SCC File No.: 40619

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL OF QUÉBEC)

BETWEEN:

ATTORNEY GENERAL OF QUÉBEC

APPELLANT
(Respondent)

- and -

PEKUAKAMIULNUATSH TAKUHIKAN

RESPONDENT
(Appellant)

- and -

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INTERVENERS

AMENDED FACTUM OF THE INTERVENER, CONGRESS OF ABORIGINAL PEOPLES

(Pursuant to Rules 37 and 42 of the *Rules of the Supreme Court of Canada*)

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PART I. OVERVIEW AND FACTS

1. The Congress of Aboriginal Peoples ("CAP") intervenes in this appeal to provide its perspective as a national Indigenous organization representing the interests of off-reserve status and non-status Indians, Métis and Southern Inuit.

2. CAP has a mandate to protect the rights of off-reserve Indigenous people, including their rights protected by s. 35 of the *Constitution Act, 1982* ("s.35"),[1] the *Charter*, and *UNDRIP*.[2] CAP has been at the forefront of cases protecting the rights of off-reserve Indigenous people, as lead plaintiff in *Daniels v. Canada*,[3] and intervener in *Dickson v Vuntut Gwitchin First Nation* ("*Dickson*"),[4] *Reference re An Act respecting First Nations, Inuit and Métis children, youth and families* ("*Reference re Bill C-92*"),[5] *A.G. Canada v. First Nations Child and Family Services Caring Society*,[6] *R. v Desautel*,[7] *Lovelace v. Ontario*,[8] *Corbiere v. Canada*,[9] among many others.

PART II. CAP'S POSITION ON CONSTITUTIONAL QUESTIONS

3. CAP's position is that this Court:

(a) should uphold the QCCA's decision that the honour of the Crown applies to the policing agreement at issue because the agreement is one that facilitates Indigenous self-governance, and the right to Indigenous self-government engages the honour of the Crown; and

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[1] *The Constitution Act, 1982*, Sched B to the Canada Act 1982 (UK), 1981, c 11 ("*Constitution Act, 1982*"), s. 35(1).

[2] *United Nations Declaration on the Rights of Indigenous Peoples*, GA RES 295 (CVII), UNGAOR, 61st Sess, Supp No 49, UN Doc A/RES/61/295 (2007) ("*UNDRIP*").

[3] *Daniels v. Canada (Indian Affairs and Northern Development)*, 2016 SCC 12 ("*Daniels*").

[4] *Dickson v. Vuntut Gwitchin First Nation*, 2024 SCC 10 ("*Dickson*")

[5] *Reference re An Act respecting First Nations, Inuit and Métis children, youth and families*, 2024 SCC 5 ("*Bill C-92 Reference*").

[6] *Canada (Attorney General) v. First Nations Child and Family Caring Society of Canada*, 2021 FC 969.

[7] *R. v. Desautel*, 2021 SCC 17 ("*Desautel*").

[8] *Lovelace v. Ontario*, 2000 SCC 37 ("*Lovelace*").

[9] *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, 1999 CanLII 687 (SCC) ("*Corbiere*").

(b) in upholding the QCCA's decision, this Court should keep open the possibility that the honour of the Crown applies to the implementation of agreements that give effect to self-government rights and/or rights affirmed in *UNDRIP*, to avoid perpetuating the historical disadvantage experienced by non-status and off-reserve Indigenous peoples.

PART III. ARGUMENT

A. The honour of the Crown is engaged when the Crown negotiates or deals with Indigenous peoples in furtherance of self-government rights it acknowledges

4. The honour of the Crown arises "from the Crown's assertion of sovereignty over an Aboriginal people and *de facto* control of land and resources that were formerly in the control of that people."[10] This Court has repeatedly held that the honour of the Crown is always at stake in the Crown's dealings with Indigenous peoples.[11] The honour of the Crown is to be applied flexibly, and generously, and with an eye to reconciliation; the obligations on the Crown will vary according to circumstance.[12]

5. Though the honour of the Crown is not engaged by "all interactions" between the Crown and Aboriginal people,[13] it is not limited in the nature suggested by the Appellant. The honour of the Crown is engaged, generally, where Aboriginal rights are to be reconciled with Crown sovereignty.[14] For example, as held in *Badger*, 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.[15]

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[10] *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, at para. 32 ("*Haida Nation*").
[11] *Haida Nation* at para. 16.
[12] *Haida Nation* at para. 17.
[13] *Manitoba Métis Federation Inc. v. Canada (Attorney General)*, 2013 SCC 14 at para. 68 ("*MMF*").
[14] *R. v. Badger,* 1996 CanLII 236 (SCC), [1996] 1 SCR 771 at para. 41 ("*Badger*").
[15] *Badger* at para. 41; *MMF* at para. 68.

6. But the scope of the duty is broader. The honour of the Crown is engaged in all areas where "the Crown's historic assertion of sovereignty over Aboriginal societies gives rise to continuing obligations to their successors as part of an ongoing process of reconciliation".[16] As held in *Haida Nation*, the honour of the Crown is a corollary of s. 35 of the *Constitution Act, 1982*, in that the Crown must act honourably in defining the rights that s. 35 guarantees and in reconciling them with other rights and interests.[17]

7. The honour of the Crown is also engaged when carrying out any obligation to the Aboriginal peoples of Canada that is enshrined in the constitution. This is because it is the very document by which the Crown asserted its sovereignty in the face of prior Aboriginal occupation—it is at the root of the honour of the Crown.[18] Put another way, the law assumes that the Crown always intends to fulfill its solemn promises. As this Court has found, "the honour of the Crown [is] pledged to the fulfillment of its obligations to the Indians"[19] and the honour of the Crown requires the Crown to endeavour to ensure its obligations are fulfilled.[20] As recently confirmed in *Reference Re Bill C-92*, the honour of the Crown is likewise engaged when a government has formally bound itself to the position that a right (such as the right to self-government) falls within the scope of s.35, and acts to implement that right.[21]

8. On the basis of this Court's jurisprudence, the honour of the Crown is engaged when the Crown, having bound itself to the position that s.35 includes the inherent right to self-government, and having enacted a policy to advance that right in a specific context, proceeds to negotiate, deal with, contract, or make policy intended to fulfill the right.

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[16] *Desautel* at para. 22.
[17] *Haida Nation* at para. 20.
[18] *MMF* at para. 70; *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, 2004 SCC 74 at para. 24; *Haida Nation* at para. 17.
[19] *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, 2005 SCC 69 at para. 51.
[20] *MMF* at para. 79.
[21] *Bill C-92 Reference* at paras 59-61.

9. The right of Indigenous self-government shares the selfsame historical and legal origins as the honour of the Crown. Long before Europeans arrived in North America, "[A]boriginal peoples were occupying and using most of this vast expanse of land in organized, distinctive societies with their own social and political structures".[22] Aboriginal peoples have always maintained a form of self-government that flows from their original sovereignty over the territory. To the extent that the Crown assertion of sovereignty over that territory and the Indigenous peoples interfered with the assertion of the right of self-government, which it definitively has, then the honour of the Crown is engaged in the present as part of this nation's project of reconciliation.

10. The duty is now recognized in federal legislation, including in the *Act respecting First Nations, Inuit and Métis children, youth and families*, which explicitly affirms that Aboriginal people have an inherent right of self-government that is recognized and affirmed by s. 35 of the *Constitution.*[23] The Quebec Court of Appeal has also held that self-government is included in s. 35. This Court upheld the federal government's ability to recognize the inherent right to self-government, in a manner that binds the Crown, in its recent decision in *Reference re Bill C-92*.[24]

11. The right is also enshrined in *UNDRIP* which has been incorporated into Canada's positive law.[25] In adopting the *UNDRIP Act*, Parliament explicitly recognized that "all relations with Indigenous peoples must be based on the recognition and implementation of the inherent right to self-determination, including the right of self-government", and confirmed that the *Act* "is to be construed as upholding the rights of Indigenous peoples recognized and affirmed by section 35 of the *Constitution Act, 1982*."[26] The *UNDRIP Act* also positively committed to the achievement of the articles of UNDRIP in Canada, in a

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[22] *Mitchell v. M.N.R.*, 2001 SCC 33 at para. 9.
[23] *An Act respecting First Nations, Inuit and Métis children, youth and families,* SC 2019, c 24 at s. 8(a), 18(1).
[24] *Bill C-92 Reference* at paras 59-61.
[25] *United Nations Declaration on the Rights of Indigenous Peoples Act*, SC 2021, c 14 ("*UNDRIP Act*").
[26] *UNDRIP Act* Preamble & s. 2(2).

"spirit of partnership and mutual respect."[27] Article 4 of UNDRIP affirms the rights of Indigenous persons to self-government "in matters relating to their internal and local affairs".[28] Quebec's National Assembly has passed a resolution recognizing UNDRIP.[29]

12. What does the right to self-government encompass in this context? Section 35 recognizes that Indigenous peoples occupied and used this land as organized societies with their own social and political structures and their distinctive practices, traditions and cultures; from this pre-existence flows the inherent right of a community to govern itself. Section 35 is intended to reconcile this history with the assertion of Crown sovereignty. This may mean different things in different contexts but as the Royal Commission on Aboriginal Peoples put this, governance in general means the right of Aboriginal peoples to have greater control over the establishment and exercise of their modes of governance, the management of Aboriginal rights, title and interests in land, and their well-being and flourishing as Indigenous peoples.[30]

13. The right of self-government is the lens through which this Court should view the QCCA's decision that the honour of the Crown applies to the agreement under appeal. It is not because policing is inherently an Indigenous right or interest—it is because policing and safety are means by which Indigenous peoples can secure their own self-determination, and the Crown is honour-bound to ensure that this goal is achieved.

B. The honour of the Crown is not limited to implementing policing agreements, and may extend to other arrangements to advance self-government and/or other UNDRIP rights

14. This Court should be careful not to limit the application of the honour of the Crown to a solemn promise to implement self-government in the particular context of a tripartite

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[27] *UNDRIP Act* Schedule, s. 2(1), Annex.

[28] *UNDRIP Act* Schedule, s. 2(1), Article 4.

[29] Québec, ASSEMBLÉE NATIONALE, Journal des débats, 1ère sess., 42e légis., 18 février 2020, « Mise aux voix », p. 6712 (Mme. Manon Massé).

[30] Canada. Royal Commission on Aboriginal Peoples. *Report of the Royal Commission on Aboriginal Peoples*, Vol. 2, *Restructuring the Relationship*. Ottawa: The Commission, 1996, p. 133 ("Vol. 2").

policing agreement. If the QCCA's conclusion is correct that the federal and provincial governments "solemnly undertook to fund the appellant's police services at a level comparable to that of 'communities with similar conditions in the region', a commitment that… reflects the objective of supporting First Nations in acquiring the tools to become self-sufficient and self-governing, one of the purposes of s.35",[31] then the honour of the Crown was clearly engaged. The agreements give effect to the federal government's policy, supported by Quebec, of advancing the right to self-government by facilitating and funding Indigenous police forces.

15. CAP submits that on this logic, the honour of the Crown is implicated where the Crown implements policies or makes agreements in respect of self-governance in relation to *all* of the Aboriginal peoples of Canada, not only First Nations or self-governing bodies. Further, at a minimum, the honour of the Crown may be engaged in respect of other aspects of self-government and/or other rights protected by *UNDRIP*.

16. CAP represents many off-reserve Indigenous people who are likely to be affected by services provided under self-government agreements with First Nations and treaty bodies. Where those services are underfunded or under-inclusive, this may disproportionately affect off-reserve status and non-status Indians. CAP's constituents are particularly vulnerable and in need of protection against dishonourable Crown conduct.

17. This Court has been consistent and clear in holding that the honour of the Crown is implicated in all of the Crown's dealings with the Indigenous peoples of Canada. This includes those who are non-status, off-reserve, and Métis.[32]

18. Off-reserve Indigenous people have been historically disadvantaged, which disadvantage continues into the present. As of 2021, a majority of Registered or Treaty

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[31] *Takuhikan c. Procureur général du Québec*, 2022 QCCA 1699 at para. 74 ("*Takuhikan QCCA*").
[32] *Bill C-92 Reference* at para 63.

Indians (60% or approximately 520,000) reside off-reserve.[33] However, many off-reserve or remote members of First Nations have little or no connection to their governments.[34] They are vulnerable to being viewed as "less aboriginal" than [First Nation] members living on reserve[35] - a direct legacy of colonial and assimilationist policies and practices.[36]

19. Examples include the residential school system and the involuntary loss of status by Indigenous women who married non-Indigenous men, beginning as early as 1857.[37] The increase in the off-reserve status Indian population is intricately tied to a legacy of past discrimination, including the "marrying out" rule that applied differently to women and men prior to 1985. These rules were explicitly designed to encourage Indigenous people to renounce their identities.[38] Bill C-31, passed in 1985, altered this rule so that women who had lost status by marrying out, and their first-generation descendants, could become entitled for registration. Further amendments in 2010 (Bill C-10) following *McIvor v. Canada (Registrar of Indian and Northern Affairs)*[39] and 2017 (Bill S-3) following *Descheneaux v. Canada (A.G.)*,[40] led to substantial increases in the off-reserve population. In addition to these legislative changes, many Indigenous children left reserves as a result of residential schools and the Sixties Scoop.

20. As a result of this history, a large number of off-reserve status Indians who are nominally members of First Nations have little or no connection to the reserves or to "home" communities. Yet, they are subject to the decisions of First Nations governments

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[33] Statistics Canada, Indigenous identity by Registered or Treaty Indian status and residence by Indigenous geography: Canada, provinces and territories, Table No. 98-10-0264-01 (Ottawa: Statistics Canada, 2021). Statistics Canada reports that in total, 82% of Indigenous people reside off-reserve.

[34] Royal Commission on Aboriginal Peoples, *Final Report* (Queen's Printer, 1996), Vol. 4, p.446; Vol. 2, p.120.

[35] *Lovelace* at paras. 71-72; *Corbiere* at paras. 18 (*per* McLachlin & Bastarache JJ.), 71 and 92 (*per* L'Heureux-Dubé J.).

[36] *Dickson* at para. 197.

[37] *Corbiere* at para 86.

[38] *Corbiere* at para. 88.

[39] *McIvor v. Canada (Registrar of Indian and Northern Affairs)*, 2009 BCCA 153.

[40] *Descheneaux c. Canada (Procureur Général)*, 2015 QCCS 3555.

that control access to benefits, opportunities, and services for them, but do not always prioritize their interests.

21. This Court has recognized this legacy of discrimination and the vulnerability of off-reserve and non-status peoples. In *Corbiere,* this Court held that a provision in the *Indian Act* restricting voting rights for band elections to members ordinarily living on-reserve impermissibly discriminated on the ground of "aboriginality-residence", in part because it "implie[d] that off-reserve band members are lesser members of their bands or persons who have chosen to be assimilated by the mainstream society".[41]

22. Most recently, in *Dickson*, this Court affirmed Justice L'Heureux-Dubé's findings in *Corbiere* that "band members living off-reserve have generally experienced disadvantage, stereotyping, and prejudice, and form part of a 'discrete and insular minority' defined by race and place of residence."[42] This Court further held in *Dickson*, relying on CAP's submissions, that "non resident status in a self-governing Indigenous community" qualifies as an analogous ground under s.15 of the *Charter*. This is because the historical and continuing disadvantage faced by Indigenous people living away from their traditional lands means that distinctions based on this ground will serve as "constant markers of suspect decision making or potential discrimination."[43]

23. The federal and provincial governments enter into a range of agreements with Indigenous organizations, including CAP. Such agreements are generally not typical commercial contracts characterized by commercial objectives and a relative equality of bargaining power between the parties. In many cases, they are expressly or impliedly for the purpose of implementing rights protected under s.35 and/or recognized in *UNDRIP*.

24. CAP submits that the honour of the Crown is engaged, at a minimum, where a government recognizes and solemnly undertakes to implement Indigenous rights. There are likely to be many situations where this may arise, including in agreements involving or affecting off-reserve Indigenous people. Such cases will be determined in future, on

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[41] *Corbiere* at para. 19.
[42] *Dickson* at para. 198.
[43] *Dickson* at para. 198.

their own facts. For present purposes, this Court should be careful not to limit the application of its analysis to an unduly narrow context. It is not hard to imagine that there may be other situations where a government grandly announces its intention to implement an Indigenous right – perhaps reaping some political benefit in so doing – but fails to follow through with measures necessary to make the right a reality.

25. This Court's jurisprudence is abundantly clear that "the honour of the Crown is engaged through its relationship with the native people",[44] and that the Crown is in a fiduciary relationship with *all* of Canada's Indigenous peoples.[45] CAP submits that this Court should be careful not to suggest that the Crown has a wide latitude to act dishonourably where it has made solemn undertakings to implement Indigenous rights.

PART IV. COSTS | PART V. ORDER SOUGHT

26. CAP does not seek costs and asks that it not be liable for costs as an Intervener. CAP takes no position on the outcome of this appeal.

Dated at Toronto, Ontario this 2nd day of April, 2024.

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[44] *Badger* at para. 78.
[45] *Daniels* at para. 53.

PART VI. TABLE OF AUTHORITIES

Authority	Paragraph(s) Referenced in Memorandum of Argument
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