

Charter, Constitutionality and the Honour of the Crown: Considering an Additional Constraint

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ABSTRACT

The provincial governments of Ontario and Quebec recently deployed section 33 of the *Canadian Charter of Rights and Freedoms* to curtail labour rights and religious freedoms in ways that have surprised voters and lawyers alike. Many commentators argue that section 33 was intended to be used sparingly in only the direst of circumstances. This contention does not survive a plain reading of the Constitution Act, 1982. In this paper, we explore the common law doctrine of the honour of the Crown and its potential constraint on executive power that gives texture to elected leaders' and public officials' relationship to the Constitution and the state. We analyze the doctrine's development to argue that the honour of the Crown resonates with the popular sentiment shared by many: elected leaders cannot simply deploy section 33 at will. The feudal concept of honour owed to and from the Crown animates the

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Westminster system and *Canada's Charter of Rights and Freedoms* in ways that provide legal arguments that may constrain political leaders from tyranny and overreach.

I. INTRODUCTION

In the context of constitutional sovereignty, legislators in Canada are constrained in law-making by the *Canadian Charter of Rights and Freedoms*. However, section 33, the “notwithstanding clause”, of the *Charter*, provides an opportunity for provincial and federal lawmakers to promulgate laws that violate constitutionally enshrined rights. Justice Miller, writing for a majority of the Ontario Court of Appeal, framed the question in any challenge to legislation in binary terms: “the question before this court is not whether the legislation is good or bad policy, was fair or unfair.”¹ On this view, section 33 may be used to roll back the promises made between the Crown and the subject when Queen Elizabeth II gave her assent to the *Canada Act*. Indeed, this power has recently been used by the Premiers of Quebec and Ontario to constrain religious freedoms and labour rights. Some have argued that section 33 should be deployed only in limited, emergency circumstances, but nothing in the *Charter* requires or implies such a limit.

This article explores the doctrine of the honour of the Crown as a potential protection against legislators’ overuse and bad faith use of the notwithstanding clause. Put differently (and in terms of yore), the Crown’s separation from politics as the dignified branch of government does not make it a neutral force in the machinery of government. The existence of the Crown’s honour is a tool that has been—and can be—used by courts to balance executive, legislative, and judicial power. We argue that the doctrine of the honour of the Crown gives important texture to the relationship between the Crown, the state, and the state’s political actors in the executive and Parliament. We suggest that the doctrine of the honour of the Crown may be developed to constrain the use of section 33 by governments. The relationship between the executive and other branches of government and the Crown is defined by service. Political failures become constitutional crises when service is not conducted in good faith, when it is sufficiently politically self-interested to deny the Sovereign’s role altogether. This failure may be a “fatal defect to many of the fundamental constitutional rights in Canada”—a characterization of section 33 itself.² A court may intervene in this context, as the United Kingdom’s

¹ *Toronto (City) v Ontario (Attorney General)*, 2019 ONCA 732 at para 2.

² Jeffrey B Meyers, “What We Talk About When We Talk About the Rule of Law”

Supreme Court did in *Miller v Prime Minister*, to preserve the dignified branch of government, the Crown.³

We take a long view of the honour of the Crown, which carefully hews to some courts' characterization of the honour of the Crown as a concept apart from the *sui generis* fiduciary duties to which it may give rise.⁴ This view stands against the Supreme Court's recent uninflected proclamation that "the honour of the Crown arises from the assertion of Crown sovereignty over pre-existing aboriginal societies, and from the unique relationship between the Crown and Indigenous peoples."⁵ A historical perspective on the honour of the Crown shows not just how feudal concepts still animate the Westminster system and Canada's parliamentary democracy, but also how the feudal concept of honour could potentially assist in preventing politicians and lawmakers from abusing their powers as elected officials in overriding hard-won *Charter* rights. We hope to flesh out the unique way in which the honour of the Crown may invalidate legislation beyond the first-nations context to which it usually attaches. In so doing, we respond to the Supreme Court's suggestion that the honour of the Crown may be the "unique" unwritten constitutional principle that could invalidate legislation.⁶ Invalidation of legislation, in brief, could flow from judicial review of the executive action that influences parliamentary proceedings. The United Kingdom Supreme Court broke new ground in *Miller v Prime Minister* when it reviewed the prime minister's advice given to Her late Majesty. We contend that a similar review of the Canadian the advice to grant Royal assent given to the Governor General could, in an appropriate case, be successfully judicially reviewed. That advice would have to undermine the Crown's honour for a court to intercede.

Provincial governments in Ontario and Quebec have now at least once relied upon section 33 to enact legislation that clearly would otherwise violate *Charter* rights. In 2022, the government of Ontario enacted Bill 28,

(2021) 7 Canadian Journal of Comparative and Contemporary Law 405 at 428.

³ *R (on the application of Miller) (Appellant) v The Prime Minister (Respondent)*, 2019 UKSC 41 [Miller].

⁴ See, for example, *Restoule v Canada (Attorney General)*, 2021 ONCA 779 at para 406: "Our jurisprudence regards a treaty between Canada and a First Nation as a unique, *sui generis* agreement, which attracts special principles of interpretation, and possesses a unique nature in that the honour of the Crown is engaged through its relationship with Aboriginal people"; leave to appeal granted: *Attorney General of Ontario v Restoule et al*, 2022 CanLII 54122; *vide First Nation of Na-Cho Nyäk Dun v Yukon*, 2023 YKSC 5 at para 71: "the duty to consult arises from the honour of the Crown, a constitutional principle that informs the purposive interpretation of s. 35".

⁵ *Toronto (City) v Ontario (Attorney General)*, 2021 SCC 34 at para 62.

⁶ *Ibid.*

Keeping Students in Class Act, 2022,⁷ to render illegal a strike by education workers. It made clear reference to section 33 of the *Charter*. Notably, this legislation was put forward at least partly in response to constitutional jurisprudence about labour rights. Although some reasonable people may disagree, they should acknowledge this legislative act was a bold use of section 33. A law enacted in Quebec in 2019, Bill 21⁸, precludes persons from wearing “conspicuous religious symbols” such as headscarves, while working in public sector jobs. The successful enactments by provincial governments of these laws have undermined the notion that Canadians possess constitutionally protected rights.

Uniquely amongst constitutions of constitutional democracies, section 33 of the *Charter of Rights and Freedoms* empowers elected governments to override rights otherwise guaranteed by a constitutional document. Section 33 allows Canada’s Parliament or its provincial legislatures to derogate from certain sections of the *Charter*, those being:

- section 2 (fundamental freedoms);
- sections 7 to 14 (legal rights); and
- section 15 (equality rights).

Notably, section 33 does not apply to democratic rights (section 3, 4 and 5 – the right to vote, and the sitting of the House of Commons or other Canadian legislatures), mobility rights (section 6), and language rights (sections 16 to 23). The unavailability of section 33 in respect of these rights reflects the particular importance the unavailability of section 33 in respect of these rights reflects the particular importance placed on them by the framers of the *Charter*.⁹

Once invoked, section 33 precludes judicial scrutiny of provincial or federal legislation under the *Charter* sections to which it applies. A check governments’ ability to rely upon section 33 is made by its limited duration: a declaration under section 33 is only valid for five years. After this period, it will cease to have effect unless it is re-enacted, providing the electorate with an opportunity to vote governments that use section 33 out of office.

⁷ *Keeping Students in Class Act, 2022*, SO 2022, c 19.

⁸ *An Act respecting the laicity of the State*, SQ 2019, c 12.

⁹ *Bill No. 21, An Act Respecting the Laicity of the State*, June 16, 2019. See also *Frank v Canada (Attorney General)*, 2019 SCC 1 at para 25; *Conseil scolaire francophone de la Colombie-Britannique v British Columbia*, 2020 SCC 13 at para 148. It remains unsettled whether section 33 applies to section 28 of the *Charter* (equality of men and women: *Hak c Procureure générale du Québec*, 2019 QCCA 2145 at 39–52, 93–4.

II.

The honour of the Crown is a concept expressly applied by Canadian courts to the state's relationship with its Indigenous peoples: through Aboriginal law dealing with first nations, Métis, and Inuit communities. It has been principally applied in the context of land claims and, more recently, in the context of the imperative to effect reconciliation. This application gives rise to a doctrinal view of the honour of the Crown as a matter purely for first-nations law. It has been said that 'the doctrine's rationale is somewhat obscure'.¹⁰ However, before the concept came to be applied in this settler context,¹¹ it created rules of more general application. Historical uses of the doctrine in contexts not relating to Indigenous law are illustrative of the doctrine's potential for a broader application in Canada. Notably, the doctrine has been extended to executive power, and its applicability to the legislative branch is a novel extension of the concept that we contend should be explored. The doctrine's importance is a form of constitutional equity, one that authorizes judges, who are officers of the Crown, to defend the Sovereign's honour from potential abuses. These abuses may include ministers recommending royal asset to legislation that renders constitutional protections meaningless.

The feudal Sovereign was immanent as a person possessed of legal powers, rights, and responsibilities. The Sovereign sustained personal bonds with subjects; its honour was a language used to define the relationship. In the centuries that followed the English Civil Wars (1640-49) and the Glorious Revolution (1688), this language lost ground to the idea of an impersonal, monolithic nation-state.¹² The state that represents Canada or the United Kingdom is, however, not monolithic.¹³ The

¹⁰ Patrick McCabe, "An Australian Indigenous common law right to participate in decision-making" (2020) 20:1 Oxford University Commonwealth Law Journal 52-85 at 66.

¹¹ viz. Peter W Hogg & Laura Dougan, "The Honour of the Crown: Reshaping Canada's Constitutional Law" (2016) 72 Supreme Court Law Review 291-318; Brian Slattery, "The Aboriginal Constitution" (2014) 67 Supreme Court Law Review 319-336; *Manitoba Métis Federation Inc v Canada (Attorney General)*, 2013 SCC 14 op 77 [Manitoba Métis]; *Province of Ontario v The Dominion of Canada and Province of Quebec In re Indian Claims*, [1895] 25 SCR 434; *Wewaykum Indian Band v Canada*, 2002 SCC 79.

¹² Though this personal form of government endures: Cris Shore, "The Crown as Proxy for the State? Opening up the Black Box of Constitutional Monarchy" (2018) 107:4 The Round Table 401-416 at 412.

¹³ F W Maitland, "Crown as Corporation" (1901) 17:2 L Q Rev 131-146 at 132, 136; Martin Loughlin, "The State, the Crown and the Law" in Maurice Sunkin & Sebastian Payne, eds, *The Nature of the Crown* (Oxford University Press, 1999) 33 at 39-40 DOI: 10.1093/acprof:oso/9780198262732.003.0003.

Crown's honour is an expression of the personal stakes implicit in sustaining a democracy, and it is one that accords with Sir William Wade's appreciation of the Crown's historic immunity:

I prefer to uphold the rules legitimated by history, unsatisfying as they may be to political theorists. The immunity of the Crown and the non-immunity of its servants represents a compromise, which is well suited to a state, which is both a monarchy and a democracy.¹⁴

Wade, unfortunately, did not completely follow through on this view (nor did he lump administrative lawyers in with political theorists),¹⁵ for he ignored the Crown's honour entirely in a discussion of Crown immunity.¹⁶ Such ignorance, though understandable, fails to detail the full meaning of the compromise in which the Crown governs solely on the advice of responsible ministers.

The present effort argues that the honour of the Crown is a legal tool that allows courts to hold the Crown's servants to their words.¹⁷ Seventeenth-century English sources show the Crown's honour at work shaping what becomes the settlement between the Crown and its subjects during the Glorious Revolution. That tendency continues through the eighteenth and nineteenth centuries, with the caveat that royal power now more readily inheres in parliamentary institutions. This caveat proves especially important, for the Crown's increasing abstraction renders its honour less visible, yet more valuable. The honour of the Crown is invoked to prevent abuses of the royal prerogative and delegated executive

¹⁴ William Wade, "The Crown, Ministers and Officials: Legal Status and Liability" in Maurice Sunkin & Sebastian Payne, eds, *The Nature of the Crown* (Oxford University Press, 1999) 22 at 32 DOI: 10.1093/acprof:oso/9780198262732.003.0002; see also: Alexander Bolt & Philippe Lagassé, "Beyond Dicey: Executive Authorities in Canada" (2021) 3:1 *Journal of Commonwealth Law*, n. 107, where the authors say that "the Crown prerogative is not an arbitrary power, but must be sourced in historical precedent."

¹⁵ Noel Cox, *The Royal Prerogative and Constitutional Law: A Search for the Quintessence of Executive Power* (London: Routledge, 2020) at 143-4.

¹⁶ Wade, *supra* note 14 at 24-5.

¹⁷ This principle is at work in *Baker v Waitangi Tribunal*, [2014] 3 NZLR 390, where the Court states that "although the relationship has on occasion been tested, it has consistently produced legislation giving effect to Treaty settlements. In this process, the honour of the Crown is at stake, and it is in order for Judges to take careful account of what an honourable Crown represents it will be able to do for others in the future. If that were not so, there could be no confidence in the Treaty settlement process at all" (para. 53). *R v Badger*, [1996] 1 SCR 771, 1996 CanLII 236: "Interpretations of treaties and statutory provisions which have an impact upon treaty or aboriginal rights must be approached in a manner which maintains the integrity of the Crown. It is always assumed that the Crown intends to fulfil its promises."

authority.¹⁸ Canadian sources illustrate the reception of the honour of the Crown in Canadian political culture.

The ultimate view of this exploration, which many view as chivalric decadence, is to point up a standard of political conduct for which legal terms also exist. Those terms may influence courts' approach to establish a common-law constitution, for that constitution omits an important part of English legal history: the Crown's justices can dispense with general common law rules by ruling in equity.¹⁹ Canadian lawyers are acquainted with these terms through Aboriginal law, where the honour of the Crown may give rise to fiduciary obligations.²⁰ They are, however, reticent to recognize a wider honour for our Crown that builds a check into the efficient branch of government – even if the Canadian Supreme Court opined that “a persistent pattern of inattention may [fail to implement an obligation in a manner demanded by the honour of the Crown] if it frustrates the purpose of the constitutional obligation, particularly if it is not satisfactorily explained”.²¹ Understanding this check on executive authority presents a means to check the Crown's authority, where that authority is narrowly construed as referring solely to the executive branch.²² The Crown's honour may well enhance Canadian democracy by forcing the executive branch to more carefully consider the promises that it makes in the Sovereign's name.

III.

Before casting back to the honour of yore, a modern instance in which the Crown's honour could have been invoked illustrates part of the concept's enduring importance. The United Kingdom Supreme Court's decision in *Miller v Prime Minister (Miller II)* results from an instance in which the honour of the Crown might have been invoked. Those facts have

¹⁸ e.g. Andrew Flavell Martin & Candice Telfer, “The Impact of the Honour of the Crown on the Ethical Obligations of Government Lawyers: A Duty of Honourable Dealing” (2018) 41:2 Dalhousie Law Journal 443–478 at 475.

¹⁹ Mark D Walters, “The Common Law Constitution in Canada: Return of *lex non scripta* as Fundamental Law” (2001) 51:2 The University of Toronto Law Journal 91–141 at 92–3; Thomas Poole, “Back to the Future? Unearthing the Theory of Common Law Constitutionalism” (2003) 23:3 Oxford Journal of Legal Studies 435–454 at 439.

²⁰ *Manitoba Métis*, *supra* note 11 at paras 73–74.

²¹ *Ibid* at para 107.

²² McLean summarizes this argument in relation to New Zealand's relationship with the Māori: “The Many Faces of the Crown and the Implications for the Future of the New Zealand Constitution” (2018) 107:4 The Round Table 475–481 at 478.

on occasion almost obtained in Canada: applying the honour of the Crown to the facts presented in *Miller II* may thus speak more generally to Westminster systems over which the Crown continues to lord.

The case came on because the United Kingdom's prime minister advised the Queen to prorogue Parliament at a critical moment in a parliamentary debate on Brexit, which created a conflict between the executive and legislative branches. The Court set aside the Crown's prorogation of Parliament—a first in Westminster systems²³—by answering a narrow question: was the effect of the advice resulting in a prorogation to frustrate or prevent, 'without reasonable justification, the ability of Parliament to carry out its constitutional functions'?²⁴ The Court found that the prime minister's advice created a situation in which Parliament's constitutional functions were curtailed. In so doing, however, the Court gave the Crown neither agency nor personality.²⁵ The technicalities of prime ministerial advice to his Sovereign require judicial recognition of the Crown's personal relationship with its subjects.²⁶ The ministry employs the Crown's 'motive power', to borrow from Walter Bagehot, who continues to say that the "Crown is, according to the saying, the 'fountain of honour;' but the Treasury is the spring of business."²⁷ The broader issue in *Miller II* seems to be calibrating that spring to still account for the Crown's honour.

The Supreme Court's decision affirms that ministers' advice is justiciable in matters of state; the Court's reasoning does not deduce or infer a rule that might afford Commonwealth subjects certainty about Parliament's constitutional position.²⁸ Critics of this decision have not searched for such a rule. They instead bemoan the Court's impinging on the political sphere without robust legal justification.²⁹ Conversely, another

²³ *Miller*, *supra* note 3.

²⁴ *Ibid* at para 50.

²⁵ Parties did not plead on this point; the Court did not adjudicate on it *ibid* at para 30.

²⁶ *Contra* Cox, *supra* note 15 at 161–2.

²⁷ Walter Bagehot, *The English Constitution*, Miles Taylor, ed (Oxford: Oxford University Press, 2001) at 7, 11–12.

²⁸ *Miller*, *supra* note 3, para. 52, shows that courts can adjudicate the prerogative; para. 30 imposes a duty on the prime minister to account for all interests when giving advice.

²⁹ John Finnis, "The unconstitutionality of the Supreme Court's prorogation judgment", (28 September 2019), online: *Policy Exchange* <<https://policyexchange.org.uk/wp-content/uploads/2019/10/The-unconstitutionality-of-the-Supreme-Courts-prorogation-judgment.pdf>>; expanded upon in: *The Unconstitutionality of the Supreme Court's Prorogation Judgment, with Supplementary Notes*, Notre Dame Legal Studies Paper, by John Finnis, papers.ssrn.com, Notre Dame Legal Studies Paper No. 200304 (Oxford: Notre Dame, 2020); Martin Loughlin, "The Case of Prorogation", (15 October 2019), online: *Policy Exchange* <<https://policyexchange.org.uk/wp-content/uploads/2019/10/The-Case-of-Prorogation.pdf>>; Sebastian Payne, "The

scholar argues that the United Kingdom's courts can enforce constitutional principles.³⁰ These positions evoke a debate that turns on the question raised (though unsatisfactorily answered)³¹ by Leonid Sirota: can a court infer a legal rule from a convention if the convention resonates with constitutional text?³² In the English case, of course, the Supreme Court relies on legal decisions to ground its view of constitutional principles.

Another approach to reviewing the decision to prorogue could instead ask: was the effect of the prime minister's advice to the Queen resulting in a prorogation to denigrate the Sovereign's honour? This question shifts focus from a formal analysis of the quality of a minister's advice and its legal standing in the Westminster system to a contextual discussion of the permissible standards of political behaviour in the Crown's name. The analysis focuses on the Crown's procedural role: ensuring that the machinery of government operates correctly.³³ Such an approach vests the Crown's agency in Her courts. The courts are empowered to explain the limits to which the efficient branch may go when relying on the dignified branch's image. That reliance depends on the quality of information that the Crown can (theoretically) cognize. In *Miller II*, the sufficiency of the advice tendered to the prime minister, who in turn counselled the Queen, makes the problem plain. The Queen only acts on cabinet's advice. "Advice" in this setting denotes the information that She receives from Her minister, which is the only information that She can officially cognize. If that information is tainted, the Queen's honour is diminished. She has acted on advice that does not serve Her interest as a benevolent head of state. Her obligation in *Miller II*, where the legislature was at odds with cabinet, was to receive information from the larger, more representative council.³⁴ Some similar dictum was laid down by Prince Albert, Queen Victoria's consort:

The most patriotic Minister has to think of his party. His judgment therefore is often insensibly warped by party considerations. Not so the Constitutional

Supreme Court and the *Miller* Case: More Reasons Why the UK Needs a Written Constitution" (2018) 107:4 *The Round Table* 441–450 at 448.

³⁰ Paul P Craig, "The Supreme Court, Prorogation and Constitutional Principle" (2020) *Public Law* 248–277.

³¹ See "Immuring Dicey's Ghost: The Senate Reform Reference and Constitutional Conventions" (2020) 51:2 *Ottawa Law Review* 313–360 at 359, for his novel claim regarding an originalist interpretation of constitutional law.

³² *Ibid* at 318–319.

³³ Anne Twomey, "From Bagehot to Brexit: The Monarch's Rights to be Consulted, to Encourage and to Warn" (2018) 107:4 *The Round Table* 417–428 at 420.

³⁴ Such a course was recommended, albeit with some caution, in *Malloch v Her Majesty's Ordnance*, [1847] OJ No. 106 at para 7; see also Peter W Hogg, *Constitutional Law of Canada*, 5th ed (Toronto: Thomson Reuters, 2019) c 1.9.7(d.2).

Sovereign, who is exposed to no such disturbing agency. As the permanent head of the nation, he has only to consider what is best for its welfare and its honour; and his accumulated knowledge and experience, and his calm and practised judgment, are always available in Council to the Ministry for the time without distinction of party.³⁵

Two sides of the same coin: the British prime minister advises the Crown with the interests of Parliament in mind; the Crown governs by quietly restraining political actors from their worst tendencies, thus preserving its dignified interest.

Albert's view evokes the immanence of the Crown as a body distinct from its ministers and servants. Ministers that advise the Crown, as well as public servants, are obliged to defend the Crown's reputation. The House of Lords, for example, mentions the phrase in *R v Wilkes*, where the North ministry (1770-82) prosecuted John Wilkes for allegedly publishing a libel against the Crown.³⁶ In this case, the Sovereign's honour was noted as an occasion for extra-judicial commentary best left to proceedings in Parliament.

In Canada, reserve power is subject to parliamentary scrutiny after the House of Commons added rule 32(7) to its standing orders, which requires a minister to submit the reasons for a prorogation. Those reasons are referred to the Procedure and House Affairs Committee, which recently recommended creating 'procedural "disincentives"' to limit the Crown's use of prorogation.³⁷ These innovations would, perhaps, give the Canadian Commons the ability to review executive decisions to the exclusion of the courts.³⁸ Creating such a review jurisdiction cuts the application of *Miller II* off at the pass, but it arguably provides a clearer constitutional framework than the English courts' intervention in *Miller II*.³⁹

Current scholarship relating to prorogation and dissolution does not take this historical view.⁴⁰ Prorogation in the face of obvious differences

³⁵ Theodore Martin, *Life of the Prince Consort* (London: Smith, Elder & Co., 1876) at 159-60.

³⁶ *R v Wilkes*, [1769] 2 ER 244 at 248, 19 State Tr 1075.

³⁷ *Report of the Government's Report to Parliament: August 2020 Prorogation-COVID-19 Pandemic*, Parliamentary committee, by Standing Committee on Procedure and House Affairs, Parliamentary committee 43-2-18 (Ottawa, ON: House of Commons, 2021) at 37-8.

³⁸ This consideration seems alive to the Committee's mind: *Ibid* at 33.

³⁹ On this point, we agree with Noel Cox, albeit for different reasons: *supra* note 15 at 158-62.

⁴⁰ Robert Craig, "Could the Government Advise the Queen to Refuse Royal Assent to a Backbench Bill?", (22 January 2019), online: *UK Constitutional Law Association* <<https://ukconstitutionallaw.org/2019/01/22/robert-craig-could-the-government-advise-the-queen-to-refuse-royal-assent-to-a-backbench-bill/>>, alludes to this point;

between executive and legislative councils may, however, breach the Crown's honour. Its gift, expressed in writs of elections and summons, grants members of Parliament and Senators, the individual and collective right to advise the Crown-in-Parliament.⁴¹ This suggestion—for it can only be a suggestion until the Crown's honour is better understood—balances calls for greater judicial examination of prorogation and dissolution against the conservative view that only constitutional convention can limit prorogation and dissolution.⁴² The Crown's honour may be the guiding light in this regard because it fosters a contextual analysis of matters of state, one freed from adversarial politics with and between the so-called branches of government.⁴³

IV.

Canadian courts have not yet acknowledged a right to review executive power over Parliament, yet such power appears inherent when the legal standard regarding the Crown's honourable behaviour is adduced.⁴⁴ The seventeenth century contains a wealth of precedents in this regard because jurists and parliamentarians throughout the period sharply curtailed the Crown's prerogatives leading up to the Glorious Revolution (1688). Sir Edward Coke is one such light, and John Selden's interest in honour may be another example. We also see many heraldic print publications appearing between 1580 and 1620, which provides a historical standard for honour. Later nineteenth-century British and Canadian cases apply this wisdom to review ministers' advice to the Crown on political matters.

Edward Coke defines the Crown's honour alongside other examples of regal restraint. As a parliamentarian, he drafted the Petition of Right, a precursor to the Bill of Rights (1689), which claimed that, where the exercise of the prerogative occurs, it must be subject to Parliament and it must have regard to common law.⁴⁵ Coke's famous dictum in the *Case of*

followed by Jeff King, "Can Royal Assent to a Bill Be Withheld If So Advised by Ministers?", (5 April 2019), online: UK Constitutional Law Association <<https://ukconstitutionallaw.org/2019/04/05/jeff-king-can-royal-assent-to-a-bill-be-withheld-if-so-advised-by-ministers/>>.

⁴¹ Anne Twomey, *The Veiled Sceptre: Reserve Powers of Heads of State in Westminster Systems* (Cambridge: Cambridge University Press, 2018) at 361–5, 586–91, 626–7.

⁴² e.g. Warren J Newman, "Of Dissolution, Prorogation, and Constitutional Law, Principle and Convention: Maintaining Fundamental Distinctions During a Parliamentary Crisis" (2009) 27 National Journal of Constitutional Law 217.

⁴³ *Operation Dismantle Inc v R*, [1985] 1 SCR 441 at 471; Geoffrey Marshall, *Constitutional Theory* (Oxford: Clarendon Press, 1971) at 124.

⁴⁴ e.g. *Engel v Alberta (Executive Council)*, 2019 ABQB 490 at para 79.

⁴⁵ *The Petition of Right*, 3 Car I, c 1, s 8.

Proclamations subjected the royal prerogative to other branches of law: ‘the King by his proclamation or other ways cannot change any part of the common law, or statute law, or the customs of the realm’.⁴⁶ He develops a parallel rationale for binding the Crown, as the fountain of honour, to its promises. His reports include several cases that define the honour of the Crown at law by prescribing rules for judicial interpretation of gifts from the Crown. It is these gifts—property that the Crown allows into subjects’ hands—that forms the basis of parliamentary representation.⁴⁷

Parliament was the vehicle through which these gifts were confirmed. Coke draws his idea of honour from statute 4 Hen. VI c 4. Henry IV (r. 1399-1413), declared in Parliament that land in the gift of the Crown would only be granted to those who deserved it.⁴⁸ Coke first elaborates on this statute in *Sir John Molyne’s Case*, where he argued as Attorney General that a subject’s tenure in gift from the Crown was contested: ‘Note the gravity of the ancient sages of the law, to construe the King’s grant beneficially for his honour, and the relief of the subject, and not to make any strict or literal construction in subversion of such grants.’⁴⁹ Coke expresses a principle of public law that resonates today in democratic terms. The Crown is limited by the reasonable expectations that it engenders. Courts may derogate from a written instrument issued by the Crown in the measure that the Crown’s subsequent representations contradict the instrument.

Coke goes further two years later when an intrusion upon a wood turned on the interpretation of the King’s grant. He argued the grant void because the King did not know the law, and thus could not make an effective grant *ex certa scientia et mero motu* (out of certain knowledge and mere motion).⁵⁰ The Court agreed: the Crown’s knowledge was imperfect, which vitiated the grant.⁵¹ The phrase *mero motu* implicates the Crown’s honour because there is no obligation upon the Crown. The grant is a gift in accordance with Henry IV’s declaration in Parliament. A gift made thus benefits the King, but it must also confer a tangible benefit on the subject

⁴⁶ *Case of Proclamations*, [1610] 12 Co Rep 74 at 75.

⁴⁷ e.g. *Perry, ex parte*, [1782] V Brown 509; for some sense of the Renaissance interest in property and the franchise, see Melanie Hansen, “Identity and Ownership: narrative of land in the English Renaissance” in Suzanne Trill & William Zunder, eds, *Writing and the English Renaissance* (London: Routledge, 1996) 87 at 94–5.

⁴⁸ The text reads: ‘son entent est de soy abstenir de faire aucuns tielx douns ou g’ntes, sinon a ceux psonnes qe le deservont & come mieultz y semblera au Roy & son conseil’ (*Statutes of the Realm* anno. 1402).

⁴⁹ *Sir John Molyne’s Case*, [1598] 6 Co Rep 5b at 6a, 77 Eng Rep 261.

⁵⁰ *The Case of Alton Woods*, [1600] 1 Co Rep 40a at 43b, 76 Eng Rep 89: “with certain knowledge and mere motion”.

⁵¹ *Ibid* at 53a.

(*ex certa scientia* – of a certain knowledge). Coke entrenched this view from the Bench in the *Earl of Rutland's Case*⁵² and again in *The Churchwards of St. Saviour in Southwark*.⁵³

None of Coke's pronouncements, however, defined 'honour' with criteria that could make it justiciable. John Selden, Coke's fellow jurist, wrote in a heraldic vein that first situated honour as a defining quality of sovereign authority:

Deserved Honour added to the eminence of some fit mans Vertue, made him by publique consent, or some by his own ambition violently got to be what every of them were in proportion to their owne Families; that is, over the common state, and as for the common good, King.⁵⁴

Selden's definition is a feudal or chivalric expression of Hobbes' compact theory of government.⁵⁵ Honour is an explicit and public manifestation of virtues that are recognized by the community or by its representatives. Selden gives no ready example of these virtues. He instead commends antiquity philosophers to his humanist readers' attention.⁵⁶

We need not look too far back: Queen Elizabeth's reign saw a resurgence of heraldic interest, some of which defines chivalric virtue in relation to classic literature.⁵⁷ Selden's reference to this older literature appears to vamp on books like John Bossewell's *Workes of Armorie*, which enumerates four virtues through which honour may be attained: prudence, justice, fortitude, and temperance.⁵⁸ Prudence requires the search for truth.⁵⁹ Justice consists of actions taken with the intent of aiding the community, and cannot knowingly cause another harm.⁶⁰ Courage demands constant respect for society's moral principles.⁶¹ Moderation

⁵² *Roger Earl of Rutland's Case*, [1608] 8 Co Rep 55a at 56a, 77 E.R. 555.

⁵³ *The Case of The Churchwardens of St Saviour in Southwark*, [1613] 10 Co Rep 66b at 67b, 77 E.R. 1025.

⁵⁴ John Selden, *Titles of honor*, EEBO STC (2nd ed.) / 22177 (London: John Helme, 1614), sig. B v.

⁵⁵ Thomas Hobbes, *Leviathan: The English and Latin Texts* (i), Noel Malcolm, ed (Oxford: Clarendon Press, 2012) at 256–8, 260, 278, 306.

⁵⁶ Selden, *supra* note 54, sig. A r-v.

⁵⁷ Steven Thiry, "In Open Shew to the World': Mary Stuart's Armorial Claim to the English Throne and Anglo-French Relations (1559–1561)" (2017) 132:559 *Engl Hist Rev* 1405–1439; J F R Day, "Primers of Honor: Heraldry, Heraldry Books, and English Renaissance Literature" (1990) 21 *The Sixteenth Century Journal* 93–103.

⁵⁸ John Bossewell, *Workes of armorie deuyded into three bookes, entituled, the concordes of armorie, the armorie of honor, and of coates and creastes*, EEBO STC / 282:09 (London: Richardi Totelli, 1572), sig. A.iii r.

⁵⁹ *Ibid.*, sig. A.v r.

⁶⁰ *Ibid.*, sig. A.vi r.

⁶¹ *Ibid.*, sig. A.vii r.

privileges reason in all decisions.⁶² Each of these virtues informs the other to arrive at a perfect honour.

This version of honour relates back to the Crown's gift *ex certa scientia et mero motu*. The phrase captures all four chivalric criteria. Prudence and justice speak to the quality of the Crown's knowledge when making its grant. The Crown must be well informed of the factual circumstances giving rise to its generosity; it must be advised of the community's interest. The Crown's simple motion captures the latter two virtues. Gifts are given to promote social order by transmitting property or rights to those deemed worthy. Deeming a person worthy of a gift cognizes their social standing and character (or virtues). The Crown makes a grant through its officers at the end of this cognitive process.

Grants in this wise are promises between ruler and subject enforced with reference to the ruler's character. In the chivalric terms from which honour springs, 'the third vertue of chivalry is, to be just in his behests, that is to say, to hold thy promis given both to foe and frend'.⁶³ Jumping forward, to a Canadian setting, the Upper Canada Court of Chancery framed the obligation in nineteenth-century language: 'it would be derogating from the honour of the Crown to assume an intention to do that which would be injurious to the people'.⁶⁴ The gift promises the Crown's favour and generosity, and the Crown's gifts are thus construed in the Crown's interest.⁶⁵ Such promises must imply effective rights, powers, privileges, or obligations because the Crown is chiefly concerned with dispensing 'justice and right'.⁶⁶

The case of *Egerton v Earl Brownlow* (1853) bears this interpretation of the Crown's honour. A will was challenged as against public policy because the legatee's interest was assumed when he took up the title of Duke or Marquis of Bridgewater. The legatee never took up the title, but the will was tainted by the possibility that it encouraged corruption of the Crown's prerogative through bribery of ministers to procure the necessary title. The House of Lords roundly criticized such a proviso, with Lord Brougham saying:

⁶² *Ibid*, sig. A.viii r.

⁶³ John Ferne, *The blazon of gentrie*, EEBO STC (2nd ed.) / 10825 (London: John Windet, 1586), sig. H.viii r; Paul Daly, "Royal Treatment – The Special Status of the Crown in Administrative Law" (2017) 22:1 *Review of Constitutional Studies* 81–102 at 97, provides a modern statement of the Royal need for honour.

⁶⁴ *Upper Canada (Attorney General) v Harrison*, [1866] OJ No. 288 at para 15.

⁶⁵ *Rex v Hon William Allan, Hon Peter McGill and SP Jarvis, Esq*, [1831] OJ No. 4 at para 13; *Doe dem Henderson v Westover*, [1852] OJ No. 269 at paras 13, 60.

⁶⁶ *Malloch v. Her Majesty's Ordnance*, *supra* note 34 at para 7.

The Crown is the fountain of honour, and the Sovereign must be presumed incapable of giving a wrong direction to its streams, is an undeniable principle of the constitution - an undoubted position of law. But there is another quite as irrefragable, which supersedes it, and precludes its application to the present question. The Sovereign can only act by advisers, and through the instrumentality of those who are neither infallible nor impeccable - answerable, indeed, for all that the irresponsible Sovereign may do, but liable to err through undue influence, and to be swayed by improper motives.⁶⁷

The Crown's minister is fallible and thus responsible for a misstep in the Crown's service.⁶⁸ A will that promotes the acquisition of a title for the sake of financial gain undermines the honour conferred with the title. In so doing, Lord Truro suggests that 'acts of state' be accomplished with a 'sense of right and duty'.⁶⁹ The use of the prerogative to confer honours and titles was thus bounded by a requirement that all whose influence, public or private, was brought to bear on the conferment come with pure motives.⁷⁰

In an apposite Canadian example, such motives were invoked by prime minister William Lyon Mackenzie King in the wake of the King-Byng affair. In a July 23, 1926, speech, he characterized the Dominion Parliament's role in connection to the British constitution as 'custodians of the honour of the British Crown'.⁷¹ The sociologist condemned Arthur Meighen's assumption of power as ignorance of Parliament's sovereignty: 'the all-important issue of the source from which all power of government is derived, the issue, when Parliament exists, of the supremacy of Parliament itself'.⁷² King's reasoning suggests the exercise of the prerogative over dissolution offended the will of Parliament, which body was summoned specifically to advise the Crown on the national interest rather than the execution of the government. By exercising the prerogative to curtail Parliament's advice when the efficient branch of executive power was being criticized, King contended, the Crown betrays its own sovereignty in the *Magna concilium*, thus undermining its own dignity. In a colonial context, when the Crown's dignity was undermined, it seems, the Crown's legitimacy went along with it.⁷³

⁶⁷ *Egerton v Earl Brownlow*, [1853] 10 ER 359 at 428, 4 H.L.C. 1.

⁶⁸ *vide. ibid* at 438.

⁶⁹ *Ibid* at 439.

⁷⁰ This principle was enshrined in relation to honours in the *Honours (Prevention of Abuses) Act 1925*, 15 & 16 Geo V c 72 (UK).

⁷¹ Arthur Berriedale Keith, ed, *Speeches and Documents on the British Dominions 1918-1931* (London: Oxford University Press, 1961) at 157.

⁷² *Ibid* at 155.

⁷³ *viz.* Bagehot, *supra* note 27 at 7; *cf.* Miller, *supra* note 3 at paras 30, 51, 56-8.

On the seventeenth-century logic of royal honour, the Crown's honour provides terms suited to judicial review. The rule, *ex certa scientia et mero motu*, limits such interference to moments when the Crown's original grant is perverted to a point where the grant becomes ineffective, so aligning the Crown's honour with superior courts' review powers. Chivalric norms define the standard to which a court may hold the Crown's servants; in so doing, Coke's logic applies. A grant *ex gratia* is enforceable against the Crown's interest to preserve the subject's rights. A promise of representation made, in Mackenzie King's example, is a promise to hear those representatives, even when hearing them means putting the ministry of the day at risk. This principle extends well beyond parliamentary matters to touch every aspect of conduct undertaken in the Crown's name. It imposes a special duty of care that goes beyond a fiduciary obligation. If the Crown's ministers knowingly undertake a course of action for another that is not required by law, the Crown's honour requires those ministers to keep to their word.

V.

One Canadian example of the honour of the Crown being engaged in a matter outside dealings with Indigenous populations is the Ryland Affair. This employment dispute between a senior civil servant and the governments of the United Kingdom and the Province of Canada and, after the Confederation, of Canada, Ontario, and Quebec, span the better part of Queen Victoria's reign (1837-1901). The dispute turned on the honour of the Crown because the respective levels of government each argued that the other levels were responsible, yet the employment obligation that sat at the heart of the dispute was created, Lord Sydenham (Charles Poulett Thomson), the Crown's representative in 1841, without consulting the Canadian or home governments.⁷⁴ Royal honour thus became emblematic of appeals to London, where the regal presence was better felt and more respected. Successive Canadian governments instead deferred to their newly won responsible governments: the legislature authorized employment and, accordingly, authorized indemnification.⁷⁵ The record of

⁷⁴ A fact tersely noted up by the Canadian Executive Council: *Canada: copies or extracts of the correspondence and memorials or representations relative to the claim of Mr. Ryland, formerly secretary to the Executive Council of Canada.*, Early Canadiana Online 9_01890 (London: HMSO, 1850) publisher: [London : HMSO, 1850], no. 24, encl. 1.

⁷⁵ This Canadian position was not of universal application. The New Zealand Court of Appeal would later hold that authority to appoint under a law implied authority to fix remuneration. See: *Attorney-General v Mr Justice Edwards*, [1891] 9 NZLR 321 at

this case shows the Crown's honour implicated in a colonial dispute symbolic of Canada's growing independence.

The injured party in this case, George Herman Ryland, was appointed the Clerk of the Executive Council of Lower Canada by the Earl of Durham.⁷⁶ Shortly after appointing Ryland, the Earl published his famous report.⁷⁷ The Earl's successor, Lord Sydenham, the first Governor-General of the now-united Province of Canada, induced Ryland to resign from his position as Clerk by offering him the Registrarship of Quebec—a lucrative office at the time of offer.⁷⁸ Ryland was promised a minimum income from his new position equal to the pension to which Ryland was entitled had he left public service as the Clerk of the Executive Council (£515).⁷⁹

The promise that he obtained from the Crown's representative was quickly countermanded by the Crown's Canadian servants and its legislature. The new government rearranged the land registry system.⁸⁰ At

344–5, “Irrespective of the reasons upon which the principle that Judges of a Supreme Court should have security of tenure of office, and should have their remuneration also fixed and secured, it is due to the credit and honour of the Crown that, in respect of any office, judicial or otherwise, and to which the Crown is empowered to appoint for life, and the holder of which has public services to perform, there should be adequate remuneration provided, and that such remuneration should be inseparably attached to the office; and, consequently, one is entitled to expect that, where such offices exist under the law, the law has provided for the payment of such remuneration, either by expressly defining such remuneration and providing for it, or by giving to the authority to which is given the power to appoint the power also to define the remuneration, and by providing for that which may be so defined.”; and the case found recent application in *North Australian Aboriginal Legal Aid Service Inc v Bradley*, [2002] FCA 297 at para 214, 192 ALR 701.

⁷⁶ *Supra* note 73, no. 4.

⁷⁷ Earl of Durham, *Report on the Affairs of British North America* (Montreal: Morning Courier Office, 1839) at 116.

⁷⁸ *Supra* note 73, nos. 5–5a; Sydenham assumed direct control over the government and implemented his policy without the advice of a ministry. See G Poulett Scrope, *Memoir of the life of the Right Honourable Charles Lord Sydenham*, G. C. B., Early Canadiana Online 36545 (London: J. Murray, 1843) at 245–55.

⁷⁹ A certified copy of Ryland's swearing-in as Clerk of the Executive Council of the Province of Canada is reproduced in note 73 *supra*.

⁸⁰ See *An Ordinance to prescribe and regulate the Registering of Titles to Lands, Tenements and Hereditaments, Real or Immoveable Estates, and of Charges and Incumbrances on the same: and for the alteration and improvement of the law, in certain particulars, in relation to the Alienation and Hypothecation of Real Estates, and the Rights and Interests acquired therein*, 1841 (4 Vict) Ordinances L C, c 30; *An Act to amend the time allowed by the Ordinance therein mentioned for the Registration of certain charges or incumbrances on Real Estates, and to repeal certain parts thereof*, 1842 (6 Vict) S Prov Can, c 15; *An Act to amend the Ordinance providing for the Registration of Titles to Real Property or Incumbrances thereon in Lower Canada; and further to extend the time allowed by the said Ordinance for the Registration of certain claims*, 1843 (7 Vict) S Prov Can, c 22.

the same time, the legislature reduced the size of Ryland's jurisdiction to the county of Quebec.⁸¹ These acts diminished his revenues such that he was forced to personally fund his office. He began to grieve this state of affairs in 1842. By Sir Charles Metcalfe's administration (1843-5), Ryland was caught between the royal grant made in his favour, the Crown's minister's unwillingness to honour the grant, and the assembly's similar reticence.⁸² His claim fell between the royal prerogative and Canadians' view of responsible government.

The honour of the Crown was Ryland's natural recourse.⁸³ Metcalfe forwarded Ryland's summary of the situation along with his own summary to Lord Stanley, the Secretary of State for the Colonies, on October 25, 1843. Ryland's note rehearses the facts before appealing to the Imperial government for relief out of London's treasury. Ryland based his appeal on colonial intransigence by lamenting:

the inability of his Excellency [Metcalfe] to afford your memorialist relief, or to oblige his advisers to go before the House with a case founded in justice and reason, which in private life would be considered binding between man and man, and in settlement of which the faith and honour of the British Crown are at stake.⁸⁴

Ryland imputed the Crown's honour *ex certa scientia et mero motu*. Lord Sydenham's promise to Ryland represented the Crown's knowledge and it bestowed upon the Clerk the benefit of a new office with a guaranteed income. London, however, denied Ryland's claim by asserting that the Clerk of the Executive Council held office at pleasure and that Lord Sydenham acted beyond his power during negotiations with Ryland.⁸⁵ London's tack conveniently alluded to Sydenham's direct control over government, a politics described by Robert Baldwin's progressive element in the Canadian legislature.⁸⁶ Governor Metcalfe attempted to redress the

⁸¹ *Journals of the Legislative Assembly of the Province of Canada*, Early Canadiana Online 9_00952_5 (Montreal: R. Campbell, 1846) at 201.

⁸² *Supra* note 73.

⁸³ For a contemporary British view of the Crown's power over Canadians, see James Colthart & Sandra Clark, "British and Canadian Responses to American Expansionism" (1978) 8:2 *American Review of Canadian Studies* 48-60 at 50.

⁸⁴ *Supra* note 73.

⁸⁵ *Ibid* no. 7, no. 8, encl.

⁸⁶ e.g. Baldwin's remarks in debate regarding the reply to the speech from the Throne on June 18, 1841, in *The Canadian mirror of Parliament*, Early Canadiana Online 9_08121 (Kingston: Chronicle & Gazette Office, 1841); *vide*. Phillip Buckner, "Thomson, Charles Edward Poulett, 1st Baron Sydenham" in *Dictionary of Canadian Biography* (Toronto: University of Toronto / Université de Laval, 2003).

situation by paying some of Ryland's debts and again by appointing him to the more lucrative office of registrar for the county of Montreal.⁸⁷

Ryland nevertheless appealed to the Parliament of the Province of Canada after the Canadian government denied his claim.⁸⁸ In 1846, both houses of the legislature voted an address to the Queen that evoked the Crown's honour to emphasize that responsibility for Ryland's claim lay with the British government. John A. MacDonald, on the eve of his accepting office as Receiver General, led the Assembly's committee that drafted the address.⁸⁹ The address adopted on May 12 closed by saying: 'And we feel bound to declare our opinion, that the denial of compensation to Mr. Ryland, would be a breach of faith that would greatly weaken public confidence in the acts of Your Majesty's Representatives and Government in this Province.'⁹⁰ The Legislative Council endorsed these words on May 13.⁹¹ The language of 'breach of faith' alluded to the Crown's combination of prudence, justice, fortitude, and temperance. The Crown's image, to the pluck from Prince Albert's view of the monarch's role, was a serene representation of these virtues that elicited faith from the governed. More importantly (and something that Ryland intimated to the Imperial government in correspondence),⁹² faith in the Crown and its representatives was a cornerstone of Canada's 'Peace and Good Government'.⁹³ Trust in the home government meant trust in the royal person. A failure in this faith undermined the home government's ability to govern. William Gladstone, who then served a brief stint as colonial secretary, had, by the time of the address, already replied to it by inviting the Canadian legislature to compensate Ryland.⁹⁴

London's response to the Canadian government's deference to its legislature further relied upon the Crown's honour to critique the incumbent ministry. The House of Lords debated Ryland's case in these

⁸⁷ *Supra* note 73.

⁸⁸ *Ibid.*, No. 15, encl. 6; *Journals of the Legislative Assembly of the Province of Canada*, Early Canadiana Online 9_00952_4 (Montreal: R. Campbell, 1845) at 375.

⁸⁹ *Mirror of Parliament of the Province of Canada*, Early Canadiana Online 90148 (Montreal: M. Reynolds, 1846) at 139.

⁹⁰ *Ibid.* at 162.

⁹¹ *Journals of the Legislative Council of the Province of Canada*, Early Canadiana Online 9_00967_5 (Montreal: R. Campbell, 1846) at 125.

⁹² *Supra* note 73.

⁹³ Henry Bliss, *An essay on the re-constitution of Her Majesty's government in Canada*, Early Canadiana Online 21721 (London: E. Wilson, 1839) at 3 (sig. B2r).

⁹⁴ *Journals of the Legislative Assembly of the Province of Canada from the 2nd day of June to the 28th day of July, 1847*, Early Canadiana Online 9_00952_6 (Montreal: R. Campbell, 1847) at 51.

terms on May 10, 1850, when the Duke of Argyll moved resolutions in favour of Ryland's compensation. The Duke said that:

He did not know whether the Canadas were so far infected with republican principles that the promises made by the Crown, at a moment when it was taking a course deeply connected with the permanence of the welfare and the power of that great colony, were to be wholly renounced. This repudiation was utterly at variance with the sentiments expressed in a recent speech of Lord John Russell upon responsible governments, in which he asserted the impossibility of confiding implicitly the honour and faith of the Crown to a popular assembly.⁹⁵

The Duke imputed John Russell, then the first minister of a Whig government. The prime minister's words defending the Crown's honour fell flat if his Secretary of State for War and the Colonies, Earl Grey, could not assert the Crown's honour in the face of colonial opposition. Indeed, Earl Grey rose to agree with the Canadian government's approach.⁹⁶ Lord Stanley, who had been the conservative Secretary of State for War and the Colonies when Ryland began his claim, rose in reply to emphasize the ideological significance of the Crown's honour:

His noble Friend [the Duke of Argyll] did not call on them to go to the House of Commons to ask for compensation, but called on them as a body which had the power of controlling the responsible Ministers of the Crown, [...] to declare that in their judgment Mr. Ryland had suffered gross hardship and injustice.⁹⁷

The language of responsible government that Stanley deployed in unison with the Duke of Argyll emphasized Canadians' preoccupation with achieving responsible government—only won in 1848. In so doing, the pair's rhetoric further emphasized the difference between the republic and the monarchy. The personal (and feudal) logic of the monarchy, in which the Crown maintains a personal relationship with its subjects, could only be sustained if its ministers strove to keep the faith in the Crown alive.

That emphasis fell upon a ministry beset by Lord Palmerston's unilateral decision to blockade Greek shipping in the Mediterranean. Members of the opposition took advantage of Palmerston's unilateral action to condemn him and the government. They argued that it violated the Crown's war prerogative, which could only be invoked by the Crown-in-council.⁹⁸ The honour of the Crown was invoked in this connection on the floor of the House of Commons by Henry Drummond, the member for Surrey West, on May 23, 1850:

⁹⁵ House of Lords, May 10, Hansard 110 (Westminster: Hansard, 1850) cols 1291–2.

⁹⁶ *Ibid* cols 1293–4.

⁹⁷ *Ibid* col 1297.

⁹⁸ House of Commons, April 8, Hansard 110 (Westminster: Hansard, 1850) cols 14–15.

Now, suppose two private gentlemen had had a quarrel about one of their servants, and agreed to make peace with each other, would not every feeling of delicacy and honour prevent the name of the servant from being introduced into their conference? It is desirable the House should clearly understand that it is not upon Ministers they are called upon to pronounce judgment in these matters. It is the honour of the Crown which is at stake—it is a question of peace or war.⁹⁹

These arguments found expression in the Duke of Argyll's motion and Lord Stanley's speech in support of Ryland's case: responsible government implied holding Ministers and royal officials to their words, which became only binding because they expressed royal will. This principle would be later repeated in the Lords' decision in *Egerton v Earl Brownlow* HL 1853.

These words proved of little effect at the time, but sentiment in London did finally cause the Imperial government to appoint a commissioner to a very limited jurisdiction in 1855-6. The proposed legate, New Brunswick Chief Justice Sir James Carter,¹⁰⁰ could only decide the amount of Ryland's claim, which he accomplished in October 1856. He awarded Ryland some £7,735, which, with interest, rounded up to £9,000.¹⁰¹ The British government paid its share in 1856-7.¹⁰² The Canadian government paid its part of the award in 1859 after reluctantly accepting the commissioner's results.¹⁰³ Ryland would go on to make further claims, but these took aim at the Canadian government's recalcitrance, which to Ryland's mind created a fresh obligation to pay interest.¹⁰⁴

Ryland's case was animated by a clash between British Royal dignity and the Canadian impulse toward a responsible government that, at its core, represented the push-and-pull of British control over its colony. The honour of the Crown was evoked throughout this dispute, by colonial and imperial actors, to demonstrate the binding nature of Lord Sydenham's promise. That promise ultimately ran on the Crown's behalf, even though the British government controlled colonial appointments in the Crown's name. Even as early as the 1840s, when Ryland was only embarking on his quest, the Canadian government refused to accede to Imperial demands that the Crown's promise—one made for Canada's benefit—be honoured at least in part from Canadian funds. That refusal speaks to the Crown's

⁹⁹ House of Commons, May 24, Hansard 111 (Westminster: Hansard, 1850) col 256.

¹⁰⁰ *Papers relative to the case of Mr. G.H. Ryland*, Early Canadiana Online 9_01857 (London: HMSO, 1859), no. 3.

¹⁰¹ *Ibid.*, appendix.

¹⁰² *Ibid.*, no. 5.

¹⁰³ *Journals of the Legislative Assembly of the Province of Canada, from the 29th January to 4th May, 1859*, Early Canadiana Online 9_00952_17 (Toronto: R. Campbell, 1859) at 532.

¹⁰⁴ "Report of [Minister] of Justice, on claim for payment" Ottawa (3 February 1877) at 62; "Claim for interest on compensation" Ottawa (1869).

personal nature and growing divisions between English and Canadian political values. The case became emblematic of Canada's growing independence and Britain's acquiescence based in part on the Crown's position as a British institution. Determining which government was responsible for maintaining the Crown's honour in Ryland's case was the deciding factor in the matter, and neither government budged for over a decade.

VI.

Though disallowance is now considered spent by some, it remains a legal power under which the honour of the Crown found someplace.¹⁰⁵ The federal exercise of disallowance shows the Crown's honour being applied to exhort federal ministers to action and to prescribe a standard of federal review of provincial statutes.¹⁰⁶ This power was quasi-judicial. Its importance in a discussion of the honour of the Crown relates specifically to post-Confederation disallowance, where the federal ministry wielded the Crown's authority to disallow provincial legislation. The first instance of this power derives from governors' instructions. After Confederation, governors' instructions complimented the text of the *British North America Act*. Subjects' pleas to the Canadian ministry adopt the language of these instructions in their requests for disallowance. These pleas were throwaway: they ran on assumptions about the honour of the Crown, which shows how lawyers adapted the concept to litigation on matters of state. The principle *ex certa scientia et mero motu* was being applied to defend grants made by the Crown and by the Crown-in-Parliament.

The Crown's honour is mentioned from the earliest days of imperial disallowance. The first principle on which the Governor's exercise of royal assent relied was stated in 1839: 'The Governor must only oppose the wishes of the Assembly where the honour of the Crown or the interests of the Empire are deeply concerned'.¹⁰⁷ This rule notionally afforded

¹⁰⁵ Eugene Forsey, "Disallowance of Provincial Acts, Reservation of Provincial Bills, and Refusal of Assent by Lieutenant-Governors since 1867" (1938) 4 *The Canadian Journal of Economics and Political Science* 47-59; *Reference re Power of Disallowance & Power of Reservation (Canada)*, [1938] SCR 71.

¹⁰⁶ *Department of Justice Act*, RSC 1985, c J-2, s 4(c).

¹⁰⁷ Legislative Assembly of Canada, *Appendix to the first volume of the journals of the Legislative Assembly of the province of Canada : session 1841*, Early Canadiana Online 9_00955_1 (Kingston: G. Desbarats & T. Cary, 1842), app. B.B. Legislative Assembly of Canada, *Journals of the Legislative Assembly of the Province of Canada from the 14th day of June to the 18th day of September, in the year of Our Lord 1841 and in the 4th & 5th years of the reign of ... Queen Victoria : being the first session of the first Provincial Parliament of Canada*, Early

autonomy to colonized subjects while retaining one source of the Crown's legitimacy: its faith. Prudence, justice, fortitude, and temperance could be hallmarks of colonial governance in conquered places far from the metropolis. Though these chivalric virtues were not in evidence through the English occupation of Canada, reference to the Crown's honour in a governor's instructions on the eve of rebellion is indicative of the tensions bubbling under the surface of Canadian politics.

Early Governors' instructions implicitly recognized the need for commentary from local political officials. Governors General, when confronted with legislation that they had to reserve, were to send an explanation to London along with the bill.¹⁰⁸ In this way, the Imperial executive could deliberate on the matter before exercising the Crown's ultimate legislative function. The Queen's power of disallowance bounded the Parliament of Canada's new jurisdiction, but it did so with regard to the Crown's informed discretion.¹⁰⁹

Canada's first prime minister, John A. Macdonald, was attuned to these powers. He acknowledged the Crown's right to reserve and, potentially, to disallow, legislation in an 1868 memorandum: 'Of late years Her Majesty's Government has not, as a general rule, interfered with the legislation of colonies having representative institutions and responsible government, except in the cases specially mentioned in the instructions to the governors'.¹¹⁰ Then-governor Lord Monck's instructions enumerated classes of bills that were to be reserved for the Queen's pleasure, one of which was 'any bill, the provisions of which shall appear inconsistent with Obligations imposed upon Us by Treaty'.¹¹¹ The central government asserted its sovereignty; treaties were exercises of prerogative that bound the Crown's honour (and the empire) to international actors.¹¹² Dominion assemblies' interference with these decisions was reviewed by federal and imperial cabinets, and these reviewing ministers became the guardians of royal dignity because the information necessary for all grants out of the prerogative responded to their perspective (*ex certa scientia*).

Canadiana Online 9_00952_1 (Kingston: Desbarats & Cary, 1842) at 480.

¹⁰⁸ *Instructions to Viscount Monck as Governor-General of Canada*, Early Canadiana Online 9_01600 (London: Foreign Office, 1867), s 8.

¹⁰⁹ WE Hodgins, *Correspondence, reports of the ministers of justice and orders in council upon the subject of Dominion and provincial legislation, 1867-1895*, Early Canadiana Online 14543 (Ottawa: Govt. Print Bureau, 1896) at 5-60.

¹¹⁰ *Ibid* at 61.

¹¹¹ Hodgins, note 109, *supra* s 7(5).

¹¹² e.g. *The Juno (No 1)*, [1799] Prize Causes 198 at 200; *Rex v Phillips*, [1922] 128 Law Times 133 at 114b.

Canadian courts have not much touched on the executive's right of disallowance, whether at the federal or imperial levels,¹¹³ and whether honour might figure into the executive's action in disallowance. The 1938 reference on this point saw the Supreme Court decline any jurisdiction over the power.¹¹⁴

The earlier Ontario case of *Goodhue v Tovey* saw Chief Justice Draper (onetime first minister of the Province of Canada) lay down criteria for disallowance that relate to the Crown's honour. The case came on before the Ontario Court of Appeal from the Court of Chancery, where a private act homologizing a will dividing property in favour of the act's sponsors was contested. The Court of Appeal deferred to the legislature's supremacy, but adverted to the disallowance power in relation to the unicameral nature of the legislature:

such bills are still subject to the consideration of the Governor General who, as the representative of the Sovereign, is entrusted with authority, - to which a corresponding duty attaches, - to disallow any law contrary to reason or to natural justice and equity. So that, while our legislation must unavoidably originate in the single chamber, and can only be openly discussed there, and once adopted there cannot be revised or amended by any other authority, it does not become law until the Lieutenant Governor announces his assent, after which it is subject to disallowance by the Governor General.¹¹⁵

Chief Justice Draper stated a view of the Governor General's duty as something of constitutional equity.¹¹⁶ The duty incumbent on the Governor General and his cabinet was to review legislation on what modern practitioners would call administrative law grounds. Draper invokes 'equity' as the better term because it evaluates the legislator's reasons for legislation alongside the law's general fairness toward affected subjects.

This precedent shows that the Governor's discretion in the legislative sphere operates with the Privy Council's advice, thus allowing the honour of the Crown to intrude in that council's deliberations.¹¹⁷ *Goodhue* is cited by counsel making representations for disallowance to the federal Cabinet. The Parliament of Ontario passed an act imposing licencing fees on mining

¹¹³ *Severn v Ontario*, [1878] 2 SCR 70, is an exception to this tendency.

¹¹⁴ *Reference re Power of Disallowance & Power of Reservation (Canada)*, *supra* note 105.

¹¹⁵ *Re Goodhue v Tovey*, [1873] OJ No. 209 at para 51, 19 Gr. 366.

¹¹⁶ Benjamin L Berger, "The Abiding Presence of Conscience: Criminal Justice against the Law and the Modern Constitutional Imagination" (2011) 61:4 *The University of Toronto Law Journal* 579-616 at 582-3, suggests a similar principle with respect to criminal law and constitutional norms.

¹¹⁷ Putting paid to Hogg's categorical denial of the Governor's power to disallow: *supra* note 33, s 1.9.5 (d). Hogg, note 51 *et seq.*, even qualifies his own categorical view.

rights granted by letters patent before 1891. These rights were to be free from taxation of any kind, a right repeatedly confirmed by legislative enactment. Affected mine owners resisted this legislation by petitioning the federal government for disallowance because the legislation, amongst other things, was 'a gross breach of faith'. Citing the disallowance of British Columbia legislation affecting first nations' territorial rights in 1875,¹¹⁸ the petitioners' counsel invokes the 'honour and good faith of the Crown' as grounds for disallowance.¹¹⁹ The act was subsequently disallowed subject to amendments removing impingement on federal jurisdiction.¹²⁰

These examples of the Crown's honour in judicial consideration blend rhetoric and legal considerations. The decision-makers in these examples all acknowledged the limited nature of royal authority based on dignified aspects of the Crown's existence. Those limits themselves required limits, for an impotent Crown emboldened the legislature and, with them, the responsible governments that they supported. When a promise made in the Crown's service creates a precise obligation, the Crown's honour has at times been invoked (even with regard to legislation) to curb its (well, its ministers') enthusiasm for the executive government.

VII.

Far be it from us to suggest that our current crop of political figures come into executive office with too much zeal. The honour of the Crown similarly ignores these figures' zeal because it is a necessary part of Canadians' British inheritance. Much of this inheritance is rightly viewed with suspicion. The present work aims only to allay concerns about a seemingly fustian politico-legal concept. The honour of the Crown is, as is demonstrated by the cases and law explored above, a technology that, though borne of another time, still captures the essence of legitimate government: faith, or the subject citizen's willingness to sacrifice without the prospect of return.¹²¹ The Crown's servants may not do anything which undermines subjects' faith in their putative master. The image of the state is tarnished: the Crown cannot, or so the story goes, hope to maintain its position if its servants do not govern with prudence, justice, temperance,

¹¹⁸ Hodgins, *supra* note 109 at 1028.

¹¹⁹ Francis H Gisborne & Arthur A Fraser, eds, *Correspondence, reports of the minister of justice and orders in council upon the subject of provincial legislation, 1896-1920*, Early Canadiana Online FC 02 0203 no. 14544 (Ottawa: F.A. Acland, 1922) at 27, 32.

¹²⁰ *Ibid* at 44.

¹²¹ Melvin L Rogers, "The Fact of Sacrifice and Necessity of Faith: Dewey and the Ethics of Democracy" (2011) 47:3 *Transactions of the Charles S Peirce Society* 274-300 at 275.

and fortitude in mind. Its ministers carry this burden when they advise the Crown.

The cases where the honour of the Crown has been invoked are cases where subjects redeem a right to fair treatment by the state. This right is incorporated, of course, into administrative law rules; the honour of the Crown is the public equity due to subjects where the Crown's agents extend the Crown's faith—its motive force—to make a grant upon a subject. This grant is interpreted very broadly in the cases: it may include a public-law concept akin to detrimental reliance (George Ryland would, perhaps, advocate for the concept in these terms). In modern vernacular, the honour of the Crown arises when a subject assumes that the state acts in her or his interest yet finds itself at a loss.

The Sovereign cannot, however, derogate from Her council's advice: She ineluctably grants based on Her ministers' information. This view maintains a comity between dignified and efficient parts of executive government. Courts are the appropriate fora for preserving the Crown's honour in matters of state, not because of the division of powers. Courts instead shield the Crown based on their own commissions issued from the prerogative: judges are law officers. They can interpose themselves where they perceive a difference in the Crown's dignified interest – to preserve Her subjects' rights granted out of the prerogative – and the Cabinet's political interest.¹²²

Such interposition does not create an unfettered right to review the Crown's decisions in matters of state. Courts instead have the discretion to enforce subjects' pre-existing rights based on freely given Royal promises.

VIII. CONCLUSION

As noted in the introduction to this paper, in recent years, the provincial governments of Ontario and Quebec have deployed section 33 of the *Canadian Charter of Rights and Freedoms* to curtail labour rights and religious freedoms in ways that have shocked the conscience of the nation and have lead to unrest in the streets, surprising Canadian voters and lawyers alike. The popular sentiment that section 33 is intended only for use in dire circumstances, and sparingly, has no constitutional basis, at least on the letter of the law. Absent some constraint on elected officials' use of section 33, the notwithstanding clause renders the *Charter's* promises devoid of meaning. Elected officials can instead withdraw constitutional protections with relative ease if they are supported by a legislative majority.

¹²² Though the case does not touch on the Crown's honour, *Air Canada v British Columbia (Attorney General)*, [1986] 2 SCR 539, is instructive on this point.

This paper explored the legal foundation for the popular sentiment that there must be something that constrains elected officials' power to override *Charter* rights: this constraint is the doctrine of the honour of the Crown.

In this paper, we have explored the historical development of the common law doctrine of the honour of the Crown through early-modern cases. We suggest that this doctrine has the potential to be deployed as a constraint on lawmakers' power—if (for example) the Crown, by giving Royal assent to legislation, compromises its own grant. We suggest that the honour of the Crown is a doctrine that should be considered as a common law tool that could provide the remedial prospect of striking down or limiting the application of legislation enacted under section 33. Developing ways in which this remedy could be deployed is the next recommended step in research and advocacy that is our purpose in writing this article to suggest.

We argue that the honour of the Crown resonates with the popular sentiment shared by many: elected leaders cannot simply deploy section 33 at will, and that the feudal concept of "honour" owed to and from the Crown animates the Westminster system and Canada's *Charter of Rights and Freedoms* in ways that provide helpful legal arguments to those seeking to constrain political leaders from tyranny and overreach.

Based on the above review of early-modern cases, the Crown is meaningfully involved in lawmaking in Canada. The Crown may make promises, in the form of statutes duly passed by a legislature, and elected leaders make commitments to the Crown upon taking office. Promises made must be kept. The honour of the Crown dictates that the Crown, as the dignified branch of government, is to be preserved from the worst tendencies of its political, or efficient, advisors. The dignified part of government cannot be undermined by its transitory actors. Judges are the last resort to enforce this division of executive power. In so enforcing this division, the Crown's dignity is better preserved because it does not descend into partisan politics, yet it takes in a range of views before exercising its prerogatives. The Crown must be honoured: it is the task of legislators to uphold its dignity and its honour so that it, its parliaments, and its ministries remain, in the long run, as legitimate as possible in Canada and throughout the Commonwealth. Though it has its roots in feudal conceptions of fealty, the doctrine of the honour of the Crown continues to exist in law, and still captures the essence of what is contemporarily understood as legitimate government.