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The Geography of the Crown: Reflections on *Mikisew Cree* and *Williams Lake*

Patricia Burke Wood and David A. Rossiter*

I. INTRODUCTION

In this article, we argue for the importance of the geographic underpinnings of the concepts of "the Crown", the "honour of the Crown", "fiduciary duty", and the "duty to consult" in cases concerning Aboriginal title and rights in Canada. Recent decisions, including *Williams Lake*[1] (2018) and *Mikisew Cree*[2] (2018), while further developing and refining these concepts, continue to skirt around the fundamentally geographic issue of territorial sovereignty. We argue that both political and legal discussions fail to recognize fully how the honour of the Crown, fiduciary duty, and the duty to consult arise from this geographical basis, rather than from a legal or abstracted definition of the Crown. More than a bounded space or a specific site, territory is a strategic process of settler-colonial statecraft, in which the law is a constitutive instrument in the unmaking and remaking of territory. The concepts of the Crown, its honour and its duties are not exempt from this process.

From the Royal Proclamation of 1763 onwards, imperial actors employed legal discourse to secure geography, specifically through the assertion of sovereignty over territory, and thus to legitimate the Crown and make its largely unpracticed and abstract claims more real. This

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1 *Williams Lake Indian Band v. Canada (Aboriginal Affairs and Northern Development)*, [2018] S.C.J. No. 4, 2018 SCC 4 (S.C.C.) [hereinafter "*Williams Lake* (2018)"].

2 *Mikisew Cree First Nation v. Canada (Governor in Council)*, [2018] S.C.J. No. 40, 2018 SCC 40 (S.C.C.) [hereinafter "*Mikisew Cree* (2018)"].

assertion was, and continues to be, challenged by pre-existing Aboriginal political geographies. Even in their efforts to recognize the legitimacy of Indigenous claims, the courts have strategically deployed and developed legal concepts to stabilize imperial claims. The Crown, its honour and its duties are all inventions of British and Canadian law. They emerged for strategic purposes and are not universal concepts, even among settler societies formerly part of the British Empire.[3] Thus, the historical-geographic context, particularly settler-colonialism, is essential to understanding their meaning and application.

Williams Lake (2018) and *Mikisew Cree* (2018) each provide opportunities to interrogate the Court's understanding of the geography of the Crown. In the former decision, Justices address territorial control through concepts related to the Crown in two distinct ways – grounded and abstract. In finding that the Crown breached its fiduciary duty by not securing the Williams Lake Indian Band village site from encroachment by settlers in the late 19th century, the Court acknowledges the lived geographies of use and occupation that the Band has never ceded. At the same time, the decision relies upon an assertion of an abstract underlying Crown sovereignty over the territory in question and finds that the fiduciary duty owed to the Band arises from this assertion. In *Mikisew Cree* (2018), these geographies are largely absent. Rather than relying upon the geographic roots of fiduciary duty and duty to consult in securing territory, this decision invokes a decontextualized Crown as governing authority. This a-geographical approach misreads the character and function of the Crown in Canada.

The unresolved point of tension in both cases is the origin and legitimacy of the Crown's assertion of territorial sovereignty. By introducing a geographic critique of the two decisions and their broader legal history, we intend to demonstrate that, in the context of settler colonialism in Canada, "the Crown" is a land claim.

II. The Invention and Evolution of the Honour and Duties of the Crown

The obligation of the Crown's duty to consult arises, variably, from the Crown's fiduciary duty and/or the honour of the Crown. In the 1984

[3] Kirsty Gover, "The Honour of the Crowns: State-Indigenous Fiduciary Relationships and Australian Exceptionalism", (2016) 38 *Sydney Law Review* 339-68.

Guerin[4] decision, a case in which the Crown was found to have consciously behaved in a duplicitous manner towards the Musqueam Nation in a land surrender and lease arrangement, the unethical behaviour was described as in breach of the Crown's "fiduciary duty". This duty, the Court argued, arose from the "special relationship" between the Crown and Indigenous peoples, which was to be one of mutual trust, not competitive, exploitative or adversarial. Citing the *Indian Act*,[5] the Court spoke of the Crown's responsibility to protect and act in the best interests of Indigenous peoples. Moreover, Aboriginal title was affirmed as a pre-existing property right, and that land could only be surrendered to the Crown. Although Aboriginal title was understood as *sui generis*, this arrangement made the Crown a trustee, subject to the same legal obligations as other fiduciary relationships. This assertion of the Crown's fiduciary duty was upheld in *Sparrow* (1990).[6] This led to multiple Indigenous claims that the Crown had failed to fulfil its obligations and, by the early 21st century, established "the role of the fiduciary relationship as a cornerstone of Canadian Aboriginal law" that could protect Aboriginal rights and title.[7]

For example, fiduciary duty is slightly curtailed, but ultimately confirmed in 2002 in *Wewaykum Indian Band v. Canada*,[8] where Binnie J. writes that "A fiduciary duty, where it exists, is called into existence to facilitate supervision of the high degree of discretionary control gradually assumed by the Crown over the lives of aboriginal peoples", and such duties "are shaped by the demands of the situation". The language of "called into existence" is significant here. We call into existence things that do not already exist, but which the circumstances require. Moreover, the passive voice leaves it unclear who calls the duty into existence. The Crown? The Court? Who invents this duty and why? If it is "to facilitate supervision" of the Crown's control of Aboriginal peoples, then surely it must be noted that such control and supervision have also been "called into existence", rather than negotiated.

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4 *Guerin v. Canada*, [1984] S.C.J. No. 45, [1984] 2 S.C.R. 335 (S.C.C.).

5 *Indian Act*, R.S.C. 1952, c. 149, s. 18(1).

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

7 James I. Reynolds, *A Breach of Duty: Fiduciary Obligations and Aboriginal Peoples* (Saskatoon: Purich Publishing, 2005) 83.

8 *Wewaykum Indian Band v. Canada*, [2003] S.C.J. No. 50, [2003] 2 S.C.R. 259, 2003 SCC 45 (S.C.C.).

The duty to consult emerges after *Guerin*'s clear articulation of a fiduciary duty, and is further supported by (and, in many ways, arises from) section 35 of the *Constitution Act*, which gives constitutional protection to existing Aboriginal and treaty rights. The duty to consult was set out in *Sparrow* (1990) with explicit reference to section 35, and this was affirmed in *Delgamuukw* (1997),[9] among others. What "the duty to consult" entailed and whom it obliged were questions that courts took up largely on a case-by-case basis, noting that the details were affected by the circumstances.[10] The duty to consult was explicitly understood as part of another court expectation, that of acting in good faith, which was "viewed as an incident of the Crown's fiduciary duty",[11] but in *Delgamuukw* the Court also recognized the instability of that expectation, noting that "the Crown is under a moral, if not legal, duty to enter into and conduct those negotiations in good faith".

As the duty to consult has often been triggered by the violation of rights, Lawrence and Macklem advocate for its *ex ante* use. They also assert its potential as a strategic instrument to "minimize reliance on litigation as a means of recognizing and affirming Aboriginal rights," as a means of identifying those rights in the first place, as having "the objective of creating incentives on the parties to reach negotiated settlements", and on the Crown "to establish processes for inter-departmental scrutiny of the adequacy of consultation …. and to develop a coordinated strategy to seek to avoid litigated outcomes", and perhaps even a springboard to a "jurisprudence of Reconciliation" or "an instrument that fosters reconciliation".[12] It is clear that the Courts have consistently encouraged the Crown to enter into consultation and negotiation wherever possible, and avoid litigation. It is also worth noting that "the duty to consult" has accumulated "several distinct theoretical foundations" which do not always align, and these differences contribute to the overall churn and emergent quality of Aboriginal law.[13]

The fiduciary relationship as a protector of Aboriginal rights and title is not without critique. Richard Flannigan sees the invention of this special fiduciary duty in *Guerin* as having "no support or foundation of

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[9] *Delgamuukw v. British Columbia*, [1997] S.C.J. No. 108, [1997] 3 S.C.R. 1010 (S.C.C.).

[10] *Id.*, at 1113.

[11] Sonia Lawrence and Patrick Macklem, "From Consultation to Reconciliation: Aboriginal Rights and the Crown's Duty to Consult" (2000) 79 *Canadian Bar Review* 271.

[12] *Id.*, 255, 258, 260, 261, 267.

[13] Dwight Newman, *Revisiting the Duty to Consult Aboriginal Peoples*, 2d ed. (Saskatoon: Purich Publishing, 2014) 34-35.

any kind in the conventional fiduciary jurisprudence",[14] and argues it is an instrument of the court in its efforts to constrain sovereign power. "The wrong was simply a failure by the trustee to act according to the terms of the trust. There was only a trust law (nominate) issue. That issue had nothing to do with the nature of Indian title, unconscionability or, indeed, the fiduciary responsibility of the Crown."[15] Jamie Dickson has gone further to assert that the idea of a fiduciary relationship has "reinforce[d] a paternalistic and constitutionally immoral power structure".[16]

In 2004, this inadequate or unnecessary fiduciary responsibility was "eclipsed" in the *Haida Nation* decision with a more explicit idea of "the honour of the Crown", from which, it argued, flows fiduciary responsibility and the duty to consult.[17] This was baldly restated in *Rio Tinto* (2010): "The duty to consult is grounded in the honour of the Crown."[18] Fiduciary duty had already been linked in *Sparrow* to the honour of the Crown. In the decision of Dickson C.J.C. and La Forest J., the Court said that "a legislative objective must be attained in such a way as to uphold the honour of the Crown and be in keeping with the unique contemporary relationship, grounded in history and policy, between the Crown and Canada's aboriginal peoples". David Arnot has read the "honour of the Crown" as inherent in fiduciary duty, calling it "a rebuke of government privilege" and suggesting that it "restored the ancient concept of holding ministers to a standard of fair dealing that stands above and outside the black-letter law".[19] Dickson argues that the "attempted use of non-conventional fiduciary concepts in Aboriginal law failed" and that the courts have tried to replace them with the idea of the honour of the Crown. The difficulty in the switch is that the former was not explicitly thrown out and replaced.[20]

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[14] Richard Flannigan, "The Boundaries of Fiduciary Responsibility" (2004) *Canadian Bar Review* 83:1, 65.

[15] *Id.*, 61, n. 71,

[16] Jamie D. Dickson, *The Honour and Dishonour of the Crown: Making Sense of Aboriginal Law in Canada* (Vancouver: UBC Press and Purich Publishing, 2015) 9.

[17] *Id.*, 10.

[18] *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, [2010] S.C.J. No. 43, 2010 SCC 43, [2010] 2 S.C.R. 650, at para. 32 (S.C.C.), cited in Dwight Newman, *Revisiting the Duty to Consult Aboriginal Peoples*, 2d ed. (Saskatoon: Purich Publishing, 2014) 167.

[19] David Arnot, "The Honour of the Crown," 60 *Saskatchewan Law Review*, 1996, 340.

[20] Jamie D. Dickson, *The Honour and Dishonour of the Crown: Making Sense of Aboriginal Law in Canada* (Vancouver: UBC Press and Purich Publishing, 2015), 149.

The honour of the Crown is an old concept whose history is relevant, but not directive in its present application in cases concerning Aboriginal rights and title: "The development of the honour of the Crown doctrine in Canada is and will be a novel, contemporary project."[21] It is widely acknowledged that its honour is not always evident in the Crown's actions, and that it is an aspirational or even hollow concept. In *Badger* (1996), the Court found that "the honour of the Crown is always at stake in its dealings with Indigenous people [*i.e.*, not just treaties]. It is always assumed that the Crown intends to fulfill its promises. No appearance of 'sharp dealing' will be sanctioned."[22] Prior to *Haida Nation* (2004), consultation was commonly restricted to established rights, but by the late 1990s, courts were expanding its use. Echoing Lawrence and Macklem's call for *ex ante* application of the duty to consult, *Haida Nation* (2004) asserted an expansive approach as necessary to uphold the honour of the Crown, and cited the New Zealand Government's 1997 *Guide For Consultation with Maori* at some length, including its explicit call to consult at the "proposal" stage, ahead of any decision-making. Brian Slattery considers the "honour of the Crown" as one of "three basic elements of Aboriginal law" (the other two are the *Royal Proclamation* of 1763 and treaties), which now "form the framework of the Aboriginal Constitution".[23] Drawing on *Haida Nation* (2004) and *Manitoba Métis* (2013), Slattery writes, "The principle [of the honour of the Crown] lies at the base of the Canadian constitutional order and governs the actions of the Crown from the initial assertion of sovereignty onward."[24] Kent McNeil has similarly argued that maintaining a fiduciary duty and upholding the honour of the Crown "derives from the political and moral import of the act of sovereign acquisition itself".[25]

On this point of sovereignty, we might usefully step back to ask: what is "the Crown"? The nuances of this question were at the heart of the decision in *Mikisew Cree* (2018). In politics and law, the Canadian Crown is a corporation sole, which is a legal personality: "this legal person personifies the Canadian state and acts as the guarantor of the rule of law and the underlying authority behind Canada's institutions. … As a legal person, the Crown can hold property and enter into contracts.

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[21] *Id*., 28.

[22] *R. v. Badger*, [1996] S.C.J. No. 39, [1996] 1 S.C.R. 771 (S.C.C.).

[23] Brian Slattery, "The Aboriginal Constitution", *The Supreme Court Law Review: Osgoode's Annual Constitutional Cases Conference* 67, (2014), 319.

[24] *Id*., 320-21.

[25] *Id*., 365.

In fact, it is for this reason that the state and the executive can legally act as a person."[26] In its pre-modern iteration, the monarch's power was personal; to increase and stabilize the power of the state, the doctrine of the "king's two bodies" was conceived, to separate the human individual and the body politic so that the latter would endure upon the death of the former. In its relationship with Indigenous peoples, the personhood of the Crown remained significant, and the nation-to-nation relationship was seen as interpersonal. The "mystical" properties of the person-who-is-not-a-person support further critique of the "honour of the Crown", with Courts declining to explain the meaning or source of the term: we "invoke (or 'conjure', as Borrows puts it [Borrows, 1999]) the mystical foundation of (European) sovereign authority in Canada, without any of the usual trappings of modern judicial discourse. In other words: the marked epistemological hybridity of white law's discourse about itself is taken for granted, as if the Scientific Revolution had never happened…".[27] Like the honour and duties of the Crown, the concept of "the Crown" itself is a strategic invention, particularly in the context of settler colonialism and Aboriginal title claims. The monarch is the governor; the Crown is the territorial state.

We will use the recent Supreme Court decisions of *Williams Lake* (2018) and *Mikisew Cree* (2018) to offer a geographical critique of the evolution and application of these constitutional concepts as they stand at the end of the second decade of the 21st century.

III. *WILLIAMS LAKE* 2018

The *Williams Lake* (2018) decision deals with the concepts of the Crown, fiduciary duty, and honour of the Crown in the context of a claim centred upon land dispossession in territory that lacks treaties. Focused on the wrongful displacement, beginning in the 1860s, of the Williams Lake Indian Band from their long-term village site at the head of Williams Lake, the Band took this case to the Specific Claims Tribunal in 2009. They succeeded in arguing before the Tribunal that settlers,

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[26] Philippe Lagassé and James W.J. Bowden, "The Crown as Corporation Sole and the Royal Succession: A Critique of Canada's Succession to the Throne Act, 2013", (2014) 23:1 *Constitutional Forum*, 18.

[27] Mariana Valverde, "The Crown in a Multicultural Age: The Changing Epistemology of (Post)colonial Sovereignty", (2012) 21:1 *Social & Legal Studies*, 5; John Borrows, "Sovereignty's Alchemy: An Analysis of *Delgamuukw v. British Columbia*", (1999) *Osgoode Hall Law Journal* 37, 537-96.

contrary to colonial law and obligation, took their village lands illegitimately, and upon entry into Confederation the Federal Crown inherited that obligation and fiduciary duty. The ruling held that in laying out reserves in 1881, Commissioner Peter O'Reilly's prioritization of settler "rights" to the exclusion of Indigenous claims and rights constituted a break from the honourable obligations of the Crown and the abdication of its fiduciary duty. The Federal Court of Appeals overturned the Tribunal in 2016, finding that O'Reilly reconciled the Crown's duty to protect Indigenous lands from settler occupation simply by setting aside a reserve near the village site in 1881. The 2018 Supreme Court ruling overturned the FCA ruling and reinstated the Tribunal's findings.

At the heart of the SCC decision was the issue of the Crown's fiduciary duty and its application to actions during and after the colonial era. In what they termed "an extended meaning of 'Crown'", the majority confirmed that the breach of fiduciary duty by the Imperial Crown became the responsibility of the Canadian Crown,[28] an inheritance that was noted in the terms of the specific claims process the Tribunal oversaw. While the decision recognizes a use and occupation claim to land by the Williams Lake band, it deploys "fiduciary duty" to talk about Crown conduct rather than consider the legitimacy of the Crown's claim to territorial sovereignty in the first place. In essence, the specific claim to place and its use is the geography recognized by the decision. However, the fundamental political geography remains unquestioned. At what point, by what mechanisms, and under what moral authority did the Crown obtain underlying sovereignty to the territory in question? By focusing the decision on the conduct of the Crown *following the assertion of territorial sovereignty*, the Justices effectively legitimate the Crown's land claim, not the Indigenous one. There is an unresolved tension here.

While not resolved in the decision, the reasoning in *William Lake* (2018) does shine a light on this tension. The honour of the Crown is mentioned only three times in the decision, noting that the Tribunal had argued the honour of the Crown gives rise to a *sui generis* fiduciary duty and that the Province of British Columbia is bound by it. More frequently, the decision refers to an expected "standard of conduct". Despite Dickson's assertion of the superiority and centrality of the honour of the Crown, *Williams Lake* (2018) concentrates on the fiduciary duty and an appropriate standard of conduct of the Crown in the

[28] *Williams Lake* (2018), at paras. 102-106.

establishment of reserves. Significantly, however, the decision also cites the Tribunal's view of "the fiduciary relationship grounded in the assertion of Crown sovereignty in British Columbia"[29] and that "[t]he assertion of Crown title placed the Colony in a fiduciary relationship with the aboriginal inhabitants".[30] The decision also notes the Tribunal's recognition of the nature of the interest at stake. "It was an interest in the land on which the band had had its settlement — land with which the band had a 'tangible, practical and cultural connection'", and this "grounded" the Crown's duty.[31] Here, then, fiduciary duty does not flow abstractly from the honour of the Crown, but materially from the assertion of territorial sovereignty. The Crown's territorial claim compels a narrative of honour and duty in order to legitimate itself. In this sense, the territorial claim serves to constitute the Crown in the first instance.

IV. *MIKISEW CREE* 2018

In distinction to *Williams Lake* (2018), the *Mikisew Cree* (2018) decision is set within the context of a treaty relationship. Located in the northeastern portion of what is today called Alberta, the Nation's land is part of Treaty 8.

In 2012, in response to new environmental legislation, the Mikisew Cree went to Federal Court to insist that the Crown's "duty to consult" them should apply to the entire legislative process in any instance where the aspects of the treaty relationship would be impacted by proposed legislation. The Federal Court affirmed the Mikisew position, but the Federal Court of Appeals overturned it. The case went before the Supreme Court in January 2018, which decided against the Mikisew on October 11, 2018.

This decision highlights the honour of the Crown and repeatedly asserts that it is the grounding for the duty to consult. The majority held that, "With respect to the duty to consult, the development of legislation by ministers is legislative action that does not trigger this duty. The duty to consult is an obligation that flows from the honour of the Crown, a foundational principle of Aboriginal law that governs the relationship between the Crown and Aboriginal peoples. This duty requires the Crown to consult Aboriginal peoples before taking action that may

[29] *Id*., at para. 43.
[30] *Id*., at para. 114.
[31] *Id.*, at paras. 72-73.

adversely affect their asserted or established rights under s. 35 of the *Constitution Act, 1982* and ensures that the Crown acts honourably by preventing it from acting unilaterally in ways that undermine s. 35 rights. Although the duty to consult has been recognized in a variety of contexts, Crown conduct sufficient to trigger the duty has only been found to include executive action or action taken on behalf of the executive."[32] In this, the Court's decision echoes the *Mikisew Cree* decision of 2005,[33] which also asserted the duty to consult flows from the honour of the Crown and "its fiduciary duty to consult".

Mikisew Cree (2018) takes an approach that asserts Parliamentary supremacy over Aboriginal law, which is the contingent understanding of Aboriginal title: "Recognizing that a duty to consult applies during the law-making process may require courts to improperly trespass onto the legislature's domain. Parliamentary sovereignty mandates that the legislature can make or unmake any law it wishes, within the confines of its constitutional authority."[34] The duty to consult is thus understood as a problem because it might interfere with what Parliament does. Aboriginal title and law are not to be allowed to restrain Parliament and thus, Parliament decides the boundaries of Aboriginal title and law.

The majority decision correctly notes that, in strictly constitutional terms, the Crown is the executive and the Queen's representative, separate and distinct from the legislature. This is an important assertion. To blur the difference between executive and legislative authority risks endangering the independence of Parliament as a legislative body which deliberates on its own terms and not merely as an instrument of the executive. However, this elides the political geographic constitution of the Crown in Canada in the first place.

In the concurring decision of Rowe J. *et al*., in *Mikisew Cree* (2018), they echo the framework in *Williams Lake* (2018) and argue that "[t]he honour of the Crown arises from the fiduciary duty that Canada owes to Indigenous peoples following the assertion of sovereignty".[35] This statement begs the same questions about the timing, means, and legitimacy of Crown territorial claims raised above in relation to the reasoning in *Williams Lake* (2018). It positions the Crown as constituted by legitimating conduct, and implies that Indigenous territorial

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[32] *Mikisew Cree* (2018).

[33] *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, [2005] S.C.J. No. 71, [2005] 3 S.C.R. 388, 2005 SCC 69 (S.C.C.).

[34] *Mikisew Cree* (2018).

[35] *Id.*, at para. 153.

sovereignty was somehow overlain by Crown claims underwritten by such conduct. This tension of political geography remains largely unspoken and completely unresolved in the decision.

In their dissent in *Mikisew Cree* (2018), Abella and Martin JJ. offered a broader view than the majority by pointing to the primacy of the Crown as a legitimating tool, echoing *Badger* (1996): "The honour of the Crown is always at stake in its dealings with Indigenous peoples, whether through the exercise of legislative power or executive authority."[36] However, its geographical basis remains obscured in this formulation. They acknowledge the assertion of the Crown's territorial claim and accept it without question, locating legitimacy in conduct.

As we have conceived of it, then, the honour and duties identified in the decisions are strategic instruments deployed to secure territorial claims. The honour of the Crown here is only aspirational; in practice the Crown functions as a dishonourable land claim due to the ongoing failure to reconcile itself with pre-existing Indigenous territorial sovereignty. In this light, *Mikisew Cree* (2018) answers the wrong question. Rather than who or what represents the Crown in dealing with Indigenous peoples, the issue is how the Crown is constituted in the first place by claims of legitimate territorial sovereignty over the lands in question.

V. THE GEOGRAPHY OF THE CROWN

When we argue that the ideas of the honour and duties of the Crown fundamentally concern political geography, we are referring to the politics of exercising power and control over, thereby producing, space. We have particular interest in territoriality. By "territoriality", we refer to the desire for and management of territory: the placement of borders on land and maps, and the practices, beliefs, and identities that are imagined from and flow through them, including the concept of sovereignty. Political geography as a field approaches territoriality as a socio-material process whose product, territory, must be "actively made, unmade, and made again".[37] Thus, the "reality" of political geography is constituted by an inextricable interweaving of the materiality of land and contested

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[36] *Id.*

[37] Anssi Paasi, "Boundaries as Social Processes: Territoriality in the World of Flows", in David Newman, ed. *Boundaries, Territory and Postmodernity*, London and Portland, OR: Frank Cass, (1999), 69-88; Elizabeth Lunstrum, "Landscapes of Terror and the Unmaking of State Power in the Mozambican 'Civil' War" (2009) 99:5, *Annals of the American Association of Geographers*, 887.

ideas and practices of how it is bounded and claimed. The Crown, its honour, and duties are the core ideas and practices underlying Canada's territorial claim. That claim is not natural or immutable – it is contested by other, quite real ideas and practices. It is a political geography.

The Crown's claim to territory in Canada is the specific product of the evolution of a modern bureaucratic state, and not merely land claimed for occupation and use. It "should never be conceptualized in isolation, for it is part of a complex of state power, geography and identity".[38] Several scholars have noted the possibility that terror and territory have the same etymological base, and argued this would not be inconsistent with the existing meaning and practice of territory. States threaten and exercise violence against those who threaten their territory and thus their authority, whether the opponents are internal or external enemies. This "legitimate" violence is inherent to the meaning of the modern state: "To occupy a territory is to receive sustenance and to exercise violence. Territory is land occupied by violence."[39]

As such, governments and citizens, through "a bundle of political technologies" including "techniques for measuring land (property value) and controlling terrain", practice territoriality.[40] These techniques constitute much of the violence of Crown claims to territory, for they police land access with the threat of violence in the case of transgression of associated laws (*i.e.*, arrest for property trespass). In Canada, the strategic deployment in law of the idea of the "frontier" and the practices of survey and cadastral mapping assisted colonial officials in asserting Crown sovereignty and installing a new geographical order, both materially and symbolically.[41]

Thus, territory is not merely a bounded space. Additionally, sovereignty and physical borders do not always converge absolutely; states exert sovereignty over non-resident citizens and beyond their bordered jurisdictions (*e.g.*, visa travel requirements). Nevertheless,

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[38] Gearóid Ó Tuathail, "Borderless Worlds? Problematising Discourses of Deterritorialisation", (1999) 4:2 *Geopolitics*, 140.

[39] Stuart Elden, *The Birth of Territory* (Chicago and London: University of Chicago Press, 2013); Barry Hindess, "Terrortory", *Alternatives: Global, Local, Political*, 31:3 (2006), 243-257; quotation from William Connolly, "Tocqueville, Territory and Violence", in M.J. Shapiro and H.R. Alker, eds. *Challenging Boundaries: Global Flows, Territorial Identities* (Minneapolis: University of Minnesota Press, 1996), 144.

[40] Stuart Elden, *The Birth of Territory* (Chicago and London: University of Chicago Press, 2013), 322-23.

[41] Nicholas Blomley, "Law, Property, and the Geography of Violence: the Frontier, the Survey, and the Grid" (2003) 93:1 *Annals of the Association of American Geographers*, 121-41.

sovereignty is exercised through a land base, which is transformed into "territory".[42] This is consistent with the legal concept of jurisdiction, but the emphasis here is on actual land as known, occupied, stewarded and controlled rather than simply the geographical partition of authority. In this sense, territory is continually *re*produced as a contested socio-material terrain.

Beyond such techniques (and giving them a rationale), the idea at the core of the political geography of settler colonialism in Canada is the Crown. It is in the name of the Crown that representatives of the state have pursued territoriality; without ontological explanation, an idea has claimed the land. This underpinning of territorial claims squares with Barry Hindess's discussion of *Leviathan*, where he observes, "Hobbes's sovereign is an artificial person, a territorial state…"; the legal person and the territorial claim are one and the same thing.[43] The Crown is, by definition, the assertion of territorial sovereignty.

In the case of British Columbia, the Crown's claim of territorial sovereignty arose in the first instance simply from its own aspirational assertion and not from knowledge, occupation, stewardship or actual control (as *Baker Lake* and others have asserted as source of Aboriginal title). Haijo Westra and Peter Hutchins has called these "paper claims", and they are variably "justified" by the doctrine of discovery and *terra nullius*.[44] Moreover, the political geography of settler colonialism pursues the "elimination" of Indigenous polities. This may be, but is not necessarily, genocidal. It always seeks to deterritorialize, which is to sever the relationship between Indigenous people and their land. To establish a new colonial geography, with an inherent sense of eternal and inevitable existence requires removing any trace of "permanence" of pre-colonial societies.[45] These are the violent results of the techniques of territoriality noted above. This is what the courts and governments deploy the honour of the Crown and duty to consult to purportedly confront, but actually conceal.

As Asch and Macklem observed about the shifting rationales for Canadian sovereignty in the 1990 *Sparrow* decision, Canada's claim is

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[42] Stuart Elden, *The Birth of Territory* (Chicago and London: University of Chicago Press, 2013), 329.

[43] Barry Hindess, "Terrortory" (2006) 31:3 *Alternatives: Global, Local, Political* 247.

[44] Peter W. Hutchins, "Power and Principle: State-Indigenous Relations across Time and Space," in Louis A. Knafla and Haijo Westra, eds., *Aboriginal Title and Indigenous Peoples: Canada: Australia, and New Zealand* (Vancouver and Toronto: UBC Press, 2010), 223.

[45] Patrick Wolfe, "Settler Colonialism and the Elimination of the Native" (2004) 8:4, *Journal of Genocide Research*, 387-409.

grounded "ultimately in what we call the settlement thesis and colonial beliefs about the superiority of European nations".[46] These beliefs are made manifest through geography. When it comes to territory and sovereignty, law works through land and land works through law. As Patrick Wolfe has argued, "settler colonization [is] a structure rather than an event"[47] and it could not establish its political geography without the legal invention of the Crown. For settler colonialism, "the logic of elimination…is premised on the securing — the obtaining and the maintaining of territory".[48] As Asch and Macklem note, "nowhere in the *Constitution Act, 1867* does it actually state that the Canadian state enjoys sovereignty over its indigenous population". It "justifies, but is not justified by" section 91(24) that awards jurisdiction over "Indians and lands reserved for the Indians" to the federal government.[49] This is due to the construction of sovereignty arising from an aspirational territorial claim that desires the land, not specific control of its residents. Crown governments have been largely indifferent to whether Indigenous peoples are inside or outside that territory, but if they are inside, they are subject to Canadian law. It is in the act of securing territory that the nation must be invented. While our narratives of nationhood speak of cultural coherence and bottom-up processes of self-government, the reality of settler colonialism is the opposite. Geography determines the governed. The nation is determined after the fact.[50]

When Rowe J., *et al*. wrote in *Mikisew Cree* (2018), "The honour of the Crown arises from the fiduciary duty that Canada owes to Indigenous peoples following the assertion of sovereignty", the order of their logic serves to hide the empty and unstable source of the Crown's assertion. The assertion invokes the Crown as a spectral sovereign projected onto polities that do not recognize its authority. In the first instance, the Crown appears to ignore the people and claim the territory. It then treats the people's dissatisfaction as a problem that it has an obligation to address. In response, courts and governments invoke the "honour of the Crown" as a technique to assert and naturalize that claim. Seen from the

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[46] Michael Asch and Patrick Macklem, "Aboriginal rights and Canadian sovereignty: An essay on R. v. Sparrow" (1991) 29:2 *Alberta Law Review*, 501.

[47] Patrick Wolfe, "Settler Colonialism and the Elimination of the Native" (2004) 8:4 *Journal of Genocide Research*, 390.

[48] *Id.*, 402.

[49] Michael Asch and Patrick Macklem, "Aboriginal rights and Canadian sovereignty: An essay on R. v. Sparrow", (1991) 29:2 *Alberta Law Review*, 510.

[50] Ernest Gellner, *Nations and Nationalism*; Stuart Elden, *The Birth of Territory* (Chicago and London: University of Chicago Press, 2013).

perspective of the political geography of the Crown, the burden on its claim arises from incomplete conquest. Discomfort with what could be termed a failure to fully colonize — failure to eliminate Indigenous communities and sever them from their land, failure to assimilate and reduce them to individual subjects — has driven the courts to view that failure as intentional and, indeed, signifying the Crown's honour.

Thus, the presence of Indigenous people, polities, and territories within the territory claimed by the Crown has produced the need for shifting political strategies that would maintain the authority of the claim. These have included extermination policies, displacement, child theft, and assimilation. It also required a legal framework, which has alternated between *terra nullius*, land theft and displacement, erasure of land claims, devaluation of Indigenous land claims because Indigenous peoples were deemed uncivilized, and the reduction or partition of "Aboriginal title" as a claim of property rather than sovereignty. These strategies were often openly racist, and none has resolved the fundamental issue of the need to reconcile Indigenous people and their polities with the Crown's claim. Indigenous scholars in particular have called for us to "examine how white possession manifests in regulatory mechanisms, including legal decisions",[51] and consequently goes unquestioned. Particularly in the wake of the *Calder* decision in 1973, activism and legal challenges by Indigenous people have sustained their refusal of the Crown's claim to govern their territory. They have steadily compelled the Canadian state to face its history and to reconcile its actions with its stated values. The honour of the Crown and its fiduciary duty have become legally necessary because the Crown has yet to reconcile its land claims with the sovereign territorial claims of Indigenous polities.[52]

When we speak of claims to territorial sovereignty in examining the political geography here, there are two understandings at work. Claims made by empires are just lines on a map – they can be drawn, redrawn and withdrawn. Indigenous claims are inhabited and practiced by people on the ground. The ideas of the honour and duties of the Crown arise from and strategically serve the stabilization of the Crown's paper claim; the courts have represented less well Indigenous perspectives, despite the

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[51] Aileen Moreton-Robinson, *The White Possessive: Property, Power, and Indigenous Sovereignty* (Minneapolis: University of Minnesota Press, 2015), 134.

[52] Brian Slattery, "The Aboriginal Constitution", (2014) *The Supreme Court Law Review: Osgoode's Annual Constitutional Cases Conference* 67, 321-322.

fact that they align with political geography theorization of sovereignty – as the tensions we identified in *Williams Lake* (2018) and *Mikisew Cree* (2018) show. McNeil notes that SCC decisions that have tended to treat Aboriginal title as a use and occupation right and conceive of Aboriginal self-governance as a separate issue reflect this.[53] The effect has been to sever Indigenous collective polities from their territories in legal discourse. While decisions since *Delgamuukw* (1997) have gone some ways towards reconnecting these severed halves of a properly conceived Indigenous territorial sovereignty, the legitimacy of an underlying assertion of Crown sovereignty remains unchallenged — it constitutes the very terms of its existence and all that it recognizes.

Mikisew Cree (2018) exposes the reality of a governance structure in which Indigenous sovereignty and the parties' treaty obligations are isolated from the political process. The honour of the Crown is not meaningless, but it is empty. This hollowness is not unique to constitutional conventions. It is not unlike the aspirational geography of drawing a line on a map and filling it with settlement and the assertion of political authority afterwards, as the Imperial Crown did. While it has been recognized that the honour of the Crown is only an aspirational concept, and one that might be actualized by the idea and practice of the duty to consult, it must still go farther because the geographical realities remain.

Because it answers "who is the Crown?" rather than acknowledging the purpose of the honour of the Crown as a legal instrument, *Mikisew Cree* (2018) appears to retreat from using the Crown's honour or duties as incentives to negotiation and Reconciliation. Used expansively, the duty to consult has the potential to address the much larger, more fundamental question: what legal or moral right does Canada have to assert sovereignty over Indigenous people and their territories, particularly in places not even covered by treaty? The honour of the Crown concerns the way in which the Crown is going to continue to assert sovereignty over the territory it calls Canada, despite its legally and morally uncertain claim to do so.

Given the uncertainty, the courts have said, starting most explicitly with *Haida Nation* (2004), that it is dishonourable to proceed with anything that affects Indigenous people without consulting them. "The honour of the Crown" and the consequent duty to consult arise directly from our political

[53] Kent McNeil, "Aboriginal Rights in Canada: From Title to Land to Territorial Sovereignty", (1998) 5:2 *Tulsa Journal of Comparative and International Law*, 253-98.

geography. The purpose of the invention of the duty to consult is to provide moral grounds to secure the territorial claim of the Crown. The courts have signaled consciously or otherwise, that they can continue to enforce the legality of that claim only if settlers and their governments behave honourably. While McNeil has noted the limitation of the courts to rule on the sovereignty of Canada, he asks how the courts' recognition of Canada's sovereignty as fact can be squared with the demonstrable lack of "political and legal control of most of the province" when it claimed British Columbia. As McNeil has put it, "in *Haida Nation* and *Taku River*, the Court demonstrated that it was becoming uncomfortable with unquestioned Crown sovereignty, given the realization that Indigenous nations in the province had sovereignty (*de facto*, and *de jure* under their own systems of law) prior to British colonization".[54] While the courts have moved steadily towards Aboriginal title as an inherent right more than a contingent right, both remain present. McNeil, Lindberg and Hoehn have argued further that honourable behaviour includes "accepting the continued existence of Indigenous sovereignty and legal systems".[55] The political geography of British Columbia is fundamentally contested: the Crown's claim of territorial sovereignty is challenged by the pre-existing polities of Indigenous peoples through their repeated claims that their territory was never ceded.[56] The courts have tried to find a balance between order and justice (generally favouring the former as they pursue a careful expansion of the latter), but there is a fundamental tension between order and justice, when it concerns land and territorial sovereignty. The peace and order of the status quo is unjust and violence-laden; a just restoration of land rights is likely profoundly destabilizing to the Canadian and British Columbian Governments' idea of the spatial order. However, we must remain mindful that the competing claims differ in their defining characteristics: in their use of boundaries, in the relationship between inhabitance and sovereignty, and in the legal and moral basis for their claims.

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[54] Kent McNeil, "The Doctrine of Discovery Reconsidered: Reflecting on Discovering Indigenous Lands: The Doctrine of Discovery in the English Colonies, by Robert J. Miller, Jacinta Ruru, Larissa Behrendt, and Tracey Lindberg, and Reconciling Sovereignties: Aboriginal Nations and Canada, by Felix Hoehn", (2016) 53:2 *Osgoode Hall Law Journal*, 726.

[55] *Id.*, 728.

[56] Patricia Burke Wood and David A. Rossiter, "The Politics of Refusal: Aboriginal Sovereignty and the Northern Gateway Pipeline", (2017) 61:2 *The Canadian Geographer*, 165-77.

VI. Conclusion

The instruments invented by the courts to address the instability of Canadian territorial sovereignty have brought many past injustices to the surface and enabled a measure of redress in many cases. They have provided a legal framework and foundation for the legitimacy of Indigenous land and governance claims under Canadian law and a platform for the exposure of this unresolved history. They are an attempt and a plea for the legal to address a massive gap in the political. Indigenous people are written into *Canadian* law; Indigenous polities are not, and neither people nor polities are integrated into a political-geographic system marked by any kind of shared sovereignty or even consultative architecture. In some ways, then, the Court is speaking to the immense difficulty of upholding justice in a country with a Parliament and an Executive that has not behaved, and still does not behave, honourably or justly (not just legally) in securing its territorial claims.

These instruments are limited in their capacity to address the situation precisely because they are instruments of the courts, which are themselves limited in their ability to restrain Crown sovereignty and the legislative process, as *Mikisew Cree* (2018) made clear. The limitations are also evident in *Williams Lake* (2018), in the Court's failure to address the larger question of sovereignty underlying individual land claims. For all the courts' ambition and goodwill, the available instruments are constituted by and grounded in an acceptance of imperial sovereign territorial claims. One might cynically read the honour of the Crown not only as aspirational but also evasive, in that it avoids an acknowledgment of other foundational political geographies and shared territorial sovereignty. The stability of present Crown claims to the territory of Canada relies upon a refusal to apply the concept of honour to the securing of the geographical foundations of the nation.

First Nations told the Royal Commission on Aboriginal Peoples that Canada needed "a forum to restore and renew the relationships between aboriginal and non-aboriginal people and that forum must embody, more genuinely and effectively than any of our existing institutions, 'the honour of the Crown'".[57] *Mikisew Cree* (2018) seems to teach us at least one reason why, despite the Cree's efforts, the House of Commons cannot be that forum, unless and until it binds itself to uphold the honour

[57] David Arnot, "The Honour of the Crown," 60 *Saskatchewan Law Review*, 1996, 345.

of the Crown. The courts have been more successful at holding the Crown to its aspirations, but there too, we find limits. Are the courts seeking to create a check on Parliament's sovereignty, as Flannigan argued, or are they acknowledging one?

Territory is not a neutral entity. The incomplete project of settler colonialism in British Columbia exposes the "Crown" as no mere governor, but a violent territorial claim. In our view, *Williams Lake* (2018) and *Mikisew Cree* (2018) demonstrate that Crown claims to territory in Canada remain an unstable project of political geography, in which the Court plays both a disruptive and accommodating role. Understanding that the Crown is a land claim reveals more clearly the political work being done by the legal instruments of its duties and honour. The legitimacy of the Crown's claim is in dispute; in British Columbia, its legitimacy is tenuous, at best. Instruments that assist the courts in addressing their assessment of Aboriginal also serve to normalize the Crown's claim and guard it from scrutiny. And yet: as the political bodies of the government continue to delay or refuse negotiations that might reconcile the Crown's claim with Indigenous peoples, the courts' efforts to incentivize negotiations help to expose the instability of the Crown's position. Any act of creating and enforcing exclusive territory is an unstable act that will require vigilance and violence to maintain. In the case of settler colonialism, the instability is increased, as the creation of territory is predicated on the imposition of one polity on top of another, and that entails either the latter's consent or elimination.