia, the government must take all measures necessary to ensure the laws of British Columbia are consistent with the Declaration.”

requirement to “consult...*before adopting and implementing legislative...measures*” (author emphasis). Rather, it elided such specifics by referring to article 38 — the general implementation duty — in UNDRIP:

99. The *United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIP) sets out international standards and principles that may be used as a contextual aid in interpreting domestic law where there is ambiguity. Article 38 of the *UNDRIP* provides that the role of the state, in consultation and co-operation with Indigenous peoples, is to take the appropriate measures to achieve the ends of the Declaration. This is consistent with the Crown’s duty to consult and accommodate as set out in various decisions by this Court.

100. Canada supports the *UNDRIP* and is taking steps to engage with Indigenous peoples and other Canadians on its implementation. These efforts form part of Canada’s commitments to pursue reconciliation and move toward a renewed nation-to-nation relationship with Indigenous peoples based on recognition, rights, respect, co-operation and partnership, and include the commitment to a federal review of laws, policies and operational practices.³⁴

(b) The Karakatsanis J. Signalling

As noted earlier, the reasons of Karakatsanis J. keep open possible future doctrines related to procedural review of the (in)adequacy of legislative process in integrating Indigenous substantive and jurisdictional interests. A fairly long series of paragraphs hint rather enigmatically at “other forms of recourse” (para. 47) tied to the “honour of the Crown”, without much clarity on the precise basis — section 35 or unwritten principles or an intersection of the two — on which the Court might intervene or, except for one example, the circumstances in which a new doctrine would come into play. From the perspective of judicial foreshadowing, the method of signalling (of a future constitutional duty of honourable dealing applicable to the legislative process) serves the dialogical purpose of directing Parliament’s attention to Parliament itself. That this was possibly a deliberate sub-textual intention may be indicated by a line that

³⁴ Factum of the Respondents, Governor General in Council (Canada) *et al.*, in *Mikisew Cree First Nation v. Canada (Governor General in Council)*, [2018] S.C.J. No. 40, [2018] 2 S.C.R. 765 (S.C.C.), November 2017, available via the SCC Registry for Case No. 37441, online: <https://www.scc-csc.ca/WebDocuments-DocumentsWeb/37441/FM020_Respondents_Governor-General-in-Council-et-al.pdf>.

Karakatsanis J. inserts in a penultimate paragraph in the judgment, in which she specifically lays down certain caveats for clarity's sake. She first says that the conclusions about the duty to consult not applying to the legislative process do not extend to subordinate legislation "as such conduct is clearly executive rather than parliamentary"; she frames this observation as if the issue would still need to be decided in a concrete case, at the same time as she very clearly is saying the duty does apply to such executive conduct. She then says:

[51] ...[The] conclusion [that the duty to consult does not apply to legislative processes] does not affect the enforceability of treaty provisions, implemented through legislation, that explicitly require pre-legislative consultation (see e.g. *Nisga'a Final Agreement*, Chapter 11, paras. 30-31; *Nisga'a Final Agreement Act*, S.B.C. 1999, c. 2; *Nisga'a Final Agreement Act*, S.C. 2000, c. 7). Manner and form requirements (i.e. procedural restraints on enactments) imposed by legislation are binding (*Hogg*, at s. 12.3(b); see also *R. v. Mercure*, [1988] 1 S.C.R. 234).

The first sentence's reference to manner and form provisions is limited to legislation enforcing treaty requirements — a result that arguably follows from the fact that a treaty is itself constitutionally enforceable under section 35. However, the second sentence is a more general statement. In particular, her citation to *Hogg* may be telling. In the referenced section of his *Canadian Constitutional Law*, *Hogg* takes a position at the more robust end of the manner and form spectrum. I say "robust" because *Hogg* takes the view that it is possible for a legislature to protect a manner and form provision with another level of manner and form provision.³⁵ He does not engage in any explicit discussion of whether there would be any limits to this possibility — for instance, where an ancillary manner and form constraint on amending or repealing a principal manner and form constraint would make legislation on the matter in question virtually impossible, in practice.

Although it may be that Karakatsanis J. inserted her broad manner and form statement as a specific explanation for her comment about

³⁵ This view is developed as an extension of his discussion of *Canadian Taxpayers Federation v. Ontario (Minister of Finance)*, [2004] O.J. No. 5239, 73 O.R. (3d) 621 (Ont. S.C.J.) and the use of a two-step procedure by the Provincial Parliament of Ontario to amend the substance of a tax statute that had been protected by a manner and form clause requiring use of a referendum before amendment. At step one, one statute repealed the manner and form provision. Then, once that statute received royal assent, a second statute then amended the substance, free of the now-repealed manner and form requirements.

treaty-implementing legislation, there seems little principled basis for limiting its applicability to the treaty legislation example. And that may well have been Karakatsanis J.'s ultimate intention — *i.e.*, to signal to Parliament something along the lines of “You have the tools to require that your own processes build in pre-legislative consultation. If you do, we — and our understanding of constitutional law on parliamentary sovereignty — will not stand in the way.”

(c) *The Ire of Brown J.*

However much the Karakatsanis J.'s phrasing seemed to hew towards leaving open some forms of future review of *legislation* by virtue of failures of legislative process, Brown J. took sharp issue with her reasons, in terms that make clear that he reads her as leaving open ways to attack *legislative process*. His critique throws into relief the extent to which *Mikisew Cree II* does not represent a final shutdown of Indigenous-State co-production of legislation but rather supplies productive pressure on political processes to take up the baton that appeared to have been dropped by the Court. Justice Brown's critique of Karakatsanis J. serves to highlight that which he fears:

[139] [I]n my respectful view, ... she endorses the potential engorgement of judicial power — not required by the law of our Constitution, but rather precluded by it — at the expense of legislatures' power over their processes. Far from preserving what my colleague calls “the respectful balance between the ... pillars of our democracy” (para. 2), this conveys inter-institutional *disrespect*. It would be no more “respectful” (or constitutionally legitimate) for a legislature to purport to direct this Court or any other court on its own deliberative processes....

[143] As my colleague Rowe J. explains (paras. 160-65), the effects of the legal uncertainty generated by Karakatsanis J.'s reasons would also be felt [not only by Indigenous peoples — discussed by Brown J. in para. 142 — but] by legislators, who are, in essence, being told that they cannot enact legislation that “affects” (but does not infringe) certain rights that might exist — and that, if they do, they may be subject to as-yet unrecognized “recourse.”...

Yet, at the same time as expending considerable energy expressing his fears that Karakatsanis J. may “circuitous[ly]” have ruled in a manner no different in result from Abella J., Brown J. ends his judgment in a way that seeks to highlight the constitutionally normative reasons for judicial

non-intervention into parliamentary process. He does this in a way that undermines the various practical reasons (as he emphasizes elsewhere in his opinion) that a legislative “duty to consult” would be messy or unworkable:

[144]To be clear, then: judicial review of the legislative process, including *post-facto* review of the process of legislative enactment, for adherence to s. 35 and for consistency with the honour of the Crown, is unconstitutional.

[145] That this is so should not, however, 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 (*Sparrow*, at p. 1119; *Tsilhqot’in*, at paras. 77-78). But the absence or inadequacy of consultation may be considered only once the legislation at issue has been enacted, and then, only in respect of a challenge under s. 35 to the substance or the effects of such enacted legislation (as opposed to a challenge to the legislative process leading to and including its enactment). (Author emphasis)

Despite lauding the “value and wisdom” of legislative consultation, however, he makes no express mention of manner and form as a way forward.³⁶

³⁶ This failure to endorse self-imposed manner and form as a way forward should not be taken as a sign that Brown J. is unmindful of manner and form doctrine. On the contrary, he earlier characterizes the Mikisew Cree’s s. 35 argument as one that treats the duty to consult as a constitutionally-mandated manner and form requirement, and then takes issue with this characterization. He commented at para. 124: “Mikisew Cree First Nation argues that s. 35 of the *Constitution Act, 1982* also creates a manner and form requirement which applies to the legislative process in the form of a constitutional and justiciable duty to consult. But the duty to consult is distinct from the constitutionally mandated manner and form requirements with which Parliament must comply in order to enact valid legislation. Applied to the exercise of legislative power, it is a claim *not* about the *manner and form* of enactment, but about the *procedure* of (or leading to) enactment. And, as this Court said in *Authorson v. Canada (Attorney General)*, [2003] S.C.J. No. 40, [2003] 2 S.C.R. 40, at para. 37, ‘the only procedure due any citizen of Canada is that proposed legislation receive three readings in the Senate and House of Commons and that it receive Royal Assent’.” Now is not the occasion to unpack the tenuousness, if not the sterility, of “manner and form” somehow being distinct from “procedure” but merely to note that this passage may hint that, when faced with self-imposed legislative constraints, Brown J. may find some way to treat them as matters of “procedure” — with unclear implications when the claim is not about what Parliament *must* do procedurally (*per Authorson*) but about what Parliament *may* do by way of self-imposing “manner and form”/“procedural” requirements.

(d) *Rowe J.’s Apocalypse...Not*

Justice Rowe presents an intriguing counterpoint to Brown J. Justice Rowe endorses Brown J. but then structures his additional reasons quite differently.

The first tack that differs is that Rowe J. occupies considerable real estate in his judgment with an almost apocalyptic rendition of just how complex the legislative process is and just how many questions there are about how exactly — when, where, what stage of law-making — consultation would come in. At one point (para. 160), he paraphrases all 30 law-making steps in the Privy Council *Guide to Making Federal Acts and Regulations*. While the Mikisew Cree focused on the duty to consult taking place somewhere in the pre-tabling stages (steps 1-16), “the next logical step would be to say that the duty to consult extends to consideration by Parliament (or provincial legislatures)”, which he labels as steps 17-29 (para. 161). Come to think of it, Rowe J. then muses, “why should the duty to consult relate only to legislation? Why not budgetary measures (including the Estimates)?” (para. 162). He then builds on these observations by focusing on why the courts are not suitable for determining how, where and when consultation should take place, if a constitutional duty were to be imposed:

[164] ...Imposing a duty to consult at this stage could effectively grind the day-to-day internal operation of government to a halt. What is now complex and difficult could become drawn out and dysfunctional. Inevitably, disputes would arise about the way that this obligation would be fulfilled. This is why the separation of powers operates the way it does. The courts are ill-equipped to deal with the procedural complexities of the legislative process.

He finishes this line of argument off by listing seven questions that would need to be answered in order to know the shape of the duty to consult, with the purpose of showing how complex and consequential the issues are, and consequently, why the judiciary is not in a good position — at least at the present time — to answer such questions in the detail he assumes would be required.

The second tack Rowe J. takes is to make a clear distinction between a constitutionally imposed duty to consult and a self-imposed one, invoking manner and form to do so (and, like Karakatsanis J., also citing to Hogg):

[167] If Parliament or a provincial legislature wishes to bind itself to a manner and form requirement incorporating the duty to consult Indigenous peoples before the passing of legislation, it is free to do so (Hogg, at p. 12-12). But the courts will not infringe on the discretion of legislatures by imposing additional procedural requirements on legislative bodies (*Authorson v. Canada (Attorney General)*, 2003 SCC 39, [2003] 2 S.C.R. 40).

Justice Rowe's two approaches do build on each other, in that his emphasis is on the institutional incompetence of the courts to mandate and then supervise a duty to consult — out of a whole cloth, so to speak. Consistent with this, he gestures towards the legislature itself as capable of managing the complexity and making the necessary policy choices as to how, when and where consultation (and accommodation) could be built into its own processes. While he does not say so, one assumes that he accepts that, were a legislature to set out law-making consultations in legislation, the courts would be called upon to make some judgments as to whether those consultations had occurred in conformity with the legislation.³⁷

As for the third tack of Rowe J., he is the only judge — to his credit — to reference the fact that at least a few governments already have duty to consult procedures that include pre-legislature consultation procedures:

[155] The significance of prior consultation in the infringement/justification analysis is a strong incentive for law makers to seek input from Indigenous communities whose interests may be affected by nascent legislation. This is exemplified by provinces which have recognized the importance of consulting Indigenous peoples prior to enacting legislation that has the potential to adversely impact the exercise of treaty or Aboriginal rights in the province (see e.g. Saskatchewan, "First Nation and Metis Consultation Policy Framework" (June 2010) (online), at p. 5; Manitoba, "Interim Provincial Policy For Crown Consultations with First Nations, Métis Communities and Other Aboriginal Communities" (May 4, 2009) (online), at p. 1; Quebec, Interministerial Support Group on Aboriginal Consultation, *Interim Guide for Consulting the Aboriginal Communities*, Quebec City: 2008, at p. 4). However, good public policy does not necessarily equate to a constitutional right. It is for each

³⁷ Unless, of course, the legislation sought to bar or limit judicial review and make adequacy a matter for Parliament itself to decide. This is not to say that such an institutional bar would necessarily be accepted by the courts.

jurisdiction, federal, provincial and territorial, to decide on the modalities for consultation in the context of *Sparrow*.

In an echo of Brown J.'s emphasis on "value and wisdom" not rising to the level of constitutional obligation, Rowe J. adds later:

[166] ...As a matter of practice and in furtherance of good public administration, consultation on policy options in the preparation of legislation is very often undertaken. But, it is not constitutionally required.

Such it is that Rowe J. ends up finessing his initial apocalyptic reasoning by emphasizing both the feasibility and the desirability of consultation procedures for legislation even as he steps back from the courts finding them to be constitutionally mandated by section 35. In the process, however, he makes clear — even more so than Karakatsanis J. — that the ball is in the House of Commons' court.

(e) *Abella J.: Leave it to us (but have no fear)*

Justice Abella's judgment is rich for the reasoning it deploys to arrive at the conclusion that a constitutionally-required duty to consult applies to legislative process and not just to administrative process. It has a more holistic understanding of separation of powers and parliamentary privilege as undergirding principles generally protecting legislative process from judicial supervision that appears most consistent with the methodology first deployed in the *Quebec Secession Reference* case — namely, that unwritten principles of the Constitution need to be integrated and optimized rather than approached in terms of any one of them being an absolute. However, my purpose is not to laud how it is that Abella J. arrived at the normative conclusion that the constitutional duty to consult applies, but, rather, to observe that — in the result — her approach converges in important respects with that of both Karakatsanis and Rowe JJ. In each case, the ball is served into Parliament's court.

Justice Abella achieves her own version of the deflection that I discussed as characterizing the Karakatsanis J. judgment in three moves. The first move goes to timing of a challenge to the legislative process. A vectoring of the several constitutional principles in play produces a deference to Parliament in terms of when the courts can get involved:

[93] ...On judicial review of executive action, consultation challenges are often initiated prior to the decision being made, and common remedies include an order for consultation, appointment of a mediator, and ongoing court supervision (Newman, at p. 78; *Clyde River*, at para. 24). Conversely, in my view institutional constraints in the legislative context require that applicants challenge existing legislation. It would unduly interfere with the legislative process to allow direct challenges to a legislature's procedure prior to the enactment of legislation. Parliament has exclusive control over its own proceedings, which should be respected by the courts (*New Brunswick Broadcasting, Co.*, at p. 386)....

The second move is to show remedial flexibility. Justice Abella reasons that a constitutionally mandated duty to consult need not have the same remedial consequences as when the same manner and form requirement is self-imposed by the legislature. In order to arrive at a softer form of remedy, however, her reasoning contains some — not easily disentangled — argumentation that will complicate any future effort to work consultation into parliamentary procedures within a manner and form framework:

[96] The duty to consult is about encouraging governments to consider their effects on Indigenous communities and consult proactively, and should not replace the *Sparrow* infringement test or become a means by which legislation is routinely struck down (see Newman, at p. 63). In this sense, the duty to consult differs from constitutional (and self-imposed) manner and form requirements, which are another accepted instance of court review of legislative processes (see for e.g. *Re Manitoba Language Rights*, [1985] 1 S.C.R. 721; *Gallant v. The King*, [1949] 2 D.L.R. 425 (P.E.I.S.C.) (per Campbell C.J.)). Failure to comply with a manner and form requirement will result in the legislation being invalid, as there is “no doubt as to the binding character of the rules in the Constitution” (Hogg, at pp. 12-11, 12-18 and 12-19). ... However, the duty to consult is a constitutional obligation that must be satisfied, not a rule of procedure itself. The test is what will uphold the honour of the Crown and effect reconciliation in those circumstances (*Haida Nation*, at para. 45).³⁸

³⁸ What exactly is meant by the duty to consult being “a constitutional obligation that must be satisfied” and “not a rule of procedure itself” is less than clear. At the same time, whatever distinction Abella J. had in mind, one assumes that self-imposed obligations can be drafted in a way that make clear what specific procedural requirements are. Certainly, Rowe J. expressed no doubts on this score.

Finally, the third move by Abella J. takes us to Parliament and the need for Parliament to step up and attend to consultation for itself through “adopt[ing]” its own “procedures”:

[93]... While it is not the role of the courts to dictate the procedures legislatures adopt to fulfill their consultation obligations, they may consider whether the chosen process accords with the special relationship between the Crown and Indigenous peoples of Canada. This need not be any more onerous than the judicial oversight already conducted under the *Sparrow* justification inquiry.

Ironically, these two sentences in what I am calling the third move are so deferentially framed — not just the words “not ...to dictate” but also the exceptionally loose “may consider whether” — that it may be the case that Abella J.’s judgment puts even less pressure on Parliament than did either Karakatsanis or Rowe J. — perhaps even than Brown J. At least the structure of the latter judgments found a way — albeit imperfectly and *sotto voce* — to send strong signals that Parliament not only can legislate manner and form consultation requirements but also that such legislation is desirable. In some contrast, by laying in the “need not be any more onerous” caveat, Abella J. comes very close to saying, “No need, we have it. There is a s. 35 duty, but you need not do more than what you already do when showing there was consultation when the legislation itself is challenged.”³⁹

All that said, what nonetheless emerges from the judgment is that eight of the nine Supreme Court justices in *Mikisew Cree II* have clearly endorsed the existence of a manner and form theory of parliamentary sovereignty (even if Abella J. understand its relationship to consultation

³⁹ And, in the process, the reasoning demonstrates a certain complacency that the s. 35 duty to consult, as it has been developed by the Court, is adequate to the task of executive consultations let alone legislative consultations — not least (but not only) for a near-complete blindness to unjust power relations that undercuts the rhetoric of reconciliation that is laced throughout the Court’s duty to consult case law. For a powerful critique of duty to consult jurisprudence, see Grace Nosek, “Re-Imagining Indigenous Peoples’ Role in Natural Resource Development Decision Making: Implementing Free, Prior and Informed Consent in Canada through Indigenous Legal Traditions” (2017) 50 U.B.C. L. Rev. 95. Here it must be observed that, Canadian courts (including the Supreme Court), have done virtually nothing to recognize that specific Indigenous legal orders have their own principles and procedures relevant to consultation, cooperation and consent-seeking that need to be integrated in some poly-juridical way into constitutional requirements: see, for example, Val Napoleon, “Making the Rounds: Aboriginal Title in the Common Law from a Tsilhqot’in Legal Perspective,” (2015) 43 UBC L. Rev. 873 and Karen Drake, <https://heinonline-org.ezproxy.library.yorku.ca/HOL/Page?public=true&handle=hein.journals/mcgijosd11&div=11&start_page=183&collection=journals&set_as_cursor=0&men_tab=srchresults>. The Trials and Tribulations of Ontario’s *Mining Act*: The Duty to Consult and Anishinaabek Law,” (2015) *McGill International Journal of Sustainable Development Law and Policy* 183-218.

in an enigmatic way) — and each one has cited Hogg, whose version of that theory appears to be at the very robust end of the spectrum in terms of how extensively one legislature can tie the hands of a subsequent legislature. Notwithstanding that the Mikisew Cree suffered a 7-2 loss on whether there is a constitutionally required requirement to consult as part of the legislative process, they garnered an 8-1 judgment that signalled in no uncertain terms the constitutional permissibility of Parliament building a duty to consult into federal legislating. The duty to consult is now in the Commons' court.

4. When Manner and Form Requirements amount to Renunciation of Legislative Power: *Pan-Canadian Securities Regulation Reference* and the *Canada Assistance Plan Reference*

While I have read *Mikisew Cree II* as encouraging Parliament to step up to the plate on the duty to consult, it bears emphasizing that the Court offers no insights on what shape it will eventually give to a manner and form version of parliamentary sovereignty. Indeed, one possible caveat emerged scarcely one month following *Mikisew Cree II*, when the Court released its *Pan-Canadian Securities Regulation Reference*.⁴⁰

That case involves an extensive discussion of parliamentary sovereignty within Canada's overall constitutional order, in the course of which a unanimous Court dropped in a single, barebones half-sentence in a longer paragraph:

A legislature intending to bind itself to rules respecting the manner and form by which the statute is to be amended *must* do so in clear terms (see: *Reference Re Canada Assistance Plan (B.C.)*, [1991] 2 S.C.R. 525, at pp. 561-64; *Canadian Taxpayers Federation v. Ontario (Minister of Finance)* (2004), 73 O.R. (3d) 621 (S.C.J.), at para. 49).⁴¹

In one of the two cited cases, Sopinka J. wrote for the Court on one issue of considerable relevance in the Indigenous context, namely whether a legislature could condition its future legislation on the consent of an external entity. In that regard, recall that article 19 of UNDRIP posits an obligation to engage in consultation and cooperation in pursuit of “free,

⁴⁰ *Pan-Canadian Securities Reference*, [2018] S.C.J. No. 48, 2018 SCC 48 (S.C.C.). A second caveat emerging from this case will be referenced briefly in section 6 of this article.

⁴¹ *Id.*, at para. 51 (Court emphasis).

prior and informed consent” before either administrative or legislative law-making is finalized. Should Parliament at some point seek to self-impose the obtaining, or at least the seeking, of Indigenous “consent” as a generally applicable manner and form requirement, such an effort would bump up against the following reasoning of Sopinka J. in *Canada Assistance Plan*:

...It is clear that parliamentary sovereignty prevents a legislative body from binding itself as to the substance of its future legislation. The claim that is made in a “manner and form” argument is that the body has restrained itself, not in respect of substance, but in respect of the procedure which must be followed to enact future legislation of some sort, or the form which such legislation must take. In *West Lakes Ltd. v. South Australia*, *supra*, a “manner and form” argument was rejected. King C.J. said (at pp. 397-98):

Even if I could construe the statute according to the plaintiff’s argument, I could not regard the provision as prescribing the manner or form of future legislation. A provision requiring the consent to legislation of a certain kind, of an entity not forming part of the legislative structure . . . does not, to my mind, prescribe a manner or form of lawmaking, but rather amounts to a renunciation *pro tanto* of the lawmaking power.

Those words are fully applicable here.

Absent revisiting or development of the received law on this point, much could depend on how much Parliament were to legislate the free prior and informed consent (“FPIC”) condition on its own law-making as something that falls short of dispositive consent (*i.e.*, that does not interpret UNDRIP’s FPIC as stipulating an absolute veto power). While the present article is not the occasion to elaborate in any detail on UNDRIP interpretations, it can be noted that article 19 is framed so as to express the obtaining of Indigenous consent as the object of cooperation and consultation in contrast to the framing of FPIC as an absolute requirement in two other UNDRIP articles.

In contrast to article 19, article 29(2) reads, “States shall take effective measures *to ensure* that no storage or disposal of hazardous materials shall take place in the lands or territories of indigenous peoples *without their free, prior and informed consent*”, while article 10 provides, “Indigenous peoples shall not be forcibly removed from their lands or territories. No relocation shall take place *without the free, prior and informed consent of the indigenous peoples concerned* and after agreement on just and fair compensation and, where possible, with the option of return.” The “without FPIC” formulation in articles 10 and

29(2) is different from “consult and cooperate in good faith...*in order to obtain*”. There is an argument to be made that article 19 signals a high presumption that consent is to be obtained without unambiguously saying that consent must, in every case, be obtained after genuine consultation and cooperation.

But quite beyond the issue of whether article 19 itself may fall short of an absolute-consent norm, UNDRIP makes clear, through its general limitations clause, article 46(2), that UNDRIP mirrors the two-stage structure of Canadian section 35 law, in that infringements may be justified by the state. Just over a hundred scholars and practitioners familiar with UNDRIP wrote an open letter to the Senate when it became known certain senators were trying to defeat Bill C-262 on the grounds that the FPIC norms constituted a veto power, and emphasized article 46(2):

It is absolutely false, as some have claimed, that it gives Indigenous peoples a veto over, for example, development projects. ... The UN Declaration provides for comprehensive balancing provisions. It reaffirms what international and Canadian law already acknowledge: the human rights and fundamental freedoms of all must be respected, but limitations may be necessary in a democratic society. Limitations are possible if they are non-discriminatory and strictly necessary for the purpose of securing due recognition and respect for the rights and freedoms of others. Bill C-262 only reinforces this essential attribute of human rights law.⁴²

Thus, an invariable requirement of consent in the UNDRIP article 19 right can be subject to some limits — albeit, importantly, ones that are clearer and stricter than the loose and expansive articulation of justification criteria by the Court from *Sparrow* onward.⁴³ As such, even an unmodified reading of Sopinka J.’s statement regarding external consent should not preclude a self-imposed procedural requirement to seek consent through a process of good faith consultation and cooperation before legislating and, also as a procedural requirement (to

⁴² See “Open letter signed by 101 experts supporting Bill C-262”, dated May 7, 2019, online: <<https://cpij-pciji.ca/open-letter-signed-by-101-experts-supporting-bill-c-262/>>. The development projects reference with respect to FPIC is to article 32(2), which has the same semantic structure as article 19: “States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.” Disclosure: the author was one of the signatories.

⁴³ Article 46(2) refers to limits on UNDRIP rights that are “[a] *strictly necessary solely for the purpose* of securing due recognition and respect for the rights and freedoms of others and for meeting the just and *most compelling* requirements of a democratic society”. (Author emphasis).

take a substantive decision), to exercise its own judgment as to whether – exceptionally – to proceed with legislation if consent is not obtained.

5. Manner and Form in the Joint Future of Parliament and Indigenous Peoples

It is possible that developments elsewhere in Ottawa paralleling the Court's deliberations in *Mikisew Cree II*, justified, at least in the Court's collective mind, the combination of deflection (no section 35 duty and no interpretive use of UNDRIP) and signalling (the reminders of the manner and form pathway). One can appreciate the attractiveness of buying time for an evolving constitutional architecture to develop and saving the Court from playing a manifestly proactive role at this point in evolution. In the House of Commons, Romeo Saganash's Bill C-262 (*United Nations Declaration on the Rights of Indigenous Peoples Act*) had finally attracted cross-aisle support and had passed Third Reading in late May 2018.⁴⁴ If it had survived the Senate,⁴⁵ Bill C-262 would have brought UNDRIP into the governmental, legislative, and indeed judicial spheres to an extent that one might forgive the SCC for not wanting to get too far ahead of the curve:

3 The United Nations Declaration on the Rights of Indigenous Peoples that was adopted by the General Assembly of the United Nations as General Assembly Resolution 61/295 on September 13, 2007, and that is set out in the schedule, is hereby affirmed as a universal international human rights instrument with application in Canadian law.

⁴⁴ The progress of Bill C-262, and votes on it, online: <<https://www.parl.ca/LegisInfo/BillDetails.aspx?billId=8160636&Language=E>>.

⁴⁵ Certain Conservative Senators successfully delayed moving the bill to Committee Stage for a full year, until May 2019. The Whip for the Conservative Party of Canada, Donald Plett, and several collaborating Senators remained intent on killing the bill, notwithstanding the House of Commons adopting a resolution by unanimous consent — including the consent of the MPs of the Conservative Party of Canada — calling on the Senate to stop constructing the bill. His delay tactics were successful: Jorge Barrera, “UNDRIP bill in ‘grave danger’ of dying in Senate, committee chair says”, CBC, online: <<https://www.cbc.ca/news/indigenous/undrip-senate-conservatives-1.5164330>> (June 5, 2019); Justin Brake, “Pressure mounts on Conservatives poised to kill Indigenous rights legislation”, APTN News, online: <<https://aptnnews.ca/2019/06/17/pressure-mounts-on-conservatives-poised-to-kill-indigenous-rights-legislation/>> (June 17, 2019); Justin Brake, “‘Let us rise with more energy’: Saganash responds to Senate death of C-262 as Liberals promise, again, to legislate UNDRIP”, APTN News, online: <<https://aptnnews.ca/2019/06/24/let-us-rise-with-more-energy-saganash-responds-to-senate-death-of-c-262-as-liberals-promise-again-to-legislate-undrip/>> (June 24, 2019) — all last accessed August 13, 2019. As explained earlier in note 21, these senators blocking strategy worked: the bill then died the Senate's order paper when Parliament was prorogued for the 2019 federal general election.

4 The Government of Canada, in consultation and cooperation with indigenous peoples in Canada, must take all measures necessary to ensure that the laws of Canada are consistent with the United Nations Declaration on the Rights of Indigenous Peoples.

5 The Government of Canada must, in consultation and cooperation with indigenous peoples, develop and implement a national action plan to achieve the objectives of the United Nations Declaration on the Rights of Indigenous Peoples.

It does not take much imagination to read section 3 as a directive to the courts to give UNDRIP at least indirect application through interpretive use. Nor is much more imagination needed to see section 4 as not just implementing article 38 of UNDRIP (the general implementation clause) but as more immediately giving effect to article 19. It is very difficult to see how a review of existing laws and enactment of new laws can take place without the law-making process itself building in “consultation and cooperation” processes. Indeed, section 4 could be viewed as itself a manner and form provision, even if not explicitly so and even if quite imprecise in its content.⁴⁶

Would it be beyond the pale for the courts — or at least, the Supreme Court of Canada — to read section 4 as creating at minimum an enforceable obligation of conduct for Parliament in its post-tabling legislative process and/or the Cabinet in its pre-tabling legislative mode “to take all measures necessary” to arrive — in consultation and cooperation with Indigenous peoples — at law-making procedures that themselves are consultative in nature? The framing of section 4 falls just short of expressly directing an FPIC goal even as a “take all measures necessary” standard is arguably only compatible with a very high

⁴⁶ I return to the mention earlier, in section 5 at note 41, of the Supreme Court’s one-sentence reference to manner and form in the *Pan-Canadian Securities Reference* as signalling a caveat to my claim that the Court in *Mikisew Cree II* gave essentially no guidance, going forward, on the content of manner and form doctrine. I then indicated I would later address a second caveat that also emerges from the statement by the Court in the quoted *Pan-Canadian Securities Reference*. Recall the Court stated that “a legislature intending to bind itself to rules respecting the manner and form by which the statute is to be amended *must* do so in clear terms” (Court emphasis). This formulation dovetails, more or less, with language used by Sopinka J. in the *Canada Assistance Plan Reference*. For present purposes, the issue is whether the requirement of “clear terms” — so emphatically put (“*must*”) — is to be read as essentially the equivalent of “expressly” and, if not, how much interpretive room there is left for courts to read less-than-express language — for example, in light of unwritten principles of the Constitution — as nonetheless sufficiently clear. This clarity rule will be discussed in an parallel article on the limits of manner and form. For the moment, suffice it to say that an expansive understanding of “clear terms” make it less likely a court would read section 4 of the proposed UNDRIP Act as a classic manner and form provision.

presumption against legislating such law-making procedures without having done so collaboratively (that is, without having obtained requisite Indigenous consent).⁴⁷ From the perspective of tilting the evolution of Parliamentary law-making in a direction that builds in the interjurisdictional nature of Indigenous-Crown relations, section 4 is probably best understood as a parliamentary self-imposition of a kind of meta-duty (a duty to consult and cooperate about the shape of the duty to seek free, prior, and informed consent as part of federal law-making).

Turning now to the Ministry, the government published the 2018 *Principles respecting the Government of Canada's relationship with Indigenous Peoples*. Principle 6 states, "Meaningful engagement with Indigenous peoples aims to secure their free, prior, and informed consent when Canada proposes to take actions which impact them and their rights on their lands, territories, and resources."⁴⁸ The commentary on that principle is brief, but telling, and includes the following passages:

This Principle acknowledges the Government of Canada's commitment to new nation-to-nation, government-to-government, and Inuit-Crown relationships that builds on and goes beyond the legal duty to consult. In delivering on this commitment, the Government recognizes *the right of Indigenous peoples to participate in decision-making in matters that affect their rights through their own representative institutions and the need to consult and cooperate in good faith with the aim of securing their free, prior, and informed consent.*

...The importance of free, prior, and informed consent, as identified in the UN Declaration, extends beyond title lands. To this end, the Government of Canada will look for opportunities to build processes and approaches aimed at securing consent, as well as creative and innovative mechanisms that will help build deeper collaboration, consensus, and new ways of working together. It will ensure that Indigenous peoples and their governments have a role in public decision-making as part of Canada's constitutional framework and ensure that Indigenous rights, interests, and aspirations are recognized in decision-making. (Author emphasis)

⁴⁷ In light of UNDRIP's overall status as part of federal law, via section 3 of Bill C-262, and in view of UNDRIP article 19 in tandem with article 46(2) raising an all-but-irrebuttable presumption of FPIC before a statute is adopted, it would be hard not to read "all measures necessary" in section 4 not to require FPIC to the same, or a very similar, extent as article 19 does.

⁴⁸ Department of Justice, *Principles respecting the Government of Canada's relationship with Indigenous Peoples* (2018), online: <<http://publications.gc.ca/site/eng/9.851661/publication.html>> (last accessed August 17, 2019).

The failure to specifically reference legislative processes as clearly part of “actions” in principle 6 and the absence of any mention of UNDRIP article 19 in the commentary are frustrating, yet at the same time, an argument can be made that the italicized passages seem to overlap to a considerable extent with the language and spirit of article 19.

All this said, the fate in the last Parliament of Bill C-262 reminds us that all is not legislatively in the hands of the Ministry, the House of Commons, and Indigenous peoples. For the House of Commons to legislate its own consultation, cooperation, and consent procedures, the Senate must also enact the legislation and can refuse to do so however much Indigenous peoples’ representatives co-developed the legislation with the government and House. Whether the Senate can evolve — *de facto* or *de jure* — in ways that allow the House of Commons not to again face blockage of UNDRIP-related legislation in the Senate is beyond the scope of this article, other than the following brief observations. On the *de facto* front, an interesting development has been the advent of a critical mass of Indigenous Senators — now around 10 per cent of that chamber. On the *de jure* front, we should remind ourselves that there have been proposals over the years for a third house of Parliament to represent Indigenous Peoples, most notably the proposal of a House of First Peoples made by the Royal Commission on Aboriginal Peoples (“RCAP”) in 1996.⁴⁹ Integrating a third chamber as an adjunct to the House of Commons and to the Senate may well be an exercise of unilateral federal legislative authority within both section 44 of the *Constitution Act, 1982*, and a manner-and-form understanding of parliamentary sovereignty. Admittedly, the precise powers of such a body — notably if they were fully co-decisional and went beyond an advisory or structured-delay role — could easily get such an initiative entangled with both Part III (*i.e.*, Aboriginal participation) and Part V (provincial participation) amending formulae and/or with Supreme Court of Canada understandings about the partial renunciation of the existing parliamentary chambers’ sovereignty to a new legislative body. However, re-purposing the Senate to become more and more a representative chamber for Indigenous participation in federal legislation — while not

⁴⁹ See the discussion of the RCAP proposal as part of an analysis of a much wider range of options for — and barriers to — enhanced Indigenous participation in central law-making institutions in Michael Morden, “Indigenizing Parliament: Time to Re-Start a Conversation” (2016) 39: 2 *Parliamentary Review* 24-33. To gain some appreciation of the challenges and tensions with respect to Indigenous communities even being open to working within still-colonial legislative bodies, see John Borrows, *Freedom and Indigenous Constitutionalism* (Toronto: University of Toronto Press, 2016).

especially likely and possibly not even desirable from some Indigenous perspectives — is not an impossible direction as part of the effort of some members in the Senate to seek to achieve a variety of organic reforms, spurred on by the very fact of Bill C-262's death in 2019 at the hands of the Senate.

The purpose of this article is not to explore further the multiple tough questions bound up with a meta-duty to arrive at consultative and cooperative law-making processes that are geared toward obtaining consent prior to legislative enactment. Exactly whose consent must be obtained is, alone, a major quandary and not answered by simple incantation of article 19's language of "Indigenous peoples[']...own representative institutions".⁵⁰ Much will be experimental and iterative, as parties grope to determine how unlegislated consultation and cooperation should be organized in order to then determine what consultation and cooperation manner-and-form provisions should be legislated in order to constrain future law-making. At the conceptual level, the objective of consent comes up against the issue of the extent to which manner-and-form constraints blur with substantive fetters and the risk that the Supreme Court of Canada might deem consent-seeking to be an abdication of parliamentary sovereignty if it refuses to integrate parliamentary sovereignty as an unwritten principle with the principle of Indigenous-Crown reconciliation as a co-equal principle. Rather, I conclude by simply observing that multiple normative signals and a growing body of scholarship suggest that the time is right for Parliament — in consultation and cooperation with Indigenous peoples — to engage seriously and with urgency the question of how federal law-making can be transformed in order to help Canada move to the next stage of intersocietal justice and reconciliation.⁵¹

⁵⁰ With respect to the present government's *Recognition and Implementation of Indigenous Rights Framework* (RIIRF), one major challenge revealed by the discussion process following the release of the framework is how to operationalize which entities are to be recognized as "nations and collectives" within the framework's development process and eventual outcomes. Compare Crown-Indigenous Relations and Northern Affairs Canada (CIRNAC), "Overview of a Recognition and Implementation of Indigenous Rights Framework" (undated) online: <<https://www.rcaanc-cirmac.gc.ca/eng/1536350959665/1539959903708?wbdisable=true#chp2d>> and Assembly of First Nations (AFN), "Canada's Proposed Recognition and Implementation of Indigenous Rights Framework: Issues Summary" (September 11/12, 2018), online: <<https://www.afn.ca/wp-content/uploads/2018/08/Issues-Summary-ENG.pdf>> (each last accessed August 13, 2019).

⁵¹ However one defines "reconciliation". I say this because reconciliation as understood by the Truth and Reconciliation Commission does not necessarily map onto the SCC's definition of "reconciliation", which has tended to take foundational Canadian sovereignty as its baseline premise and has not been able to bring itself yet to reframing the principle of reconciliation as foundationally about shared, interactive or dialogical sovereignties.