SUPREME COURT OF CANADA

Case in Brief: *Mikisew Cree First Nation v. Canada (Governor General in Council)*

2018 SCC 40 | Judgment of October 11, 2018 | On appeal from the Federal Court of Appeal

---

The Crown has to act honourably toward Canada's Indigenous peoples, but this does not mean Parliament has to consult them when making laws, the Supreme Court has ruled.

The Mikisew Cree First Nation is a band whose traditional territory is mostly in northeastern Alberta, and contains oil sands. The Mikisew joined Treaty 8 along with other groups in 1899. Treaty 8 was the eighth agreement signed by Queen Victoria and First Nations in Western Canada. Under the treaty, in exchange for giving up their ownership of a large amount of land, the Mikisew kept the right to hunt, trap, and fish on it. Today, aboriginal treaty rights, like those under Treaty 8, are protected by the Constitution.

Treaties are understood to be between Indigenous groups and "the Crown." "The Crown" means Canada as a state. The Crown negotiated and signed treaties like the one with the Mikisew in 1899, and still has a duty to fulfill them today. The Crown also has other duties, based on the Aboriginal and constitutional law concept of the "honour of the Crown." This requires the Crown to act honourably toward Indigenous peoples.

In 2012, the federal government introduced two bills that changed how Canada's environment would be protected. The Mikisew said their rights to hunt, trap, and fish on the land would be harmed by the new laws. Oil companies and others would be allowed to build structures on or near many waterways without government approval. The Mikisew said no one would be making sure fish and wildlife wouldn't be harmed. They were not consulted on the changes. The Mikisew said that the government had a legal duty to consult them, rooted in the honour of the Crown. In 2013, the Mikisew asked the Federal Court to review the bills, formally declare that the government should have consulted them, and block the new laws.

At the Federal Court, the application judge said the Crown should have consulted the Mikisew when developing the bills. But the Federal Court of Appeal disagreed, saying the Federal Court didn't have jurisdiction (power) to hear the Mikisew's application in the first place. It also said courts should only be able to hear challenges to laws that have been passed, not laws that are being developed and debated. This was because Parliament, not the Crown, develops and passes law, according to the "separation of powers" in the Canadian Constitution.

Separation of powers means that different branches of the state have different roles in Canada's democracy. The executive (which includes the Prime Minister and Cabinet) decides policy and implements laws (for example, by passing regulations). The legislature (Parliament) makes and passes laws. The judiciary (the courts) interprets and applies laws once they are passed. In this case, the Mikisew said the Ministers were acting in their executive roles when they introduced the laws. The government said they were acting in their legislative roles.

At the Supreme Court of Canada, all the judges agreed that the Federal Court did not have jurisdiction to review the actions of the federal Ministers who developed the bills. This was because the *Federal Courts Act* said it could only review decisions of a federal board, commission, or other tribunal. Ministers working on policies that might eventually become law did not fall into any of these categories. The judges disagreed about the honour of the Crown and the duty to consult.

Justice Andromache Karakatsanis said that there was no duty to consult during the law-making process. However, she said that while Parliament didn't have to consult the Mikisew, that didn't mean the Crown was off the hook. The honour of the Crown applied to both the executive and Parliament, even if the duty to consult only applied to executive action. The Crown still had to act honourably toward the Mikisew when a law might negatively affect their treaty rights. Justice Karakatsanis noted that it didn't matter to the Mikisew and other groups whether action that harmed their rights was taken by the executive or by Parliament. However, she said the duty to consult wasn't the only possible way for them to protect their constitutional rights, and other approaches could be developed. Two judges agreed with Justice Karakatsanis.

…cont'd

Justice Rosalie Silberman Abella agreed with Justice Karakatsanis that Parliament had a duty to uphold the honour of the Crown. But she went further and said that this included a duty to consult Indigenous groups when making laws that might adversely affect them. What mattered was the effect of government action on Aboriginal rights, not which branch of government the action came from. She said that parliamentary sovereignty and privilege could not override the honour of the Crown, which was also protected by the Constitution. One judge agreed with Justice Abella.

Justice Russell Brown said the honour of the Crown only bound the executive, not Parliament. That meant Parliament didn't have a duty to consult the Mikisew. Even though Ministers are part of the executive (as members of Cabinet), they act in their legislative roles when they introduce and debate bills. For Justice Brown, getting courts involved during the lawmaking process (through the duty to consult or another approach) would violate the separation of powers and parliamentary privilege. He said this would create a lot of uncertainty. For him, bills could only be challenged in court once they became law, but not before.

Justice Malcolm Rowe agreed with everything Justice Brown said, but added three additional reasons he thought there should be no duty to consult when preparing laws. He said there were other ways for the Mikisew to assert their rights without interfering with Parliament's independence. He also said it could make it very complicated for governments to prepare legislation and budgets. Finally, he said that it would put courts in the position of supervising dealings between Indigenous groups and legislators, something they are not well suited to do. Two other judges agreed with Justice Rowe (and with Justice Brown).

This case was about whether the Crown had a duty to consult Aboriginal peoples when deciding on changes to laws that may harm their treaty rights, and whether courts had a role in enforcing it. A total of five judges said the honour of the Crown was involved at the lawmaking stage. But a total of seven said there was no binding duty to consult before a law was passed.

For more information (case no. 37441):

- Reasons for judgment
- Case information
- Webcast of hearing

Breakdown of the decision:

- Separate reasons by: Karakatsanis J. (Wagner C.J. and Gascon J. in agreement), Abella J. (Martin J. in agreement), Brown J. and Rowe J. (Moldaver and Côté JJ. in agreement)

Lower court rulings:

- Federal Court of Appeal (appeal judgment)
- Federal Court (trial judgment)

Ce document est disponible en français.