Court File No.: 38921

IN THE SUPREME COURT OF CANADA

(ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO)

BETWEEN:

CITY OF TORONTO

Appellant
(Respondent in the Court of Appeal)

- and -

ATTORNEY GENERAL OF ONTARIO

Respondent
(Appellant in the Court of Appeal)

- and -

TORONTO DISTRICT SCHOOL BOARD

Intervener
(Intervener in the Court of Appeal)

- and -

ATTORNEY GENERAL OF CANADA, ATTORNEY GENERAL OF BRITISH COLUMBIA, CITYPLACE RESIDENTS' ASSOCIATION, CANADIAN CONSTITUTION FOUNDATION, INTERNATIONAL COMMISSION OF JURISTS (CANADA), FEDERATION OF CANADIAN MUNICIPALITIES, DURHAM COMMUNITY LEGAL CLINIC, CENTRE FOR FREE EXPRESSION AT RYERSON UNIVERSITY, CANADIAN CIVIL LIBERTIES ASSOCIATION, ART EGGLETON, BARBARA HALL, DAVID MILLER AND JOHN SEWELL, DAVID ASPER CENTRE FOR CONSTITUTIONAL RIGHTS, PROGRESS TORONTO, MÉTIS NATION OF ONTARIO, MÉTIS NATION OF ALBERTA and FAIR VOTING BRITISH COLUMBIA

Interveners

FACTUM OF THE INTERVENERS
MÉTIS NATION OF ONTARIO AND MÉTIS NATION OF ALBERTA
(Pursuant to Rules 37 and 42 of the *Rules of the Supreme Court of Canada*, SOR/2002-156)

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PART I AND PART II: OVERVIEW AND POSITION OF THE INTERVENERS

1. This Court has recognized that "it would be impossible to conceive of our constitutional structure without [unwritten constitutional principles]."[1] They "infuse our Constitution and breathe life into it."[2] They provide the fertile ground that nurtures and grows Canada's Constitution as a 'living tree', so it does not devolve into a dated relic of the views of 'framers' who could not have envisioned the complexity or social and cultural diversity of modern Canada. For the most part, this Court has not allowed textual 'originalism' in sheep's clothing to creep into Canadian constitutional jurisprudence. Textual silence does not necessarily equate to constitutional omission.[3] The Métis know this silence well.[4]

2. This Court has relied on these unwritten principles to answer "momentous questions that go to the heart of our system of constitutional government."[5] These answers underpin Canada's very existence and anchor its future. This Court has also repeatedly held that these principles may invalidate laws when necessary, and has relied on them even when legislators could likely have found 'ballot box' support for their legislative measures and had the written text of the Constitution (or lack thereof) on their side.[6] Unwritten principles have temporarily saved unconstitutional laws to stave off chaos.[7] One of these unwritten principles—the honour of the Crown—now acts as a workhorse in advancing reconciliation with Indigenous peoples.[8] With respect, these principles are not "abstract," or "amorphous,"[9] or "an empty vessel to be filled with whatever meaning we might wish from time to time."[10]

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1 *Reference re Secession of Quebec*, [1998] 2 SCR 217 at para 51 [*Secession Reference*].
2 *Secession Reference* at para 50.
3 *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 SCR 3 at para 104 [*Judges Reference*]. See also: *Reference re Same-Sex Marriage*, 2004 SCC 79; *Carter v Canada* (*AG*), 2015 SCC 5.
4 *Daniels v Canada* (*Indian Affairs and Northern Development*), 2016 SCC 12 [*Daniels*].
5 *Secession Reference* at para 1.
6 *Re: Resolution to amend the Constitution*, [1981] 1 SCR 753 at 841–845 (per Martland and Ritchie JJ, dissenting) [*Constitution Reference*]; *Secession Reference* at para 54; *MacMillan Bloedel Ltd v Simpson*, [1995] 4 SCR 725 [*MacMillan Bloedel*]; *Judges Reference*.
7 *Reference re Manitoba Language Rights*, [1985] 1 SCR 721 [*Language Reference*].
8 *Manitoba Metis Federation Inc v Canada* (*AG*), 2013 SCC 14 [*Manitoba Metis*].
9 *Toronto* (*City*) *v Ontario* (*AG*), 2019 ONCA 732 at para 85 [*OCA Reasons*].
10 Respondent's Factum at para 121, citing *Reference re Public Service Employee Relations Act* (*Alta*), [1987] 1 SCR 313 at para 151 and *Caron v Alberta*, 2015 SCC 56 at para 36.

3. In the court below, the Ontario Court of Appeal ("**OCA**") concluded that "unwritten constitutional principles do not invest the judiciary with a free-standing power to invalidate legislation,"[11] based solely on argument about the principles of democracy and the rule of law. Before this Court, the government of Ontario ("**Ontario**") doubles down on this categorical and overbroad statement.[12] The OCA's ruling contradicts this Court's well-established jurisprudence and has the potential to undermine unwritten constitutional principles generally and specifically at least one other principle that is not engaged on this appeal: the honour of the Crown.

4. The Métis Nation of Ontario and the Métis Nation of Alberta ("**Métis Governments**") intervene to ensure that this appeal does not inadvertently and inappropriately set back the unique and coherent legal framework this Court has developed in relation to the honour of the Crown. The Métis Governments sit at the front lines of reconciliation and rely on this legal framework on a regular basis in their dealings with other governments. They do not want the OCA's flawed reasoning to harm or limit the constitutional principle they hold dear. They say the OCA's ruling with respect to all unwritten constitutional principles must be overruled, constrained, or clarified by this Court and make the following three submissions on this issue.[13]

5. First, not all unwritten constitutional principles can be painted with the same judicial brush. The honour of the Crown is a distinct principle that has evolved to a place where this Court has expressly recognized it may be used to invalidate legislation in certain situations. It is not engaged in this appeal and therefore should not be inadvertently impacted by it.

6. Second, contrary to the OCA's ruling, unwritten constitutional principles have been relied upon by this Court to invalidate legislation, temporarily save unconstitutional legislation, and answer fundamental questions that hold Canada together as a country. These principles have had—and must continue to have—significant legal and constitutional import.

7. Third, the unwritten constitutional principles of democracy and rule of law may give rise to enforceable constitutional duties or rules in specific circumstances that may invalidate legislation.

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11 *OCA Reasons* at para 89.
12 Respondent's Factum at paras 119 and 121.
13 The Métis Governments intervene on the second appeal issues in the Appellant's Factum.

PART III: STATEMENT OF ARGUMENT

A. The honour of the Crown—as a constitutional principle—is unique and may be used to invalidate legislation in certain circumstances

8. This Court has repeatedly confirmed that the honour of the Crown is a "constitutional principle."[14] In *Beckman*, Deschamps J described it as "a fifth principle underlying our Constitution," akin to the previously recognized principles of democracy, federalism, constitutionalism and the rule of law, and respect for minorities.[15]

9. Like other unwritten principles, there is no constitutional text that sets out or explains "the honour of the Crown" and its scope. No specific constitutional 'provision' anchors its existence; yet, it is now unquestionably one of the fundamental pillars of modern Aboriginal law. With no less than twenty-five judgments of this Court referring to or relying on it over the last forty years, it is no more abstract or amorphous than the written text of the Constitution itself.

10. Other than their shared unwritten existence, the similarities between the honour of the Crown and other constitutional principles are limited. The honour of the Crown is unique to the context of the *sui generis* relationship between the Crown and Indigenous peoples.[16] There are good reasons for this. First and foremost, Indigenous communities and peoples existed in their territories, with their own customs, laws, and relationships to the land, well before Canada was created. The unique constitutional status of Indigenous people reflects this pre-existence.[17] Unlike municipalities or 'creatures of statute,' their existence, legal identities, and inherent rights do not flow from sections 91 or 92 of the *Constitution Act, 1867*.[18] They exist independently and "pre-date" Canada. Canada's constitutional architecture must reconcile with this distinct historic and legal reality.

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14 *Beckman v Little Salmon/Carmacks First Nation*, 2010 SCC 53 at paras 40–42, 97 [*Beckman*]; *Manitoba Metis* at paras 69 and 136; *Mikisew Cree First Nation v Canada (Governor General in Council)*, 2018 SCC 40 at paras 24, 42, 92 [*Mikisew*].

15 *Beckman* at para 97 (citing *Secession Reference* at paras 48–82).

16 *Guerin v The Queen*, [1984] 2 SCR 335.

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

18 *Constitution Act*, *1867* (UK), 30 & 31 Vict, c 3, ss 91 and 92. See also *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44 at paras 141–144.

11. Similarly, the honour of the Crown "pre-dates" Canada's written Constitution.[19] Accordingly, the honour of the Crown is not only engaged when a specific "right" based on constitutional text is established. Instead, the honour of the Crown arises "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."[20] The principle speaks to *how* "servants of the Crown must conduct themselves with honour when acting on behalf of the sovereign."[21] While "not a cause of action itself," it addresses "*how* obligations that attract it must be fulfilled."[22]

12. This approach enables past grievances to be addressed by asking the question of what was required in a specific situation in order to uphold the honour of the Crown. Just as importantly, the principle regulates the ongoing relationship between the Crown and Indigenous peoples as reconciliation continues.[23] It also assists in filling the cavernous textual gaps that exist in the Constitution when it comes to reconciling Crown interests with pre-existing Indigenous lands, rights, legal orders, jurisdiction, and self-government.

13. In *Manitoba Metis*, McLachlin CJC and Karakatsanis J, on behalf of this Court, brought together jurisprudence dealing with the honour of the Crown that spanned over 30 years to articulate a coherent and stable organizing theory on *how* the honour of the Crown gives rise to legally enforceable duties in specific fact situations. These recognized duties include:

(a) "a fiduciary duty when the Crown assumes discretionary control over a specific Aboriginal interest";

(b) "a duty to consult when the Crown contemplates action that will affect a claimed but as of yet unproven Aboriginal interest";

(c) "honourable negotiation and the avoidance of the appearance of sharp dealing" when the Crown engages in "treaty-making and implementation";

(d) a duty "to act in a way that accomplishes the intended purposes of treaty and statutory grants to Aboriginal peoples;" and

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19 *Manitoba Metis* at para 66.

20 *Manitoba Metis* at para 66 (citing *Haida Nation v British Columbia* (*Minister of Forests*), 2004 SCC 73 at para 32 [*Haida*]).

21 *Manitoba Metis* at para 65.

22 *Manitoba Metis* at para 73. [Emphasis in original.]

23 *Haida* at para 32.

(e) a duty to act diligently in pursuit of constitutional and solemn obligations made to Aboriginal peoples.[24]

14. The above-noted duties are not exhaustive.[25] As a statement on this constitutional principle, however, it harmonizes what could otherwise appear to be inconsistent or unpredictable jurisprudence. As a result, this Court's coherent and stable framework in relation to the honour of the Crown now plays a fundamental role in advancing Crown-Indigenous relations. The principle's scope, including, the duties and remedies that may flow from it, should not be inadvertently impacted or truncated by the OCA's overly broad and incorrect conclusions. Ontario is wrong to double down on that point.[26] This Court's jurisprudence is clear: not all constitutional principles can be painted with the same judicial brush.

15. Unwritten constitutional principles are diverse and at varying stages of their evolution and development by this Court. Some of these principles, such as the honour of the Crown, are subject to a distinct and coherent organizing approach in relation to their application. Others are in their infancy or are less developed. Unwritten principles like honour of the Crown (and, for example, the rule of law, including judicial independence) have evolved to a point where this Court has expressly considered their ability to invalidate legislation in specific circumstances.

16. Just over two years ago, in *Mikisew*, a five-member majority of this Court expressly agreed with the proposition that "the Crown's honour may well require judicial intervention where legislation may adversely affect—but does not necessarily infringe—Aboriginal or treaty rights."[27] Karakatsanis J (Wagner CJC and Gascon J concurring) wrote that "[o]ther doctrines may be developed to ensure the consistent protection of s. 35 rights [asserted and proven] and to give full effect to the honour of the Crown through the review of enacted legislation."[28] Abella J (Martin J concurring) further held that "in certain cases legislation enacted in breach of the duty to consult could be struck down by the reviewing court."[29]

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24 *Manitoba Metis* at paras 73, 77–78.
25 *Manitoba Metis* at para 73. See also *Daniels* at para 56.
26 Respondent's Factum at paras 119 and 121.
27 *Mikisew* at para 3 (per Karakatsanis J, Wagner CJC and Gascon J concurring) and paras 93–97 (per Abella J, Martin J concurring).
28 *Mikisew* at paras 45.
29 *Mikisew* at para 97.

17. These conclusions expressly contemplate a situation where courts may be required to invalidate legislation (after legislative enactment) if the honour of the Crown has not been upheld, without the claimant first having to establish the infringement of an asserted or proven Aboriginal or treaty right.[30] An example of this type of situation could include unilateral amendments to the *Indian Act* that adversely impact the governance or other interests of First Nations, without any consultation whatsoever. Even if Parliament's legislative process is shielded from the Crown's duty to consult, resulting legislative changes may ultimately be vulnerable to invalidity, even without an infringement of an established right, if the honour of the Crown was not upheld. For the Métis Governments who have signed self-government agreements with Canada that commit to federal implementation legislation, these issues are not abstractions. They are necessary safeguards to ensure that their inherent jurisdiction and self-government will not be subsumed in the process of reconciliation with Canada's Constitution.

18. Contrary to the OCA's approach to these issues, all unwritten constitutional principles should not be grouped together in one convenient basket. Even if they could be for some purposes, only democracy and the rule of law are potentially engaged on this appeal. This is not an appropriate case to make any far-reaching determinations with respect to all unwritten constitutional principles. The OCA's overbroad ruling should accordingly be reversed or limited to the constitutional principles actually argued before it.

19. In deciding this appeal, the Métis Governments ask this Court to carefully consider and safeguard the honour of the Crown. This appeal about a municipality's statutory election cannot be allowed to inadvertently undermine this Court's well-established jurisprudence in relation to the ongoing reconciliation between the Crown and Indigenous peoples who hold a unique status in Canada's Constitution.[31]

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30 See *Mikisew* at paras 44 and 46. See also: *Ross River Dena Council v Yukon*, 2012 YKCA 14 at para 37.

31 See Métis Governments' submissions above at para 10.

B. Other unwritten constitutional principles have invalidated laws

20. Notwithstanding the unique situation of the honour of the Crown, it is not unique among unwritten constitutional principles in its potential to invalidate legislation. This reality is inherent to the principle of constitutional supremacy where the Constitution "embraces written as well as unwritten rules."[32] Accordingly, "neither Parliament nor the provincial legislatures may enact legislation the effect of which would be to substantially interfere with the operation of this basic constitutional structure."[33] As guardians of the Constitution, courts cannot simply turn a blind eye when text provides no clarity or answers to "problems or situations [that] may arise."[34]

21. Even Ontario acknowledges the glaring contradiction in the OCA's unbounded conclusion that "unwritten constitutional principles do not invest the judiciary with a free-standing power to invalidate legislation."[35] In reality, this Court has repeatedly confirmed the proposition that unwritten constitutional principles "have been accorded full legal force in the sense of being employed to strike down legislative enactments," even before s. 52 of the *Constitution Act, 1982* existed.[36] Section 52 does not now constrain these constitutional principles.

22. In practice, this has occurred in situations where the constitutional text is silent, but enforceable constitutional duties or rules are necessarily derived from a pragmatic analysis of underlying principles in the Constitution's "internal architecture" or "basic constitutional structure."[37] These principles are the "very foundation" of the Constitution.[38] They are the "fundamental and organizing principles of the Constitution," which "inform and sustain the

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32 *Secession Reference* at para 32; *Judges Reference* at para 92. See also Alyn James Johnson, "The Judges Reference and the Secession Reference at Twenty: Reassessing the Supreme Court of Canada's Unfinished Unwritten Constitutional Principles Project" (2019) 56-4 Alberta L Rev 1077, 2019 CanLIIDocs 2091 at 1110–1111 [Johnson].

33 *OPSEU v Ontario* (*AG*), [1987] 2 SCR 2 at para 151; *Judges Reference* at para 103; Vincent Kazmierski, "Draconian but not Despotic: The "Unwritten" Limits of Parliamentary Sovereignty in Canada" (2010) 41-2 Ottawa L Rev 245, 2010 CanLIIDocs 84 at 282.

34 *Secession Reference* at para 32.

35 Respondent's Factum at para 119; *OCA Reasons* at para 89.

36 *Constitution Reference* at 841–845 (per Martland and Ritchie JJ, dissenting). See also *MacMillan Bloedel*; *Secession Reference* at para 54.

37 *Secession Reference* at para 50; *Reference re Senate Reform*, 2014 SCC 32 at para 26. See also Johnson at 1089–1090.

38 *Language Reference* at para 66.

constitutional text: they are the vital unstated assumptions upon which the text is based."[39] They are not abstract or amorphous, but are 'provisions' of the Constitution in every sense of the word.

23. This Court has repeatedly turned to these principles and this analytical approach when the foundations of the Constitution are tested or at risk, but the text provides no answers. In *MacMillan Bloedel*, this Court struck down legislation based on an unwritten rule—the inherent jurisdiction of superior courts—derived from the constitutional principle of the rule of law.[40] In *Judges Reference*, a six-of-seven judge majority of this Court invalidated legislation and enunciated a series of principles that expressly limit provincial legislative competence, primarily on the basis of an unwritten constitutional principle:

> Notwithstanding the presence of s. 11(d) of the *Charter*, and ss. 96-100 of the *Constitution Act, 1867*, I am of the view that judicial independence is at root an unwritten constitutional principle, in the sense that it is exterior to the particular sections of the *Constitution Acts*.… The specific provisions of the *Constitution Acts, 1867 to 1982*, merely "elaborate that principle in the institutional apparatus which they create or contemplate." [Emphasis in original.][41]

24. The constitutional consequences of these principles have also been tested and relied upon in other ways. In *Language Reference*, it was the unwritten constitutional principle of the rule of law that saved an entire body of law in Manitoba that had been invalidated by the written text of the Constitution. It was the "constitutional guarantee of rule of law" that would "not tolerate … chaos and anarchy,"[42] not any written words to be found in the Constitution.

25. In *Secession Reference*, it was—once again—unwritten constitutional principles that answered some of the most fundamental questions that underpin Canada's very existence and its relationship with the unique province of Quebec. Almost a quarter of a century later, Canada is stronger as a country because this Court (as well as legislators and Canadians) did not—and do

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39 *Secession Reference* at paras 32 and 49.
40 *MacMillan Bloedel* at paras 37–38. See also Johnson at 1087–1088.
41 *Judges Reference* at para 83.
42 *Language Reference* at para 83.

not—dismiss federalism, democracy, the protection of minorities, constitutionalism, and the rule of law as mere "amorphous … principles"[43] with no legal or constitutional significance.

26. If these unwritten principles no longer held the legal and constitutional import previously recognized by this Court and ultimately accepted and embraced by Canadians, how could these precedents continue to provide certainty and clarity to Quebecers, Indigenous peoples, or other Canadians in the future? The answer is they could not. This is why this Court has continued to recognize and rely on the significance of these principles, when necessary. They are a part of Canada's constitutional morality and cannot be easily dismissed without significant consequence.

27. While the text of the Constitution is fundamental, it is these unwritten constitutional principles that protect the very being of the Constitution when it comes under attack or when its silence cannot address important issues the country is facing.[44] Unwritten constitutional principles are not mere freight periodically used to fill a vessel. They remain as the lodestars that anchor and guide the ship in its journey.

C. The unwritten constitutional principles of democracy and rule of law in this appeal

28. As recognized by the dissenting judges of the OCA, the Ontario legislature's decision to change the rules in the middle of a Toronto election was inconsistent with the *Toronto-Ontario Cooperation and Consultation Agreement* as well as section 1(3) of the *City of Toronto Act, 2006* on its face.[45]

29. This Court has recognized that legislatures may bind themselves to procedural as well as consultation requirements in enacting legislation.[46] The failure to "comply with legislated requirements as to manner and form" for enacting the *Better Local Government Act, 2018* raises serious rule of law concerns.[47] Internationally, election observers and academics look to whether

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43 *British Columbia v Imperial Tobacco*, 2005 SCC 49 at para 66 [*Imperial Tobacco*]. See also Alyn James Johnson, "Imperial Tobacco and Trial Lawyers: An Unstable and Unsuccessful Retreat" (2019) 57-1 Alberta L Rev 29, 2019 CanLIIDocs 2839.

44 *Secession Reference* at para 32.

45 *OCA Reasons* at paras 104–109.

46 *Mikisew* at para 167 (per Rowe J); *Imperial Tobacco* at para 60.

47 *Imperial Tobacco* at para 60; *Friends of the Oldman River Society v Canada* (*Minister of Transport*), [1992] 1 SCR 3 at 38–39.

the rules of an election have changed at the last minute or during the course of an election as an indicator of a free and fair election.[48]

30. Consistent with the submissions of the Métis Governments set out above, the question to be asked in this appeal is not whether unwritten constitutional principles may invalidate legislation, but rather if there are any necessary, enforceable, and applicable constitutional duties or rules flowing from any engaged unwritten constitutional principles that may invalidate the statute at issue on the facts of this case.[49]

PART IV: SUBMISSIONS CONCERNING COSTS

31. The Métis Governments seek no costs and ask that no costs be awarded against them.

PART V: ORDER SOUGHT

32. The Métis Governments take no position on the outcome of the appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 1st day of February 2021.

JASON T. MADDEN

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[48] See: The Norwegian Helsinki Committee, "Election Observation – Manual 1/2000" (2000), Elections Standards at The Carter Center; Sylvia Bishop & Anke Hoeffler, "Free and fair elections: A new database" (2016) 53:4 Journal of Peace Research 608 at 610 [Book of Authorities, Tab 1].

[49] Johnson at 1088–1093.

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PART VII: TABLE OF AUTHORITIES, STATUES, AND REGULATIONS

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