File No. 40619

IN THE SUPREME COURT OF CANADA

(ON APPEAL FROM THE QUÉBEC COURT OF APPEAL)

BETWEEN:

ATTORNEY GENERAL OF QUÉBEC

APPELLANT

- and -

PEKUAKAMIULNUATSH TAKUHIKAN

RESPONDENT

- and -

INDIGENOUS POLICE CHIEFS OF ONTARIO, ATTORNEY GENERAL OF CANADA, ATTORNEY GENERAL OF ONTARIO, ATTORNEY GENERAL OF SASKATCHEWAN, ATTORNEY GENERAL OF ALBERTA, ASSEMBLE OF FIRST NATIONS QUEBEC-LABRADOR, CONGRESS OF ABORIGINAL PEOPLES, FIRST NATIONS CHILD AND FAMILY CARING SOCIETY OF CANADA, ASSEMBLY OF MANITOBA CHIEFS, OKANAGAN INDIAN BAND, ASSEMBLY OF FIRST NATIONS

INTERVENERS

FACTUM OF THE INTERVENER INDIGENOUS POLICE CHIEFS OF ONTARIO

PURSUANT TO RULE 42 OF THE RULES OF THE *SUPREME COURT OF CANADA*

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Part I: Overview and Statement of Facts

A. Background on IPCO

1. Indigenous Police Chiefs of Ontario ("IPCO") is a not-for-profit corporation incorporated under the *Canada Not-for-profit Corporations Act*, S.C. 2009, c. 23, established in 2019 as a core governing body to advocate and advance issues related to Indigenous policing.
2. IPCO represents the nine self-administered Indigenous police services in Ontario. Collectively these services provide policing to 86 Indigenous communities.
3. Much like the Respondent on this appeal, IPCO has an ongoing human rights complaint against Canada, filed under the *Canadian Human Rights Act*, RSC, 1985, c. H-6 ("*CHRA*"), alleging discrimination in the implementation of the FNIPP. IPCO makes these submissions not to support any party, but rather to "present the court with submissions which are useful and different, from the perspective of a non-party who has a special interest or particular expertise in the subject matter of the appeal" and considering the "broader implications of the Court's decision" on other Indigenous communities. IPCO respectfully seeks to assist by "furnishing an analysis informed by their particular experience or specialized expertise", without commenting on "the outcome of this appeal" (Rule 42(3) of the *Supreme Court Rules*), adducing further evidence or supplementing the record (Rule 59(1)(b)) or raising new issues (Rule 59(3)).[1]

B. First Nations and Inuit Policing Program

4. Until the early 1960s, the federal government was responsible for the policing of Indigenous communities. However, between 1960 and 1971, Canada withdrew from this responsibility, and provincial agencies stepped in. In Ontario, this responsibility was assumed by the Ontario Provincial Police.
5. In 1991, Canada created the First Nations Policing Policy (the "Policy") to increase the quality and level of police services that were being provided to Indigenous communities across Canada. In the same year, Canada established the First Nations and Inuit Policing Program ("FNIPP") (originally known as the FNPP) to implement the Policy. The FNIPP was a commitment undertaken by the federal government, alongside provincial funding partners, to promote Indigenous community safety and self-determination.

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[1] *R v McGregor*, 2023 SCC 4, at paras 103-109; *Rules of the Supreme Court of Canada,* SOR/2002-156, at Rule 42(3), 59(1)(b), 59(3).

6. Indigenous communities sign tripartite funding agreements via the FNIPP with both federal and provincial partners. Funding is provided 52% by Canada and 48% by the province.

C. 1996 Policy Commitments

7. The Policy is still in effect today but has not been updated since 1996, following recommendations from the Royal Commission on Aboriginal Peoples. The Policy sets out key commitments relating to Indigenous community safety, including a commitment to support Indigenous self-sufficiency and self-governance;[2] guaranteeing that Indigenous communities be "policed by such members as persons of similar cultures, linguistic backgrounds as necessary to ensure that the police service will be effective and responsive to their cultures and particular policing needs";[3] the development of a legislative framework to set robust standards for policing in Indigenous communities;[4] and a guarantee that Indigenous communities have access to policing services "equal in quality and level of service" to policing found in communities of similar conditions.[5]

8. The Policy remains a progressive, forward-looking document with no restrictions on funding or standards for policing in Indigenous communities.

D. FNIPP Terms and Conditions

9. Since at least 2012, any Indigenous community signing a tripartite funding agreement under the FNIPP must also agree to abide by a set of Terms and Conditions ("*T&Cs*"), which were drafted with no consultation with Indigenous communities.

10. While these *T&Cs* purport to describe annual reporting requirements and eligible categories of funding, the *T&Cs* also impose prohibitions designed to impede the ability of Indigenous police services to deliver adequate, effective, and culturally responsive policing. Restrictions in the *T&Cs* include a prohibition on the use of funding for legal representation related to "the negotiation of the agreement and any dispute related to the agreement, or the funding received under the agreement"; and a prohibition on the use of funding for "costs related to amortization, depreciation, and interest on loans".[6]

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[2] First Nations Policing Policy (1996), at pg. 1 and 3 [*Policy*].
[3] *Ibid*, at pg. 4.
[4] *Ibid*, at pg. 4.
[5] *Ibid*, at pg. 5.
[6] FNIPP Terms and Conditions, current as of June 24, 2023, at section 6 [*FNIPP T&Cs*].

11. Until June 24, 2023, a third prohibition existed which prevented Indigenous police services from using funding for specialized policing services, such as emergency response units, canine units, and forensic services. This prohibition was removed via Ministerial amendment by then Minister for Public Safety Canada ("PSC"), Marco Mendicino, in direct response to a Federal Court motion for emergency interim relief filed by IPCO.

E. IPCO's Ongoing CHRT Complaint

12. The aforementioned motion arose in the context of IPCO's ongoing CHRT, which complaint focuses, in part, on Canada's long-standing practice of avoiding any reference to or providing copies of the underlying 1996 Policy, which is not available publicly, effectively making it a "Phantom Policy". Instead, Canada and its provincial funding partners force Indigenous communities to comply with the restrictive *T&Cs,* which, as mentioned, run contrary to the 1996 Policy by imposing strict prohibitions on various categories of funding and policing services.

13. Canada's official explanation for concealing the "Phantom Policy" was set out in the 2014 Auditor General report, in which Canada misleadingly stated that the Policy was "outdated and impractical", even though it is clear from the restrictions in the *T&Cs* that the Policy's original equitable policing goals are "rolled back" through the *T&Cs* prohibitions.

14. In 2022, PSC determined that chronic underfunding based on this model has hampered the ability of Indigenous police services to implement culturally appropriate police services as required.[7] Lastly, the most recent Report of the Auditor General found that not only did PSC poorly manage the FNIPP, but that they had not even defined what equitable funding meant despite the commitments of the Policy.[8]

15. Meanwhile, the "Phantom Policy" is not provided to Indigenous communities participating in the FNIPP, nor is it provided to the members of parliament responsible for overseeing Indigenous community safety, a reality which became apparent during IPCO's appearance before a Parliamentary Standing Committee in May 2021, when no member of the Committee was even aware of the Policy's existence.[9]

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[7] Public Safety Canada, "*Evaluation of the FNIPP*" (February 2022), at pg. 10 and 12.
[8] Auditor General, "*Report 3: First Nations and Inuit Policing Program"* (March 2024), at s. 3.33.
[9] House of Commons, Standing Committee on Indigenous and Northern Affairs, May 13, 2021.

Part II: IPCO's Position on the Questions on Appeal

16. The Honour of the Crown always applies to the Crown in their dealings with Indigenous peoples, irrespective of whether it is the federal or provincial Crown.
17. This fundamental constitutional obligation applies to both aspects of the Crown, federal and provincial, irrespective of the nature of the agreement or negotiation at stake.

Part III: Statement of Argument

A. The Honour of the Crown Always Applies

18. The FNIPP is an equity-driven service within the meaning of section 5 of the *CHRA*.[10]
19. The controlling question in all situations involving Indigenous communities is "what is required to maintain the honour of the Crown and to effect reconciliation between the Crown and the Aboriginal peoples with respect to the interests at stake."[11]
20. The Honour of the Crown is "always at stake" when it deals with Indigenous peoples. This principle stems from the "special relationship that requires that the Crown act honourably in its dealings with Aboriginal peoples."[12] It is a constitutional principle which is underpinned by the shared objective of Reconciliation.[13]
21. This applies equally to the federal and provincial Crown, and the "commitment to Reconciliation" forms the "backdrop" to any legal dispute that engages Indigenous rights.[14]
22. Reconciliation is a long-term project. It will "not be accomplished in a single sacred moment, but rather through a continuous transformation of relationships and a braiding together of distinct legal traditions and sources of power that exist."[15]
23. The project of Reconciliation flows from the "Crown's duty of honourable dealing toward" Indigenous peoples, based on the Crown's "assertion of sovereignty" over Indigenous peoples and *de facto* control of land and resources that were formerly in their control.[16]
24. These honourable duties exist as a source of obligations independent of treaty obligations and fiduciary duties. "When a government -- be it the federal or a provincial government -

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[10] *Dominique (Pekuakamiulnuatsh) v. Public Safety Canada,* 2022 CHRT 4, at paras 191-229; *Canada (Attorney General) v. Pekuakamiulnuatsh First Nation*, 2023 FC 267, at paras 74-83.
[11] *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73, at para 45 [*Haida*].
[12] *Reference re Bill C-92*, 2024 SCC 5, at para 93 [*Bill C-92*].
[13] *Restoule v. Canada (Attorney General),* 2021 ONCA 779, at para 113.
[14] *Whiteduck v Ontario*, 2023 ONCA 543 at para 16 [*Whiteduck*].
[15] *Bill C-92,* at para 90.
[16] *Southwind v. Canada*, 2021 SCC 28, at para 55. [Emphasis added.]

- exercises Crown power, the exercise of that power is burdened by the Crown obligations toward the Aboriginal people in question."[17]

25. Where the honour of the Crown applies, there is a special duty on the Crown to negotiate honourably: "[t]his fiduciary relationship must form part of the context of the Panel's analysis, along with the corollary principle that in all its dealings with Aboriginal peoples, the honour of the Crown is always at stake".[18]

i. Reconciliation of Indigenous law and "Colonial" Law

26. Reconciliation requires the law to chart a path forward that merges "colonial" law with Indigenous social and legal orders until the two can co-exist.[19]
27. Admittedly, "not all interactions between the Crown and Aboriginal people engage" the Honour of the Crown. However, the constitutional principle is "always at stake" when the Crown is acting "in situations involving reconciliation of Aboriginal rights with Crown sovereignty."[20] In the case at hand, the central question involves reconciling Indigenous legal systems and self-determined approaches to community safety with a colonial policing system and provincial policing statutes developed without Indigenous input.
28. From the beginning, the FNIPP was intended to support Indigenous self-governance and self-determination, with a particular emphasis on the safety of historically vulnerable groups. As such, self-administered Indigenous police services operating under the FNIPP are called upon to, for example, both enforce *Criminal Code* matters as well as local Indigenous laws and protocols, whether expressed through Band Council Resolutions or some other means. This is the type of "co-existence" of legal regimes which forms the core of Reconciliation and is at the heart of the FNIPP.
29. Ultimately, it is disappointing that Quebec has sought to challenge an Indigenous community's self-governed pursuit of public safety. First Nations "have a clear right to

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[17] *Iskatewizaagegan Independent First Nation v. Winnipeg,* 2021 ONSC 1209, at para 45 [*IIFN*].
[18] *First Nations Child and Family Caring Society of Canada v. Canada,* 2016 CHRT 2, at para 95.
[19] *Dickson v. Vuntut Gwitchin First Nation*, 2024 SCC 10, Joint Reasons Dissenting in Part (Martin and O'Bonsawin JJ), at para 312.
[20] *Manitoba Metis Federation v Attorney General of Canada,* 2013 SCC 14, at para 68 [*MMF*].

expect that the defendants will address and attempt to resolve their concerns in a spirit of reconciliation before relying on the adversarial process to advocate their positions."[21]

ii. The Honour of the Crown must inform the contextual analysis in this case.

30. The Crown's obligations in implementing the FNIPP cannot be decoupled from the existence of underlying duties relating to the Honour of the Crown and Reconciliation. To that end, the "particular obligations to be borne by the Crown when dealing with First Nations are necessarily part of the circumstances the Court must consider,"[22] and must inform every contextual analysis, irrespective of the domain of law.[23]

31. The Honour of the Crown is a contextual framework informing the Crown's duties in each context and analysis. It is not a mere "incantation", but rather "finds its application in concrete practices"; and "gives rise to different duties in different circumstances".[24]

32. That contextual analysis entails, among other factors, judicial notice of "the systemic and background factors affecting Indigenous peoples in Canadian society."[25]

33. At the same time, "judicial debates raising issues affecting First Nations must take into account the Indigenous perspective, as well as the historical, social, and legal context." These guiding principles must, as a matter of law and principle, inform the contextual analysis undertaking by this Honourable Court.[26]

34. In this case, the decades of racist and discriminatory policing of Indigenous peoples must inform the analysis of the Crown's obligations. Permitting the province to renege on its honourable duties – and/or to force an Indigenous community to accept a "properly funded" non-Indigenous police service[27] – would inevitably result in a profound injustice.

35. That contextual analysis inevitably involves judicial notice of the "legacy of dislocation", which has "translated, for many aboriginal peoples, into low incomes, high unemployment,

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[21] *Kahentinetha et al. v. Hôpital Royal Victoria Et Al*, Written Reasons, Quebec Superior Court No.: 500-17-120468-221, at para 10 [*Kahentinetha Written Reasons]*; and *Kahentinetha et al. v. Hôpital Royal Victoria Et Al*, Oral Reasons, Quebec Superior Court No.: 500-17-120468-221 [*Kahentinetha Oral Reasons*]. [**Not available on CanLii/provided in BoA**]
[22] *Indigenous Police Chiefs of Ontario v. Canada*, 2023 FC 916, at paras 138-140 [*IPCO*].
[23] *Kahentinetha Written Reasons*, at para 10.
[24] *Bill C-92*, at para 65.
[25] *Anderson v Alberta*, 2022 SCC 6, at para 36.
[26] *IPCO*, at paras 138-140.
[27] *Dominique,* at paras 328-338.

lack of opportunities and options, lack or irrelevance of education, substance abuse, loneliness, and community fragmentation,"[28] alongside as "such matters as the history of colonialism, displacement, and residential schools and how that history continues to translate into lower educational attainment, lower incomes, higher unemployment, higher rates of substance abuse and suicide…"[29]

B. To permit a province to ignore the Honour of the Crown would create a perverse result

36. Every time a provincial government signs an FNIPP tripartite funding agreement, it agrees to abide by the Policy, which sets the standards for policing in the FNIPP. Notwithstanding the fact the Policy was developed by the federal government – and notwithstanding that, in the "template" FNIPP agreements, the one (indirect) reference to the Policy appears in a preamble clause referring to Canada – the fact remains that terms of the agreements are binding on all parties. This can be seen, firstly, by the fact that the text of each agreement imports, verbatim, large swathes of text from the FNIPP *T&Cs.*

37. At the same time, as this Honourable Court has recognized, the mere fact that standards are set at a federal level cannot be used as an excuse by a province to disregard those standards. In the *C-92 Reference* case, involving the promotion of Indigenous self-governed models of child safety, this Honourable Court observed that the establishment of "national standards" is both "in keeping with [Canada's] commitments relating to the [United Nations Declaration on the Rights of Indigenous Peoples or "UNDRIP"]," while also providing "Indigenous peoples with effective control" over child safety.[30]

38. The same must also apply for the community safety standards set out in the Policy, which applies equally to any province – and Indigenous community – which agrees to participate in the FNIPP. Just as this Honourable Court did in the *C-92 Reference,* where it noted how the promotion of such standards, "developed collaboratively and applied across the country", helps to "'ensure that there are no gaps in the services that are provided in relation to [Indigenous children]'."[31]

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[28] *R. v. Gladue*, [1999] 1 SCR 688, at para 68.
[29] *R v Ipeelee*, 2012 SCC 13, at para 60.
[30] *Bill C-92 Reference*, at para 19.
[31] *C-92 Reference*, at para 44.

39. While the 1996 Policy is silent on UNDRIP (which was adopted a decade after the Policy was last updated), it must nevertheless inform the understanding of both Crowns' (federal and provincial commitments) in Indigenous policing, and "should be given the same weight as a binding international instrument in the constitutional interpretation of s. 35(1)."[32]
40. Those UNDRIP obligations include, among others, an express commitment to support "the right to self-determination" (Art. 3 of UNDRIP) and "the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions" (Art. 4). Clearly, permitting only the province to unilaterally dictate the "level" of policing based on a provincial statute would run afoul of UNDRIP's commitments to self-determination.[33]
41. At all times, the Crown must exercise its powers in conformity with the Honour of the Crown, and always remains subject to the fiduciary duties that lie on the Crown in dealing with Aboriginal interests. These duties bind the Crown, regardless of which manifestation of the Crown. "When a government — be it the federal or a provincial government — exercises Crown power, the exercise of that power is burdened by the Crown obligations toward the Aboriginal people in question."[34]
42. This reflects the historical impact of colonization, while also looking "forward to Reconciliation between the Crown and Aboriginal peoples in an ongoing, 'mutually respectful long-term relationship'."[35] Given this history of being "treated as wards of the state", any province implementing the FNIPP must concurrently fulfil its fiduciary duty towards the Indigenous communities involved in any matter.[36]
43. Indigenous parties to the FNIPP negotiate with both Canada and a provincial partner under the expectation that both parties will negotiate honourably, fulfilling their duties under the Honour of the Crown. To require that only Canada be bound by these duties, while the

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[32] *R. c. Montour*, 2023 QCCS 4154, at paras 1175, 1194-1201 [Unofficial translation].
[33] *UN Declaration on the Rights of Indigenous Peoples* (Sep. 13, 2007); *United Nations Declaration on the Rights of Indigenous Peoples Act* (S.C. 2021, c. 14).
[34] *Grassy Narrows First Nation v. Ontario (Natural Resources),* 2014 SCC 48, at para 50. [*emphasis original*.]; *IIFN* at paras 45, 65.
[35] *R v Desautel*, 2021 SCC 17 (CanLII), [2021] 1 SCR 533 at para 30 [*Desautel*].
[36] *IIFN*, at para 66.

province can disregard them, can only create a perverse result where essential public safety funding is not negotiated fairly, justly, or honourably.

44. The negotiation and delivery of service choices made by provinces necessarily involve their honourable obligations. Provincial government decisions, made absent the Honour of the Crown, will result in a policing framework for Indigenous peoples which guarantees that Indigenous people will continue to face unsafe environments, backed by weaker (or non-existent) safety standards which the province chooses to unilaterally ignore.
45. As the Federal Court recently held with respect to the FNIPP itself, an unwillingness to meaningfully negotiate with a First Nation beneficiary of the program is an arguable breach of the Honour of the Crown. Where the honour of the Crown applies, there is a special duty on the Crown to negotiate honourably: "[t]his fiduciary relationship must form part of the context of the Panel's analysis, along with the corollary principle that in all its dealings with Aboriginal peoples, the honour of the Crown is always at stake."[37]
46. In the same case, the Court noted that an unwillingness on the part of Canada "to negotiate or even discuss the *T&Cs* with IPCO, besides the amount of funding, is arguably not an honourable conduct and encroaches on the principles of reconciliation and of the honour of the Crown."[38] The Court was silent on the obligations of the provincial Crown – which were not in issue – but IPCO respectfully submits the same principles must apply.
47. This fiduciary duty is rooted in the Honour of the Crown, and "structures the role voluntarily undertaken by the Crown as the intermediary between Indigenous interests in land and the interest of settlers." This duty "goes to the very foundation of this country and to the heart of its identity. Indeed, the need to reconcile the assertion of Crown sovereignty with the pre-existence of Indigenous Peoples, and to reconcile Indigenous and non-Indigenous Canadians is of 'fundamental importance'."[39]
48. The honour of the Crown "must be understood generously", to reflect the underlying realities from which it stems, i.e., the existence of distinct legal, political and social systems of Indigenous peoples, which existed long before the arrival of European settlers. In all its dealings with Indigenous peoples, "from the assertion of sovereignty to the resolution of

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[37] *IPCO*, at para 142.
[38] *Ibid*, at para 143.
[39] *Southwind*, at para 60.

claims and the implementation of treaties, the Crown must act honourably. Nothing less is required if we are to achieve the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown."[40]

iii. The Crown cannot rely on its own statute to justify a breach of a constitutional duty

49. Fundamentally, "the Crown cannot contract out of its duty of honourable dealing with Aboriginal people." It is a doctrine that applies independently of the expressed or implied intention of the parties, and irrespective of what may be found in Crown statute.[41]

50. To that end, the goals of Reconciliation and the Honour of the Crown "cannot be barred by mere statute." So long as the issue in this case - ensuring Indigenous people benefit from the same public safety standards as the settler population - remains outstanding, the goal of Reconciliation remains "unachieved." The principles of legality, constitutionality and the rule of law demand no less. [42]

51. While policy rationales adopted by the Crown cannot be disregarded entirely, "the goal of reconciliation is a far more important consideration and ought to be given more weight in the analysis." Arguments that provincial statutes apply of their own force "miss the point when aboriginal and treaty rights are at issue. They ignore the real analysis that ought to be undertaken, which is one of reconciliation and justification."[43]

iv. Crown dealings on bilateral agreements with Indigenous police services

52. As a final note, this Honourable Court should be aware that in Quebec, as in Ontario and elsewhere, Indigenous police services also sign separate, "bilateral" funding agreements directly with provincial funding partners. Since these agreements do not involve the federal Crown, the province is the only party required to uphold the Crown's honourable duties. To permit the province to disregard the Honour of the Crown would result in a new situation whereby key public safety funding is provided absent the Honour of the Crown.

Part IV: Costs

53. IPCO does not seek costs and asks that no costs be awarded against it.

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[40] *Haida*, at paras 17, 45.
[41] *Beckman v. Little Salmon/Carmacks*, 2010 SCC 53 (CanLII), [2010] 3 SCR 103, at para 61.
[42] *MMF*, at para 140.
[43] *Ibid*, at para 141.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 2nd DAY OF APRIL, 2024.

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