SCC File No: 40619

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

BETWEEN:

ATTORNEY GENERAL OF QUÉBEC

APPELLANT
(Respondent)

-and-

PEKUAKAMIULNUATSH TAKUHIKAN

RESPONDENT
(Appellant)

-and-

ATTORNEY GENERAL OF CANADA

INTERVENER
(Respondent)

FACTUM OF THE INTERVENER, ATTORNEY GENERAL OF SASKATCHEWAN
(Pursuant to Rules 37 and 42 of the *Rules of the Supreme Court of Canada)*

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PART I: OVERVIEW AND STATEMENT OF FACTS

A. Overview

1. The Court below relied on the honour of the Crown to effectively re-write the terms of a policing agreement between the parties in this appeal and Canada. To assist the Court in determining the issues in this appeal, the Attorney General will review five decisions in which courts have considered the role of the honour of the Crown for interpreting the Saskatchewan Treaty land entitlement ("TLE") agreements. Most of these decisions are referred to and relied upon by the parties and Canada in their factums. There are three main reasons why the decisions are of assistance.

2. First, unlike the agreement at issue here, the TLE agreements fulfil express constitutional obligations owed by the federal and provincial Crowns: namely, Canada's solemn Treaty promises to First Nations to provide reserve lands, and Saskatchewan's obligation to provide TLE lands to Canada under the *Constitution Act, 1930* (UK), 20-21 Geo V c 26, reprinted in RSC 1985, App II 26, Schedule 3, s. 10. Even with that clear constitutional grounding, which is absent here, courts have consistently rejected attempts to re-write the TLE agreements based on the honour of the Crown.

3. Second, the TLE decisions largely concern whether the honour of the Crown imbues the TLE agreements with duty to consult obligations. Whereas the duty to consult is a well-established legal obligation emanating from the honour of the Crown doctrine, the funding obligation identified by the Court below was hitherto unknown to that doctrine.

4. Third, the TLE decisions were provided by both the Federal Court of Appeal and the Saskatchewan superior courts. Those courts have uniformly rejected attempts to re-write the TLE agreements. Their decisions have been followed by other courts and in other contexts. The Court below did not consider or refer to them in its decision.

5. The Attorney General urges this Court to be guided by this jurisprudence, or at least to not disturb the legal certainty provided by it.

B. Facts

6. The Attorney General takes no position on the facts.

PART II: STATEMENT OF QUESTIONS AT ISSUE

7. The Attorney General will address the issue of whether courts may use the honour of the Crown to re-write agreements between the Crown and Indigenous peoples.

PART III: STATEMENT OF ARGUMENT

A. The TLE Context

8. In 1992, Canada, Saskatchewan and twenty-five First Nations signed the TLE Framework Agreement under which the Bands were paid monies by Canada and Saskatchewan to seek out and purchase private or Crown lands on a willing seller/willing buyer basis. Additional First Nations have since signed TLE agreements modelled on the Framework Agreement.

9. The agreements provide a contractual mechanism for Canada and Saskatchewan to fulfill their respective constitutional TLE obligations. Canada had unfulfilled Treaty promises to provide reserve lands to First Nations; and Saskatchewan had an outstanding obligation to provide TLE lands to Canada under the *Constitution Act, 1930*.

10. Several TLE Bands have brought suits in Federal Court and the Court of King's Bench alleging that Canada and Saskatchewan have fiduciary and honourable TLE obligations in addition to the agreements' express terms. In decisions issued between 2016 and 2023, the Court of King's Bench, the Saskatchewan Court of Appeal and the Federal Court of Appeal have uniformly rejected attempts to re-write the agreements. Those courts have also found

that the Crown owes no fiduciary obligations in relation to TLE. The Attorney General will review these decisions in turn.

B. *Muskoday First Nation v Saskatchewan*

11. At issue in *Muskoday First Nation v Saskatchewan*, 2016 SKQB 73, [2016] 3 CNLR 123 ["*Muskoday*"] was whether Saskatchewan breached provisions of the TLE agreements by refusing to sell certain Crown lands and minerals to the First Nation. Those provisions require Saskatchewan to give TLE Bands' purchase requests "favourable consideration" and to make "best efforts" to fulfil the agreements' terms according to their spirit and intent.

12. The First Nation argued that these provisions, coupled with the honour of the Crown, imposes obligations on Saskatchewan approaching that of a fiduciary: namely, that it must place the Bands' interests ahead of the public interest when considering their requests to purchase Crown lands (para 43). Accepting this proposition would have re-written the agreements such that, notwithstanding express terms to the contrary, Saskatchewan would have almost no discretion to deny purchase requests.

13. The Court held that the honour of the Crown applies to the agreements because they are intended to remedy "broken" Treaty promises and there is a "direct conceptual line between that start point and the end point, namely, the TLE Settlement Agreement": paras 38-39. It held that the honour of the Crown may provide an "interpretative lens," but clarified that this is not a basis to ignore or contradict the agreements' express terms: para 40.

14. The Court held that the honour of the Crown required Saskatchewan to implement the terms in good faith, with "intellectual honesty," and to avoid the appearance of sharp dealing: paras 41 and 50. *Muskoday* was recently cited as authority for this articulation of the honour of the Crown in *Bonneau v British Columbia*, 2023 BCSC 1676 at para 82.

15. The Respondent relies on *Muskoday* at para 67 of its Factum. However, unlike the Court below, the Court in *Muskoday* sourced the honour of the Crown in a solemn Treaty promise. The Court respected the agreements' express terms and did not re-write them. Nor did it accept that the Crown's obligations approached that of a fiduciary: paras 54, 67 & 71. *Muskoday* does not assist the Respondent.

C. *Pasqua First Nation v Canada (Attorney General)*

16. In *Pasqua First Nation v Canada (Attorney General)*, 2016 FCA 133, [2017] 3 FCR 3, leave to SCC denied 2016 CanLII 89832 [*Pasqua No. 1*], the Federal Court of Appeal held that the honour of the Crown required Saskatchewan to abide by the agreements' terms and prevented it from attempting to re-write them through the Courts.

17. The First Nation had brought a claim alleging that, for TLE purposes, the honour of the Crown gave rise to a constitutional and fiduciary duty to consult Bands before Saskatchewan could grant land or mineral rights to third parties. Contrary to the agreements' express terms, this would give the Bands a right of first refusal over Crown lands and minerals.

18. Saskatchewan sought to strike the claim for being beyond Federal Court jurisdiction. While the agreements contain a clause under which the parties attorned to the Federal Court, Saskatchewan argued that the Court's limited jurisdiction over the provinces meant that the clause had to be read down to exclude disputes involving Saskatchewan. In effect, Saskatchewan asked the Court to re-write the clause.

19. The Federal Court of Appeal was unimpressed. Near and Gleason JJ.A. (Pelletier J.A. concurring) held that, while the TLE agreements do not give rise to fiduciary obligations, the honour of the Crown applied to them because they were intended to accomplish a Treaty purpose: paras 62-63. They held that the agreements should be interpreted consistently with

their express terms and that the honour of the Crown prevented Saskatchewan from attempting to re-write them (para 64):

> [64] In these circumstances, a compelling argument may be made that the Crown must act in a way that "accomplishes the intended purposes of treaty and statutory grants to Aboriginal peoples" as set out in *Manitoba Metis*, at paragraph 73. In our view, **the Honour of the Crown is engaged in this matter to the extent that the clear and unambiguous text of the Framework Agreement and the PFN Settlement Agreement**—which were negotiated in good faith with all parties fully represented by legal counsel—**should be interpreted in a way that abides by and respects the terms** of the Agreements. **Saskatchewan should not be permitted to re-write or re-interpret the terms of the agreement** set out in section 20.19 of the PFN Settlement Agreement. [Emphasis added]

20. In the present matter, the Appellant Quebec is not attempting to re-write the policing agreement's terms. Rather, it is urging the Court to prevent them from being re-written. This is precisely what Saskatchewan succeeded in doing in *Saskatchewan (Attorney General) v Pasqua First Nation*, 2018 FCA 141 [*Pasqua No. 2*], discussed below.

D. *Saskatchewan (Attorney General) v Pasqua First Nation*

21. In *Pasqua No. 1*, the Federal Court of Appeal found that the agreements' attornment clause only contemplated contractual disputes and struck the claim's constitutional causes of action: para 89. *Pasqua No. 2* concerned Saskatchewan's motion to strike the constitutional causes of action that, despite *Pasqua No. 1*, the Band failed to remove from its claim.

22. Saskatchewan argued, *inter alia*, that it was an abuse of process for the Band to invoke the honour of the Crown to re-write the agreements. In *Pasqua No. 1* the Court chastised Saskatchewan for attempting to re-write the agreements. *Pasqua No. 2* concerned whether it was acceptable for a Band to do so.

23. The Federal Court of Appeal held that it was not. While not specifically referencing the abuse of process doctrine, the Court stated that (paras 12-13):

> [12] **The honour of the Crown as it relates to this agreement requires that the terms of the agreement be implemented in a fair and forthright manner** (*Peigan 1* at para. 64; *Wewaykum Indian Band v. Canada*, 2003 SCC 45, [2003] 2 S.C.R. 259 (*Wewaykum*)). Indeed, the basis upon which the majority in *Peigan 1* established jurisdiction in the Federal Court was a finding that the clear terms of the agreement and the honour of the Crown required that Saskatchewan live up to the specific term that disputes related to the agreement would be dealt with by the Federal Court. **This does not mean that the terms of the agreement are to be ignored or require that important aspects of the agreement be re-written or interpreted in a manner both at odds with the terms of the agreement and as expressly contemplated by the parties to the agreement**. **The respondents are, in effect, asking the Court to re-write the agreement through a series of constitutionally based declarations**. The agreement is not a treaty nor was it meant to determine all aspects of treaty land entitlements that may be outstanding as between the Crown and the respondents. Rather, it is an important tool in settling these outstanding treaty land entitlements in an orderly and fair way as agreed by the parties to the agreement.
>
> [13] Counsel for the respondents repeated several times that the Crown cannot contract out of constitutional and treaty rights. This is not disputed. However, in my view it follows that **one cannot later "contract in" constitutional and treaty rights arguments into every term of a modern agreement between the parties even where the parties agreed on specific terms to address outstanding issues, in a way that fundamentally changes the terms of the agreement retrospectively**. Rather, the honour of the Crown requires that the Crown adhere to and implement the terms of the agreement in an open and fair manner (*Wewaykum*). [Emphasis added]

24. *Pasqua No. 2* was followed in *Manitoba Metis Federation Inc. v Brian Pallister et al.*, 2021 MBCA 47 at para 56, 458 DLR (4th) 625, leave to SCC denied, 2022 CanLII 14382 [*Pallister*], where the Manitoba Court of Appeal reiterated that "[t]he honour of the Crown principle does not mean that the agreement can be ignored or rewritten."

25. *Pasqua No. 2* was also followed by both the Saskatchewan Court of Appeal in *George Gordon First Nation v Saskatchewan*, 2022 SKCA 41, leave to SCC denied 2023 CanLII 19734 [*George Gordon*] and the Federal Court of Appeal in *Saskatchewan (Attorney General) v Witchekan Lake First Nation*, 2023 FCA 105, leave to SCC denied 2023 CanLII 122410 [*Witchekan*], which are discussed below.

E. *George Gordon First Nation v Saskatchewan*

26. *George Gordon* involved yet another claim that, under the TLE agreements, Saskatchewan has a duty to consult Bands before granting mineral rights to third parties.

27. Unlike *Pasqua No. 1*, this claim was brought in the Court of King's Bench. That Court followed the Federal Court of Appeal's decision in *Pasqua No. 2* and rejected the Band's attempt to re-write the agreement (2020 SKQB 90 at para 102):

> [102] I agree with Saskatchewan that, if such a duty was contemplated in the terms proposed by George Gordon, one would expect to find it expressed within the agreement. In other words, if George Gordon wanted notice of any third party applications for acquisition of mineral resources so that it could pre-empt them with its own claim, **it should have asked for that right at the bargaining table**. **If it did not do so, or if it did and that request was rejected, it should not expect the court to re-write the agreement to introduce such a term after the fact. That was expressly rejected in *Peigan #2*** […] [Emphasis added]

28. Writing for a unanimous Saskatchewan Court of Appeal, Tholl J.A. upheld this decision with detailed and scholarly reasons. He set out the interpretive principles applicable to non-Treaty agreements between the Crown and Indigenous peoples:

- Such agreements are not subject to the special rules of Treaty interpretation articulated in *R v Marshall*, [1999] 3 SCR 456: para 170;

- While the agreements cannot be interpreted simply as commercial contracts, they are nevertheless contracts and principles of contract interpretation apply to them: paras 172 & 177, citing *Quebec (Attorney General) v Moses*, 2010 SCC 17, [2010] 1 SCR 557 [*Moses*], *Canada (Attorney General) v Fontaine*, 2017 SCC 47, [2017] 2 SCR 205, and *Watson v Canada*, 2020 FC 129 at para 344;

- While the agreements must be interpreted through the lens of the honour of the Crown, "such an interpretation cannot result in rewriting the agreement:" paras 105 & para 172, citing *Pasqua No. 1*, *Pasqua No. 2* and *Muskoday*;

- The honour of the Crown cannot "exempt the Aboriginal party from honouring its own undertakings:" para 172, quoting *Beckman v Little Salmon/Carmacks First Nation*, 2010 SCC 53 at para 106, [2010] 3 SCR 103; and,

- Courts must pay attention to the text and "not interpret in a manner that appears to better accord with broad principles that do not correspond with the [agreement's] clear words": paras 174, 176 & 178, citing *Moses* at para 6, *Pasqua No. 1*, *Muskoday*, and *Goodswimmer v Canada (Attorney General)*, 2017 ABCA 365 at paras 47-50, 418 DLR (4th) 157, leave to SCC denied, 2018 CanLII 61050 [*Goodswimmer*].

29. Accordingly, Tholl J.A. interpreted the agreements consistently with their express terms: i.e., paras 107-112 & 181-185. As did the lower Court, he held that the place to address the alleged obligation would be through negotiations, not litigation: para 155.

F. *Saskatchewan (Attorney General) v Witchekan Lake First Nation*

30. On the heels of *George Gordon*, the Federal Court of Appeal decided *Witchekan*. That case concerned whether the duty to consult is an implied term of the agreements under contract law. The First Nation alleged that, without such an obligation, the agreements would be frustrated and rendered meaningless, which would be contrary to the honour of the Crown.

31. Saskatchewan's summary judgment application was dismissed by the Federal Court on the basis that the issues required a full trial: 2021 FC 1074. The Federal Court of Appeal disagreed and dealt with the issues on the merits. It considered the evidence and the law of implied terms and dismissed the First Nation's claim in its entirety.

32. The Attorney General commends Rennie J.A.'s findings on the honour of the Crown and reconciliation at paras 127-131. After considering *Moses*, *Pasqua No. 2*, *Pallister* and *Goodswimmer*, he concluded that (para 131):

> The declarations sought by WLFN would result in a very different agreement than that negotiated. The role of the courts in the interpretation of agreements such as this is to interpret the agreement generously and purposefully, but not to rewrite, under the guise of reconciliation, the bargain struck.

33. *George Gordon* and *Witchekan* were recently followed by the Federal Court of Appeal in *Waldron v Canada (Attorney General)*, 2024 FCA 2 at para 96, in which that Court refused to re-write an Indian Day Schools Settlement Agreement.

G. Conclusion

34. The TLE cases provide a helpful contrast to the present matter. They concerned agreements rooted in express constitutional obligations burdening both Crowns, and an alleged honourable obligation well-known to law (the duty to consult). Yet the Saskatchewan Courts and the Federal Court of Appeal uniformly refused to re-write those agreements.

35. By contrast, the Court below used the honour of the Crown to impose a hitherto unknown constitutional funding obligation on the Province, based on a federal policy. Provinces have no obligation to provide such funding apart from agreements they sign related thereto. Nor do they impliedly and unwittingly undertake to comply with federal policies when they sign agreements with Canada and Indigenous peoples. Imputing such obligations will disincentivize provinces from signing such agreements.

36. The Court below did not grapple with the above authorities. Nor did it consider policy reasons for restraint, including the goals of certainty and finality, and the danger that re-writing agreements may disincentivize the Crown from signing them. As held in *Goodswimmer* at para 47: "Legal rules or approaches to the interpretations of settlement agreements should not be set in a way that acts as a disincentive to governments to settle

such claims: *Nunavut Tunngavik Inc. v Canada (Attorney General)*, 2014 NUCA 2 at paras 75-7, 580 AR 75."

37. In *Mikisew Cree First Nation v Canada (Governor General in Council)*, 2018 SCC 40 at para 22, [2018] 2 SCR 765, Karakatsanis J. wrote that reconciliation may be achieved "by promoting negotiation and the just settlement of Aboriginal claims as an alternative to litigation." Allowing the honour of the Crown to be used to re-write agreements through the courts would serve to promote litigation as an alternative to negotiation.

38. The honour of the Crown has an important role for the interpretation and implementation of agreements between the Crown and Indigenous peoples. However, reliance on the honour of the Crown to re-write agreements will undermine both the legal certainty provided by them, and the goal of reconciliation.

PART IV: SUBMISSIONS ON COSTS

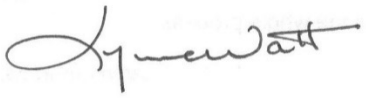
39. The Attorney General does not seek costs and asks that costs not be ordered against her.

PART V: ORDER SOUGHT

40. The Attorney General has been granted 5 minutes of oral argument at the hearing.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

DATED at Regina, Saskatchewan, this 28th day of March, 2024.



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PART VII: TABLE OF AUTHORITIES

Caselaw:	Paragraphs References
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