

Mikisew Cree: A Lost Opportunity for Doctrinal Clarity on Constitutional Principles

Abra Martin

IN THE 1998 *Secession Reference*, the Supreme Court of Canada put forth a vision of unwritten constitutional principles that function “in symbiosis” with each other. However, since then, the Court’s jurisprudence on parliamentary sovereignty has brought into question this “in symbiosis” framework and has created an unacknowledged hierarchy among constitutional principles subject to certain nuances. The 2018 case of *Mikisew Cree First Nation v Canada* offered the Court an opportunity to provide clarity on the use of these principles, as it required that the Court consider the application of multiple constitutional principles, including that of parliamentary sovereignty.

However, instead of finding consensus and providing clear direction, the Court split 3-2-1-3. In a confusing decision, the Court’s divergent sets of reasons privilege different constitutional principles, often without substantive engagement with important doctrinal issues or previous jurisprudence. The Court’s inconsistent use of principles also enables it to avoid addressing important theoretical questions regarding constitutional principles and the status of Aboriginal and treaty rights in the Canadian constitutional order. As such, this paper argues that the Court missed an important opportunity in *Mikisew Cree* to strengthen its doctrinal framework on the use of constitutional principles, but also more broadly, to

EN 1998, DANS le *Renvoi sur la sécession*, la Cour suprême du Canada a présenté une conception des principes constitutionnels non écrits qui « fonctionnent en symbiose » les uns avec les autres. Cependant, depuis, la jurisprudence de la Cour sur la souveraineté parlementaire a remis en question ce cadre « en symbiose » et a créé une hiérarchie non reconnue entre les principes constitutionnels avec certaines nuances. En 2018, l’arrêt *Mikisew Cree First Nation c Canada* permet à la Cour d’éclaircir l’utilisation de ces principes, car il fallait mettre en application multiple principes constitutionnels, dont celui de la souveraineté parlementaire.

Cependant, au lieu de trouver un consensus et une position claire, la Cour se divise 3-2-1-3. Dans une décision qui prête à confusion, les motifs divergents de la Cour privilégient différents principes constitutionnels, souvent sans s’engager en substance sur la doctrine ou sur la jurisprudence. L’utilisation inconstante des principes par la Cour lui a aussi permis d’éviter de traiter d’importantes questions théoriques concernant les principes constitutionnels et le statut des droits ancestraux et issus de traités dans l’ordre constitutionnel canadien. De la sorte, le présent document soutient que la Cour a raté une occasion importante dans l’affaire *Mikisew Cree* de renforcer son cadre doctrinal sur l’utilisation des principes constitutionnels, mais aussi, de façon plus générale, de fournir une direction claire sur le

provide clear direction on the Court's role, if any, in effecting reconciliation.

rôle de la Cour, le cas échéant, dans la réalisation de la réconciliation.

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I. INTRODUCTION

In the 1998 *Reference re Secession of Quebec (Secession Reference)*, the Supreme Court of Canada (the Court) put forth a vision of unwritten constitutional principles that “function in symbiosis” with each other.¹ In recognizing federalism, democracy, constitutionalism and the rule of law, and respect for minorities as foundational principles, the Court stated that “no single principle can be defined in isolation from the others, nor does any one principle trump or exclude the operation of any other.”² However, since then, the Court’s jurisprudence has been marked by the prominence of another constitutional principle: parliamentary sovereignty.³ The Court’s frequent, and often determinative, invocation of parliamentary sovereignty in the years following the *Secession Reference* has called into question the “in symbiosis” approach to constitutional principles.

The 2018 case of *Mikisew Cree First Nation v Canada (Governor General in Council) (Mikisew Cree)*⁴ presented the Court with a valuable opportunity to clarify and strengthen its doctrinal framework on the use of constitutional

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1 [1998] 2 SCR 217 at para 49, 161 DLR (4th) 385 [*Quebec Secession Reference*].

2 *Ibid.*

3 See Vanessa MacDonnell, “The New Parliamentary Sovereignty” (2016) 21:1 Rev Const Stud 13.

4 2018 SCC 40 [*Mikisew Cree*].

principles in light of its jurisprudence following the *Secession Reference*. The question at issue in *Mikisew Cree*, namely whether the duty to consult applied to the legislative process, required that the Court consider the application of multiple conflicting principles, including that of parliamentary sovereignty. In addition to posing important questions concerning how constitutional principles interact, *Mikisew Cree* also more broadly asked the Court to consider its role in effecting reconciliation under section 35 of the *Constitution Act, 1982*.⁵

Yet, instead of finding consensus and providing clear direction on these important constitutional issues, the Court split 3-2-1-3. Relying on inconsistent applications of constitutional principles, the majority of the Court concluded that the duty to consult does not apply to the legislative process. However, the four reasons, which privilege different constitutional principles often without substantive engagement with important doctrinal issues or previous jurisprudence, undermine the legitimacy of the unwritten Constitution; they also hinder the ability of the Court to provide clear direction on the important constitutional issues raised by the case of *Mikisew Cree*.

This paper analyzes the use and development of constitutional principles in Canadian jurisprudence to argue that *Mikisew Cree* represents a missed opportunity for doctrinal clarity. First, this paper provides an overview of the origins and development of constitutional principles in the Canadian constitutional order, culminating in the “in symbiosis” framework put forth in the *Secession Reference* (Section II). Second, it analyzes the dominance of parliamentary sovereignty after the *Secession Reference*, which has brought into question this “in symbiosis” framework and created an unacknowledged hierarchy among constitutional principles subject to certain nuances (Section III). Third, it contends that the Court’s divergent and inconsistent use of constitutional principles in *Mikisew Cree* enabled the Court to avoid addressing important theoretical questions regarding constitutional principles and the status of Aboriginal and treaty rights in the Canadian constitutional order (Section IV). Ultimately, this paper concludes that the Court missed an important opportunity in *Mikisew Cree* to strengthen its doctrinal framework on the use of constitutional principles, but also more broadly, to provide clear direction on the Court’s role, if any, in effecting reconciliation.

5 *Constitution Act, 1982*, s 35, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11.

II. CONSTITUTIONAL PRINCIPLES: ORIGINS, DEVELOPMENT, AND CHALLENGES

The Court has a long history of relying on unwritten constitutional principles, with the *Secession Reference* representing the most comprehensive explanation of constitutional principles to date. While the Court's use of constitutional principles has varied over the course of time, including in the years that followed the *Secession Reference*, the Court's prominent use of principles in the *Secession Reference* should not be characterized as a simple anomaly. The Court's jurisprudence leading up to the *Secession Reference* demonstrates a clear trend of affirming and relying on constitutional principles.

In order to place the *Secession Reference* in its proper context, this section provides an overview of the origins and development of constitutional principles. First, it examines the ways in which the unwritten elements of the Constitution were recognized and used prior to the *Secession Reference* (Section II.A). Second, it discusses the framework provided by the Court in the *Secession Reference* (Section II.B). Finally, it analyzes the inherent challenges and ambiguities associated with the use of constitutional principles (Section II.C).

A. The Jurisprudential Foundation for the *Secession Reference*

While constitutional principles were brought to the fore in the 1980s and 1990s, it is important to note that the Constitution has long been held to include unwritten elements. For example, as its name suggests, the so-called “implied bill of rights” doctrine from the 1930s to 1950s recognized that the Constitution contained certain implied (*i.e.* unwritten) rights. While never fully embraced by the entirety of the Court, the implied rights cases are an early manifestation of an approach to constitutional interpretation that recognizes, and relies upon, the unwritten Constitution—an approach that later becomes the dominant one adopted by the Court. Specifically, through four key cases in the 1980s and 1990s, the Court affirmed and developed the unwritten Constitution, laying the jurisprudential foundation for the *Secession Reference*.

Beginning with the 1938 *Reference re Alberta Statutes (Alberta Press)*, where the Court struck down a provincial statute prescribing political speech, the “implied bill of rights” doctrine represents early judicial

recognition of the unwritten Constitution.⁶ As Peter Hogg explains, the theory of an implied bill of rights “was that the Constitution, although lacking an explicit bill of rights (a deliberate choice of the framers in 1867), nonetheless contained an implied bill of rights that restrained the provincial Legislatures and perhaps the federal Parliament from restricting freedom of expression and other fundamental freedoms.”⁷

This doctrine gained further expression in the 1950s when parts of the Court relied upon these implied rights to support invalidating certain laws. For example, in *Saumur v City of Quebec*, Justice Rand, citing *Alberta Press*, invoked freedom of speech and religion to invalidate a by-law prohibiting the distribution of pamphlets by Jehovah’s Witnesses.⁸ Similarly, in *Switzman v Elbling and AG of Quebec*, Justices Rand, Kellock, and Abbott held *ultra vires* a law that, in their view, limited freedom of speech by permitting the Attorney General of Quebec to order the closure of buildings used to propagate communism.⁹

While never adopted by the majority of the Court, the implied bill of rights doctrine is noteworthy in that it marked an important development in Canadian constitutional jurisprudence. As former Chief Justice Brian Dickson wrote extrajudicially:

For those who had grown up with the British tradition of Parliamentary sovereignty, in which courts are obliged to respect the will of the legislature, the line of reasoning set out in the implied Bill of Rights cases marked a rather novel development. It meant that the highest court was prepared to protect individual rights, even if limited to reviewing legislation on the basis of the division of powers.¹⁰

In recognizing that the Constitution included certain unwritten rights that could inform constitutional interpretation, the implied bill of rights doctrine was an early articulation of what would later become a more explicit adoption of the unwritten elements of the Constitution by the Court.

Specifically, in the 1980s and 1990s, four major cases signalled the Court’s increasing recognition and reliance on constitutional principles

6 *Reference Re Alberta Statutes*, [1938] SCR 100 at 132–35 (Duff CJ), 142–46 (Cannon J), 2 DLR 81 [*Alberta Press*].

7 Peter W Hogg, *Constitutional Law of Canada*, student ed (Toronto: Thomson Reuters, 2018) at 15–56.

8 [1953] 2 SCR 299 at 330–32, 4 DLR 641.

9 [1957] SCR 285 at 306–07 (Rand J), 308–09 (Kellock J), 326–28 (Abbot J), 7 DLR (2d) 337.

10 The Right Honourable Brian Dickson, “The Canadian Charter of Rights and Freedoms: Context and Evolution” (2013) 61 SCLR (2d) 3 at para 10 (QL).

and the unwritten Constitution: (1) the 1981 *Reference re Resolution to Amend the Constitution (Patriation Reference)*,¹¹ which relied upon the federalism principle to analyze a constitutional convention; (2) the 1985 *Reference re Manitoba Language Rights (Manitoba Language Rights Reference)*¹² where the Court relied upon the rule of law to deem unconstitutional legislation temporarily valid; (3) the 1993 *New Brunswick Broadcasting Co v Nova Scotia (Speaker of the House of Assembly)*¹³ case where the Court held that the written Constitution, namely subsection 2(b) of the *Charter*, could not abrogate the unwritten Constitution; and (4) the 1997 *Reference re Remuneration of Judges of the Provincial Court (PEI) (Provincial Judges Reference)*¹⁴ where the Court used the principle of judicial independence and subsection 11(d) of the *Charter* to invalidate legislation.

1. The 1981 Patriation Reference

The 1981 *Patriation Reference*—particularly the dissent—represents the Court’s notable shift towards an increasing reliance on constitutional principles. In the *Patriation Reference*, the Court considered whether the principle of federalism meant that the federal government required provincial consent to patriate the Constitution.¹⁵ While the Court generally agreed that provincial consent should be sought, the Court disagreed on whether the principle of federalism could create a legally enforceable obligation on the federal government to seek such consent.

The majority¹⁶ of the Court concluded that federalism cannot give rise to a legally enforceable obligation, stating: “[w]hat is desirable as a political limitation does not translate into a legal limitation, without expression in imperative constitutional text or statute.”¹⁷ Instead, the majority held that the principle of federalism gives rise to a constitutional convention that the federal government receive a “substantial degree” or “measure” of provincial consent to amend, and therefore patriate, the Constitution.¹⁸ As

11 [1981] 1 SCR 753, (*sub nom Reference Re Amendment of the Constitution of Canada (Nos 1, 2 and 3)*) 125 DLR (3d) 1 [*Patriation Reference*].

12 [1985] 1 SCR 721 at 752, 26 DLR (4th) 767 [*Manitoba Language Rights*].

13 [1993] 1 SCR 319 at 377, 100 DLR (4th) 212 [*New Brunswick Broadcasting*].

14 [1997] 3 SCR 3 at para 90, 150 DLR (4th) 577 [*Provincial Judges Reference*].

15 *Patriation Reference*, *supra* note 11.

16 The majority was formed by Chief Justice Laskin and Justices Dickson (as he then was), Beetz, Estey, McIntyre, Chouinard, and Lamer (as he then was) (with Justices Martland and Ritchie dissenting).

17 *Patriation Reference*, *supra* note 11 at 784.

18 *Ibid* at 905.

constitutional conventions are “political in inception,” the consequences of breaking this convention would be political, not legal, in nature.¹⁹

However, in their dissent, Justices Martland and Ritchie disagreed that legal limitations must find expression in constitutional text. Instead, they concluded that federalism created a legally enforceable obligation on the part of the federal government to seek provincial consent.²⁰ To reach their conclusion, the Justices relied on previous jurisprudence, such as *Alberta Press*, to justify the Court’s reliance on unwritten “legal principles and doctrines” where the Constitution “offered no answer.” Specifically, Justices Martland and Ritchie stated:

However, on occasions, this Court has had to consider issues for which the *B.N.A. Act* offered no answer. In each case, this Court has denied the assertion of any power which would offend against the basic principles of the Constitution.

[Discussed various jurisprudence]

It may be noted that the above instances of judicially developed legal principles and doctrines share several characteristics. First, none is to be found in the express provisions of the *British North America Acts* or other constitutional enactments. Second, all have been perceived to represent constitutional requirements that are derived from the federal character of Canada’s Constitution. Third, they have been accorded full legal force in the sense of being employed to strike down legislative enactments. Fourth, each was judicially developed in response to a particular legislative initiative in respect of which it might have been observed, as it was by Dickson J. in the *Amax (supra)* case at p. 591, that: “There are no Canadian constitutional law precedents addressed directly to the present issue....”²¹

Thus, the above passage is an early indication of an emerging tendency on the bench to rely upon the unwritten Constitution to effect outcomes. While part of the dissent in the *Patriation Reference*, Justices Martland and Ritchie’s words would soon be affirmed by a unanimous Court in both the *Manitoba Language Rights Reference*²² and the *Secession Reference*.²³

19 *Ibid* at 774.

20 *Ibid* at 841, 844–45.

21 *Ibid*.

22 *Supra* note 12.

23 *Supra* note 1.

2. *The 1985 Manitoba Language Rights Reference*

In the 1985 *Manitoba Language Rights Reference*, the Court²⁴ brought the unwritten Constitution even further to the fore by relying on the rule of law to deem unconstitutional legislation temporarily valid. Specifically, the Court invalidated all laws enacted in Manitoba since 1890, since the laws had not been printed and published in both English and French in defiance of a constitutional requirement.²⁵ To avoid creating the resulting “legal vacuum,” the Court turned to “a fundamental principle of our Constitution”: the rule of law.²⁶ Finding that this principle “requires the creation and maintenance of an actual order of positive laws which preserves and embodies the more general principle of normative order,” the Court relied upon the rule of law to deem the unconstitutional laws temporarily valid.²⁷

Most interesting in the *Manitoba Language Rights Reference* was the Court’s characterization of the constitutional status and source of the rule of law. Notably, the Court grounded the source of the rule of law in the preambles of both *Constitution Acts* and in the nature of a constitution itself.²⁸ Referencing passages from the *Patriation Reference*—including Justices Ritchie and Martland’s dissent—the Court drew an analogy between the *Manitoba Language Rights Reference* and the *Patriation Reference*:

[I]n the process of Constitutional adjudication, the Court may have regard to unwritten postulates which form the very foundation of the Constitution of Canada. In the case of the *Patriation Reference*...this unwritten postulate was the principle of federalism. In the present case it is the principle of rule of law.²⁹

Thus, the *Manitoba Language Rights Reference* marks an important progression in the use of constitutional principles from informing the recognition of a constitutional convention (in the *Patriation Reference*) to influencing the remedies granted. This progression would be further continued in *New Brunswick Broadcasting*³⁰ when the Court explicitly relied upon a constitutional principle to determine a constitutional outcome.

24 The judgment was delivered by “The Court,” which was comprised of Chief Justice Dickson and Justices Beetz, Estey, McIntyre, Lamer (as he then was), Wilson, and Le Dain.

25 *Manitoba Language Rights*, *supra* note 12 at 747.

26 *Ibid* at 747–48.

27 *Ibid* at 749.

28 *Ibid* at 750–51.

29 *Ibid* at 752.

30 *Supra* note 13 at 377.

3. *The 1993 New Brunswick Broadcasting Case*

In the seminal 1993 case of *New Brunswick Broadcasting*, the Court further developed the unwritten Constitution by explicitly affirming that the Constitution contains “fundamental” unwritten elements, which cannot be abrogated by the written parts of the Constitution.³¹ The question at issue was whether the media could be barred from filming within a provincial legislature on the basis of parliamentary privilege. In finding that parliamentary privilege could be relied upon to bar the filming, the Court elevated the unwritten Constitution to the level of the written Constitution.

Justice McLachlin (as she was then) found that subsection 52(2) of the *Constitution Act, 1982* could not be considered an exhaustive definition of the Constitution “given the clear and stated intention of the founders of our country in the *Constitution Act, 1867* to establish a constitution similar to that of the United Kingdom.”³² As such, Justice McLachlin affirmed that the *Charter’s* entrenchment of written rights do not negate certain unwritten constitutional elements:

I do not understand the entrenchment of written rights guarantees, or the adoption of specific written instruments, to negate the manifest intention expressed in the preamble of our Constitution that Canada retain the fundamental constitutional tenets upon which British parliamentary democracy rested. This is not a case of importing an unexpressed concept into our constitutional regime, but of recognizing a legal power fundamental

31 In *New Brunswick Broadcasting*, *ibid*, the Court, consisting of Chief Justice Lamer and Justices La Forest, L’Heureux-Dubé, Sopinka, Gonthier, McLachlin (as she then was), and Iacobucci, all agreed that the Nova Scotia House of Assembly could bar media from filming within the House (Justice Cory dissented). However, similar to *Mikisew Cree*, there were multiple (albeit not as divergent) sets of reasons. Justice McLachlin (with Justices L’Heureux-Dubé, Gonthier, and Iacobucci) held that a legislative assembly’s privilege to exclude strangers from its assembly has constitutional status and cannot be abrogated by another part of the Constitution, namely subsection 2(b) of the *Charter*. Justice La Forest generally agreed with Justice McLachlin, subject to certain comments regarding the adoption of parliamentary privilege in Canada, which he characterized as “perhaps more matters of perspective than substance” (*ibid* at 367). Chief Justice Lamer concluded it was unnecessary to determine whether parliamentary privilege has constitutional status, because “the exercise of...inherent privileges by members of the Nova Scotia House of Assembly is not subject to *Charter* review under [section] 2, as the House of Assembly does not fit within the terms of [section] 32” (*ibid* at 364). Justice Sopinka held that the House of Assembly is subject to the *Charter*, but assuming that the media’s subsection 2(b) rights were infringed upon, such an infringement could be justified under section 1 of the *Charter*. Conversely, Justice Cory disagreed and held that the infringement of the media’s rights under subsection 2(b) was not justifiable under section 1 of the *Charter*.

32 *Ibid* at 377.

to the constitutional regime which Canada has adopted in its *Constitution Acts, 1867 to 1982*.³³

Thus, the Court recognized that there are certain “principles constitutionalized by virtue of [the] preamble” that are capable of overriding, or at least immunizing, parts of the written Constitution.³⁴ In doing so, the Court placed (at least parts of) the unwritten Constitution on par with the written Constitution and demonstrated that constitutional principles are capable of determining constitutional outcomes. This espousal by the Court of the unwritten Constitution laid the jurisprudential groundwork for future, bolder uses of constitutional principles by the Court.³⁵

4. *The 1997 Provincial Judges Reference*

The 1997 *Provincial Judges Reference* represents a high-water mark (or perhaps more apt, a 100-year-flood) in the use of constitutional principles. In a highly controversial and critiqued decision, Chief Justice Lamer, writing for the majority,³⁶ gave a large interpretation to the principle of judicial independence in order to invalidate legislation decreasing judicial salaries.³⁷ In doing so, he illustrated an inherent weakness of unwritten constitutional principles: some principles may be invoked to great effect, while other principles are ignored. While according great, even outsized, importance to the principle of judicial independence, the Chief Justice failed to even mention the equally important principle of parliamentary sovereignty.

At issue in the case were three provincial laws decreasing the salaries of provincial judges. Provincial judges are not covered by section 100 of the *Constitution Act, 1867*, which, while it includes no explicit guarantee of judicial independence, has been interpreted as such.³⁸ Similarly, the guarantees of subsection 11(d) of the *Charter* only apply to provincial judges when they exercise jurisdiction in relation to criminal offences.³⁹ Thus, the

33 *Ibid.*

34 *Ibid.*

35 *Provincial Judges Reference*, *supra* note 14 at para 90.

36 The majority was comprised of Chief Justice Lamer and Justices L’Heureux-Dubé, Sopinka, Gauthier, Cory, and Iacobucci.

37 See Jean Leclair & Yves-Marie Morissette, “L’indépendance judiciaire et la Cour suprême : reconstruction historique douteuse et théorie constitutionnelle de complaisance” (1998) 36:3 *Osgoode Hall LJ* 485.

38 See *The Queen v Beauregard*, [1986] 2 SCR 5 at 72–73, 30 DLR (4th) 481, citing *Toronto Corporation v York Corporation*, [1938] AC 415 at 426, 1 All ER 601.

39 See *Valente v The Queen*, [1985] 2 SCR 673, 24 DLR (4th) 161.

Chief Justice used the principle of judicial independence to fill this constitutional gap.⁴⁰

Chief Justice Lamer justified his broad interpretation of judicial independence by building upon *New Brunswick Broadcasting's* affirmation of the unwritten Constitution.⁴¹ Going a step further than Justice McLachlin (as she then was), the Chief Justice stated that the preamble has “important legal effects.”⁴² For the Chief Justice, the preamble was not merely an interpretation tool, but an invitation to the courts “to turn those principles into the premises of a constitutional argument that culminates in the filling of gaps in the express terms of the constitutional text.”⁴³ Thus, it is through “the preamble, which serves as the grand entrance hall to the castle of the Constitution,” that judicial independence enters the constitutional order.⁴⁴

The Chief Justice, while eventually deciding the merits of the case on subsection 11(d) of the *Charter*, ultimately came to a bold conclusion: the legislature must refer to an independent commission before decreasing judicial salaries.⁴⁵ Furthermore, while the legislature is not bound by the commission’s recommendations, any deviation from the recommendations would be judicially reviewable on a “rationality” standard.⁴⁶ Since none of the three legislatures in the case had followed this (retroactively imposed) procedure, all three pieces of legislation reducing judicial salaries were deemed unconstitutional.⁴⁷

Justice La Forest provided the lone dissent, taking issue “with the Chief Justice’s view that the preamble to the *Constitution Act, 1867* is a source of constitutional limitations on the power of the legislatures to interfere with judicial independence.”⁴⁸ Specifically, Justice La Forest invoked parliamentary sovereignty and came to a different conclusion: “[u]nder accepted British legal theory, Parliament is supreme.... The consequence

40 *Provincial Judges Reference*, *supra* note 14.

41 *Ibid* at para 90.

42 *Ibid* at para 95.

43 *Ibid* at para 104.

44 *Ibid* at para 109.

45 *Ibid* at paras 109, 133. Subsection 11(d) of the *Charter* states: “Any person charged with an offence has the right to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal”: *Canadian Charter of Rights and Freedoms*, s 11(d), Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11.

46 *Provincial Judges Reference*, *supra* note 14 at para 183.

47 *Ibid* at paras 166–85.

48 *Ibid* at para 304.

of parliamentary supremacy is that judicial review of legislation is not possible."⁴⁹ Thus, while there is judicial review in Canada by virtue of the written Constitution, for it to be legitimate it must be based on the express terms of the Constitution, not principles introduced by way of the preamble.⁵⁰ For Justice La Forest, subsection 11(d) of the *Charter* does not require legislatures to have recourse to independent commissions before changing judicial salaries.

Justice La Forest was not the only one to notice Chief Justice Lamer's selective use of constitutional principles. As Jean Leclair and Yves-Marie Morissette argue,

[I]l importe de souligner, comme le fait le juge La Forest, que le droit constitutionnel anglais ne posait, et ne pose toujours, aucune limite au pouvoir du Parlement de porter atteinte à l'indépendance de la magistrature [304–310]. *Le principe de la souveraineté parlementaire nie toute possibilité aux juges anglais de contrôler judiciairement la constitutionnalité des lois.*

C'est donc dire que le préambule de la Constitution ne pourrait donner aux juges canadiens un pouvoir que le droit constitutionnel anglais n'a jamais reconnu à leurs homologues britanniques [311]. Le juge en chef ne se formalise pourtant pas d'une telle logique. Il élabore plutôt une théorie constitutionnelle qui n'a aucune affinité avec la nationalité britannique qu'elle revendique [...] En somme, le principe de l'indépendance judiciaire est introduit en droit canadien parce qu'il s'agit d'un principe structurel de la *Constitution du Royaume-Uni* ; néanmoins, la portée de ce principe en droit anglais n'a pour sa part, strictement aucune importance ! Le juge est donc libre de définir le contenu de l'indépendance judiciaire comme bon lui semble, sans égard au libellé des textes constitutionnels.⁵¹

49 *Ibid* at paras 308–09.

50 *Ibid* at para 319.

51 Leclair & Morissette, *supra* note 37 at 497–98 [emphasis added]. The English translation for this passage reads as follows:

[It] is important to note, as Justice La Forest does, that English constitutional law did not, and still does not, impose any limit on the power of Parliament to interfere with the independence of the judiciary [304–310]. The principle of parliamentary sovereignty denies any possibility for English judges to judicially review the constitutionality of laws.

This means that the preamble to the Constitution could not give Canadian judges a power that English constitutional law has never recognized for their British counterparts [311]. The Chief Justice, however, does not subscribe to this logic. Rather, he develops a constitutional theory which has no affinity to the British nationality from which it claims to derive.... In short, the principle of judicial independence was introduced into Canadian law because it was a structural

Thus, the *Provincial Judges Reference* illustrates that the Court had become increasingly comfortable with invoking constitutional principles to great effect. However, the *Provincial Judges Reference* also demonstrates the inherent weakness of these principles. Namely, without judicial recourse to a clear theoretical framework, principles may be invoked in a manner where some principles are given great weight, while others are completely ignored. When principles are invoked in such an inconsistent manner, they may (perhaps even accurately) be seen as vehicles for judicial activism. However, as Leclair and Morissette observe, the Court would soon temper “[c]e qu’il y a d’excessif dans l’approche adoptée par le juge en chef Lamer” in the *Secession Reference*.⁵²

B. The *Secession Reference*

The *Secession Reference* came in the wake of the 1995 referendum where Quebec narrowly voted to remain part of Canada.⁵³ It was a time of considerable constitutional uncertainty, with the Quebec separatist government asserting that a positive referendum result would allow a unilateral secession of Quebec from the Canadian federation.⁵⁴ Faced with the potential for another referendum, then-Prime Minister Jean Chrétien asked the Court to provide a legal opinion on the constitutionality of such a secession.⁵⁵ Questioning the Court’s jurisdiction to hear the *Secession Reference* in the first place, the Government of Quebec notably refused to appear before the Court, who appointed instead an *amicus curiae* to present the secessionist point of view.⁵⁶

principle of the *Constitution of the United Kingdom*; however, the scope of this principle in English law is entirely irrelevant! The judge is therefore free to define the content of judicial independence as he sees fit, regardless of the wording of the constitutional texts.

52 *Ibid* at 491. The English translation for this passage reads as follows: “the excessive aspects of Chief Justice Lamer’s approach.”

53 Élections Québec, *Rapport des résultats officiels du scrutin: referendum du 30 octobre 1995* (Québec: Directeur general des élections du Québec, November 1995).

54 See Mary Dawson, “Reflections on the Opinion of the Supreme Court of Canada in the Quebec Secession Reference” (1999-2000) 11 NJCL 5 at 9. See also Quebec, National Assembly, *Journal des débats*, 35-2, No 24 (22 May 1996) at 14h59 (Président).

55 Gerald L Gall, “Québec Referendum (1995)” (12 August 2013), online: *The Canadian Encyclopedia* <www.thecanadianencyclopedia.ca/en/article/quebec-referendum-1995>.

56 Jean-François Gaudreault-DesBiens, “The Quebec Secession Reference and the Judicial Arbitration of Conflicting Narratives About Law, Democracy, and Identity” (1998) 23:4 Vermont L Rev 793 at 819 [Gaudreault-DesBiens].

This section will first outline the framework of constitutional principles put forth by the *Secession Reference* (Section II.B.1). It will then examine the reactions to the *Secession Reference* (Section II.B.2), before analyzing the challenges of using constitutional principles (Section II.B.3).

1. *The Court Turns to Constitutional Principles to Answer a Challenging Question*

In the *Secession Reference*, the Court was tasked with answering a politically charged question not considered by the drafters of the Constitution: how can a province leave the federation? To answer this question, the Court⁵⁷ relied upon constitutional principles. The Court affirmed that “[i]n order to endure over time, a constitution must contain a comprehensive set of rules and principles which are capable of providing an exhaustive legal framework for our system of government.”⁵⁸ These principles were not only helpful, but they were also indispensable. As the Court indicated, “it is not possible to answer the questions...without a consideration of a number of underlying principles.”⁵⁹

The Court identified four “fundamental and organizing principles”: (1) federalism; (2) democracy; (3) constitutionalism and the rule of law; and (4) respect for minorities.⁶⁰ While acknowledging this list was “by no means exhaustive,”⁶¹ the Court stated that these principles “function in symbiosis.”⁶² No one principle can “trump or exclude the operation of any other.”⁶³ This is in part because they are linked to one another within the internal architecture of the Constitution.⁶⁴ Although not explicitly mentioned in the Constitution, these principles “assist in the interpretation of the text and the delineation of spheres of jurisdiction, the scope of rights and obligations, and the role of our political institutions.”⁶⁵

In providing this description of unwritten principles, the Court also re-affirmed both (1) the primacy of the written text of the Constitution,

57 The judgment was delivered by “The Court,” consisting of Chief Justice Lamer and Justices L’Heureux-Dubé, Gonthier, Cory, McLachlin (as she then was), Iacobucci, Major, Bastarache, and Binnie.

58 *Quebec Secession Reference*, *supra* note 1 at para 32.

59 *Ibid* at para 1.

60 *Ibid* at para 32. Respect for minorities is also referred to as “respect for minority rights” at para 49.

61 *Ibid* at para 32.

62 *Ibid* at para 49.

63 *Ibid*.

64 *Ibid* at paras 49–50.

65 *Ibid* at para 52.

and (2) the “gap-filling” role of constitutional principles. For the Court, these principles “could not be taken as an invitation to dispense with the written text of the Constitution,”⁶⁶ but that they have a role in “filling [the] gaps in the express terms of the constitutional text.”⁶⁷

Critically, the Court stated in unambiguous terms that these principles may give rise to “substantive obligations flowing from the Constitution.”⁶⁸ The Court concluded that the principles of federalism and democracy “would give rise to a reciprocal obligation on all parties...to negotiate”⁶⁹ in the event of “a clear majority vote...on a clear question in favour of secession.”⁷⁰ These negotiations and the parties’ conduct within them would be governed by all four fundamental constitutional principles.⁷¹

Despite finding an obligation to negotiate, the Court held that there could be no judicial oversight as the negotiations would be inevitably political. Having provided “the constitutional framework,” the Court stated it would not take a “supervisory role over the political aspects of constitutional negotiations.”⁷² The Court further stated that even determining “the initial impetus for negotiation” would be political.⁷³ Thus, after finding that a constitutional obligation would arise in the case of a referendum with a “clear” majority on a “clear” question,⁷⁴ the Court refused (1) to explain what exactly is required for the obligation to be triggered, and (2) to enforce the obligation. As such, the consequences of failing to fulfil the constitutional “duty to negotiate” would be similar to those of breaking a constitutional convention: both are subject to political, not legal, consequences.⁷⁵

2. *Reactions to the Secession Reference*

Politically, the *Secession Reference* was well-received. While some in Quebec argued the decision favoured the federal government,⁷⁶ on the whole

66 *Ibid* at para 53.

67 *Ibid*.

68 *Ibid* at para 89.

69 *Ibid* at para 88.

70 *Ibid* at para 150.

71 *Ibid* at para 90.

72 *Ibid* at para 100.

73 *Ibid*.

74 *Ibid* at para 153.

75 Hogg, *supra* note 7 at 1-22.1-1-31.

76 See Michael Mandel, “Une cour au service du gouvernement Canadien”, *Le Devoir* (1 October 1998), A9.

there was acceptance across the board.⁷⁷ However, the legal response to the *Secession Reference* was much more mixed. For Jean-François Gaudreault-DesBiens, “[a]lthough well-received both inside and outside the legal community, the Supreme Court’s opinion in the *Secession Reference* nevertheless drew criticism in some circles. The sharpest attacks concerned the Court’s approach to the dialectical relation between the juridical realm and the political realm.”⁷⁸ Gaudreault-DesBiens disagrees with the criticism, which he summarizes as follows:

This is not law; this is politics.... [T]he Court had no business identifying some fuzzy organizing meta-principles of the Constitution when there is a constitutional text that expressly provides for amending formulas. Conversely, it had no business finding a duty to negotiate when the text does not expressly mention such a duty. Ultimately, the law as described and applied by the Court in the Quebec Secession Reference is so vague that it is of no help for the future.⁷⁹

As such, much of the mixed reaction to the *Secession Reference* was placed on the Court’s reliance on the unwritten Constitution.

For some in the legal community, the *Secession Reference* was merely a reformulation of what already existed in constitutional jurisprudence. For example, Mark Walters argues that the *Secession Reference* and other similar jurisprudence are merely written confirmation of a pre-existing phenomenon.⁸⁰ While Walters acknowledges that “the Court’s doctrinal explanation for the unwritten Constitution needs strengthening, and its application in specific instances may be questioned,” the recourse to “the unwritten Constitution itself is not the product of revolutionary or illegitimate judicial activism.”⁸¹

However, for others, the *Secession Reference* represented a shift towards a more expansive role for the judiciary and an increased threat of judicial activism. As American scholar Ronald Rotunda once stated, “[w]hen

77 Lucien Bouchard, “Déclaration liminaire du premier ministre du Québec, M Lucien Bouchard, au lendemain de l’Avis de la Cour suprême du Canada sur le renvoi du gouvernement fédéral concernant l’accession du Québec à la souveraineté, Québec, 21 août 1998” (21 August 1998), online (pdf): *Secrétariat aux relations canadiennes Québec* <www.sqrc.gouv.qc.ca/documents/positions-historiques/positions-du-qc/partie2/LucienBouchard1998.pdf>.

78 Gaudreault-DesBiens, *supra* note 56 at 839.

79 *Ibid.*

80 Mark D Walters, “The Common Law Constitution in Canada: Return of *Lex Non Scripta* as Fundamental Law” (2001) 51:2 UTLJ 91 at 98.

81 *Ibid* at 94.

judges look outside the [written] Constitution, they ultimately look inside themselves.”⁸² For Patrick Monahan, much of the threat of judicial activism comes from the “gap-filling” role of these constitutional principles in a written Constitution full of gaps:

The Court appears to have proceeded on the basis of a rather novel and enlarged conception of the judicial role in constitutional matters, one in which the judiciary is free to create constitutional obligations whenever it identifies a “gap” in the constitutional text. Given the wide variety of matters that are not expressly dealt with in the constitutional text...this approach, if widely applied, could lead to considerable uncertainty in the law.⁸³

The suspicions of judicial activism in light of the *Secession Reference* should also be placed in the context of the increased importance of the judiciary since the adoption of the *Charter*.⁸⁴ As Jean Leclair observes:

Since the advent of the Canadian Charter of Rights and Freedoms in 1982, the importance of courts in the Canadian political environment has grown dramatically. Not surprisingly, this increased importance has had some repercussions on how courts see themselves and their constitutional role within the Canadian political structure. This increase in power has made the courts bolder in their law-creating enterprise. It is no coincidence therefore that the invocation of unwritten principles having a substantive normative force is a recent phenomenon, at once concomitant with a weakening of parliamentary supremacy and an enhancement of constitutional supremacy greater than what existed prior to 1982.⁸⁵

Yet, it is worth noting that despite this potential for an enlarged role for the judiciary, in practice, the Court has not taken an expansive or bold approach to unwritten constitutional principles in the years since the adoption of the *Charter*.⁸⁶ In fact, as will be discussed in Section III, the

82 Ronald D Rotunda, “Interpreting an Unwritten Constitution” (1989) 12:1 Harv JL & Pub Pol’y 15 at 17.

83 Patrick J Monahan, “The Public Policy Role of the Supreme Court of Canada in the Secession Reference” (1999) 11 NJCL 65 at 69.

84 Jean Leclair, “Canada’s Unfathomable Unwritten Constitutional Principles” (2002) 27:2 Queen’s LJ 389 at 392.

85 *Ibid.*

86 In a 2014 empirical study on the use of unwritten principles from 1982–2012, Dominic DiFruscio found that courts are more likely to accept parliamentary sovereignty as a ground for upholding legislation than to rely on another unwritten principle to invalidate it.

Court's jurisprudence following the *Secession Reference* can, in some ways, be characterized as a "climb-down" from the ardent espousal of the four principles identified in the *Secession Reference*, as the Court continues to privilege the principle of parliamentary sovereignty over others.

C. THE CHALLENGES WITH CONSTITUTIONAL PRINCIPLES

The foregoing suggests that constitutional principles are not free of challenges. For example, in what remains the most comprehensive critique of constitutional principles to date, Jean Leclair, in a 2002 article, argues that constitutional principles have "ambiguous normative force."⁸⁷ Largely relying on the *Provincial Judges Reference* and the *Secession Reference*, Leclair identifies three areas of ambiguity:

First, is the court referring to broad sets of standards that generate specific rules, or is it referring to enshrined pre-Confederation common law? Second, are those principles judicially enforceable? Finally, in what context and circumstances should those principles be resorted to?⁸⁸

In raising these questions, Leclair adeptly differentiates between various uses of constitutional principles in the Court's jurisprudence to demonstrate the ambiguous normative force of these principles. As Leclair persuasively notes, there is a significant difference between common law rules being given constitutional status (such as parliamentary privilege in *New Brunswick Broadcasting*) and judges claiming "as Lamer C.J. does in [the *Provincial Judges Reference*], that from such precedents, one can extract abstract principles which allow for the creation of novel obligations."⁸⁹ Similarly, there is also a significant difference between the Court relying on constitutional principles to justify the invalidity of legislation (*Provincial Judges Reference*) and the Court relying on principles to find a non-judicially enforceable obligation (*Secession Reference*).⁹⁰ Thus, by providing an overview of the different types of constitutional principles, and the manner and circumstances in which these principles are invoked, Leclair emphasizes the lack of clarity concerning why in some

See Dominic DiFruscio, "Patriation, Politics and Power: The State of Balance Between the Supreme Court and Parliament After Thirty Years of the Charter" (2014) 8 JPPL 29 at 57.

87 Leclair, *supra* note 84 at 401-17.

88 *Ibid* at 401.

89 *Ibid* at 404-05.

90 *Ibid* at 405-06.

situations—but not in others—constitutional principles may be invoked to great effect.⁹¹ In doing so, Leclair effectively identifies areas where it might be argued that the doctrinal explanation behind constitutional principles could be strengthened.⁹²

It is worth noting that some have argued that the ambiguities surrounding constitutional principles derive from the fact that these principles are invoked strategically and have no real independent normative force. For example, David Schneiderman argues that when the Court invokes constitutional principles, it is “likely engaging in some version of strategic behaviour.”⁹³ In his opinion, the “principles revealed in the *Secession Reference* were a response to legitimacy concerns then facing the Court and which no longer are present.”⁹⁴ As mentioned above, the Government of Quebec questioned the Court’s jurisdiction to hear the *Secession Reference* and refused to appear in front of the Court in the matter. Thus, Schneiderman contends that “the Court chose an outcome that ensured maintenance of the Court’s legitimacy within Quebec,”⁹⁵ and consequently, “the Court’s invocation of unwritten Constitutional principles...was not intended to determine constitutional outcomes going forward.”⁹⁶

The context that gave rise to the *Secession Reference* was clearly politically charged. However, to argue that the Court’s articulation of principles in the *Secession Reference* was exclusively a manifestation of strategic behaviour disregards the Court’s increasing reliance on constitutional principles leading up to the *Secession Reference*. It also undermines the legitimacy of both the unwritten Constitution and the judiciary, by painting a cynical picture whereby constitutional principles are simply the tools that allow the judiciary to be “legally disingenuous.”⁹⁷ Finally, it discounts the continued influence of constitutional principles in judicial reasoning after the *Secession Reference*.⁹⁸ As will be discussed in Sections III and IV,

91 *Ibid* at 401–17.

92 See Walters, *supra* note 80 at 94.

93 David Schneiderman, “Unwritten Constitutional Principles in Canada” in Rosalind Dixon & Adrienne Stone, eds, *The Invisible Constitution in Comparative Perspective* (Cambridge: Cambridge University Press, 2018) 517 at 519.

94 *Ibid* at 524 [emphasis added].

95 *Ibid* at 528.

96 *Ibid* at 519.

97 *Ibid* at 519, 524.

98 It is worth noting that in coming to his conclusion that the Court’s invocation of constitutional principles in the *Secession Reference* was strategic and not intended to influence constitutional outcomes going forward, Schneiderman relies heavily on the 2015 case of *Quebec (AG) v Canada (AG)*, 2015 SCC 14 [*Quebec AG*] (*ibid* at 519, 531–36, 539). In this case,

in the jurisprudence that follows the *Secession Reference*, the Court relies upon certain constitutional principles—notably, but not always, that of parliamentary sovereignty—to determine constitutional outcomes.

In fact, the Court's persistent use of parliamentary sovereignty to determine constitutional outcomes raises the perpetual question of how constitutional principles interact with each other. According to Leclair, what weight and priority to give conflicting principles is the “most problematic feature of the use of unwritten principles.”⁹⁹ While the four principles in the *Secession Reference* were able to interact more or less “in symbiosis” with each other, this is not always the case.¹⁰⁰ For instance, Leclair pragmatically observes that some constitutional principles “if given their full extension, may be irreconcilable.”¹⁰¹ Furthermore, as will be examined below, in the cases that follow the *Secession Reference*, the Court's invocation of parliamentary sovereignty—generally to determinative effect—calls into question the “in symbiosis” approach to constitutional principles and suggests that parliamentary sovereignty, subject to some

the majority of the Court found that the principle of cooperative federalism did not prevent the federal government from destroying the long-gun registry data despite Quebec's objections (*Quebec AG* at para 3). First, I would remark that the principle of cooperative federalism, which in *Quebec AG* was characterized as “a concept used to describe the ‘network of relationships between the executives of the central and regional governments [through which] mechanisms are developed, especially fiscal mechanisms, which allow a continuous redistribution of powers and resources without recourse to the courts or the amending process’” (*Quebec AG* at para 17), is more narrow and prescriptive than the principle of federalism described in the *Secession Reference* (i.e. “the political mechanism by which diversity could be reconciled with unity” (*Quebec Secession Reference*, *supra* note 1 at para 43)). As such, one can argue that the principle of “federalism” should not automatically be equated with that of “cooperative federalism.” Second, while it is true that the Court did not give the powerful normative force to cooperative federalism that Quebec might have wished, it is important to note that the Court also invoked another constitutional principle that will be analyzed in detail in Section III of this article—that of parliamentary sovereignty (*Quebec Secession Reference*, *supra* note 1 at paras 3, 22, 24, 27, 45). Specifically, the majority held that relying on the principle of cooperative federalism as a basis to limit legislative authority would “undermine” the principle of parliamentary sovereignty (*Quebec AG* at paras 19–20). Therefore, one could argue that judicial reasoning continues to be influenced by constitutional principles, just not always the ones listed in the “by no means exhaustive” enumeration in the *Secession Reference* (*Quebec Secession Reference*, *supra* note 1 at para 32).

99 Leclair, *supra* note 84 at 417.

100 *Quebec Secession Reference*, *supra* note 1 at paras 88–90.

101 Leclair, *supra* note 84 at 417–18.

nuances, is a principle that is to be given full expression to the detriment of other principles.¹⁰²

III. THE PERSISTENCE OF PARLIAMENTARY SOVEREIGNTY: A REJECTION OF THE “IN SYMBIOSIS” APPROACH TO CONSTITUTIONAL PRINCIPLES?

Given its foundational role in the Canadian constitutional order, the term parliamentary sovereignty was conspicuously absent from the *Secession Reference*. While it is true that parliamentary sovereignty may have been unlikely to assist the Court in resolving the issues before it, its absence coupled with the Court’s statement that “the Canadian system of government has transformed to a significant extent from a system of Parliamentary supremacy to one of constitutional supremacy” seemed to suggest that parliamentary sovereignty’s dominance in the Canadian constitutional order might be waning.¹⁰³ However, despite this emphasis on constitutionalism and constitutional principles, since the *Secession Reference* the Court has continued to invoke parliamentary sovereignty in a generally determinative manner to uphold legislation.

This section provides a brief overview of the principle of parliamentary sovereignty and its use in constitutional jurisprudence prior to the *Secession Reference* (Section III.A). Second, it argues that while the Court’s jurisprudence following the *Secession Reference* demonstrates that parliamentary sovereignty is generally determinative, as with all principles, its application is still subject to nuance (Section III.B).

A. A Brief Overview of Parliamentary Sovereignty in Canada

The British constitutionalist Albert Venn Dicey is often quoted by the Court for his definition of parliamentary sovereignty:

¹⁰² For example, in addition to the *Provincial Judges Reference*, *supra* note 14, the principle of judicial independence (in conjunction with subsection 11(d) of the *Charter*) has been used to strike down legislation abolishing the system of supernumerary judges in New Brunswick (*Mackin v New Brunswick (Minister of Finance)*; *Rice v New Brunswick*, 2002 SCC 13). Similarly, in *Trial Lawyers* (which is discussed in more detail in Section III.B.1), the Court based itself upon section 96 of the *Constitution Act, 1867* and the principle of the rule of law to find that a provincial hearing fee scheme deprived access to superior courts and was thus unconstitutional. See generally *Trial Lawyers Association of British Columbia v British Columbia (AG)*, 2014 SCC 59 [*Trial Lawyers*].

¹⁰³ *Quebec Secession Reference*, *supra* note 1 at para 72.

The principle of Parliamentary sovereignty means neither more nor less than this, namely, that Parliament thus defined has, under the English constitution, the right to make or unmake any law whatever; and, further, that no person or body is recognised by the law of England as having a right to override or set aside the legislation of Parliament.¹⁰⁴

In short, in the United Kingdom, as Hogg states, “there are no limits to legislative power: there is no fundamental law which cannot be altered by ordinary parliamentary action.”¹⁰⁵ However, certain manner and form requirements may permit legislation to be judicially reviewed on procedural grounds.¹⁰⁶

As a country “with a Constitution similar in Principle to that of the United Kingdom,” Canada has always given a broad interpretation to parliamentary sovereignty in its jurisprudence.¹⁰⁷ Yet, unlike the United Kingdom, Canada also has a written Constitution which provides certain limitations. In Canada, the two most significant constitutional limitations on parliamentary sovereignty are: (1) Canada’s federal character, and (2) since 1982, the *Charter*.¹⁰⁸

However, within these limitations, “[t]he *grundnorm* with which the courts must work...is that of the sovereignty of Parliament.”¹⁰⁹ The Court has generally not wavered from this principle. For example, in the 1991 *Reference re Canada Assistance Plan (BC) (CAP Reference)*, the Court put forth a “conception classique et maximaliste”¹¹⁰ of parliamentary sovereignty at the expense of cooperative federalism.¹¹¹ The issue concerned whether the federal government could alter federal legislation to place a

104 Albert Venn Dicey, *Introduction to the Study of the Law of the Constitution*, 10th ed (London, UK: Macmillan, 1982) at 3–4, cited in *Reference re Pan-Canadian Securities Regulation*, 2018 SCC 48 at para 54 [*Pan-Canadian Securities*].

105 Hogg, *supra* note 7 at 12-1, n 3.

106 *Ibid* at 12-1; Mark Elliot, “Parliamentary Sovereignty and the New Constitutional Order: Legislative Freedom, Political Reality and Convention” (2002) 22:3 LS 340 at 346–52.

107 *Constitution Act, 1867* (UK), preamble, 30 & 31 Vict, c 3, s 91, reprinted in RSC 1985, Appendix II, No 5. [*Constitution Act, 1867*]. See *Florence Mining Co v Cobalt Lake Mining Co* (1909), 18 OLR 275 at 279, [1909] OJ No 196.

108 Hogg, *supra* note 7 at 12-3–12-6.

109 *Canada (Auditor General) v Canada (Minister of Energy, Mines and Resources)*, [1989] 2 SCR 49 at 103, 61 DLR (4th) 604 [*Auditor General*].

110 The English translation for this passage reads as follows: “a classical and maximalist conception.”

111 [1991] 2 SCR 525, 83 DLR (4th) 297 [*Re CAP* cited to SCR]; Johanne Poirier, “Souveraineté parlementaire et armes à feu : Le fédéralisme coopératif dans la ligne de mire?” (2015) 45 RDUS 47 at 83.

five percent cap on transfer payments to three provinces. Under this legislation, agreements had been made with the provinces in which the federal government committed to financing certain social assistance and welfare programs. The provinces argued that the five percent cap on transfers in the legislation amounted to a unilateral amendment of the agreement. Justice Sopinka, writing for the unanimous Court,¹¹² emphasized that the funding formulas were only present in the legislation, not the intergovernmental agreements, and thus could be altered: “[i]t is conceded that the government could not bind Parliament from exercising its powers to legislate amendments to the *Plan*. To assert the contrary would be to negate the sovereignty of Parliament.”¹¹³ It is noteworthy that after such a definitive articulation of parliamentary sovereignty, less than a decade later, the Court chose to omit any mention of parliamentary sovereignty in both the *Provincial Judges Reference* and the *Secession Reference*.

B. The Persistence of Parliamentary Sovereignty

However, a mere four years after the *Secession Reference*, it became clear that parliamentary sovereignty still plays an important role in the Canadian constitutional order. In the 2002 case of *Babcock v Canada (AG)*, the Court upheld legislation limiting courts’ powers to compel the disclosure of Cabinet confidences.¹¹⁴ To come to this conclusion, Chief Justice McLachlin, writing for the majority,¹¹⁵ gave pre-eminent importance to parliamentary sovereignty: “[t]he unwritten principles must be balanced

112 The Court consisted of Chief Justice Lamer and Justices La Forest, Sopinka, Gonthier, Cory, McLachlin (as she then was), and Stevenson.

113 *Re CAP*, *supra* note 111 at 548 [emphasis added].

114 2002 SCC 57 [*Babcock*]. While *Babcock* is the Court’s first articulation of parliamentary sovereignty after the *Secession Reference*, it is worth noting that, between the *Secession Reference* and *Babcock*, there were a series of appellate decisions that also affirmed the continued applicability of parliamentary sovereignty. See *Bacon v Saskatchewan Crop Insurance Corporation* (1999), 180 Sask R 20, [1999] 11 WWR 51 (Sask CA), leave to appeal to SCC refused, 27469 (13 August 1999); *Hogan v Newfoundland (AG)*, 2000 NFCA 12 at para 59, leave to appeal to SCC refused, 27865 (20 April 2000), citing *Wells v Newfoundland*, [1999] 3 SCR 199 at para 59, 177 DLR (4th) 73; *Singh v Canada (AG)*, [2000] 3 FC 185 (CA) at para 12, 183 DLR (4th) 458; *Baie d’Urfé (Ville) c Québec (Procureur général)*, [2001] JQ no 4821, [2001] RJQ 2520 (Que CA), leave to appeal to SCC refused, 28869 (29 October 2001).

115 The majority consisted of Chief Justice McLachlin and Justices Gonthier, Iacobucci, Major, Bastarache, Binnie, Arbour, and LeBel. Justice L’Heureux-Dubé “substantially” agreed with Chief Justice McLachlin, except on whether “‘competing interests’ in disclosure must be taken into account” (*Babcock*, *supra* note 114 at paras 64–65).

against the principle of [p]arliamentary sovereignty.”¹¹⁶ For the Chief Justice, it is within the legislature’s powers “to enact laws, even laws which some would consider draconian.”¹¹⁷ Yet, this characterization also created confusion. As Johanne Poirier states, “[c]ette affirmation [de McLachlin C.J.] signifie-t-elle que la souveraineté parlementaire ne ferait pas partie de ces principes constitutionnels sous-jacents? Mais quel est donc le statut de ce principe?”¹¹⁸

The Chief Justice’s statement in *Babcock* strongly indicates that parliamentary sovereignty was not intended to form part of the “in symbiosis” framework proposed in the *Secession Reference* and may be invoked to determinative effect.¹¹⁹ However, in two cases that follow, *Trial Lawyers* (Section III.B.1) and the *Pan-Canadian Securities Reference* (Section III.B.2), the Court’s reasoning suggests that while often determinative, the use of parliamentary sovereignty is still subject to certain nuances. Thus, despite its general dominance, parliamentary sovereignty is not immune from the ambiguity that plagues the use of all constitutional principles (Section III.B.3).

1. Trial Lawyers Association of British Columbia v British Columbia (AG) (2014)

As with the *Provincial Judges Reference*, the Court in *Trial Lawyers* relied upon a broad interpretation of the Constitution in conjunction with a constitutional principle to find provincial legislation unconstitutional. However, instead of relying on subsection 11(d) of the *Charter*, the Court relied upon section 96 of the *Constitution Act, 1867* to find legislation establishing hearing fees unconstitutional.¹²⁰ In contrast to *Babcock*, where the “core

¹¹⁶ *Ibid* at para 55.

¹¹⁷ *Ibid* at para 57.

¹¹⁸ Poirier, *supra* note 111 at 81. The English translation for this passage reads as follows: “Does this assertion [from Chief Justice McLachlin] mean that parliamentary sovereignty is not one of the underlying constitutional principles? If so, then what is the status of this principle?”

¹¹⁹ This indication is further supported by the Court’s decision, three years later, in *British Columbia v Imperial Tobacco Canada Ltd*, 2005 SCC 49 [*Imperial Tobacco*], where the Court refused to use the principle of the rule of law to invalidate legislation that created a new cause of action allowing the British Columbia government to recover health costs for tobacco-related diseases from tobacco companies.

¹²⁰ *Trial Lawyers*, *supra* note 102. *Constitution Act, 1867*, *supra* note 107, s 96. Section 96 states: “The Governor General shall appoint the Judges of the Superior, District and County Courts in each Province, except those of the Courts of Probate in Nova Scotia and New Brunswick.”

jurisdiction” under section 96 was found to be insufficient to invalidate legislation preventing the disclosure of Cabinet confidences,¹²¹ the Court in *Trial Lawyers* put forth “an unexpectedly robust interpretation” of this core jurisdiction.¹²²

Chief Justice McLachlin, writing again for the majority,¹²³ relied on both section 96 and access to justice, as part of the underlying principle of the rule of law, to deem the legislation unconstitutional. In her view, provincial powers to enact hearing fees are subject to two limits: (1) other “constitutional grants of powers,” and (2) “the assumptions that underlie the text.”¹²⁴ For the Chief Justice, these constitutional constraints involve not only express constitutional terms, but also “requirements...that flow by necessary implication from those terms.”¹²⁵ Finding that “[t]he right of Canadians to access the superior courts flows by necessary implication from the express terms of [section] 96 of the *Constitution Act, 1867*,” Chief Justice McLachlin held that it “follows that the province does not have the power under [subsection] 92(14) to enact legislation that prevents people from accessing the courts.”¹²⁶ Similar to the *Provincial Judges Reference*, the written provisions of the Constitution provided a sufficient basis on which to resolve the appeal, but the Chief Justice bolstered her argument by stating “the connection between [section] 96 and access to justice is further supported by considerations relating to the rule of law.”¹²⁷

However, it is worth noting that seven years earlier in *British Columbia (AG) v Christie (Christie)*, a unanimous Court took an entirely different approach in upholding provincial legislation creating a tax on legal services.¹²⁸ The Court chose to broadly characterize the issue as to “whether general access to legal services...is a fundamental aspect of the rule of law,”

121 *Babcock*, *supra* note 114 at para 60.

122 Hogg, *supra* note 7 at 7-43.

123 In *Trial Lawyers*, the majority was formed by Chief Justice McLachlin with Justices LeBel, Abella, Moldaver, and Karakatsanis concurring. Justice Cromwell wrote separate reasons where he held that the case could be resolved on administrative law grounds and found “that it is unnecessary to address the broader constitutional issues raised” (*Trial Lawyers*, *supra* note 102 at para 70). Justice Rothstein dissented finding that the provincial legislation was constitutional (*ibid* at para 117).

124 *Ibid* at paras 25-27.

125 *Ibid* at para 37, citing *Imperial Tobacco*, *supra* note 119 at para 66.

126 *Ibid*.

127 *Ibid* at para 38.

128 2007 SCC 21. The judgment was delivered by “The Court” consisting of Chief Justice McLachlin and Justices Bastarache, Binnie, LeBel, Deschamps, Fish, Abella, Charron, and Rothstein.

finding it is not.¹²⁹ The similarities between the two cases did not escape Chief Justice McLachlin, who sought to distinguish *Trial Lawyers* from *Christie*: “[i]n the present case, the hearing fee requirement has the potential to bar litigants with legitimate claims from the courts. The tax at issue in *Christie*, on the evidence and arguments adduced, was not shown to have a similar impact.”¹³⁰ However, in *Christie*, the Court chose to not mention section 96 entirely, including its connection to access to justice. Why?

Perhaps it is because, as Justice Rothstein noted in his dissent in *Trial Lawyers*, the interpretation of section 96 advanced by the majority is a “novel” one.¹³¹ Justice Rothstein opined that “[t]he majority must base its finding on an overly broad reading of [section] 96, with support from the unwritten Constitutional principle of the rule of law, because there is no express constitutional right to access the civil courts without hearing fees.”¹³²

Thus, *Trial Lawyers* raises important questions. Specifically, when can parliamentary sovereignty be trumped by a requirement that “flows by necessary implication from the express terms” of the Constitution?¹³³ How directly related to the text must a “necessary implication” be? *Trial Lawyers* suggests that, at least in some circumstances, certain unwritten requirements, derived from the written Constitution and bolstered by constitutional principles, can serve as a limit to parliamentary sovereignty.

2. Pan-Canadian Securities Reference (2018)

In the 2018 *Pan-Canadian Securities Reference*, the Court¹³⁴ articulated a theoretically all-encompassing conception of parliamentary sovereignty that appears to disregard practical realities.¹³⁵ The Reference concerned the creation of a cooperative system of securities regulation. In finding the cooperative system was constitutional, the Court unanimously affirmed the Diceyan conception of parliamentary sovereignty: “the principle of parliamentary sovereignty remains foundational to the structure of the Canadian state: aside from...constitutional limits, the legislative branch of government remains supreme over both the judiciary and the executive.”¹³⁶

129 *Ibid* at para 23.

130 *Trial Lawyers*, *supra* note 102 at para 41.

131 *Ibid* at para 85.

132 *Ibid* at para 81.

133 *Ibid* at para 37.

134 The judgment was delivered by “The Court” consisting of Chief Justice Wagner and Justices Abella, Moldaver, Karakatsanis, Gascon, Côté, Brown, Rowe, and Martin.

135 *Pan-Canadian Securities*, *supra* note 104.

136 *Ibid* at para 58.

However, the Court's interpretation was solely theoretical. As part of the proposed cooperative system, a Council of Ministers, comprised of the federal Minister of Finance and respective provincial ministers responsible for capital market regulation, would, among other things, approve draft provincial legislation.¹³⁷ The majority of the Court of Appeal of Quebec found that this system was unconstitutional as it fettered the sovereignty of provincial legislatures through requiring the approval of an external body (Council of Ministers) for any amendments to the model provincial legislation.¹³⁸

The Court disagreed. For the Court, while executive actions purporting to bind the legislature are “not...invalid,” parliamentary sovereignty simply means they may not be effective. In other words, each provincial legislature would preserve their “right to enact, amend and repeal their securities legislation *independently* of the Council of Ministers’ approval.”¹³⁹ Notably, this analysis of parliamentary sovereignty is not affected by practical considerations. It is of “no consequence” to the Court that provinces would need to “effectively dissolve their existing securities commission, and to merge the administration of those commissions into the Authority’s organizational structure” making it “impractical for those provinces to extricate themselves...at a later date.”¹⁴⁰ By refusing to consider practical implications, the Court effectively removed an important consideration of why the cooperative system fettered the sovereignty of the provinces, allowing the Court to more easily uphold the cooperative system as constitutional.

As such, the Court's articulation of parliamentary sovereignty is confusing. Particularly, what is confusing is the Court's distinction that an executive action purporting to bind a legislature can be “not...invalid,” but simply “ineffective.”¹⁴¹ This lack of clarity is compounded by the Court's explicit refusal to consider practical considerations which would create significant challenges for provincial legislatures to legislate in the future. This leads to a conception of parliamentary sovereignty whereby executive actions may be theoretically ineffective at binding the hands of the legislature, but in practice may be very effective at doing so. As Johanne Poirier notes, the Court relied “on its ‘maximalist’ conception of

137 *Ibid* at para 21.

138 *Ibid* at para 31.

139 *Ibid* at paras 62, 67 [emphasis in original].

140 *Ibid* at para 70.

141 *Ibid* at para 62.

parliamentary sovereignty to salvage part of a cooperative arrangement that—paradoxically—seemed to fetter the sovereignty of participating provinces.”¹⁴²

Had the Court chosen to include practical considerations in its articulation of parliamentary sovereignty, its analysis may have resulted in a different conclusion. Thus, it is not just whether parliamentary sovereignty applies that is determinative of the outcome of a case, but also the way in which the Court chooses to characterize parliamentary sovereignty.

3. *Parliamentary Sovereignty, Constitutional Principles, and the Need for Doctrinal Clarity*

The Court’s jurisprudence suggests that, while it continues to affirm the Diceyan conception of parliamentary sovereignty, its application of this conception is subject to nuance. It can be limited by the unwritten “necessary implications” of the Constitution (*Trial Lawyers*). In contrast, it cannot be limited, at least in cooperative systems, by practical considerations (*Pan-Canadian Securities Reference*). In sum, the legislature’s ability to make or unmake any law seems generally, but not always, absolute.

Clarification is needed. As mentioned previously, writing in 2001, Mark Walters noted that the use of constitutional principles is not inherently illegitimate; however, “the Court’s doctrinal explanation...needs strengthening.”¹⁴³ Both *Trial Lawyers* and the *Pan-Canadian Securities Reference* suggest that Walters’s statement remains an apt one. For example, how far can the unwritten “necessary implications” of the Constitution go? When parliamentary sovereignty applies, does it apply exclusively on a theoretical level, or is it sometimes subject to practical considerations? Furthermore, does the “in symbiosis” approach continue to apply to all constitutional principles other than parliamentary sovereignty? Strengthening the doctrinal explanation of the unwritten Constitution would help facilitate consistent and coherent applications of constitutional principles. Similarly, it would help constrain what could be characterized as the strategic use of principles. This need for doctrinal strengthening becomes particularly pressing when one considers the circumstances in which constitutional principles are invoked. Constitutional principles are often relied upon to answer some of the most difficult questions relating to the Canadian constitutional order.

142 See Johanne Poirier, “The 2018 Pan-Canadian Securities Regulation Reference: Dualist Federalism to the Rescue of Cooperative Federalism” (2020) 94 SCLR (2d) 85 at 119.

143 Walters, *supra* note 80 at 94.

IV. MIKISEW CREE: A LOST OPPORTUNITY

Released one month after the *Pan-Canadian Securities Reference*, *Mikisew Cree* offered an opportunity for the Court to strengthen its doctrinal framework on the use of constitutional principles. The justiciable issue in question was whether the Federal Court had jurisdiction to hear the Mikisew Cree First Nation's request for judicial review, with all judges finding it did not. However, the Court then went on to expound on the substantive issue pleaded before it. As with the *Secession Reference*, the Court was required to invoke constitutional principles to answer a constitutional question that is not addressed by the written Constitution. However, in this case, instead of the secession of a member of the Canadian federation, the question concerned the reconciliation of Indigenous peoples within the Canadian federation. Specifically, the question was: does the duty to consult apply to legislative action?

The facts of the case concerned two pieces of omnibus legislation that significantly altered Canada's environmental assessment and protection regime. The Mikisew Cree First Nation argued that they should have been consulted in the development of this legislation as it had the potential to adversely affect their Treaty No. 8 rights to hunt, trap, and fish.¹⁴⁴ The respondents, the Governor-in-Council and multiple ministers,¹⁴⁵ contended that no such duty exists.

While the goal of *Mikisew Cree* was to add clarity to an area of law known for its complexity, the Court's 3-2-1-3 decision merely creates more uncertainty. Notable is the Court's inconsistent use of constitutional principles: which principles are invoked and the weight they are given. *Mikisew Cree* raised many questions. Is the honour of the Crown a constitutional principle? Does it apply to legislative action, and, if so, through what means? Does parliamentary sovereignty apply and is its effect determinative? Do all other constitutional principles function "in symbiosis"? If not, how do they interact and what weight should each principle be afforded? What is the role of the Court, if any, in effecting reconciliation under section 35? In *Mikisew Cree*, the Court's divergent reasons provide contradictory answers to these questions.

¹⁴⁴ *Mikisew Cree*, *supra* note 4 at para 1 (see also Factum of the Appellant).

¹⁴⁵ The respondent ministers were the Minister of Aboriginal Affairs and Northern Development, Minister of Finance, Minister of the Environment, Minister of Fisheries and Oceans, Minister of Transport, and Minister of Natural Resources. *Ibid* (Factum of the Respondent).

The majority of the Court takes a principled approach that recognizes the honour of the Crown as a constitutional principle and finds it applies to legislation. However, this majority, consisting of the distinct reasons of Justice Karakatsanis (with Justice Gascon and Chief Justice Wagner) and Justice Abella (with Justice Martin), disagrees about the means through which the honour of the Crown applies. Justice Karakatsanis finds the duty to consult is “ill-suited to the law-making process,” but does not specify another means through which the honour of the Crown applies.¹⁴⁶ She simply states that “[o]ther doctrines may be developed to ensure the consistent protection of [section] 35 rights and to give full effect of the honour of the Crown through review of enacted legislation.”¹⁴⁷ For Justice Karakatsanis, these remedies would likely be declaratory.¹⁴⁸ In comparison, Justice Abella adopts a more theoretically coherent approach, finding that the honour of the Crown applies through the duty to consult. However, Justice Abella then circumscribes the duty after balancing it with the other constitutional principles engaged, holding, as Justice Karakatsanis does, that the most appropriate remedy would be declaratory.¹⁴⁹

The minority holding employs a narrow approach that avoids recognizing the honour of the Crown as a constitutional principle. Justice Brown holds that the “Crown action” triggering the duty to consult does not include legislative action. While Justice Brown does acknowledge that “[t]he duty to consult...is grounded in the honour of the Crown,” he does not cite the Court’s past jurisprudence affirming the latter as a constitutional principle.¹⁵⁰ Justice Rowe (with Justices Moldaver and Côté) concurs with Justice Brown’s analysis and expounds on the practical considerations of extending the duty to consult to the legislative process. Similar to Justice Brown, Justice Rowe does not refer to the honour of the Crown as a constitutional principle, but instead as “an overarching guide to Canada’s dealings with Indigenous peoples.”¹⁵¹

Thus, the divergent reasons in *Mikisew Cree* highlight sharp divisions on the bench about the status of the honour of the Crown, but also more broadly, inconsistencies with constitutional interpretation. This section will first, provide a brief overview of the duty to consult and its relationship

146 *Ibid* at para 2.

147 *Ibid* at para 45.

148 *Ibid* at para 47.

149 *Ibid* at paras 93, 97.

150 *Ibid* at para 127.

151 *Ibid* at para 153.

to the honour of the Crown (Section IV.A). Second, it will demonstrate that, instead of providing clear direction, the Court in *Mikisew Cree* confounds more than clarifies this area of constitutional law by issuing multiple sets of divergent reasons, each prioritizing different constitutional principles, often without substantive engagement with important conceptual issues (Section IV.B). Third, it will argue through its confounding application of principles, the Court avoids grappling with key theoretical and doctrinal questions concerning constitutional principles and the status of Aboriginal and treaty rights in the Canadian constitutional order (Section IV.C). Ultimately, without clearly answering these key theoretical and doctrinal questions, the Court in *Mikisew Cree* misses not only an important opportunity to strengthen its doctrinal framework on the use of constitutional principles, but also more broadly, to provide clear direction on the Court's role, if any, in effecting reconciliation.

A. The Duty to Consult and its Connection to the Honour of the Crown

The doctrine of the duty to consult derives from section 35 of the *Constitution Act, 1982* and is a key means through which the Court has recognized and affirmed Aboriginal rights in Canada. First developed by a unanimous Court¹⁵² in the seminal 2006 case of *Haida Nation v British Columbia (Minister of Forests)* (*Haida*), the duty requires that the government consult with Aboriginal peoples.¹⁵³ This duty “arises whenever the Crown has knowledge, real or constructive, of the potential existence of the Aboriginal right or title and contemplates conduct that might adversely affect it.”¹⁵⁴ The content of the duty is highly contextual and its scope “is proportionate to a preliminary assessment of the strength of the case supporting the existence of the right or title, and to the seriousness of the potentially adverse effect upon the right or title claimed.”¹⁵⁵

Thus, the content of the duty exists on a spectrum. At the lower end of the spectrum, the duty may simply require “the Crown...to give notice, disclose information, and discuss any issues raised in response to the

¹⁵² The unanimous decision was delivered by Chief Justice McLachlin. The other members of the bench were Justices Major, Bastarache, Binnie, LeBel, Deschamps, and Fish.

¹⁵³ 2004 SCC 73 at para 35 [*Haida*].

¹⁵⁴ *Ibid.*

¹⁵⁵ *Ibid* at para 39.

notice.”¹⁵⁶ At the higher end of the spectrum, consultation “may entail the opportunity to make submissions for consideration, formal participation in the decision-making process, and provision of written reasons to show that Aboriginal concerns were considered and to reveal the impact they had on the decision.”¹⁵⁷ As the “duty to consult...is grounded in the honour of the Crown,”¹⁵⁸ in each contextual analysis to determine the content of the duty, “[t]he controlling question...is what is required to maintain the honour of the Crown and to effect reconciliation between the Crown and the Aboriginal peoples with respect to the interests at stake.”¹⁵⁹ The duty may be “challenging,” but it is nevertheless “an essential corollary to the honourable process of reconciliation that [section] 35 demands.”¹⁶⁰

The honour of the Crown is not interchangeable with the duty to consult. However, the duty is one of the vital ways in which the honour of the Crown is upheld. The honour of the Crown originates “from the Crown’s assertion of sovereignty over an Aboriginal people and *de facto* control of land and resources that were formerly in the control of that people”¹⁶¹ and goes back to the *Royal Proclamation* of 1763.¹⁶² It was affirmed as a constitutional principle in 2010.¹⁶³ The Court has found the honour of the Crown “is engaged by [subsection] 35(1).”¹⁶⁴ Thus, it is not surprising that both the honour of the Crown and section 35 share the same ultimate purpose: that of “the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown.”¹⁶⁵

In *Manitoba Metis Federation Inc. v Canada (AG)*,¹⁶⁶ Chief Justice McLachlin and Justice Karakatsanis¹⁶⁷ stated that “[t]he honour of the Crown...is not a cause of action itself; rather it speaks to *how* obligations that attract

156 *Ibid* at para 43.

157 *Ibid* at para 44.

158 *Ibid* at para 16.

159 *Ibid* at para 45.

160 *Ibid* at para 38.

161 *Ibid* at para 66.

162 *Manitoba Metis Federation Inc v Canada (AG)*, 2013 SCC 14 at para 66 [*Manitoba Metis*].

163 *Beckman v Little Salmon/Carmacks First Nation*, 2010 SCC 53 at para 42 [*Beckman*].

164 *Manitoba Metis*, *supra* note 162 at para 69.

165 *Ibid* at para 66; *R v Van der Peet*, [1996] 2 SCR 507 at para 31, 137 DLR (4th) 289 [*Van der Peet*].

166 *Supra* note 162.

167 Chief Justice McLachlin and Justice Karakatsanis delivered the reasons for the majority, which included Justices LeBel, Fish, Abella, and Cromwell. Justices Rothstein and Moldaver dissented, disagreeing with the majority’s “conclusions on the scope of the duty engaged by the honour of the Crown and the applicability of limitations and laches to this claim.” *Manitoba Metis*, *supra* note 162 at para 157.

it must be fulfilled.”¹⁶⁸ In this case, the Court provided a declaratory remedy that “the federal Crown failed to implement the land grant provision set out in [section] 31 of the *Manitoba Act, 1870* in accordance with the honour of the Crown.”¹⁶⁹ Other cases have found that the honour of the Crown (1) “gives rise to a fiduciary duty when the Crown assumes discretionary control over a specific Aboriginal interest”; (2) requires “honourable negotiation and the avoidance of sharp dealing” in treaty-making; and (3) “requires the Crown act in a way that accomplishes the intended purposes of treaty and statutory grants to Aboriginal peoples.”¹⁷⁰ Aside from these specific cases, the duty to consult triggered by Crown action represents the main means through which the honour of the Crown is upheld.

B. A Lack of Clear Direction: A Divided Court Prioritizes Different Constitutional Principles

While the Court’s intention was undoubtedly to provide clear direction on the use of constitutional principles in *Mikisew Cree*, the Court’s inability to find consensus and the resulting 3-2-1-3 decision significantly hinders the Court in achieving this goal. Instead, the Court provides four sets of reasons, which prioritizes different constitutional principles, generally without substantive engagement with key conceptual and theoretical issues. This inconsistent use of constitutional principles ultimately undermines the legitimacy of these principles. As Leclair argues in commenting on the *Secession Reference* and related jurisprudence, there are four conditions which should be considered pre-requisites to legitimate judicial review:

First, the judge’s reasoning must be reconcilable with prior decisions on similar issues. *Principles must be used in a coherent fashion.* Second, the judge’s reasoning *must take into account that principles and rules emerge from a particular historical context. The moral underpinnings of our constitution can be understood as appeals to improve ourselves, but in a fashion which agrees with the basic historical thread of our nation....* Third, in interpreting the law, a judge must bear in mind that, even though law is forever subject to change, *judicial interpretation itself involves “methods that...ensure[e] continuity, stability and legal order.”* Fourth, the process will be legitimate if the methods employed by the judiciary are respectful of some very basic

¹⁶⁸ *Ibid* at para 73 [emphasis in original].

¹⁶⁹ *Ibid* at para 154.

¹⁷⁰ *Ibid* at para 73.

rules of propriety in the handling of cases and also if judicial interpretive activity is aimed at reinforcing rather than enfeebling the democratic fibre of the Canadian constitutional order. This does not necessarily mean that court decisions must reflect the aspirations of the majority.¹⁷¹

Unfortunately, the Court's use of constitutional principles in *Mikisew Cree* does not reflect the above approach to judicial reasoning. Justices Karakatsanis, Abella, and Brown all invoke different constitutional principles and give them different weights, often without considering the particular historical contexts in which different constitutional principles emerged. Justice Karakatsanis finds that the separation of powers, parliamentary sovereignty, and the honour of the Crown all apply to legislative action, but then effectively gives the honour of the Crown limited weight by not specifying the doctrine through which it would apply (Section IV.B.1). Justice Abella emphasizes the honour of the Crown, which she calls a "constitutional imperative," implicitly suggesting it is more determinative than the other "principles" she also invokes, namely parliamentary sovereignty, parliamentary privilege, and the separation of powers (Section IV.B.2). Justice Brown relies on parliamentary privilege and the separation of powers, while omitting any reference to parliamentary sovereignty and not affirming the honour of the Crown as a constitutional principle (Section IV.B.3). Finally, Justice Rowe concurs with Justice Brown, choosing to simply expound on other practical considerations militating against extending the duty to consult to the legislative process (Section IV.B.4). As such, instead of finding consensus and providing clear direction, the Justices emphasize their preferred principles, generally without substantial engagement with critical conceptual and theoretical issues.

1. Justice Karakatsanis Prioritizes the Separation of Powers and Parliamentary Sovereignty

Justice Karakatsanis holds that the separation of powers, parliamentary sovereignty, and the honour of the Crown all apply, but implicitly gives more weight to the first two principles. In her reasons, she finds that the separation of powers and parliamentary sovereignty "dictate that it is rarely appropriate for the courts to scrutinize the law-making process" and that "extending the duty to consult doctrine to the legislative process would oblige the judiciary to step beyond the core of its institutional

¹⁷¹ Leclair, *supra* note 84 at 427–28 [emphasis added].

role and threaten the respectful balance between the three pillars of our democracy.”¹⁷²

Justice Karakatsanis acknowledges the Court’s past recognition of the honour of the Crown as a constitutional principle: “because of the close relationship between the honour of the Crown and [section] 35, the honour of the Crown has been described as a ‘constitutional principle’.”¹⁷³ However, Justice Karakatsanis’s reasons also suggest that the honour of the Crown applies to legislative action in theory, but not in practice. This is because Justice Karakatsanis does not specify a means through which the honour of the Crown would apply. She states that due to parliamentary sovereignty and the separation of powers, “[t]he duty to consult doctrine is ill-suited for legislative action,”¹⁷⁴ but that “[o]ther doctrines may be developed” to uphold the honour of the Crown.¹⁷⁵ However, she does not elaborate on how these other doctrines would avoid judicial review of legislative action, her main objection to applying the duty to consult.¹⁷⁶ If the honour of the Crown applies to legislative action, regardless of the doctrine through which it applies, it seems unavoidable that there would be some sort of judicial oversight of the procedural rights it accords.

Moreover, Justice Karakatsanis does not explain how the procedural rights flowing from the honour of the Crown differ in practice from the procedural rights accorded through the doctrine of the duty to consult. This is particularly confusing as the content of the duty to consult, as was stated in *Haida*, “is what is required to maintain the honour of the Crown” and may be as limited as simply giving notice.¹⁷⁷ How would Justice Karakatsanis’s “[o]ther doctrines [that] may be developed” differ?¹⁷⁸ While it is true, as was explained above, that there are other concrete practices through which the honour of the Crown manifests itself—such as giving rise to fiduciary duties, requiring honourable negotiation in treaty-making, and respecting the intended purposes of treaty and statutory grants¹⁷⁹—it is hard to conceive that consultation would not be the one best suited to the legislative process. It is after all what is a best practice in the

172 *Mikisew Cree*, *supra* note 4 at para 2.

173 *Ibid* at para 24.

174 *Ibid* at para 32.

175 *Ibid* at para 45.

176 *Ibid* at paras 34–38.

177 *Haida*, *supra* note 153 at para 45.

178 *Mikisew Cree*, *supra* note 4 at para 45.

179 *Manitoba Metis*, *supra* note 162 at para 69.

development of legislation and a consideration in the *Sparrow* infringement/justification analysis under section 35.¹⁸⁰

How would the content of the honour of the Crown as manifested through the other doctrines proposed by Justice Karakatsanis be determined? Again, it is hard to conceive of how it would differ from the contextual analysis under the duty to consult, which considers (1) the strength of the claimed right or title, and (2) the seriousness of the potential adverse effect on the claimed right or title.¹⁸¹ Moreover, what is the benefit of finding that the honour of the Crown applies through “other protections” which may be determined at a future date?¹⁸² It is hard to understand how creating uncertainty advances either Aboriginal or constitutional jurisprudence.

Justice Karakatsanis does not address these questions in her reasons, merely stating that potential remedies could be declaratory and available after legislative enactment.¹⁸³ For Justice Karakatsanis, the Court had “not received sufficient submissions on how to ensure that the honour of the Crown is upheld other than through the specific mechanism of the duty to consult.”¹⁸⁴ As Justice Brown persuasively states, “[b]y raising (and then leaving undecided) this quixotic argument about the honour of the Crown—which neither the appellant nor any of the intervenors even thought to raise—my colleague Karakatsanis J. would cast the law into considerable uncertainty.”¹⁸⁵

Furthermore, Justice Karakatsanis’s use of parliamentary sovereignty as an impediment to the application of the duty to consult is also problematic. The Court has explicitly stated on many occasions that the duty to consult is a right to a process, not a veto.¹⁸⁶ Justice Karakatsanis explains that, “[p]arliamentary sovereignty mandates that the legislature can make or unmake any law it wishes, within the confines of its constitutional authority.”¹⁸⁷ However, she does not explain how the procedural rights accorded through the duty to consult would prevent the legislature from making or unmaking any law. She simply states that “[r]ecognizing that

180 See *R v Sparrow*, [1990] 1 SCR 1075 at 1119, 70 DLR (4th) 385.

181 *Haida*, *supra* note 153 at para 39.

182 *Mikisew Cree*, *supra* note 4 at para 49.

183 *Ibid* at para 47.

184 *Ibid* at para 49.

185 *Ibid* at para 142.

186 See *Ktunaxa Nation v British Columbia (Forests, Lands and Natural Resource Operations)*, 2017 SCC 54 at para 83.

187 *Mikisew Cree*, *supra* note 4 at para 36.

the elected legislature has specific consultation obligations may constrain it in pursuing its mandate and therefore undermine its ability to act as the voice of the electorate.”¹⁸⁸ As previously stated, parliamentary sovereignty concerns the ability of Parliament to have control over the substance of laws. It is not negated by manner and form or constitutionally mandated procedural requirements.

Justice Karakatsanis also invokes parliamentary privilege—while not central to her reasoning—as additional justification for Parliament’s immunity from judicial review: “[p]arliamentary privilege, a related constitutional principle, also demonstrates that the law-making process is largely beyond the reach of judicial interference.... The existence of this privilege generally prevents courts from enforcing procedural constraints on the parliamentary process.”¹⁸⁹ The fact that parliamentary privilege is invoked as a related, but not central, principle is confusing, as it is “the sum of privileges, immunities and powers enjoyed by the Senate, the House of Commons and provincial legislative assemblies, and by each member individually, without which they could not discharge their functions.”¹⁹⁰ In short, it shields parliamentary functions, such as the enactment of legislation, from judicial review—what was at issue in *Mikisew Cree*.

As with the separation of powers, parliamentary privilege also clashes with the finding that the honour of the Crown applies to legislative action. This is unsurprising, as the two principles are interrelated. As the Court stated in *Canada (House of Commons) v Vaid*, parliamentary privilege “is one of the ways in which the fundamental constitutional separation of powers is respected.”¹⁹¹ If the procedural rights mandated by the honour of the Crown apply to the legislative process, there must be some level of judicial review, and by extension no absolute parliamentary immunity or privilege in the enactment of legislation. It is evident that if Parliament failed to uphold the honour of the Crown, any judicial review would conflict with the principle of parliamentary privilege. In other words, Justice Karakatsanis’s finding that the honour of the Crown applies to the legislative process is, by definition, in conflict with both the separation of powers and parliamentary privilege.

188 *Ibid.*

189 *Ibid* at para 37.

190 *Canada (House of Commons) v Vaid*, 2005 SCC 30 at para 29 [*Vaid*].

191 *Ibid* at para 21. Justice Binnie delivered the reasons of a unanimous Court consisting of Chief Justice McLachlin and Justices Major, Bastarache, LeBel, Deschamps, Fish, Abella, and Charron.

Thus, something, or more specifically some constitutional principle, has to give. Justice Karakatsanis implicitly acknowledges this because she prioritizes the separation of powers and parliamentary sovereignty over the honour of the Crown. While stating that all three principles can apply at the same time, in effect, by not specifying a means through which the honour of the Crown applies, Justice Karakatsanis effectively creates a constitutional Potemkin village: the honour of the Crown applies to legislative action through name only. This extension of the honour of the Crown to legislative action voids it of any practical force. By not closing the door to potential judicial review of legislative action, while simultaneously not specifying the means through which it would occur, Justice Karakatsanis's reasoning allows the Court to potentially review legislative action in the future without the assistance of a well-developed doctrine. In short, Justice Karakatsanis seems to be implying that the judiciary will know unhonourable dealing when it sees it and will only interfere when it deems it appropriate.

*2. Justice Abella Prioritizes the Honour of the Crown:
“A Constitutional Imperative”*

Justice Abella takes a more conceptually coherent approach than Justice Karakatsanis, finding the honour of the Crown applies to legislative action through the duty to consult. Justice Abella also recognizes that the principles of parliamentary sovereignty, parliamentary privilege, and the separation of powers apply. Consequently, Justice Abella constrains her application of the duty to consult “to achieve an appropriate balance” among all constitutional principles.¹⁹² The result of Justice Abella's balancing act ends up producing a practical result that is very similar to that proposed by Justice Karakatsanis,¹⁹³ namely that the honour of the Crown applies to legislative action and that the remedies available should be (1) declaratory and (2) only available post-enactment. Thus, while conceptually different, the reasons of Justices Abella and Karakatsanis arrive at the same practical conclusion.

However, even if the practical result of Justice Abella's reasons does not substantively differ from that proposed by Justice Karakatsanis, the strong rhetoric Justice Abella uses throughout her reasons suggests otherwise. Justice Abella begins by seemingly elevating the honour of the Crown

¹⁹² *Mikisew Cree*, *supra* note 4 at para 92.

¹⁹³ *Ibid.*

above other principles calling it “a constitutional imperative” without justifying (or defining) the use of the term, finding it “cannot be undermined, let alone extinguished, by the legislature’s assertion of parliamentary sovereignty.”¹⁹⁴ In addition, Justice Abella is categorical that the honour of the Crown applies to legislative action through the doctrine of the duty to consult. She refuses to “accept an approach that replaces an enforceable legal right to consultation, with a vague and unenforceable right to ‘honourable dealing’,”¹⁹⁵ undoubtedly a reference to Justice Karakatsanis’s unspecified “[o]ther doctrines.”¹⁹⁶

While referring to the honour of the Crown as a “constitutional imperative,” Justice Abella initially uses the terms “concepts” or “principles” to refer to other constitutional principles. In fact, Justice Abella’s preliminary wording seems to suggest that “the *concepts* of parliamentary sovereignty and parliamentary privilege” should be given less weight, as they “cannot displace the honour of the Crown.”¹⁹⁷ However, later in her reasons, she does refer to parliamentary sovereignty as a principle, finding that “[a]lthough parliamentary sovereignty cannot displace the honour of the Crown, its force as a constitutional principle must be given adequate weight.”¹⁹⁸ Thus, while not resulting in a substantive difference in remedies, Justice Abella’s reasons place symbolic importance on the principle of the honour of the Crown and reconciliation.

Justice Abella persuasively states that the constitutional source of the honour of the Crown means it can be interpreted as a constitutional constraint on legislative action. As previously mentioned, parliamentary sovereignty must operate within the limits of the written Constitution. Thus, as Justice Abella opines, “[c]ases which advocate against intrusion into the parliamentary process must therefore be read in the context of a duty that is not only a constitutional imperative, but a recognition of the limits of Crown sovereignty itself.”¹⁹⁹ Furthermore, section 35 is outside of the *Charter*, and thus the considerations in *New Brunswick Broadcasting*, where subsection 2(b) of the *Charter* was found to be inapplicable to Parliament, do not apply. For Justice Abella, section 35 differs from the *Charter* as it delineates a relationship between governing entities:

194 *Ibid* at para 55.

195 *Ibid* at para 84.

196 *Ibid* at para 45.

197 *Ibid* at para 84 [emphasis in original].

198 *Ibid* at para 92.

199 *Ibid* at para 88.

[W]hile the Charter defines a sphere of rights for individuals that are protected from state action, the majority of the Constitution, including [section] 35, allocates power between governing entities, such as the division of powers between the provincial and federal governments, or the separation of powers between the branches of government. In the same way, [section] 35 defines the relationship between the sovereignty of the Crown and the “[A]boriginal peoples of Canada”, mandating a process of reconciliation between the Crown and Indigenous groups.²⁰⁰

Thus, Justice Abella’s balancing of principles is most consistent with the approach put forth by the Court in the *Secession Reference* where constitutional principles act “in symbiosis” with each other and no one principle, in this case including parliamentary sovereignty, can trump the other. As Justice Abella states, “[l]ike all constitutional principles, parliamentary sovereignty must be balanced against other aspects of our constitutional order, including the duty to consult.”²⁰¹

Justice Abella also persuasively states that the contextual nature of the duty to consult analysis means that it is well suited to the legislative process. As Justice Abella holds, “the content of the duty to consult depends heavily on the circumstances” and there is “no reason why the unique challenges raised in the legislative sphere cannot be addressed by the spectrum of consultation and accommodation duties that arise.”²⁰² For Justice Abella, these “institutional constraints” mean that only enacted legislation may be challenged, not proposed legislation or contemplated legislation.²⁰³ Furthermore, Justice Abella, “without ruling out the possibility that in certain cases legislation enacted in breach of the duty to consult could be struck down by the reviewing court,” finds that “a declaration will generally be the appropriate remedy.”²⁰⁴

While Justice Abella never fully substantiates her strong language of a “constitutional imperative” or offers much more in respect of remedies than Justice Karakatsanis’s ambiguous future doctrines, she does adopt the most conceptually coherent approach of all the Court’s reasons in *Mikisew Cree* by explicitly balancing the principles she invokes.

200 *Ibid.*

201 *Ibid* at para 91.

202 *Ibid* at para 92.

203 *Ibid* at para 93.

204 *Ibid* at para 97.

3. *Justice Brown Privileges the Separation of Powers and Parliamentary Privilege*

Possibly because the duty to consult does not actually prevent the legislature from making or unmaking any law, Justice Brown does not explicitly mention parliamentary sovereignty. Nor does he recognize the honour of the Crown as a constitutional principle. This omission has a determinative effect on his holding that the duty to consult does not apply to legislative action. In short, if there is no constitutional principle of honourable dealing, there is no need to balance this principle with other constitutional principles, namely the separation of powers and parliamentary privilege.

Justice Brown avoids recognizing the honour of the Crown as a constitutional principle by employing a narrow analysis. He begins his analysis by asking whether legislative action falls under “Crown action” triggering the duty to consult and finds it does not. He is thus able to omit any reference to the constitutional nature of the principle of the honour of the Crown. Had Justice Brown employed the principled-based analysis of the majority, he would have been required to engage with the purpose of section 35 and its associated jurisprudence. In other words, he would have been required to explicitly justify why the honour of the Crown cannot affect the separation of powers and parliamentary privilege. Instead, by utilizing a narrow analysis, Justice Brown skillfully avoids these important, but difficult, conceptual questions.

This narrow approach also allows Justice Brown to invoke whichever principles he deems pertinent, which for him are the separation of powers and parliamentary privilege.²⁰⁵ Justice Brown holds that “the separation of powers protects the process of legislative policy-making...from judicial review.”²⁰⁶ He acknowledges there are constitutional limits to this immunity. Implicitly invoking parliamentary sovereignty, Justice Brown states: “Parliament is sovereign, subject only to the limits of its legislative authority as set out in the *Constitution Act, 1867*.”²⁰⁷ In other words, Justice Brown is indirectly stating that section 35 of the *Constitution Act, 1982* cannot limit legislative powers.

In addition, Justice Brown opines that it “would...be contrary to parliamentary privilege” to judicially extend the duty to consult to the legislative process.²⁰⁸ As previously mentioned, parliamentary privilege is a way in

²⁰⁵ *Ibid* at para 128.

²⁰⁶ *Ibid* at para 118.

²⁰⁷ *Ibid* at para 113.

²⁰⁸ *Ibid* at para 122.

which the separation of powers is respected; the two principles are intimately connected. As with the separation of powers, parliamentary privilege also finds “its roots in the preamble” of the *Constitution Act, 1867*.²⁰⁹ It also, as Justice Brown acknowledges, “operates within certain constraints imposed by the Constitution.”²¹⁰ However, in his view, the duty to consult cannot be one such constraint. Justice Brown justifies this through relying on an unclear distinction between “manner and form” and “procedure”:

[T]he 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.²¹¹

Justice Brown then goes on to cite the Court’s statement from *Authorson v Canada (AG)* that “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.”²¹² However, while well-accepted in constitutional law, it is worth noting that the requirement of three readings is not explicitly stated by the text of the *Constitution Act, 1867*.²¹³ Furthermore, Aboriginal peoples are not simply “any citizen of Canada.” As Justice Abella persuasively states: “as [section] 35 makes clear, it is inappropriate to equate Aboriginal peoples with ‘any citizen of Canada’, particularly when considering the procedural rights owed under the Constitution.”²¹⁴

It is notable that both principles of the separation of powers and parliamentary privilege find their source in the preamble to the *Constitution Act, 1867*. The honour of the Crown, while it predates the *Constitution Act, 1982*, finds its expression through section 35 and the resulting jurisprudence. Thus, through a narrow analysis limiting the duty to consult to the executive outside the legislative process, Justice Brown skillfully avoids having to engage with the implications of section 35. Consequently, he avoids needing to justify why he elevates two constitutional principles,

209 *Vaid*, *supra* note 190 at para 21.

210 *Mikisew Cree*, *supra* note 4 at para 123.

211 *Ibid* at para 124 [emphasis in original].

212 2003 SCC 39 at para 37.

213 *Constitution Act, 1867*, *supra* note 107.

214 *Mikisew Cree*, *supra* note 4 at para 89.

whose source derives from the preamble, above a constitutional principle linked to a term of the Constitution.

4. *Justice Rowe Concurrs with Justice Brown and Expounds on Practical Concerns*

Justice Rowe simply states: “I concur with the reasons of Justice Brown. In particular, I would adopt his analysis with respect to...the separation of powers, notably between the legislature and the judiciary; and the critical importance of maintaining parliamentary privilege.”²¹⁵ Justice Rowe then goes on to further build on Justice Brown’s reasons finding: (1) that despite the fact that the duty to consult does not apply to the legislative process, section 35 of the *Constitution Act, 1982* still provides Aboriginal peoples effective means to have their rights vindicated after the enactment of legislation; (2) applying the duty to consult to the legislative process would be “highly disruptive to the carrying out of that work”; and (3) applying the duty to the legislative process would require the courts to play an “interventionist role.”²¹⁶

C. **Lost in the Confusion: The Court’s Reasons Sidestep Important Constitutional Questions**

As Justice Brown aptly states in *Mikisew Cree*, “[a]n apex court should not strive to sow uncertainty, but rather to resolve it by, wherever possible (as here), stating clear legal rules.”²¹⁷ However, while he uses his statement to segue into clearly stating his holding, the four reasons in *Mikisew Cree* do indeed sow uncertainty. At the root of this uncertainty is an inconsistent use of constitutional principles based on implicit assumptions. Through leaving these implicit assumptions unexamined and the doctrinal framework on the use of constitutional principles untouched, the Court avoids having to grapple with important conceptual and doctrinal questions concerning the status of Aboriginal and treaty rights in the Canadian constitutional order.

Mikisew Cree posed an exceedingly difficult question animated by the larger issue of reconciliation. While the reasons of Justices Karakatsanis, Abella, and Brown all invoked reconciliation, none of them provided a clear answer of what reconciliation actually is or entails. Quite simply, what

²¹⁵ *Ibid* at para 148.

²¹⁶ *Ibid* at para 149.

²¹⁷ *Ibid* at para 144.

does “the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown” look like?²¹⁸ *Mikisew Cree* asked whether reconciliation means that section 35 provides constraints on legislative action. In other words, does the reconciliation of pre-existing Aboriginal societies with the sovereignty of the Crown result in Aboriginal peoples being subsumed into a static constitutional order? Or should the Canadian constitutional order be altered to accommodate Aboriginal peoples?

As in the *Secession Reference*, the answer to the question posed is not contained in the text of the Constitution. Thus, this was a perfect opportunity for the Court to draw on constitutional principles and to strengthen its doctrinal framework. For example, since the “in symbiosis” framework in the *Secession Reference*, the jurisprudence suggests that parliamentary sovereignty is a determinative principle that must be balanced against all others. In other words, it does not act “in symbiosis” with others; it trumps them, or, in rare cases, is trumped by judicial independence and its variations. As mentioned in Section III, the Court has been reluctant to invalidate legislation on the basis of constitutional principles without the support of the written Constitution.

However, the lines between the written and unwritten parts of the Constitution become blurred when the Court interprets the written provisions of the Constitution to have meaning that stretch far beyond their written words. Hence, an analogy can be drawn between section 96 of the *Constitution Act, 1867* and section 35 of the *Constitution Act, 1982*. Both sections have been interpreted by the Court to provide constitutional guarantees, which are not immediately apparent from the wording of each sections. However, in *Trial Lawyers*, section 96 in conjunction with the principle of the rule of law was found to be sufficient to invalidate legislation (thus, trumping parliamentary sovereignty).²¹⁹ By contrast, in *Mikisew Cree*, section 35 in conjunction with the honour of the Crown was insufficient to permit judicial review of the enactment of legislation. The contexts are not identical: one concerns the substance of enacted legislation, the other a legislative procedural requirement. Yet, the similarities raise the perpetual question of the normative force of constitutional principles and how these principles interact with each other and the provisions of the Constitution.

While parliamentary sovereignty has been accorded much weight in the jurisprudence, it was only invoked by Justices Karakatsanis and Abella

218 *Delgamuukw v British Columbia*, [1997] 3 SCR 1010 at para 186, 153 DLR (4th) 193.

219 *Trial Lawyers*, *supra* note 102 at para 91.

in *Mikisew Cree*. Neither satisfactorily explained how a procedural requirement would unduly curtail parliamentary sovereignty. Indeed, the *Pan-Canadian Securities Reference*, released a month after *Mikisew Cree*, put forth a conception of parliamentary sovereignty where practical implications of the actual workings of legislative assemblies were deemed not pertinent. Thus, the view of the legislative process advanced in *Mikisew Cree* was much broader (as it included policy development and undoubtedly practical considerations) than in the *Pan-Canadian Securities Reference*, which dealt with (potential, but denied) interference with actual legislative amendments. As Paul Daly states, “the issue in *Mikisew Cree* was different—the concern was with judicial interference, not interference by other provinces—so there is only a tension, not a contradiction between *Mikisew Cree* and the *Reference*.”²²⁰ In considering the role of policy development in the exercise of legislative power, Daly finds support for “the proposition that the view taken in *Mikisew Cree* of the nature of the legislative process was too broad; the *Pan-Canadian Securities Reference* represents a more realistic view of the law-making process and the constraints that may lawfully be placed upon it.”²²¹

Thus, the conception of parliamentary sovereignty in *Mikisew Cree* is unclear as the plurality holding failed to (1) explicitly explain how the specific procedural requirement of the duty to consult curtails parliamentary sovereignty, when other procedural requirements do not, and (2) provide guidance regarding why practical considerations are pertinent to parliamentary sovereignty in some situations, but not in others.

Even leaving aside parliamentary sovereignty, *Mikisew Cree* suggests there is a hierarchy among other constitutional principles. Part of the difficulty arises from the fact that many of the constitutional principles invoked in *Mikisew Cree* developed “in symbiosis” in the United Kingdom. For example, while parliamentary sovereignty protects the substance of legislation from judicial review, parliamentary privilege protects the legislative process and is one of the ways in which the separation of powers is respected.²²² However, it is worth noting that these two principles were modified when they were incorporated into the Canadian constitutional

220 Paul Daly, “Parliamentary Sovereignty and Intergovernmental Agreements: Reference re Pan-Canadian Securities Regulation, 2018 SCC 48” (13 November 2018), online: *Administrative Law Matters* <www.administrativelawmatters.com/blog/2018/11/13/parliamentary-sovereignty-and-intergovernmental-agreements-reference-re-pan%E2%80%91canadian-securities-regulation-2018-scc-48>.

221 *Ibid.*

222 *Vaid*, *supra* note 190 at para 21.

order. Parliamentary sovereignty was limited by a written Constitution. Parliamentary privilege in Canada arose from the common law and is “governed by the principle of *necessity* rather than by historical incident, and thus may not exactly replicate the powers and privileges found in the United Kingdom.”²²³ These principles work “in symbiosis” and serve the same purpose: recognizing the supremacy of Parliament.

The development of the honour of the Crown as a guiding principle of Aboriginal rights jurisprudence is notably different from the above principles. It developed separately for an entirely different purpose: reconciling pre-existing Aboriginal societies with the sovereignty of the Crown. It also is relatively new; its status as a constitutional principle was only recognized in 2010.²²⁴ However, does that mean that it is any less important than the constitutional principles inherited from the United Kingdom? The language in Justice Abella’s reasons seems to suggest her answer is, at least symbolically, no. Justice Karakatsanis does not give a decisive answer. Justices Brown and Rowe do not attempt to answer the question.

What gives weight to a constitutional principle? Its historical pedigree? In that case, parliamentary sovereignty and parliamentary privilege would prevail. Its constitutional source? The Court has been very clear that parliamentary privilege is incorporated into the Canadian constitutional order via the preamble. The honour of the Crown is animated by section 35 of the *Constitution Act, 1982*. Why should a common law rule incorporated into the Constitution via the preamble take precedence over, to borrow the language of *Trial Lawyers*, “the requirements that flow from necessary implication” from a written term of the Constitution?²²⁵ In order to invoke constitutional principles in a coherent fashion, the Court needed to answer these questions.

However, the plurality holding written by Justice Karakatsanis does not seriously engage with these important conceptual questions. Instead, Justice Karakatsanis provides a very Canadian compromise: a “feel good” result whereby the honour of the Crown applies to legislation without any change to the *status quo*. In fact, none of the reasons in *Mikisew Cree* meaningfully engage with these important conceptual questions regarding constitutional principles. As such, the Court not only misses a critical opportunity to strengthen its doctrinal framework guiding the use of constitutional principles, but it also misses an opportunity to provide clear

223 *New Brunswick Broadcasting*, *supra* note 13 at 379 [emphasis in original].

224 *Beckman*, *supra* note 163 at para 42.

225 *Trial Lawyers*, *supra* note 102 at para 24.

direction on the status of Aboriginal and treaty rights within the Canadian constitutional order.

V. CONCLUSION: CONSTITUTIONAL PRINCIPLES ARE A FINE BALANCE

Judges have a challenging job. Staying within the confines of their constitutional role was undoubtedly first and foremost on the minds of all Supreme Court justices. After all, the only constitutional principle invoked in all four reasons was the separation of powers. As Chief Justice Dickson stated in *Auditor General*, “[t]here is an array of issues which calls for the exercise of judicial judgment on whether the questions are properly cognizable by the courts. Ultimately, such judgment depends on the appreciation by the judiciary of its own position in the constitutional scheme.”²²⁶ In *Mikisew Cree*, it is clear that the Court gave much appreciation to its role and decided that it did not include reviewing legislative action through the duty to consult. In some ways, this is reminiscent of the *Secession Reference* where the Court refused to oversee negotiations (although, in contrast to *Mikisew Cree*, the Court did find a constitutional duty to negotiate).

However, unlike the *Secession Reference*, the constitutional principles engaged in *Mikisew Cree* did not function “in symbiosis” with each other.²²⁷ As a recently developed principle addressing a uniquely Canadian constitutional reality, the honour of the Crown stood in sharp contrast to the other more pedigreed principles recognizing the supremacy of Parliament. In essence, *Mikisew Cree* called upon the Court to adjudicate between its section 35 jurisprudence and the fundamental principles that govern Canada’s parliamentary democracy and, in doing so, asked the Court what role, if any, it would play in effecting reconciliation.

Yet, instead of using the challenge posed by *Mikisew Cree* as an opportunity to provide leadership and clear direction on such an important constitutional issue, the Court was unable to find common ground. The resulting divergence is a noteworthy departure from the level of cohesion seen under previous decisions discussed earlier in this article. It suggests clear divisions on the bench regarding preferred approaches to constitutional interpretation. Both Justices Karakatsanis’s and Abella’s reasons are reminiscent of the Court’s previous espousal of constitutional principles

²²⁶ *Auditor General*, *supra* note 109 at 91.

²²⁷ *Quebec Secession Reference*, *supra* note 1 at para 49.

as a guide to constitutional interpretation. In contrast, Justices Brown and Rowe's reasons suggest part of the Court is shifting away from a principled approach to constitutional interpretation, preferring instead a more circumscribed approach to the unwritten Constitution that relies solely on traditional constitutional principles.

Just as the inability of the Court to find common ground is concerning, so too is the Court's confounding use of constitutional principles. Instead of invoking constitutional principles in a coherent fashion with substantive engagement with theoretical and doctrinal issues, the Court effectively selects different constitutional principles and prioritizes certain principles over others. With the exception of Justice Abella's reasoning, the Court does not attempt to balance the relevant constitutional principles. Nor do many of the Court's reasons clearly provide explicit rationale for why certain principles are privileged over others.

In relying on implicit assumptions and disregarding underlying theoretical and conceptual issues, the Court is able to sidestep answering the difficult, but critical, questions. Where does the honour of the Crown fit in what could be described as an unacknowledged hierarchy of constitutional principles? What does reconciliation, the underlying purpose of section 35, look like in practice?²²⁸ Does section 35 constrain legislative action? While both Justices Karakatsanis and Abella suggest that the Court has a role to play in effecting reconciliation,²²⁹ the ambiguity surrounding Justice Karakatsanis's future "[o]ther doctrines" leaves much uncertainty about what exactly this role entails.²³⁰ Ultimately, by failing to provide clear answers to these critical questions, the Court misses an

228 In *Van der Peet*, *supra* note 165 at para 31, Chief Justice Lamer, writing for the majority, stated: "what [subsection] 35(1) does is provide the constitutional framework through which the fact that aboriginals lived on the land in distinctive societies, with their own practices, traditions and cultures, is acknowledged and reconciled with the sovereignty of the Crown. The substantive rights which fall within the provisions must be defined in light of this purpose; the aboriginal rights recognized and affirmed by [subsection] 35(1) must be directed towards the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown."

229 Writing in an Australian context, Gabrielle Appleby observes that courts may shift constitutional responsibility to Parliament who has a broader "range of innovative responses to balancing constitutional principles" than the judiciary. See Gabrielle Appleby, "The 2018 Australian High Court Constitutional Term: Placing the Court in its Inter-Institutional Context" [forthcoming in UNSWLJ]. However, it is worth noting that in *Mikisew Cree*, the majority of the Court, through holding the honour of the Crown applies to legislation, decided not to completely abdicate responsibility to Parliament, even if the honour of the Crown's application to Parliament is ambiguous.

230 *Mikisew Cree*, *supra* note 4 at para 45.

important opportunity to clarify and strengthen its doctrinal framework on the use of constitutional principles.

In the long run, given the essential role constitutional principles play in the Canadian constitutional order, it is essential that the Court strengthen its doctrinal framework for the use of these principles. As Warren Newman explains, employing constitutional principles is “a means of ensuring a necessary margin of flexibility in the application of the terms of the formal Constitution and their adaptation to new or changing circumstances.”²³¹ For example, constitutional principles have been critical in allowing for the Canadian constitutional order to evolve without recourse to difficult constitutional amending procedures.²³² In other words, unwritten constitutional principles play an important role in providing a balance between flexibility and constitutional certainty.

However, without a strong doctrinal framework in place, constitutional principles become vulnerable to implicit assumptions and selective applications, as was the case in *Mikisew Cree*. The need for doctrinal clarity is of utmost importance when one considers in which circumstances constitutional principles are generally invoked: when the written Constitution does not provide a clear answer to difficult constitutional questions. From secession to reconciliation, judges need to start their analysis within a theoretically coherent framework. From there, it is up to the judges to appreciate their own position in the constitutional scheme and determine how best to apply constitutional principles.

As Chief Justice McLachlin, who authored many of the seminal decisions discussed in this paper (*New Brunswick Broadcasting*, *Trial Lawyers*, *Haida*, and *Manitoba Metis*), stated extrajudicially, the conundrum between judges conforming to “fundamental moral norms of a constitutional nature” and going beyond their judicial functions “is a false one.”²³³ For the Chief Justice, “judges must be able to do justice and at the same time stay within the proper confines of their role.”²³⁴ Similarly, Justice Binnie, who authored the seminal *Vaid* decision on parliamentary privilege, observed extrajudicially that

231 Warren J Newman, “‘Grand Entrance Hall,’ Back Door or Foundation Stone? The Role of Constitutional Principles in Construing and Applying the Constitution of Canada” (2001) 14:2 SCLR (2d) 197 at para 220.

232 See Vivek Krishnamurthy, “Colonial Cousins: Explaining India and Canada’s Unwritten Constitutional Principles” (2009) 34:1 Yale J Int’l L 207 at 209–10.

233 The Right Honourable Beverley McLachlin, “Unwritten Constitutional Principles: What is Going on?” (2006) 4 NZ J Public & Intl L 147 at 160.

234 *Ibid.*

[t]he word “activism” is usually used by critics to imply that a judge is pushing the envelope beyond the proper boundaries of the law, but properly understood the term may equally indicate a judicial tightening of the boundaries to deny the bench a power seemingly conferred by the Constitution or legislation. Restraint, as much as expansion, is governed by the judges’ recognition of the limits of their institutional competence and their appreciation of their role in the constitutional scheme.²³⁵

In other words, judging is picking the right balance between restraint and expansion. The use of constitutional principles in answering difficult constitutional questions is an example of this fine balance. What is critical for this balance to be effectively executed is that these principles be used in a clear and consistent way and for the Court to be explicit about its role in the constitutional order. In *Mikisew Cree*, the Court needed to answer an important question: what should the Court’s role be in effecting reconciliation? Despite all the answers provided by the Court, none provided a definitive answer to this question.

²³⁵ The Honourable Ian Binnie, “Judging the Judges: May They Boldly Go Where Ivan Rand Went Before” (2013) 26:1 Can JL & Jur 5 at 6.

