

**IN THE SUPREME COURT OF CANADA**  
(ON APPEAL FROM THE COURT OF APPEAL OF QUEBEC)

B E T W E E N :

**ATTORNEY GENERAL OF QUÉBEC**

Appellant

- and -

**PEKUAKAMIULNUATSH TAKUHIKAN**

Respondent

- and -

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CARING SOCIETY OF CANADA, OKANAGAN INDIAN BAND,  
and ASSEMBLY OF FIRST NATIONS**

Interveners

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**FACTUM OF THE INTERVENER, ASSEMBLY OF MANITOBA CHIEFS**  
(Pursuant to Rules 37 and 42 of the *Rules of the Supreme Court of Canada*)

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## PART I – OVERVIEW OF POSITION AND STATEMENT OF FACTS

1. This factum is submitted on behalf of the Assembly of Manitoba Chiefs (“AMC”). The circumstances of this appeal highlight the untenable position whereby the Respondent, like many First Nations, must choose between accepting insufficient and discriminatory funding to exercise a fundamental aspect of its inherent right to self-government, or accept culturally inappropriate and discriminatory services that are neither designed by nor meaningfully operated by the First Nation.<sup>1</sup> In either scenario, Crown conduct impairs a First Nation’s inherent right to self-government and threatens its cultural continuity and collective existence.

2. The AMC submits that elements of the broad inherent right to self-government are cognizable First Nations interests where the Crown has assumed discretionary control. This Honourable Court has recognized the *sui generis* fiduciary duty as a vital component of the relationship between First Nations and the Crown.<sup>2</sup> The *sui generis* fiduciary duty serves to reconcile the Crown’s assertion of sovereignty with the enduring sovereignty of First Nations. The AMC recognizes that not all aspects of the relationship between First Nations and the Crown are fiduciary in nature, however, it submits that the *sui generis* fiduciary duty arises when the Crown exercises discretionary control over cognizable First Nations interests arising from the inherent right to self-government. In such instances, this duty imposes substantial obligations to protect the fiduciary relationship and the ancillary interest at stake.<sup>3</sup>

## PART II – THE AMC POSITION ON THE QUESTION IN ISSUE

3. The AMC takes no position on the outcome of this appeal. Instead, it asks this Court to meaningfully advance reconciliation by clarifying the nature of the Crown’s *sui generis* fiduciary duty and its application beyond First Nations interests in land in a manner that recognizes the unique First Nations-Crown relationship.

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<sup>1</sup> Respondent’s Factum at para 123; *Dominique (on behalf of the members of the Pekuakamiulnuatsh First Nation) v Public Safety Canada*, [2022 CHRT 4](#) [*Dominique*] at para 331; affirmed in *Canada (Attorney General) v Pekuakamiulnuatsh First Nation*, [2023 FC 267](#) [*Pekuakamiulnuatsh*]; *Takuhikan c Procureur général du Québec*, [2022 QCCA 1699](#) [*Takuhikan*] at paras 65-70 and 108.

<sup>2</sup> *Southwind v Canada*, [2021 SCC 28](#) [*Southwind*] at para 60.

<sup>3</sup> *Southwind* at paras 60-61.

### PART III – STATEMENT OF ARGUMENT

#### A. Cognizable First Nation Interests

4. Specific aspects of the broad inherent right to self-government are distinctly First Nations interests. These interests precede any claimed Crown assertion of sovereignty, are capable of being recognized by the Crown, and remain sufficiently autonomous from Crown executive or legislative functions. The AMC submits that First Nations do not need to prove these specific aspects of the inherent right to self-government as a right recognized and affirmed by section 35 of the *Constitution Act, 1982*, to be recognized as cognizable First Nations interests.

5. Canadian courts' narrow interpretation of First Nations inherent rights,<sup>4</sup> as shown by the application of the *Van der Peet* test,<sup>5</sup> has led to impractical and unnecessary demands for proof of a right to self-government. This requirement forces an unduly narrow characterization of the right, diverging from both First Nations perspectives<sup>6</sup> and the *United Nations Declaration on the Rights of Indigenous Peoples*, which has been recognized by Parliament as a universal international human rights instrument with application in Canadian law.<sup>7</sup>

6. A cognizable First Nation interest does not need to be an asserted or proven section 35 right, and it is unnecessary to confine the First Nation's inherent right to self-government under the section 35 framework<sup>8</sup> to ground a *sui generis* fiduciary duty. The inherent right to self-government is not sourced in colonial law; section 35 of the *Constitution Act, 1982* did not create or establish First Nations rights; and the "superimposition of European laws and customs" on First Nations did not suspend First Nations inherent right to self-govern.<sup>9</sup> This Court has long

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<sup>4</sup> *R v Van der Peet*, [1996] [2 SCR 507](#), 1996 CanLII 216 (SCC) [*Van der Peet*]; *R v Pamajewon*, [1996] [2 SCR 821](#), 1996 CanLII 161.

<sup>5</sup> *Van der Peet*.

<sup>6</sup> John Borrows, "[Challenging Historical Frameworks: Aboriginal Rights, The Trickster, and Originalism](#)" (2017) Can Hist Rev 98:1 114 at 115-116.

<sup>7</sup> *Dickson v Vuntut Gwitchin First Nation*, [2024 SCC 10](#) [*Dickson*] at paras 47, 117; *Reference re An Act respecting First Nations, Inuit and Métis children, youth and families*, [2024 SCC 5](#) at para 4 [*C-92 Reference*]; *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 295, UNGAOR, 61st Sess, Supp No 49, [UN Doc A/RES/61/295](#), 46 ILM 1013 (2007) at 6 and 8.

<sup>8</sup> Robert Hamilton and Joshua Nichols, "[Reconciliation and the Straitjacket: A Comparative Analysis of the Secession Reference and R v Sparrow](#)" (2021) 52:2 Ottawa Law Rev 205 at 221-232.

<sup>9</sup> *R v Desautel*, [2021 SCC 17](#) at paras 30 and 34.

recognized First Nations interests in land outside of the section 35 framework as cognizable First Nation interests.<sup>10</sup> It is illogical to disregard the connection between interests in land and interests flowing from First Nations sovereignty.<sup>11</sup>

7. For an interest to be cognizable and capable of establishing a *sui generis* fiduciary duty, it must be “distinctly Aboriginal” as a collective interest integral to the First Nation’s distinctive community and relationship to the land.<sup>12</sup> First Nations inherent right to self-government embodies these collective interests, as the continuity and existence of a First Nation are at risk when its self-governing authority is undermined. This Court has affirmed that First Nations rights embody collective “interests connected to cultural difference, prior occupancy, prior sovereignty, or participation in the treaty process” that are worthy of constitutional protection outside of section 35.<sup>13</sup> In the context of First Nations inherent right to self-government over child and family services, this Court has acknowledged that “[i]t is no coincidence that the Crown targeted Indigenous children [through assimilative policies] when, at the height of its imperialism, it was seeking to destroy Indigenous cultures”.<sup>14</sup> Further, there is an undeniable collective aspect to a First Nation’s exercise of the right and ability to enter into Treaty<sup>15</sup>, which is a clear and fundamental aspect of the First Nations inherent right to self-government.

8. A cognizable First Nation interest is one that is capable of recognition.<sup>16</sup> This Court has acknowledged Parliament’s recognition that the First Nations inherent right to self-government encompasses jurisdiction over laws in pertaining to child and family services.<sup>17</sup> In the context of

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<sup>10</sup> See for example: *Southwind* at para 62-63.

<sup>11</sup> Douglas C Harris, “[Property and Sovereignty: An Indian Reserve and a Canadian City](#)” (2017) 50:2 UBC L Rev 321 at 321-324; *C-92 Reference* at para 112; *Delgamuukw v British Columbia*, [1997] [3 SCR 1010](#), 1997 CanLII 302 (SCC) at paras 115 and 166; *Tsilhqot’in Nation v British Columbia*, [2014 SCC 44](#) [*Tsilhqot’in*] at para 75.

<sup>12</sup> *Manitoba Metis Federation Inc v Canada (Attorney General)*, [2013 SCC 14](#) [*MMF*] at para 53

<sup>13</sup> *Dickson* at paras 5 and 150.

<sup>14</sup> *C-92 Reference* at para 113; *Renvoi à la Cour d’appel du Québec relatif à la Loi concernant les enfants, les jeunes et les familles des Premières Nations, des Inuits et des Métis*, [2022 QCCA 185](#) at para 85.

<sup>15</sup> *C-92 Reference* at para 112; *R v Sioui*, [1990] [1 SCR 1025](#), 1990 CanLII 103 (SCC) [*Sioui*] at 1056.

<sup>16</sup> *Williams Lake Indian Band v Canada (Aboriginal Affairs and Northern Development)*, [2018 SCC 4](#) [*Williams Lake*] at para 68.

<sup>17</sup> *C-92 Reference* at para 9.

First Nation-Crown Treaties, the colonial government and its officials acknowledged and recognized pre-existing First Nation sovereignty and the inherent right to self-government through the very act of Treaty-making. Long before Europeans arrived in what is now Canada, First Nations exercised their sovereignty by making their own laws and entering into Treaties, as they did with the Crown.<sup>18</sup> Treaty-making is a recognition of the sovereign nationhood between treaty partners.<sup>19</sup> The Crown’s recognition that First Nations are sovereign has been consistently demonstrated by the process of Treaty-making.<sup>20</sup>

9. This Court has instructed that in the absence of a First Nation interest sufficiently distinct from the Crown’s executive and legislative functions to warrant a private law duty, no fiduciary duty arises; only public law duties apply.<sup>21</sup> While the Crown and its agents acknowledged First Nations sovereignty through negotiated Treaties, neither this recognition nor any other executive order or legislative provision created the First Nations inherent right to self-government.

10. The inherent right to self-government pre-exists any Crown assertion of sovereignty. Any assumption that First Nations legal orders and governance before European contact were not reasonable and managed by intelligent, rational people is illogical and premised on racist, false, legally invalid, and morally condemnable legal doctrines.<sup>22</sup> First Nations sovereignty and the inherent right to self-government stem from First Nations' longstanding and ongoing connections to the land and relationship with the earth.<sup>23</sup> As recognized by this Court: “when Europeans arrived in North America, [First Nations] were already here, living in communities on the land, and

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<sup>18</sup> James Cote et al, *Gakina Gidagwi 'igoomin Anishinaabewiyang – We are all Treaty People: Treaty Elders' Teachings*, Vol 4 (Winnipeg: Treaty Relations Commission of Manitoba and Assembly of Manitoba Chiefs Secretariat, 2016) [*We are all Treaty People*] at 28-31.

<sup>19</sup> Canada, Royal Commission on Aboriginal Peoples, [Restructuring the Relationship](#), Vol 2 (Ottawa: Canada Communication Group, 1996) [*Restructuring the Relationship*] at 17.

<sup>20</sup> *Sioui* at 1053.

<sup>21</sup> *Williams Lake* at para 52, citing *Wewaykum Indian Band v Canada*, [2002 SCC 79](#) [*Wewaykum*] at paras 74 and 85; *Guerin v The Queen*, [1984] [2 SCR 335](#), 1984 CanLII 25 (SCC) [*Guerin*] at 385.

<sup>22</sup> Val Napoleon and Hadley Friedland, “[Indigenous Legal Traditions: Roots to Renaissance](#)” in Markus D. Dubber and Tatjana Hörnle, eds, *The Oxford Handbook of Criminal Law* (Oxford: Oxford University Press, 2014) at 2-3; *Thomas and Saik'uz First Nation v Rio Tinto Alcan Inc*, [2022 BCSC 15](#) at paras 187-198; *Tsilhqot'in* at para 69; *United Nations Declaration on the Rights of Indigenous Peoples Act*, [SC 2021, c 14](#) at preamble.

<sup>23</sup> *We are all Treaty People* at 9-10.

participating in distinctive cultures, as they had done for centuries;”<sup>24</sup> when Europeans arrived, First Nations were “organized in societies...as their forefathers had done for centuries;”<sup>25</sup> and First Nations “were here when Europeans came, and were never conquered.”<sup>26</sup>

11. Courts have limited the application of *sui generis* fiduciary duty on the basis that public law aspects of the First Nations-Crown relationship overwhelm any private law duties.<sup>27</sup> This narrow interpretation of *Wewaykum* fails to distinguish between an *ad hoc* and *sui generis* fiduciary duty, and diminishes the legal recognition of the Crown-First Nation relationship that gives rise to the *sui generis* fiduciary duty.<sup>28</sup> In *Guerin*, this Court established that the *sui generis* fiduciary relationship arising from the assumption of discretionary control over First Nation’s independent interests is merely grounded in analogy to private law.<sup>29</sup> In *Wewaykum*, Binnie J. further confirmed that the *sui generis* fiduciary duty owed by the Crown to First Nations is not restricted to instances where the facts raise “considerations in the nature of a private law duty.”<sup>30</sup>

12. This Court has emphasized that establishing an *ad hoc* fiduciary duty on the Crown is rare as it requires the fiduciary to forsake the interests of all others in favour of those of the beneficiary in respect of the specific interest at stake.<sup>31</sup> However, this Court has repeatedly acknowledged that the unique and historic nature of the First Nations-Crown relationship grounds the *sui generis* fiduciary duty.<sup>32</sup> The *sui generis* fiduciary duty allows the Crown to consider both its public law duties and its fiduciary duty to First Nations; it does not require the Crown to forsake the interests of all others in favour of First Nations.<sup>33</sup>

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<sup>24</sup> *Van der Peet* at para 30 [emphasis in original].

<sup>25</sup> *Calder v Attorney-General of British Columbia*, [1973] [SCR 313](#), 1973 CanLII 4 (SCC) [*Calder*] at 328.

<sup>26</sup> *Haida Nation v British Columbia*, [2004 SCC 73](#) at para 25.

<sup>27</sup> *Restoule v Canada (Attorney General)*, [2021 ONCA 779](#) [*Restoule* ONCA] at para 627.

<sup>28</sup> See: Appellant’s Factum at para 46.

<sup>29</sup> *Guerin* at 385; *Elder Advocates of Alberta Society v Alberta*, [2011 SCC 34](#) [*Elder Advocates*] at para 38.

<sup>30</sup> *Wewaykum* at paras 74, 85; *Elder Advocates* at para 39.

<sup>31</sup> *Elder Advocates* at paras 31, 44 and 48.

<sup>32</sup> *Elder Advocates* at paras 38-41; *Van der Peet* at paras 23-25; *R v Sparrow*, [1990] [1 SCR 1075](#), 1990 CanLII 104 at 1108; *MMF* at para 66; *Southwind* at para 60.

<sup>33</sup> *Southwind* at paras 101-102.

## B. Discretionary Control and the Inherent Right to Self-Government

13. Unilateral and dishonorable Crown conduct has made facets of the First Nations inherent right to self-government vulnerable to the adverse exercise of assumed Crown discretion. This Court has recognized that the source of the Crown’s *sui generis* fiduciary duty does not lie in a paternalistic concern to protect a “weaker” or “primitive people”; the fiduciary duty is “called into existence to facilitate the supervision of the high degree of discretionary control gradually assumed by the Crown over the lives of” First Nations.<sup>34</sup> When First Nations entered into Treaty, they agreed to share the land and resources with the newcomers; they did not agree to submit to the Crown’s assertion of sovereignty, or to give up their laws, jurisdiction, languages, or belief systems.<sup>35</sup> While historic Treaty-making represented a mutually beneficial Nation to Nation relationship, the manner in which the Crown has since exercised its unilateral assumption of discretionary control over First Nations has left First Nations “vulnerable to the risk of government misconduct or ineptitude.”<sup>36</sup>

14. For generations, the Crown has exerted extensive discretionary control over First Nations governance. Rooted in colonial ideologies and policies, this control has perpetuated a pattern of systemic marginalization that has subverted and manipulated aspects of First Nations inherent right to self-government. The Crown’s imposition of its authority has created a forced dependency on frameworks designed to serve colonial interests, thereby obstructing the development of First Nation governance structures and perpetuating a legacy of inequality and injustice.

15. The *Indian Act* and its related policies represent the clearest examples of the negative impacts of the Crown's imposition of discretionary control over First Nations governance. The

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<sup>34</sup> *Wewaykum* at para 78.

<sup>35</sup> *Restructuring the Relationship* at 17; Doris Pratt, Harry Bone, and the Treaty & Dakota Elders of Manitoba with contributions by the AMC Council of Elders, *Untuwe Pi Kin He—Who We Are: Treaty Elders’ Teachings*, Vol 1, 2nd ed (Winnipeg: Treaty Relations Commission of Manitoba & Assembly of Manitoba Chiefs Secretariat, 2014) at 21-33; Aboriginal Justice Inquiry of Manitoba, Report of the Aboriginal Justice Inquiry of Manitoba, [\*The Justice System and Aboriginal People\*](#), Vol 1 (Winnipeg: Aboriginal Justice Implementation Commission, 1999) at chapter 5; *Our Relations to the Newcomers* at 131; *Restructuring the Relationship* at 39; Gina Starblanket, “[Constitutionalizing \(in\)justice: Treaty Interpretation and the Containment of Indigenous Governance](#)” (2019) 28:2 Constitutional Forum 13 at 15; *R v Turtle*, [2020 ONCJ 429](#) at para 53.

<sup>36</sup> *Wewaykum* at para 80.



Royal Commission on Aboriginal Peoples identified that “the *Indian Act* was intended to hasten the assimilation, civilization and eventual annihilation of Indian nations as distinct political, social and economic entities... it focused on containment and disempowerment — not by accident or by ignorance, but as a matter of conscious and explicit policy.”<sup>37</sup>

16. From 1927 until 1951, the *Indian Act* prohibited raising funds to finance an “Indian” claim.<sup>38</sup> Even after 1951, permission was required to commence a lawsuit against the Crown.<sup>39</sup> If a First Nation individual wanted to become a lawyer, it would result in enfranchisement and meant giving up his or her treaty rights and losing their “Indian status”.<sup>40</sup> These legislative and policy barriers severely limited First Nations ability to seek redress for Crown misconduct, perpetuating a cycle of legal disenfranchisement and reinforcing colonial power structures.

17. The imposition of the *Indian Act* framework was a coordinated effort by the Crown to disrupt and displace First Nation governance and decision-making. It was used to depose First Nation leadership at the discretion of Crown officials, significantly undermining the ability of many First Nations to exercise their inherent right of self-government. Consequently, this has also entrenched a pervasive dependency on the Canadian government among First Nations, making First Nations exceptionally vulnerable to Crown discretion.<sup>41</sup>

18. There are numerous instances throughout the shared history of First Nations and the Crown where the extensive discretionary control of the Crown has resulted in devastating consequences such as the unilateral dispossession of traditional lands, Treaty territories, and reserve lands contrary to First Nations’ perspective on Treaty and resulting in First Nations growing poor on

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<sup>37</sup> *Restructuring the Relationship* at 84.

<sup>38</sup> *Indian Act*, RSC 1927, c 98, s 141.

<sup>39</sup> Jack Woodward, *Aboriginal Law in Canada* (Toronto: Thomson Reuters, 2023) vol 2, ch 20.1 at para 20.20; *Calder* at 326.

<sup>40</sup> *Indian Act*, SC 1876, c 18 (39 Vict), s 86(1).

<sup>41</sup> Canada, Royal Commission on Aboriginal Peoples, [Looking Forward, Looking Back](#), Vol 1 (Ottawa: Canada Communications Group, 1996) [*Looking Forward, Looking Back*] at 253; Truth and Reconciliation Commission of Canada, “[What We Have Learned: Principles of Truth and Reconciliation](#)” (Winnipeg: Truth and Reconciliation Committee of Canada: 2015) [*What We Have Learned*] at 5; Kent McNeil, “The Crown’s Fiduciary Obligations in the Era of Aboriginal Self-Government” (2009) [88:1 Can Bar Rev 1](#) at 13.

their own land while the Crown enjoys “infinite resources”.<sup>42</sup> Coercive legislation and policies the Crown has unilaterally used to ban First Nation spiritual practices;<sup>43</sup> cause starvation to control First Nations and First Nations citizens; attempt to control and confine the movement of First Nations citizens through the pass system; assume control over membership lists resulting in the Crown’s long and discriminatory history of control over who may be an “Indian”.<sup>44</sup>

19. Perhaps the most damaging policy that adversely impacted First Nation self-government was the genocide committed by Canada through its participation in and the design of the residential school system. The residential schools were part of a coherent policy to eliminate First Nation people as distinct people and to assimilate them against their will.<sup>45</sup> However, these impacts did not end when the last residential school closed in 1996.<sup>46</sup> The devastation caused by removing children from their families and Nations was continued by the subsequent child welfare system imposed by the Crown.<sup>47</sup> The Canadian Human Rights Tribunal (“CHRT”) found “that Canada racially discriminated against First Nations children on reserve and in the Yukon in a systemic way not only by underfunding the First Nations Child and Family Services Program (FNCFS) but also in the manner that it designed, managed and controlled it.”<sup>48</sup> The Crown’s historical and ongoing policies, from residential schools and inadequate funding policies for essential services to

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<sup>42</sup> *R v Blais*, [2003 SCC 44](#) at para 12; *R v Bunting*, [2015 ONSC 5594](#); *Anderson et al v Manitoba et al*, [2015 MBCA 123](#) at para 105.

<sup>43</sup> *An Act further to amend “The Indian Act 1880”*, SC 1884, c 27, s 3; *An Act to Further Amend the Indian Act*, SC 1914, c 35, s 6; *An Act to Amend the Indian Act*, SC 1914, c 35, s 8.

<sup>44</sup> *What We Have Learned* at 25 and 62-63; *Looking Forward, Looking Back* at 76, 169, 259-262, 269 and 271-272; Truth and Reconciliation Commission of Canada, “[Canada’s Residential Schools: The History, Part 1 Origins to 1939](#)” Volume 1 (Winnipeg: Truth and Reconciliation Committee of Canada: 2015) at 123-124; Standing Senate on Aboriginal Peoples, Canada, Standing Senate on Aboriginal Peoples, [How Did We Get Here? A Concise, Unvarnished Account of the History of the Relationship Between Indigenous Peoples and Canada](#) (Ottawa: Standing Senate Committee on Aboriginal Peoples, 2019) at 17.

<sup>45</sup> *What We Have Learned* at 5-6.

<sup>46</sup> *Baxter v Canada (Attorney General)*, [83 OR \(3d\) 481](#), 2006 CanLII 41673 (ON SC) at para 2.

<sup>47</sup> Public Inquiry into the Administration of Justice and Aboriginal People, [Report of the Aboriginal Justice Inquiry of Manitoba](#) (Winnipeg: The Aboriginal Justice Implementation Commission, 1991) Vol 1 [AJI Report] at chapter 14.

<sup>48</sup> *First Nations Child & Family Caring Society of Canada et al v Attorney General of Canada (representing the Minister of Indigenous and Northern Affairs Canada)*, [2023 CHRT 44](#) [*Child & Family Caring Society*] at para 16.



discriminatory child welfare practices, persistently obstruct the path to genuine self-governance for First Nations.

20. Inadequate and discriminatory funding and services resulting from the Crown’s pervasive control over First Nations governance is an ongoing issue for First Nations and their citizens. Examples include the lengthy history of chronic underfunding of residential schools;<sup>49</sup> the findings by the CHRT of underfunding related to the FNCFS program;<sup>50</sup> the chronic underfunding of First Nations’ water needs as a result of systemic racism;<sup>51</sup> the discriminatory and dishonourable funding of First Nations police services.<sup>52</sup> The chronic underfunding of essential services further underscores how Canada's discretion negatively impacts First Nation self-government.

### C. The *Sui Generis* Fiduciary Duty Advances Reconciliation

21. The *sui generis* fiduciary duty is a vital and necessary component of the First Nation-Crown relationship.<sup>53</sup> Although “[t]rue reconciliation is rarely, if ever, achieved in courtrooms,”<sup>54</sup> the *sui generis* fiduciary duty holds the Crown accountable for its dishonourable conduct through enforceable remedies that facilitate reconciliation outside of courtrooms. A breach of fiduciary duty constitutes an independent cause of action, unlike the honour of the Crown.<sup>55</sup> While “the honour of the Crown and fiduciary duty are not in competition”<sup>56</sup>, practically, a breach of fiduciary duty leads to remedies, while the honour of the Crown does not.<sup>57</sup>

22. Shortly after entering into Treaties, the Crown transformed the Treaty relationship “from autonomous partners into paternalistic subjugation.”<sup>58</sup> Acting unilaterally, the Crown attempted to shift the Nation-to-Nation relationship to one of sovereign and subject.<sup>59</sup> Despite the extensive

<sup>49</sup> *What We Have Learned* at 30-31

<sup>50</sup> *Child & Family Caring Society* at para 16.

<sup>51</sup> *Tataskweyak Cree Nation et al v Canada (A.G.)*, [2021 MBQB 275](#) at paras 9, 15 and 73.

<sup>52</sup> *Dominique* at paras 389-391; affirmed in *Pekuakamiulnuatsh; Indigenous Police Chiefs of Ontario v Canada (Public Safety)*, [2023 FC 916](#) at paras 196-197; *Takuhikan* at paras 123-124.

<sup>53</sup> *Southwind* at para 60.

<sup>54</sup> *Clyde River (Hamlet) v Petroleum Geo-Services Inc.*, [2017 SCC 40](#) at para. 24

<sup>55</sup> *Fort McKay First Nation v Prosper Petroleum Ltd*, [2020 ABCA 163](#) at para 54.

<sup>56</sup> *Restoule ONCA* at para 254.

<sup>57</sup> *Restoule v Canada (Attorney General)*, [2018 ONSC 7701](#) [*Restoule* ONSC] at paras 499 and 504; *Southwind* at paras 68 and 72.

<sup>58</sup> Alan Hanna, “[Reconciliation Through Relationality in Indigenous Legal Orders](#)” (2019) *Alta Law Rev* 56:3 817 at 823.

<sup>59</sup> *Looking Forward, Looking Back* at 242.

history of dishonourable Crown conduct towards First Nations and the clear power imbalance arising from the Crown’s unilateral assumption of discretionary control over First Nations governance, the Crown often asks courts to recognize an “impoverished view” of the honour of the Crown that affords it broad discretion in how it implements its obligations with limited court intervention.<sup>60</sup> This approach perpetuates the power imbalance created by the Crown and fails to recognize the reality that “when negotiation fails to achieve a resolution or if the Crown refuses to negotiate” then First Nations must be entitled to ask for judicial intervention.<sup>61</sup>

23. The *sui generis* fiduciary duty promotes accountability and enforceable solutions that align with the “ongoing project that seeks the ‘reconciliation of Aboriginal and non-Aboriginal Canadians in a mutually respectful long-term relationship’”.<sup>62</sup> Upholding the Crown’s *sui generis* fiduciary duty recognizes the unique First Nations-Crown relationship, and gives rise to clear remedies, while also enabling the Crown to simultaneously balance multiple interests while discharging their duty to First Nations. The *sui generis* fiduciary duty allows the Crown to consider its obligations to others, including the general public and “reconcile them fairly.”<sup>63</sup> The Crown may decide a certain course of action is in the public interest, however, the *sui generis* fiduciary duty dictates how the Crown proceeds and ensures that the public interest does not trump First Nations interests.<sup>64</sup> Ultimately, ensuring the “protection for collective Indigenous interests [is] a social and constitutional good for all Canadians”.<sup>65</sup>

#### **PART IV - SUBMISSIONS CONCERNING COSTS**

24. The AMC does not seek costs and should not be liable to pay costs to any party.

#### **PART V – ORDER SOUGHT**

25. The AMC takes no position regarding the disposition of this appeal.

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<sup>60</sup> *Restoule ONCA* at paras 124, 190; *Taku River Tlingit First Nation v British Columbia (Project Assessment Director)*, [2004 SCC 74](#) at paras 23-24.

<sup>61</sup> *Restoule ONSC* at para 492.

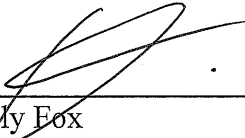
<sup>62</sup> *Southwind* at para 55; *Beckman v Little Salmon/Carmacks First Nation*, [2010 SCC 53](#) at para 10.

<sup>63</sup> *Williams Lake* at para 55.

<sup>64</sup> *Southwind* at para 102; *Osoyoos Indian Band v Oliver (Town)*, [2001 SCC 85](#) at para 52.

<sup>65</sup> *Dickson* at para 5.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED this 28th day of March 2024.**



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Carly Fox  
Nick Saunders

Counsel for the Intervener

## PART VI – TABLE OF AUTHORITIES

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