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Chair

Mr. Bruce Stanton

Standing Committee on Aboriginal Affairs and Northern Development

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● (1130)

[*Translation*]

The Chair (Mr. Bruce Stanton (Simcoe North, CPC)): Honourable members, ladies and gentlemen, welcome to our committee.

[*English*]

This is the 30th meeting of the Standing Committee on Aboriginal Affairs and Northern Development.

By way of introduction, members, we're going to get started today. As you know, we were delayed by the vote. I do have business at the Liaison Committee that begins at 1 p.m. We might have a little bit of leeway there, but probably no later than 1:15. Normally, we could go longer today, but we are backed up with our Liaison Committee meeting, which, as members know, is important for getting the approval of our travel budget for the northern economic development study.

Today's order of the day relates to a briefing on the topic of the honour of the crown. We're delighted today to have with us Mark Prystupa, associate director general, negotiations centre for treaties and aboriginal government, from the Department of Indian Affairs and Northern Development, and also Charles Pryce, general counsel, aboriginal law and strategic policy, from the Department of Justice

Gentlemen, I'm sure you know that we generally begin with a ten-minute presentation from each of you, after which we'll go to questions from members. In view of the timelines here, I think we will begin with a five-minute round as opposed to the customary seven minutes.

Mr. Duncan, did you have a point of order?

Mr. John Duncan (Vancouver Island North, CPC): I simply wanted to indicate that I have a briefing at one o'clock, so I will have to leave.

The Chair: I think there's a number of reasons why we will try to stick to our 1 p.m. finish time, if we can today.

Gentlemen, whichever of you would like to proceed first, it matters not to me.

Mr. Pryce, do you want to lead off? It's great to have you here today.

Mr. Charles Pryce (General Counsel, Aboriginal Law and Strategic Policy, Department of Justice): Thank you, Mr. Chairman. We welcome the opportunity to speak to this issue. We felt that I'd be the one to speak to it, simply because the interest is somewhat driven by legal considerations. I'll provide a quick summary.

The issue of honour of the crown is linked to other things like fiduciary relationship and fiduciary duty. It's a bit of a challenge to provide an adequate overview in such a short time. I shall provide a chronology of how the law was developed in this area and then leave further explanation to questions.

It has always been recognized that there is a special relationship between the crown and aboriginal peoples. But until recently, the case law has tended to view it more as a political relationship than a legal one. The Royal Proclamation of 1763 had a few things to say about the Indian tribes. The crown, the King himself, referred to "... the tribes of Indians with whom we are connected and who live under our protection...". So even going back 250 years there was this special relationship. As I say, it seems mainly political rather than legal.

The earliest references in the case law, at least in Canada, to the notion of honour of the crown were in cases around the end of the 19th century. These were related to treaty interpretation and implementation. One judge on the Supreme Court commented on how the honour of the crown was engaged in the interpretation and implementation of treaty obligations.

Before 1984, however, it was mostly a political relationship, not a legal one. This changed in 1984. There was a very important case in the Supreme Court called Guerin, which for the first time recognized that the crown could owe legally enforceable fiduciary dealings to first nations. I don't have time to get into the law of fiduciary dealings and relationships, but I will say that the term "fiduciary" or "fiduciary relationships" has application in the aboriginal area. Of course, it is a broader equitable principle that has application in many instances. It's a mechanism, a principle, that allows courts and judges to oversee certain kinds of relationships in which there's a power imbalance. Trustee-beneficiary is a fiduciary relationship. Parent and child, doctor-patient, lawyer-client—all these are examples of fiduciary relationships.

In Guerin, those principles were applied to the relationship between the crown and aboriginal people. The case had to do with the surrender of reserve land and the disposal of that land. It was found in this case that the crown not only owed a fiduciary duty, but also breached its fiduciary duty.

The concept of fiduciary relationship and honour of the crown was further expanded in a critical case in aboriginal law—the 1990 Sparrow decision. I suspect members are familiar with this case. It referenced both the fiduciary relationship and honour of the crown in interpreting and applying section 35 of the Constitution Act 1982. That's the provision that provides constitutional protection for aboriginal treaty rights. The court said that those rights are not absolute, but if the crown is going to affect the rights adversely, then it must do so in a way that upholds the honour of the crown and is consistent with the special fiduciary relationship that exists between the crown and aboriginal people.

● (1135)

Following on Sparrow, there were references in various cases in the 1990s to honour of the crown and how it applies to or is at stake in all dealings between the crown and aboriginal people.

There was a case in 1996, called Badger, that dealt with treaty rights on the Prairies; and, perhaps most telling, in 1999, there was the Marshall decision that dealt with the peace and friendship treaties in the Maritimes and found that the Mi'kmaq have treaty rights to harvest and trade traditionally harvested resources with a view to attaining a moderate livelihood. Justice Binnie, who wrote the majority reasons in that case, relied very much on honour of the crown, saying that the honour of the crown almost dictated the result, dictated the interpretation of the treaty in that case.

The next sort of milestone, in a sense, was in 2002. There was a decision of the Supreme Court, again written by Justice Binnie, on fiduciary relationships, fiduciary duties, called Wewaykum. It did not involve section 35 rights, but it provided general guidance on the scope of the crown's fiduciary duties. The judgment spoke of the need to have a cognizable Indian interest and the crown undertaking a discretionary control of that interest, and in those kinds of circumstances a fiduciary duty would apply. One thing that was said in that case is that while there is a fiduciary relationship between the crown and aboriginal people, not every aspect of that relationship gives rise to fiduciary duties. That had been said in previous cases but was confirmed in Wewaykum.

Perhaps the most important decision around honour of the crown came two years later, in 2004, and again I'm sure it is well known to the members of this committee: the Taku River decision and Haida Nation decision of the Supreme Court. That was the case that found there was a legally enforceable duty to consult when the crown was going to make decisions that could adversely affect claimed, not just established, rights. The source of that duty, while it was connected with section 35 of the Constitution Act, was the honour of the crown.

In 2005, there was another case before the Supreme Court, called Mikisew Cree First Nation. That just developed a little further the concept of honour of the crown and applied the duty to consult to established rights, as well as claimed rights. That case involved a treaty right to hunt and the attempt by the crown to take up for the building of a road some land where the right to hunt existed. Perhaps very importantly, one of the opening statements in that case made a quite critical statement regarding the modern law of aboriginal rights, again written by Justice Binnie. He indicated that the fundamental objective of modern aboriginal law is the reconciliation of aboriginal peoples and non-aboriginal peoples and their respective claims, interests, and ambitions. The idea of reconciliation wasn't new. It had been referred to in some earlier cases by Justice Lamer when he was chief justice, but this kind of nailed it in the Mikisew Cree decision.

Between 2005 and 2009, there have been various lower court decisions. The Supreme Court really hasn't had the opportunity to explain further what the concept of honour of the crown means. The results have been variable. In some cases, the lower courts have relied on honour of the crown.

● (1140)

There is a case called Abenakis of Odanak, wherein the Federal Court of Appeal spoke about honour of the crown in the interpretation and implementation of the Indian Act, saying that the minister had an obligation to act honourably to make the act work. It was a case involving a first nation taking control over its membership.

There is a case where honour of the crown as certainly a duty to consult is actually still before the courts, and is in fact going to the Supreme Court in November. It's a case called Little Salmon Carmacks First Nation. That involves the role of the duty to consult in the context of a modern treaty. It may or may not be an opportunity for the Supreme Court to talk a little more broadly about the honour of the crown.

On the other side of the coin, some lower courts have indicated that yes, the honour of the crown is very important, but it is not applicable in all circumstances. There are a couple of cases in which appeal courts have indicated that the honour of the crown does not apply normally in litigation, so that where there is what is normally an adversarial process, the crown does not have to act in accordance with honour of the crown and that litigation is sort of controlled by its own rules.

It's a very minor case—well, I'll say a minor case—and a lower level decision, but it's probably one that's going to get revisited in other circumstances. It is indicating that while the honour of the crown is a source of legal duty, it isn't actually a cause of action in and of itself. It doesn't automatically give rise to legal remedies because, say, the crown hasn't acted honourably; it somehow has to be linked to some other form of legal duty.

Just to sum up, I would say that the honour of the crown as a source of legal duty is relatively new. While there have been references to it over the years and the courts have made clear that it's something that actually arose on the assertion of sovereignty, so that it does have a historical element, as a source of legal duty it's relatively new and in fact was only set out clearly in 2004 in the Haida Nation case.

So while the Supreme Court has provided some general direction on what the honour of the crown means, the nature and scope of it are very much under development. To date, lower courts looking at the principle have been fairly careful and cautious in extending the honour of the crown beyond where it already seems to exist. It's the duty to consult. It can give rise to fiduciary duties in certain circumstances, and it is clearly very much an aid to interpretation, both of statutes and treaties and indeed the implementation of treaties.

But having said that, I note that the honour of the crown is a broad and flexible concept. It's still under development, so it certainly has the potential to be the source of additional legal duties. In that regard, I guess there will be further developments as cases come before the courts.

Those, Mr. Chair, are my opening remarks. I obviously welcome questions.

● (1145)

The Chair: Thank you very much, Mr. Pryce.

With that, we will go directly to questions, as you invited us to do.

For the members who came in while we were getting under way, I'll point out that we are going to go with five-minute rounds initially so we can get more questions in. I should add that we do have some committee business to deal with, for which purpose we'll try to reserve 15 minutes, starting at 12:45. So we'll begin....

Madam Crowder.

Ms. Jean Crowder (Nanaimo—Cowichan, NDP): On a point of order, Mr. Chair, I'll agree to the five minutes this time, but we do have an order that the committee passed for rounds and the number of minutes allocated for questions. It seems that you're falling into a pattern of reducing the number of minutes on that first round. I just think that we do have those rules in place and we should respect them.

However, I will agree with the five minutes this time.

The Chair: I would say, Ms. Crowder, that you're absolutely right. It's my preference also to stick to the seven-minute rounds. When we get pressed for time, as we talked about today, we would normally go past one o'clock, but we have the Liaison Committee beginning right at one o'clock. It's difficult for us to go past the normal time.

But I take your point to heart. We'll make sure that we abide by those rules in every case we can.

We'll begin the first round, then, with Mr. Bagnell, for five minutes.

Hon. Larry Bagnell (Yukon, Lib.): Thank you very much, and thank you for your paper. I know there is much interest in the committee in it, so it's great. And if new things arise, it would be helpful if you sent it off to the committee.

I know you're a lawyer, which is great, but I wonder if you could explain for the man in the street, in Tim Hortons, what these two concepts mean. In particular, my understanding would be that the fiduciary relationships would be related to some financial obligations that the federal government has in oversight and responsibilities of stewardship, with the honour of the crown being much broader, suggesting in general that the crown should be honourable in its dealings with first nations, that in its negotiations and following up of ancient treaties and everything else, it should do that as honourably as possible.

Maybe you can try to put it in common language, either of you.

● (1150)

Mr. Charles Pryce: Thanks for that question. Does the five minutes include my response?

You're right that right at bottom is the notion of reconciliation, that that's the purpose of aboriginal.... Above that, the honour of the crown is almost like the bedrock. Then pursuant to the honour of the crown there may be some political or moral imperative, and then as a matter of law it begins to have some traction over things like aids to interpretation of statutes and treaties. Where there isn't specific enough interest at play, it can be the source of duties like the duty to consult. The Supreme Court was clear in Haida that because there wasn't what they call cognizable interest, the source of the duty to consult was honour of the crown rather than fiduciary duties.

So yes, fiduciary relationship and duties are like a subset of the honour of the crown, it would appear, and it is more engaged once you have particular interests. It actually has two aspects to it. One is in connection with section 35 of the Constitution Act. There are fiduciary duties not to adversely affect those rights unless the adverse impacts can be justified. In that sense it's not just about money, because there could be hunting rights, fishing rights, self-government rights of first nations that the government may be impacting on. The fiduciary relationship is relevant there, and the crown must conduct itself in accordance with fiduciary relationship or honour of the crown. It's engaged.

Fiduciary duty as it's normally thought of outside aboriginal law—and it definitely applies inside aboriginal law—is, as you've said, more seemingly to do with assets, and the cases that have come down so far are principally about reserve land and Indian moneys that have arisen once reserve land is disposed of. So you have the cases like Apsassin, Blueberry River, and in those instances the crown is almost like a trustee—they say it's not a trust exactly—where there's no competing interests, and yes, indeed, the crown is held to a high standard in dealing with those lands or property.

Hon. Larry Bagnell: Could you say that the fiduciary is related to some stewardship of the crown, responsibilities of the crown, which it has for aboriginal people where the honour of the crown could also apply to where they're negotiating as equals for whatever purpose?

Mr. Charles Pryce: I think that's probably fair, and the whole negotiation side is a very interesting aspect because the Supreme Court in Haida did actually reference that, saying that as part of the process of reconciliation and respect for section 35 rights there was a kind of obligation—I'm not sure if it's a legal or a moral obligation—to enter into negotiations and achieve a just settlement of claims to aboriginal rights.

So there certainly would appear some role to play in honour of the crown in the context of negotiations. Exactly what role is unclear at this point.

Hon. Larry Bagnell: That's about it.

[*Translation*]

The Chair: We will now go to Mr. Lemay for five minutes.

Mr. Marc Lemay (Abitibi—Témiscamingue, BQ): My question is specific as well as general in nature.

When I read the decisions of the Supreme Court, I always get the same feeling. It was the same when I was studying for my law degree. I have always felt that first nations were poorly defended by the federal government, despite its fiduciary obligation toward them. This government's priority has been to protect itself, in the interest of the Crown. That has always been the overarching consideration. I don't know if you understand what I'm saying.

When the time comes to defend the interests of first nations, the federal government finds itself in a blatant conflict of interest situation. Rarely have I seen decisions where the federal government sided with aboriginal peoples. We talk about the honour of the Crown. From the decision in Sparrow on down to the Haida decision, it is clear to me when I look at these cases. I have to wonder who has priority consideration, because the rulings always go against first nations.

An upcoming appeal that will be heard by the Supreme Court is one of the best examples of this. I'm referring to the McIvor decision. The federal government is against the appeal. Given that the court will rule on this important legal matter, one would have expected... You might think that this is a little off point, but to my way of thinking, the honour of the Crown is a much broader concept than that.

Do you not think that you are caught in the middle? You represent the Department of Justice. Your colleague, Mr. Prystupa, is from the Department of Indian and Northern Affairs. Do you not find yourself caught in the middle, trying to defend the federal government and the honour of the crown at the same time?

You can use the remaining time to try and convince me.

● (1155)

[*English*]

Mr. Charles Pryce: Thanks for that question, Mr. Lemay.

I think it's fair to say it is a challenge, and I have heard that question before. I'm not sure if this is going to convince you, but in all instances what the courts recognize, even under honour of the crown and fiduciary duty, is that the crown is in a unique position. They talk about how the crown wears many hats, and even when the aboriginal interests are at the forefront, it is still acting as a government of all Canadians, so there's always some balancing going on.

So while it is challenging, I would say it's not impossible for the Department of Justice or particular government departments to act consistently with honour of the crown and fiduciary obligations.

[*Translation*]

Mr. Marc Lemay: Your salary is paid by the federal government. When I pay someone, that person must be in my corner. That is where I have a problem. Shouldn't the government appoint an ombudsman to handle all aboriginal issues, thereby taking this burden off your shoulders? At some point, you are clearly in a conflict of interest situation.

I will let you finish answering the question because I know that we do not have a lot of time remaining.

[*English*]

Mr. Charles Pryce: I think it's an issue that has been raised. I'm not sure whether there is support for that.

You asked for an example of where the crown has sided with aboriginal people. There's one that comes to mind. There was a case called Glass that went to the Supreme Court of Canada. It was to do with the management of Musqueam lands and some leases for development, where as fiduciary the crown was actually arguing on precisely the same basis as the first nation. So it can happen that we are on the same side as first nations. It's not by any means always the case, but it does happen.

[*Translation*]

The Chair: Thank you, Mr. Lemay and Mr. Pryce.

Go ahead, Ms. Crowder.

[*English*]

For your benefit, Ms. Crowder, I think we will have time for a second question for you on this five-minute round—just to let you know.

Ms. Jean Crowder: Thanks for coming. I think you are probably well aware that this is a very complicated matter.

I want to come back to a couple of points, and I want to thank the research people for a very good document.

My understanding of this, and I'm not a lawyer, is that really the honour of the crown and fiduciary responsibility is actually grounded in the Royal Proclamation of 1763. That's kind of the root document that establishes, in my understanding, that there was this recognition of not ceded territories. I don't have the whole document in front of me.

Certainly from a first nations perspective, my understanding is that they looked at this royal proclamation as the document that recognizes the nation-to-nation status. So the honour of the crown, in my understanding of their view, is that it is rooted in the Royal Proclamation of 1763.

Then we have hundreds of years of a colonial approach that in fact prevented first nations from taking their cases to court. It wasn't until recent decades that they have actually been able to litigate on behalf of their people in terms of the honour of the crown, fiduciary responsibility, treaty lands, and all of that.

Once they actually are able to get into the courts, we start finding that the supreme courts are generally making some rulings around honour of the crown. I think in your own presentation you indicated that actually this started in 1984. It may have been completely clarified in 2004 with the Haida decision, but it actually started in 1984.

I don't have time to go through them all, but we have a variety of Auditor General reports that talk about treaty implementation and about the fact that the government does not honour the spirit and the intent of these treaties. We now have the Land Claims Agreements Coalition, which includes people from Yukon, and on and on, because the government doesn't appear to be honouring the spirit and intent of those treaties.

I wonder if you could tell me, in principle, how the government is moving to incorporate the honour of the crown into its dealings with first nations.

● (1200)

Mr. Charles Pryce: Maybe I'll start, but maybe my colleague will have some comments too.

In part response, I would say things obviously are not perfect. It's interesting that you raised the issue of treaty implementation, because I think that is an example.

The Supreme Court did say in Haida, and certainly in Mikisew Cree, that the negotiation of treaties is part way to achieving reconciliation, and that honour of the crown plays a role both in interpretation and implementation of those rights. What I can say is that certainly there's a recognition of the need to implement the treaties properly. I think there may be a difference of view. You mentioned not living up to the spirit and intent. It's both good and bad.

It's unfortunate I'm a lawyer, because I do tend to look at things as to what are the legal obligations and then think that's what was agreed to in the treaty. Then there may be broader objectives that the government or the parties can move toward, but it isn't necessarily a legal obligation. But as I said, I think there may be some differences of view.

I recall some of the discussions around treaty implementation, and I think it was Jim Aldridge who fashioned the phrase that government sees a treaty as a divorce settlement, that you just do the strict legal obligation. Aboriginal people see it as a marriage settlement, that there's an ongoing relationship. I'm not sure how accurate that is, but it does catch a certain kind of dynamic.

I think the government is certainly seeking better ways to implement the treaties. I know there is work going on with Indian Affairs that they're trying to pull together. What I think is being recognized is that these obligations are obligations of government, not only of DIAND, so there is a need to develop some greater consistency.

Maybe Mr.—

The Chair: Mr. Prystupa, did you want to add anything?

Mr. Mark Prystupa (Associate Director General, Negotiations - Centre, Treaties and Aboriginal Government, Department of Indian Affairs and Northern Development): I will just keep on the theme. You asked generally about how we try to incorporate honour of the crown into government dealings. As Charles said, it is an overall federal government responsibility, not just that of Indian Affairs.

With respect to honour of the crown, my personal feeling is that a lot of times it just makes good business sense. Sticking with the theme of implementation, if you're doing good in terms of implementation, then you're more likely to have better relationships that can extend to other areas and so on.

Yes, there has been an Auditor General's report. The Land Claims Commission has been critical of Canada in terms of the way we implement. As Charles said, a lot of that has to do with misunderstanding, having different interpretations of what the obligations are for Canada, for the aboriginal group, and for provincial or territorial governments.

As we are getting more and more agreements, we are beginning to become better able to systematize. I think we are continuously trying to improve. One of the areas that I think needs improvement is sometimes there might be agreement that almost everything has been implemented except for a couple of issues, but it is hard to deal once and for all with those issues to get them resolved.

● (1205)

The Chair: We will have to leave it at that; we're a little over.

Let's go to Mr. Duncan for five minutes.

Mr. Duncan.

Mr. John Duncan: Thank you.

I was just looking at some background information. It talks about the duty to consult and it says there are several cases wherein the courts have found that the crown breached its duty to consult. None have stopped the proposed action by the crown, but there is now a legal and enforceable duty that is there for our use, albeit imperfect.

Does that sum up some of this discussion quite succinctly, or would you have a different point of view?

Mr. Charles Pryce: With respect to the duty to consult, I am not sure I completely followed the comment.

Certainly the duty to consult does provide legal remedies. It does allow first nations and other aboriginal groups to challenge government action before there is potential damage to claimed aboriginal rights or established treaty rights. The nature of the remedy is through a process called judicial review, so it's not determining what the rights are; it's not necessarily requiring the government to compensate directly.

What it tends to do is say a decision has been taken that has not taken proper account of the duty to consult and accommodate. It then forces the parties to go back and consult more.

Mr. John Duncan: I am assuming the honour of the crown is at stake in all decisions with all departments, with all stakeholders, but when it comes to the aboriginal, that is what separates honour of the crown from duty to consult.

That is an important distinction, that the duty to consult only applies in the one case, in the case of first nations and aboriginal rights, and the honour of the crown applies across the board. It has been around for centuries, correct?

Mr. Charles Pryce: The honour of the crown was applied relatively narrowly, certainly as a legal concept. I think the political and moral imperative applies across the board. It engages legal duties in particular circumstances, and the duty to consult is a clear example of where that occurs.

Mr. John Duncan: Can I go to Wewaykum Indian Band v. Canada?

As part of the ruling, it was noted the crown is not an ordinary fiduciary and is obliged to have regard to the interests of many parties. We've had a lot of discussion about the UN Declaration on the Rights of Indigenous Peoples. That declaration does not balance the rights of all Canadians.

I am wondering if you can expand on the Wewaykum court ruling and what that might mean for the federal government.

● (1210)

Mr. Charles Pryce: I can certainly do that, but as I think I said in the opening remarks, and you've just confirmed it, the crown is no ordinary fiduciary, and in any circumstance it is actually having to act for all Canadians, not just aboriginal people. How that actually plays out in the balancing.... It's a much-beloved concept in aboriginal law that aboriginal rights are on a spectrum and that in a sense the nature of the duty and how the balancing occurs is on a bit of a spectrum.

In the case of Wewaykum, which was considered before a reserve was created, there was a greater balancing required between the interests of non-aboriginal people and the aboriginal groups concerned. As the reserve is created, and then beyond that you move to particular transactions related to the reserve and the disposal of land, there is less of a need to balance, so that the actual duty on the crown is closer to that of what I call a “private law fiduciary”. There isn't the same need to balance interests, so the crown can simply act in the best interests of the first nation.

But even at that end, the Supreme Court has been prepared to recognize that some balancing needs to be done.

The Chair: Okay, Mr. Duncan. Thank you very much.

Now we'll go to the second round. We'll begin with Mr. Bélanger for five minutes, followed by Mr. Payne, followed by the Bloc.

Mr. Bélanger.

Hon. Mauril Bélanger (Ottawa—Vanier, Lib.): It's rather interesting that we're exploring fairly significant and important concepts and we are limited to the five minutes. I find that very frustrating.

Mr. Duncan, I have to take exception to one comment that you were making, that the duty of the crown—or the Government of Canada—to consult applies only to aboriginal people. If you look at part 7, section 41 of the Official Languages Act, that same duty to consult rests there. That was finally put into the act in 2005, supported by the opposition at the time. But it goes further.

I tend to link both, by the way. Perhaps that's because I've been looking into matters of official languages for such a long time.

The Chair: Just as a reminder, Mr. Bélanger, we have a second meeting planned, with Mr. McCabe, on this topic as well later, so we will—

Hon. Mauril Bélanger: Yes, I'm aware of that, but I think there's more than a duty to consult, is there not? Isn't there also an obligation to act contained in this concept of honour of the crown?

Mr. Charles Pryce: I'm sorry, I'm not sure I understand the question.

Hon. Mauril Bélanger: Well, we've pretty well determined that there's a duty to consult. As a matter of fact, if I'm not mistaken, there is even, within the department, a protocol to be followed that flows from the honour of the crown decisions or concepts as they are interpreted by the courts, which tries to dictate or to encourage how the consultations and the negotiations are to be conducted.

Is that correct, Mr. Prystupa?

Mr. Mark Prystupa: In February 2008 the Government of Canada released interim aboriginal consultation accommodation guidelines, which are available publicly.

Hon. Mauril Bélanger: And that flows from this honour of the crown. Is that not correct?

My question is, doesn't the honour of the crown go beyond the duty to consult to an obligation to act?

Mr. Charles Pryce: I'm sorry. I know I'm not supposed to be asking the questions, but do you mean to accommodate beyond consultation?

Hon. Mauril Bélanger: I mean an obligation to act—not necessarily to get all the results and everything they want, but an obligation to act. The comparison I'd give is that if you go to see a doctor, there's an obligation or a duty to consult. That is the obvious one: to conduct a diagnosis. But then there is an obligation to act, to prescribe. Whether or not the result is as everyone wishes—there's no obligation as to the result per se, because then you're getting into another realm—there's certainly an obligation to act, is there not, that flows from the honour of the crown?

Mr. Charles Pryce: I apologize for being a little dense on this.

It can in certain circumstances require accommodation. This means that while the Haida Nation decision only gives general guidance, it says that you start off with consultation, and that where appropriate there may be a need to accommodate. This means making adjustments to the original proposal in order to take account of claimed interest.

● (1215)

Hon. Mauril Bélanger: I want to push this a little further, and I have two more questions.

One is this. In the Library of Parliament there's a good document called *Words & Phrases*. That document says, “The generous attitude the law takes to the definition of aboriginal rights is sometimes summarized by the phrase 'honour of the Crown'.”

I want to know whether, in the Department of Justice's mind and perhaps also in that of Indian and Northern Affairs, that concept of generosity is well implemented.

Mr. Charles Pryce: All I can say—and maybe Mr. Prystupa has some additional comments—is that there is certainly an awareness of honour of the crown. Obviously things are not perfect, but it is an understood concept from a legal perspective. When advising, we take into account the concept of the honour of the crown, so there is an awareness. Whether it's always sufficient, I'm not sure. That “generosity” at some level becomes...I won't say subjective, but there can be differences of view as to what the generosity is that is required.

Hon. Mauril Bélanger: Following from laws, the government will set policies and then guidelines. That's the traditional structure, if you wish. Is there a policy, government-wide or even in certain departments, that interprets and gives meaning and a body to “honour of the crown”, such as there is for other laws in the country?

I go back to the Official Languages Act. There is a series of policies in the Treasury Board Secretariat, for instance, that define and prescribe and give obligations, if you will. Is there such a policy government-wide for honour of the crown?

Mr. Charles Pryce: Mr. Prystupa may know differently, but I'm not aware of any such document that speaks directly to honour of the crown. I guess the closest would be these interim guidelines. It's not honour of the crown writ large, but—

Hon. Mauril Bélanger: Well, that's not a policy.

The Chair: Mr. Prystupa, do you have anything to add on that?

Mr. Mark Prystupa: I was just going to say that to my understanding there is no government-wide policy, but I think that honour of the crown helps to inform several different policies. There are many different policies within each department that would—

Hon. Mauril Bélanger: Can you give examples of them?

Mr. Mark Prystupa: I think these interim guidelines are some. I think policies around—

Hon. Mauril Bélanger: Mr. Chair, if I may, with your indulgence....

There's a fairly rigid structure in the federal apparatus, of laws.... Well, there's the Constitution; there are constitutional or quasi-constitutional laws, and legislation there; then you have policy—very strict, very firm policies that are very well-thought out, established, and fairly difficult to modify; and then you have guidelines, as the bottom rung of that tall ladder.

I'm not talking about guidelines here. I'm talking about policy. I'm hearing that there is no such policy, as far as the interpretation and application of honour of the crown is concerned. Is that correct?

Mr. Mark Prystupa: That's right.

The Chair: Thank you, Mr. Bélanger.

Thank you. I'll have to let you think about that. If there is something more afterwards, maybe we can consider it as a follow-up.

Now we are going to Mr. Payne for five minutes.

Mr. LaVar Payne (Medicine Hat, CPC): Thank you, Mr. Chairman.

I am much like Madam Crowder; I'm not a lawyer, so I don't have quite the legal understanding of this fiduciary obligation of the crown. I'm wondering whether you could help me out. Is this a one-way relationship, or does it work for both of the parties?

Mr. Charles Pryce: As I mentioned before, I think what the courts have said is that the goal of the modern law of aboriginal rights is reconciliation, and that's a two-way street. When you think about honour of the crown—and let's think particularly about the duty to consult—it is a two-way street. That manifests itself in a couple of ways—or probably more than a couple, but I can think of a couple of examples.

There's a duty on the crown to consult in certain circumstances, but then from the aboriginal side there's a need to identify what their claims are with some particularity. It's not just an open-ended process; there is no veto. Depending on the circumstances, the consultation can be an exchange of information leading to deeper consultation, but at the end of the day, consent is rarely if ever required. Instead, the crown can still act unilaterally, but it will have had to take certain steps relating to consultation.

As Mr. Bélanger has pointed out, there can in certain circumstances, depending on the adverse impact, be a need to accommodate the concern. It is a two-way street.

● (1220)

The Chair: I there anybody else? I have Mr. Rickford on the list as well.

Mr. Rickford, you have another two and a half minutes remaining.

You want me to move on.

[*Translation*]

You have five minutes, Mr. Lemay.

Mr. Marc Lemay: The honour of the Crown is a rather unique concept rooted in the Royal Proclamation of 1763. This concept has been greatly expanded on by the courts. I understand that there are no guidelines or procedural directives. Since we are still part of the British empire, the laws of Britain still apply.

Do you not think that the honour of the Crown is a somewhat overworked concept, one that has served more to defend the Canadian government?

I want to thank Ms. Hurley for the tremendous work that she has done. The notes that she has prepared for us address all of the hot points directly. I think our interpretation should be based on the following excerpt from the Royal Proclamation of 1763:

> [...] it is just and reasonable, and essential to our interest, and the security of our colonies, that the several nations or tribes of Indians with whom we are connected, and who live under our protection, should not be molested or disturbed in the possession of such parts of our dominions and territories as, not having been ceded to or purchased by us, are reserved to them, [...]

Slowly, beginning in 1800, the federal government attempted to restrict the scope of this provision. It should be a given that first nations have priority. If they have not ceded their rights to their lands, well then too bad, the lands belong to them.

That is not what I seem to hearing. Since when has this concept changed? The fundamental principle at issue initially was defending the interests of aboriginal peoples. Now it's become a matter of defending the Crown in cases involving the rights of first nations.

[*English*]

Mr. Charles Pryce: It's a difficult question to respond to, but I'll do my best.

The honour of the crown is certainly evidenced in the Royal Proclamation of 1763. In a case called Mitchell, Chief Justice McLaughlin said that on the assertion of sovereignty there arose a duty to treat aboriginal people fairly. There was a statement in that case. So in a sense her proclamation is evidence of that approach. I think that in the intervening period of colonization there was a general understanding that it was difficult for aboriginal people to establish and vindicate their rights.

The big change that occurred was in 1982—part of the patriation of the Constitution and the passage of section 35. It gave real legal effect to those rights. Prior to 1982—and certainly prior to 1973 and the Calder decision—there was not a great deal of legal recognition of the rights. The government's position until Calder was that aboriginal rights were too vague to be legally enforceable. So that changed with the Calder decision. Then there was a further change in 1982 to make them not only legal rights but constitutionally protected.

So there has been a change in the legal landscape. How well the federal government or the provinces do in respecting those rights is now monitored, in a sense, by the courts through cases dealing with section 35. As the Supreme Court has said, the best way to deal with the claims of aboriginal people is through negotiation. And as Justice Lamer mentioned in the Delgamuukw case, the best way is through negotiations informed by judgments of the court. So there is an interplay between developments in the law and negotiations between the parties.

● (1225)

[*Translation*]

The Chair: Unfortunately, your time is up.

You have five minutes, Mr. Rickford.

[*English*]

Mr. Greg Rickford (Kenora, CPC): Thank you, Mr. Chair, and thank you to the witnesses for coming today.

This can be terribly complicated, and as a lawyer who has spent a fair amount of time grappling with this, either academically or in practical terms, I am not sure being a lawyer actually gives much benefit to you in terms of too many sleepless nights, either at law school or in certain situations.

My work historically in northwestern Ontario, in the great Kenora riding, has been to deal with some of the practical implications of these decisions as they've evolved, obviously from the distinction in fiduciary duty for the interests of aboriginal groups and discretionary power on reserve land, which flows from Guerin, and in Sparrow, the obligation to respect constitutionally protected aboriginal person or treaty rights and the justificatory test for those rights.

In my view, Sparrow started a thoughtful discussion, at least in the courts, on enhancements of participation in activities and traditional activities. That is a very brief overview of those decisions that are fact-driven.

The Haida decision expounded further on economic opportunities, and that's really where I want to go in the three and a half minutes I may have left.

This committee has been dealing with a number of important issues around the Indian Oil and Gas Act, and we're going to undertake a study that looks thoughtfully at economic development. If we take a look at some of the extrajudicial considerations, the RCAP report has in it a differentiation between fiduciary relationships and obligations, a statement that said it doesn't necessarily give rise to legally enforceable fiduciary rights, just that there could be a fiduciary obligation, but that relationship wouldn't necessarily give rise to the rights.

This is kind of important to understand, because we need to understand, as a matter of policy and as a matter of legislation, how in balance and in context economic development can proceed and first nations communities can participate substantially in a fully integrated—and I mean this in an economic sense—manner.

The example, of course, is in my own riding: the Whitefeather Forest—Two Feathers Forest Products initiative, which deals uniquely with provincial crown obligations under forestry management and the relationship of the nations with them, and then the role of the federal government either collaterally or in an ancillary or complementary capacity.

I wonder if you could comment on some of the extrajudicial considerations and the impact they may have, not just on the development of the law but implications for economic development, particularly more in keeping with Sparrow and the idea of enhancing economic participation in traditional lands, because there's another important balancing act. One community wants to develop a resource on traditional lands and the other ones want to protect it for very sound environmental principles.

There are a lot of dynamics that have to be considered here. It's a big question, and I am sorry for offending the richness of a lot of decisions in three minutes. Could you comment on that?

● (1230)

Mr. Charles Pryce: Maybe Mr. Prystupa can pick up on this, as it's extrajudicial.

My only comment is yes, it is a challenge to meet these competing objectives in terms of respect for the distinctiveness of aboriginal people and their rights and also to proceed with economic development.

It is a challenge, but potentially it is through mechanisms like consultation, properly followed through, that you can achieve that balance. I think you're right that much of what the courts have been telling us is around trying to provide economic opportunity to first nations through respect for aboriginal claims, aboriginal rights, etc.

Mr. Greg Rickford: Mr. Prystupa, I saw you nodding. I'd love to hear your thoughts on some of this.

Mr. Mark Prystupa: This is another aspect. I'll touch upon consultation, because I think that's important.

Through consultation we have a better understanding of what the aboriginal interests are. At the same time, I think it's good practice, because we're able to formulate proposals or decisions that help support economic development while discharging our legal duty to consult, and so on.

One thing we need to do is to find a way to do it efficiently and effectively. That's what we're working on: being consistent across government; giving training to people from different government departments on how to consult, and making sure we're consistent; and building a repository of information on different first nations claims and assertions, so that when a development project is being proposed we can go out and do the consultation quickly, effectively, and efficiently so that we can move forward with economic development where it appears it has the support.

The Chair: Thank you, Mr. Rickford.

Mr. Greg Rickford: I share my colleagues' concerns about the five-minute round. Two or three more minutes would have made the difference.

The Chair: That's particularly true with a topic like this, but we're doing okay time-wise. That's why it's good to move along. Let's move to Ms. Crowder for five minutes, after which the government has indicated that they do not have any more questions.

I have Mr. Bélanger and Mr. Tonks on the list. Do you wish to split? Okay.

Ms. Crowder.

Ms. Jean Crowder: Great. Thanks. There is a challenge with the five minutes.

I want to refer to a question about whether first nations have a duty to act honourably. I want to refer to *First Nations Strategic Bulletin* volume 5, issues 4 and 5, which you won't have in front of you. I'll try to summarize it.

It's quite a lengthy discussion on the duty to consult. It asks whether there is a duty on first nations to act honourably. In the discussion, it indicates that the honour of the crown forces it to act honourably in dealing with aboriginal rights, even their assertive rights. The goal is to achieve reconciliation with aboriginal peoples. The duty to act honourably is a legal duty, and it arises because of the power the crown holds over aboriginal peoples. It goes on to conclude that first nations do not have a legal duty to act honourably, but they do have a duty to reciprocate in good-faith consultations once the crown has made a commitment to consult in good faith with them.

I wanted to put that on record, because I think it's a slightly different interpretation from the one you referred to. This was put forward by a member of the Indigenous Bar Association. But that's not my question.

I want to come back to the misunderstanding around spirit and intent. I think it's an important issue. In 2003, the Auditor General found that INAC seemed focused on fulfilling the letter of the land claims implementation plans but not the spirit. Officials made believe that they had met their obligations, but in fact they have not worked to support the full intent of the land claims agreements. The Land Claims Agreement Coalition put together a document on May 12, 2009, that says that the evidence is extensive that the Government of Canada has failed to implement the spirit and intent fully and meaningfully.

As to the honour of the crown, many first nations feel that when the government fails to meet its obligations, they're forced into expensive litigation that they cannot afford. They don't always win, but they win often, because the government is not fulfilling its obligations on spirit and intent.

I wonder if you could tell the committee what actions the government has taken to bring together both parties to clear up the misunderstandings about the obligations. This seems to be at the heart of it. We talk about economic development and social conditions, but they won't progress until we implement some of these treaties.

● (1235)

Mr. Mark Prystupa: I spent a lot of years as a negotiator. Sometimes you write down text that at the time seems clear to the people who are negotiating. Later on, though, when other people are looking at the document, it can take on a different meaning. It's sometimes difficult to state what the meaning was when it was being negotiated. I think that accounts for some of the problems in interpretation and bears on our understanding of spirit and intent.

With respect to your question, I'd like to follow up with a written report.

Ms. Jean Crowder: That would be great, very helpful. This is something the committee hears about regularly, the lack of movement on spirit and intent. It would be helpful if we could see some progress being made.

Is my time up?

The Chair: You still have a minute and a half.

Ms. Jean Crowder: Oh, I do? That's a relief!

I understand the adversarial positions that we end up taking in court, but is there a move towards a less adversarial approach? I had a grand chief from northern Quebec approach me about a mine that's going into their territory, and they were not consulted. Essentially, they've been told that it's too bad and to take it to court. They simply don't have the money. No one has acknowledged that they weren't consulted. In order to have their rights of consultation taken into account, they're being forced into the court system, which they can't do. That kind of approach isn't helpful. I wonder if you could comment on whether there is a move away from the adversarial approach and towards reconciliation.

Mr. Mark Prystupa: I think in all cases we try to have more of a sort of collaborative approach. Certainly there are some negotiation tables we're at that are very interest-based and we try to progress together. At other tables, where the issues are perhaps more tense, it's more difficult to do that.

In the case of consultation, what we try to do is consult in almost all cases, and we encourage industry to consult as well beforehand, but understanding that the duty rests with the Government of Canada. And we try to develop and foster those good relations with aboriginal communities.

The Chair: Okay, we'll have to leave it there. We're going to go to Mr. Rickford for five minutes, and then we'll wrap up with Mr. Tonks and Mr. Bélanger.

Mr. Rickford.

Mr. Greg Rickford: Thank you.

So just to continue where I might have otherwise gone with my extra couple of minutes, and I'm not sure I can get there but I'll do my best, I spoke about RCAP and the differentiation between fiduciary relationships and fiduciary obligations and that it doesn't necessarily give rise to legally enforceable fiduciary obligations, which was then in substantive law endorsed by Wewaykum Indian Band v. Canada.

I think there were four principles that came out of there. First of all, it was important to note that we moved beyond section 35 rights on existing reserves, and it importantly identified things around general indemnity and said this varies with the nature and importance of the interest for either party.

Then further, I alluded to the fact that this is no ordinary fiduciary duty. So when we turn to Wewaykum and we look to at least part of that ruling, we see that the crown is not an ordinary fiduciary and it does have to pay serious attention to the interests of many parties, which would include other jurisdictions within Canada.

I find this interesting because now we start to talk about the United Nations declaration, and of course there are some important things to think about in there. But in the context of the duty to consult, one of the concerns is that first nations already have entrenched constitutional rights vis-à-vis section 35, and the case law itself is advancing, in my own view, some fairly positive—as a matter of policy and law—opportunities for first nations to be involved in economic activities or environmental activities, both protectionist and preservationist in nature, to develop partnerships with private-public and private stakeholders. So, for example, Lac Seul First Nation went through the process with Ontario Power Generation and is now a full partner in the hydro dam in Ear Falls.

I'm concerned that some of that doesn't account for some of the great things that are going on in terms of economic activity. So what, in your view, or views, can you comment on further to this discussion around economic activity? At least in my riding, I know and have said on many occasions that the economic future of northwestern Ontario must include, integrally, first nations communities in areas of health, transportation, and resource development management, etc.

Can you comment or expand on, perhaps, the ruling in Wewaykum in light of what I've just created and, to the extent that you want, any concerns you might have with UNDRIP's implications in the context of accommodation and consulting?

● (1240)

Mr. Charles Pryce: Again, just by way of a general comment, with respect to economic development, no question, I would imagine that having first nations involved is important. With respect to Ontario and maybe your riding in particular, of course a lot of the resources are under the administration of the province, so that engages the province as much as it does the federal government. I'm aware of how the Province of Ontario is trying in various ways to amend legislation, like mining legislation, so that there is—

Mr. Greg Rickford: There's forestry management.

Mr. Charles Pryce: —consultation, and there is that engagement. I think to that extent, these developments are potentially positive. With respect to the UN declaration, off the top of my head I can't see the direct connection.

Mr. Greg Rickford: That's fair.

Mark, did you have some comments you wanted to add?

Mr. Mark Prystupa: Sure. I can say that in modern treaties they usually include economic measures provisions, which include, for example, preferential contracting for aboriginal claiming groups. I think last time Michel Roy, who's our assistant deputy minister, mentioned that there's now a website to look at what's been implemented.

I think there is a tremendous number of success stories, and we need to try to make other companies and other aboriginal groups more aware of what can be done when industry and aboriginal communities work together. Indian and Northern Affairs, I think, helps to facilitate that through some of the programs.

Mr. Greg Rickford: One of the concerns, obviously, is that—

The Chair: I'm sorry, Mr. Rickford, we're right at the end here. We're already over time, so now we'll go to Mr. Tonks and Mr. Bélanger.

Mr. Alan Tonks (York South—Weston, Lib.): Thank you, Mr. Chair. I'll try to make it quick.

I'm fascinated by this. I don't sit on the committee, but it seems that the Royal Proclamation guaranteed that there would be no erosion of aboriginal nations in their rights, which were reserved to them, over lands that they owned. They had treaty rights, too.

That's on the one hand. On the other hand, it stated in our briefing notes that there were relevant judicial decisions that established the crown's sovereignty and the assumption of sovereignty over a country's first nations people. You sort of have the recognition of existing treaty rights. You have judicial precedence, which establishes sovereignty. And I guess the 1982 Constitution Act recognizes existing treaty rights again.

My question is, where there is an application that's being put forward with respect to new lands, and the concept of dialogue and consultation, does it suggest that those agreements are mutual, or do they continuously have to be challenged? I think that's important with respect to how the committee looks at future economic interests. How is this process actually going to help? Never mind the law. The law suggests some trends and whatnot, but what's the culture of the approach?

● (1245)

Mr. Mark Prystupa: I guess there are historic treaties in Canada. There are the peace and friendship treaties, and the numbered treaties that exist across Canada. We call those historic treaties. For those treaties, we have a process through specific claims, where a first nation that has signed a treaty can submit a claim that's assessed by the government for potential negotiation. A first nation can always choose litigation, but our preference, and their preference, in most cases, is to negotiate.

What we try to do in coming up with negotiating instructions is to undertake analysis of what the current law provides and develop our negotiation instructions consistent with those, but also to negotiate in a way that's, hopefully, win-win. We find out ways to help protect harvesting areas, or potential areas for economic development. There are also areas where we haven't negotiated any agreements. Those have primarily been in the north and in British Columbia, where we're now involved in creating modern treaties. We do that through comprehensive claims policy.

It doesn't set up the same sort of system of reserves and so on, but we try to end up negotiating. Once again, we go to cabinet for negotiation instructions and for mandates. We do an analysis of what our obligations are under the law, in that case, and try to negotiate these win-win outcomes.

The Chair: Thank you, Mr. Tonks.

Go ahead, Mr. Bélanger.

[*Translation*]

Hon. Mauril Bélanger: Your official title is General Counsel, Aboriginal Law and Strategic Policy. That means you are responsible for formulating policy.

How can we develop and implement a policy respecting the honour of the Crown. By the way, the French equivalent is “honneur de Sa Majesté“, not “honneur de la Couronne“. I'm not asking you to give me an answer at this time, but if the department were to ask you to develop a policy, how would you go about doing that?

[*English*]

Mr. Mark Prystupa: I work in a specific area, particularly around negotiations, and you're talking about generally within the department how do we develop these policies. We have a certain internal structure whereby with any new policy proposal and policy work... we make sure that where somebody else is doing policy work in a certain area, we'll see if there is a way to combine our aggregate, our work with theirs, so that it makes more sense.

Then we have a variety of different committees internal to the department. We have a DG policy review committee. We have a committee that's led by the deputy minister called the policy committee. We also have, even before somebody comes up with developing that sort of issue and they just want to talk more generally, a focus on strategic interests committee.

All that is to say, there's an internal structure by which there's a review and analysis and development of policies.

● (1250)

Hon. Mauril Bélanger: That's it.

The Chair: Thank you.

Hon. Mauril Bélanger: I'd like to speak on another matter, Mr. Chairman, if I may.

I gather we're going to have the professor coming at some point?

The Chair: I'm glad you mentioned that. Go ahead.

Hon. Mauril Bélanger: Would it be appropriate for our committee, since we're looking into a rather complex and I think rather meaningful matter, to also hear from representatives of the aboriginal communities on this concept?

The Chair: That's something the subcommittee can take into consideration when we look at the work plan, which we'll be doing, we hope, the meeting after the break.

Monsieur Lemay, you have a point?

[*Translation*]

Mr. Marc Lemay: Without getting into the specifics, there are aboriginal law associations, aboriginal committees comprised of students, professors and lawyers who could address some of the concerns that Mr. Bélanger has just raised.

[*English*]

The Chair: Okay.

For members' interest, you may know that we are attempting to schedule a meeting with the author, Timothy McCabe. His book was published in 2008. It's called *The Honour of the Crown and its Fiduciary Duties to Aboriginal Peoples*. It's recommended reading for any of you who would like to look more closely at that. And we are attempting to get Professor McCabe before us next month. So if you'd like to delve into this, it's certainly a very good look at this question.

Now, members, there are a couple of very small items of committee business. Is it the wish of the committee to go in camera at this point?

Okay, let's proceed. I have two very quick items. You've been circulated a proposed list of witnesses, categories as well as organizations and individuals, for both the Ottawa hearings as well as the territorial hearings.

I see our witnesses are getting under way.

Gentlemen, please accept our thanks for your presentations this afternoon. It has been very helpful on a very important and complex topic. You can take your leave now, and we thank you for your help.

Mr. Charles Pryce: Mr. Chairman, I just wasn't sure if we were to stay or to go.

The Chair: You certainly are at liberty to leave if you wish. Thank you very much.

Again, back to the witnesses, I'm asking, members, if you could look at that list and give feedback to the clerk. If there are organizations you'd like to see added, please take a look at that. If you could feed that back to the clerk by Wednesday of next week, that would be a great help to us. That's on both. Let me just say it's going to be very difficult to scope down the number of witnesses for this study. We are going to have to make some choices, but to do that we need your input.

The final thing is we're going to go to the Liaison Committee here momentarily. Thanks to members, we did pass the budget at our last meeting on Tuesday. We'll present that to Liaison. The way it's looking right now, tentatively, for travel is that the first trip, which would be to Whitehorse and Yellowknife, would be in the first sitting week of November, which would be November 2 to 6. We can't do it any earlier than that. We tried to move it forward by one week, but that first week of November is coming up as the likely week for travel.

The Iqaluit trip, which you will recall is from Monday to Wednesday, is only a partial week, unlike the other one that is a full week. We'll be looking to see the Monday to Wednesday travel in the first week back after the Remembrance Day break, which would put us at November 16 to 18. That's tentative. We haven't locked in any travel arrangements, but the logistics officer from the clerk's office is suggesting that is the likely approach.

Unless there is anything else for the committee, I think we can adjourn. We'll see you back here on the Tuesday after the break. You will recall we're having a meeting on the action plan on child and family services at 11 o'clock the first Tuesday back. Is that okay?

Thank you very much for your attention, and have a good remainder of the day. The meeting is adjourned.

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