Court File No. 40619

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 QUEBEC

Appellant

– and –

PEKUAKAMIULNUATSH TAKUHIKAN

Respondent

– and –

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FACTUM OF THE INTERVENER, THE ATTORNEY GENERAL OF ONTARIO

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

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PARTS I and II – OVERVIEW AND POSITION OF ONTARIO

1. This appeal raises a number of important issues concerning the intersection of the honour of the Crown and Crown-Indigenous agreements, including the tripartite First Nation police funding agreement at issue in this proceeding.

2. Two issues raised by the Appellant in this regard are:

   a) whether the honour of the Crown is engaged on the facts of this case; and

   b) the role played by the honour of the Crown in the interpretation of a Crown-Indigenous agreement found to engage this constitutional doctrine.

3. The Attorney General of Ontario ("Ontario") takes no position on the first issue.

4. Regarding the second issue, Ontario makes the following submissions:

   a) the process of negotiating Crown-Indigenous agreements can itself facilitate reconciliation;

   b) the case law confirms that courts, when interpreting modern treaties and treaty land entitlement ("TLE") agreements, should respect the carefully negotiated written texts of these instruments;

   c) this same deference is owed when interpreting the written texts of other negotiated Crown-Indigenous agreements found to engage the honour of the Crown; and

   d) failure by a reviewing court to respect and enforce these written texts may undermine the ability of the negotiation process to promote reconciliation.

5. Ontario, in making these submissions, takes no position on the merits of this appeal.

PART III – STATEMENT OF ARGUMENT

A. The honour of the Crown

a. Overview

6. The honour of the Crown is a foundational principle of Aboriginal law governing the relationship between the Crown and Indigenous peoples. This constitutional principle arises from

the Crown's assertion of sovereignty over Indigenous peoples and *de facto* control of land and resources formerly in their control and can be traced back to the *Royal Proclamation, 1763*. It recognizes that the tension between this assertion of Crown sovereignty and the pre-existing sovereignty, rights and occupation of Indigenous peoples creates a special relationship requiring the Crown to act honourably in its dealings with Indigenous peoples.[1]

7. The honour of the Crown imposes a "heavy obligation" on Crown actors.[2] While always at stake, it is not engaged by every Crown interaction with Indigenous peoples. In *Manitoba Metis Federation Inc. v. Canada (Attorney General)*, the duty said to arise from the honour of the Crown in that case was described as "narrow and circumscribed".[3] This doctrine is not a cause of action but, rather, speaks to "*how* obligations that attract it must be fulfilled."[4]

8. The honour of the Crown is a flexible doctrine. The duty flowing from it varies with the situation in which it is engaged and what constitutes honourable conduct will depend on the circumstances.[5] In *Manitoba Metis*, this Court identified four situations said to engage the doctrine.[6] The present appeal, which concerns a situation not specifically raised in *Manitoba Metis*: the intersection of a non-treaty Crown-Indigenous agreement and the honour of the Crown, presents an opportunity for clarification and direction on this critical constitutional doctrine.

b. Ontario takes no position on whether the honour of the Crown is engaged in this case

9. Ontario takes no position on whether the honour of the Crown is engaged on the facts of this case.

10. More generally, Ontario understands, subject to further direction from this Court, that the question of whether any particular Crown-Indigenous agreement engages this doctrine is

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[1] *Mikisew Cree First Nation v Canada (Governor General in Council)*, 2018 SCC 40 ["**Mikisew Cree**"] at para 21; *Beckman v Little Salmon/Carmacks First Nation*, 2010 SCC 53 ["**Little Salmon/Carmacks**"] at para 42.
[2] *Manitoba Metis Federation Inc v Canada (Attorney General)*, 2013 SCC 14 ["**Manitoba Metis**"] at para 68.
[3] *Manitoba Metis* at paras 68, 81.
[4] *Manitoba Metis* at para 73.
[5] *Manitoba Metis* at para 74.
[6] *Manitoba Metis* at para 73.

governed by the above-referenced principles that the honour of the Crown, while always at stake, is not always engaged and that, even when engaged, duties arising from it may be narrow and circumscribed.

11. This Court has noted that when Indigenous parties "enter the commercial mainstream, it is to be expected that they will have occasion, from time to time, to enter into purely commercial agreements with the provincial Crowns in the same way as with private interests."[7] Ontario submits that the honour of the Crown would not apply to such agreements, the interpretation of which would be governed by contract principles.

B. The process of negotiating Crown-Indigenous agreements can promote reconciliation

12. One way in which the honour of the Crown facilitates reconciliation is through negotiation and the just settlement of Indigenous claims.[8] Because "true reconciliation is rarely, if ever, achieved in courtrooms",[9] Crown and Indigenous parties have been directed, where possible, to resolve disputes through negotiated settlements.

13. The ability of a successful negotiation to foster reconciliation is not limited to the settlement of litigation. Negotiating agreements to achieve specific ends unrelated to resolving litigation can also assist in advancing reconciliation and repairing Crown-Indigenous relationships. As this Court has written in relation to modern treaties, the process of entering into agreements and abiding by the rights and obligations mapped out therein "has the potential to forge a renewed relationship between the Crown and Indigenous peoples."[10]

14. Negotiating Crown-Indigenous agreements requires the parties to come together in good faith.[11] It demands collaboration and the balancing of interests and may help establish

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[7] *Mitchell v Peguis Indian Band*, [1990] 2 SCR 85 at p 138.
[8] *Mikisew Cree* at para 22.
[9] *Clyde River (Hamlet) v Petroleum Geo-Services Inc*, 2017 SCC 40 at para 24. See also *R v Desautel*, 2021 SCC 17 ["**Desautel**"] at paras 87-88; *Reference re An Act respecting First Nations, Inuit and Métis children, youth and families*, 2024 SCC 5 ["**Child and Family Services Reference**"] at paras 77, 88.
[10] *First Nation of Nacho Nyak Dun v Yukon*, 2017 SCC 58 ["**Nacho Nyak Dun**"] at para 1. See also *Saskatchewan (Attorney General) v Witchekan Lake First Nation*, 2023 FCA 105 ["**Witchekan Lake**"], leave to appeal refused, 2023 CanLII 122410, at para 127.
[11] *Desautel* at para 88.

government-to-government relationships and advance Indigenous interests. As such, the negotiation process embodies a concrete step on the road to reconciliation.

15. Earlier this year, this Court considered one such type of agreement with reconciliation potential: coordination agreements under *An Act respecting First Nations, Inuit and Métis children, youth and families.*[12] The mechanisms created by this Act, including these agreements, form part of a "long-term project" expected to "accelerate certain aspects of the process of reconciliation."[13]

16. Ontario has executed Crown-Indigenous agreements covering a broad range of subject matters promoting reconciliation and government-to-government relationships. Negotiating these agreements constitutes a step on the path to reconciliation and is key to Ontario's ongoing efforts in this regard.

C. Requirement to respect written texts of negotiated Crown-Indigenous agreements

17. It is well-established that the negotiation "handiwork"[14] of Crown and Indigenous parties should be respected by Canadian courts. This principle has been articulated most frequently in connection with modern treaties and TLE agreements, both of which have been found to engage the honour of the Crown.[15]

18. Ontario submits that, as with modern treaties and TLE agreements, the carefully negotiated written texts of other Crown-Indigenous agreements found to engage the honour of the Crown should be afforded significant deference by Canadian courts.

a. Modern treaties

19. This Court has confirmed that the texts of modern treaties negotiated by sophisticated parties, while clearly engaging the honour of the Crown, attract judicial deference.

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[12] *An Act respecting First Nations, Inuit and Métis children, youth and families*, SC 2019, c 24.
[13] *Child and Family Services Reference* at para 90.
[14] *Little Salmon/Carmacks* at para 54.
[15] *Manitoba Metis* at para 73; *Muskoday First Nation v Saskatchewan*, 2016 SKQB 73 at paras 38-39; *Witchekan Lake* at paras 127-130; *George Gordon First Nation v Saskatchewan*, 2022 SKCA 41 ["**George Gordon**"], leave to appeal refused, 2023 CanLII 19734, at para 172.

20. In *Beckman v. Little Salmon/Carmacks First Nation*, Binnie J., in discussing treaty interpretation and distinctions between modern and historic treaties, states:

> The distinction lies in the relative precision and sophistication of the modern document. Where adequately resourced and professionally represented parties have sought to order their own affairs, and have given shape to the duty to consult by incorporating consultation procedures into a treaty, their efforts should be encouraged and, subject to such constitutional limitations as the honour of the Crown, the Court should strive to respect their handiwork.[16]

21. For the purpose of this comparison, Binnie J. contrasts the "eight pages of generalities" of Treaty 8 from 1899 to the "435 pages" of a modern treaty executed in 1997.[17] As he observes, subject to "constitutional limitations" (like duties arising from the honour of the Crown), the fact that the parties to the 1997 instrument were "adequately resourced and professionally represented" warrants heightened deference to the written text negotiated by their counsel.

22. This point is also flagged in *Quebec (Attorney General) v. Moses* where Binnie J., again writing for the majority, underlines similarities existing between the process of negotiating contracts and modern treaties. Commenting that the "contract analogy is even more apt in relation to a modern comprehensive treaty", he explains that the "text of modern comprehensive treaties is meticulously negotiated by well-resourced parties" and that "[w]e should therefore pay close attention to its terms."[18]

23. Similarly, in *First Nation of Nacho Nyak Dun v. Yukon*, this Court, glancing back at these 2010 decisions, states simply: "Compared to their historic counterparts, modern treaties are detailed documents and deference to their text is warranted."[19]

b. Treaty land entitlement agreements

24. This emphasis on the need to acknowledge and respect the "handiwork" of properly resourced and represented parties engaged in crafting modern treaties is repeated in connection with TLE agreements, which must also be interpreted through the honour of the Crown lens.

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[16] *Little Salmon/Carmacks* at para 54.
[17] *Little Salmon/Carmacks* at para 52.
[18] *Quebec (Attorney General) v Moses*, 2010 SCC 17 ["**Moses**"] at para 7.
[19] *Nacho Nyak Dun* at para 36.

25. In *Saskatchewan (Attorney General) v. Witchekan Lake First Nation*, for instance, the Federal Court of Appeal remarks that applying honour of the Crown principles to the TLE framework agreement in question "does not entitle a court to reopen and rewrite the settled terms of a modern agreement negotiated between sophisticated parties over many years and with independent legal advice."[20] Nor, as the Court opines, can this doctrine be relied upon "to read in obligations supplementary to or different from those that have been expressly agreed to by the parties, or to renegotiate a better deal than that agreed to."[21]

26. Just as the Crown "cannot contract out of constitutional and treaty rights," as the Federal Court of Appeal writes elsewhere, "it follows that one cannot later "contract in" constitutional and treaty rights arguments into every term of a modern agreement" negotiated by the parties "in a way that fundamentally changes the terms of the agreement retrospectively."[22]

27. The Court of Appeal for Saskatchewan[23] and the Court of Appeal of Alberta[24] have also highlighted this need to respect the negotiated terms of TLE agreements. Even where the honour of the Crown is engaged, the executed texts of these agreements remain central to their interpretation: "The Settlement Agreement must be interpreted through the lens of the honour of the Crown, but such an interpretation cannot result in the rewriting of the agreement."[25]

c. Other Crown-Indigenous agreements found to engage the honour of the Crown

i. Deference is owed to negotiated texts of Crown-Indigenous agreements

28. As indicated previously, Ontario takes no position on whether the honour of the Crown is engaged on the facts of this case. The following submissions relate to any carefully negotiated Crown-Indigenous agreement, outside the treaty and TLE agreement context, found to engage this doctrine.

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[20] *Witchekan Lake* at para 128.
[21] *Witchekan Lake* at para 129. See also *Waldron v Canada (Attorney General)*, 2024 FCA 2 ["**Waldron**"] at para 96.
[22] *Saskatchewan (Attorney General) v Pasqua First Nation*, 2018 FCA 141 ["**Pasqua**"] at para 13. See also *Pasqua First Nation v Canada (Attorney General)*, 2016 FCA 133 at para 64.
[23] *George Gordon* at paras 169-178.
[24] *Goodswimmer v Canada (Attorney General)*, 2017 ABCA 365 ["**Goodswimmer**"], leave to appeal refused, 2018 CanLII 61050, at para 49.
[25] *George Gordon* at para 172.

29. The case law is clear that, when interpreting modern treaties and TLE agreements, both of which engage the honour of the Crown, courts should respect and not depart from their negotiated terms.

30. Likewise, Ontario submits that courts, when reviewing through the lens of the honour of the Crown other types of Crown-Indigenous agreements negotiated by "skilled individuals to reflect [a] precise agreement", have "no mandate to rewrite them"[26] and should give full effect to these written texts honed through negotiation.

31. When required to review any such Crown-Indigenous agreement, 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."[27] While the principle of the honour of the Crown underlies all Crown dealings with Indigenous peoples, it cannot be utilized to "call into existence undertakings that were never given."[28]

32. This point is stressed by the Court of Appeal of Manitoba in *Manitoba Metis Federation Inc v. Brian Pallister et al*. Here, the Court was required to determine if an agreement entered into by Manitoba, the Manitoba Hydro-Electric Board and the Manitoba Metis Federation ("MMF") to resolve MMF concerns over the licensing of two hydro projects engaged the honour of the Crown.

33. While the Court of Appeal found that the agreement did engage the doctrine, it cautioned that this "does not mean that the agreement can be ignored or rewritten."[29] Significantly, the Court provided this direction despite the fact that the agreement at issue was said to constitute, at least in part, an accommodation agreement relating to provincial consultation obligations.[30]

ii. Role of the honour of the Crown in interpreting Crown-Indigenous agreements

34. The following principles inform the application of the honour of the Crown, as an

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[26] *Moses* at para 12.
[27] *Witchekan Lake* at paras 130-131.
[28] *Lax Kw'alaams Indian Band v Canada (Attorney General)*, 2011 SCC 56 at para 13.
[29] *Manitoba Metis Federation Inc v Brian Pallister et al*, 2021 MBCA 47 ["**Brian Pallister**"], leave to appeal refused, 2022 CanLII 14382, at para 56.
[30] *Brian Pallister* at paras 21-22, 61.

interpretive device, to any carefully negotiated Crown-Indigenous agreement found to engage the doctrine.

35. Where a negotiated Crown-Indigenous agreement is found to engage the honour of the Crown, it must be interpreted in an "open and fair" manner.[31] That said, there are limits to the application of this doctrine as a judicial interpretative tool. First and foremost, as canvassed above, the fact that an agreement may engage this doctrine does not permit a court to ignore or "rewrite" its executed terms.

36. Such Crown-Indigenous agreements are also, to a very significant degree, governed by contract principles.[32] Ontario submits that this adherence to the rules of contract is even more true of agreements signed outside the treaty context, which has to some extent been distinguished from the realm of commercial contracts.[33] Courts should be guided by these rules when interpreting non-treaty Crown-Indigenous agreements found to engage the honour of the Crown.

37. Other related principles outlined in the case law include:

a) while the honour of the Crown may serve as an interpretive lens, "it is not operative as a source of obligations independent of" Crown-Indigenous agreements and "cannot add or subtract or change the promises made by the parties";[34]

b) a Crown-Indigenous agreement should be interpreted "on the basis of the terms the parties actually negotiated and agreed to as set out in the text of their agreement rather

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[31] *Brian Pallister* at para 56. See also *Pasqua* at para 12.

[32] See, for instance, *George Gordon* at paras 172-177; *Brian Pallister* at paras 45-47; *Witchekan Lake* at para 41. In *Canada (Attorney General) v Fontaine*, this Court noted that the Indian Residential Schools Settlement Agreement, which the Ontario Superior Court of Justice had previously linked to the honour of the Crown, "is at root a contract": *Canada (Attorney General) v Fontaine*, 2017 SCC 47 at paras 14, 35. See also *Fontaine v Canada (Attorney General)*, 2014 ONSC 4585 ["**Fontaine**"] at paras 83-84. The reference by this Court to the Ontario Superior Court's linking of the settlement agreement and the honour of the Crown does not "represent a holding on the scope or application" of this doctrine: *Waldron* at para 92.

[33] *Little Salmon/Carmacks* at para 10; *Nacho Nyak Dun* at para 37; *George Gordon* at para 171.

[34] *Fontaine* at para 84.

than on general observations and ideas" unsupported by this text;[35]

c) while evidence of surrounding circumstances may help interpret such an agreement, "it cannot be used to rewrite the express terms" of that agreement or, in effect, to create a new agreement;[36]

d) a term will not be read into a Crown-Indigenous agreement where the matter at issue has been expressly addressed elsewhere by the parties;[37] and

e) where both an honourable and a dishonourable interpretation of the agreement is available, the court should adopt the former.[38]

38. Ontario submits that these principles properly balance the need to ensure fairness in interpreting Crown-Indigenous agreements with the requirement that the negotiated language of such agreements be respected and enforced by a reviewing court.

D. Failure to respect written texts of negotiated agreements may impair reconciliation

39. Crown and Indigenous parties, as noted above, are encouraged to work together to achieve mutually acceptable outcomes, an end achieved through the intensive and, in some cases challenging, negotiation process. Once parties to an agreement succeed, through hard work, good will and compromise, in agreeing to terms, it is critical that they remain confident that these terms will continue to stand unless altered on mutual consent.

40. Loss of such confidence, which may arise in response to the sanctioning of agreements being judicially "rewritten" through the honour of the Crown lens, could disincentivize negotiations, hamper Crown-Indigenous collaboration and undo existing progress on this front achieved, at least in part, at the negotiation table.

41. This point is crystallized by the Federal Court of Appeal in *Witchekan Lake*:

Failing to respect the finality and legal certainty of the Framework Agreement

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[35] *Moses* at para 6. See also *George Gordon* at para 174; *Pasqua* at para 13; *Nunavut Tunngavik Incorporated v Canada (Attorney General)*, 2014 NUCA 2 at paras 71-72.
[36] *Witchekan Lake* at para 67; *Waldron* at para 75.
[37] *Witchekan Lake* at paras 87-89.
[38] *Fontaine* at para 90.

> undermines reconciliation by allowing parties to renegotiate and to seek more favourable terms than those originally settled on…A paradigm under which each generation can reopen, renegotiate, and rewrite previously settled matters is untenable.[39]

42. Indeed, the uncertainty and unpredictability stemming from any such revisiting of executed agreements could well yield little beyond disagreement and potential litigation. This, in turn, could "undermine the ultimate objective of reconciliation."[40]

43. The confidence resulting from the certainty of a negotiated agreement is of equal benefit to Indigenous and Crown parties,[41] both of whom will have spent much time and energy working to ensure that this agreement reflects their respective interests. This is reconciliation in action which, for properly represented parties, can assist in building bridges and strengthening relationships.

PART IV – SUBMISSIONS ON COSTS

44. The Attorney General of Ontario does not seek costs and asks that no costs be awarded against him.

PART V – ORDER SOUGHT

45. The Attorney General of Ontario has been granted permission to present oral argument not exceeding five minutes at the hearing of the appeal. He seeks no other order.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 2nd day of April, 2024.

David Tortell

Charles Hinse-MacCulloch

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[39] *Witchekan Lake* at para 128, 96.
[40] *Goodswimmer* at para 49. See also *George Gordon* at para 185.
[41] *Witchekan Lake* at para 130.

PART VII – TABLE OF AUTHORITIES

Jurisprudence

	Authority	Paragraph reference
1.	*Beckman v Little Salmon/Carmacks First Nation*, 2010 SCC 53	6, 17, 20, 21, 36
2.	*Canada (Attorney General) v Fontaine*, 2017 SCC 47	36
3.	*Clyde River (Hamlet) v Petroleum Geo-Services Inc*, 2017 SCC 40	12
4.	*First Nation of Nacho Nyak Dun v Yukon*, 2017 SCC 58	13, 23, 36
5.	*Fontaine v Canada (Attorney General)*, 2014 ONSC 4585	36, 37(a)
6.	*George Gordon First Nation v Saskatchewan*, 2022 SKCA 41	27, 36, 37(b), 42
7.	*Goodswimmer v Canada (Attorney General)*, 2017 ABCA 365	27, 42
8.	*Lax Kw'alaams Indian Band v Canada (Attorney General)*, 2011 SCC 56	31
9.	*Manitoba Metis Federation Inc v Brian Pallister et al*, 2021 MBCA 47	32, 33, 35, 36
10.	*Manitoba Metis Federation Inc v Canada (Attorney General)*, 2013 SCC 14	7, 8, 17
11.	*Mikisew Cree First Nation v Canada (Governor General in Council)*, 2018 SCC 40	6, 12
12.	*Mitchell v Peguis Indian Band*, [1990] 2 SCR 85	11
13.	*Muskoday First Nation v Saskatchewan*, 2016 SKQB 73	17
14.	*Nunavut Tunngavik Incorporated v Canada (Attorney General)*, 2014 NUCA 2	37(b)
15.	*Pasqua First Nation v Canada (Attorney General)*, 2016 FCA 133	26
16.	*Quebec (Attorney General) v Moses*, 2010 SCC 17	22, 30, 37(b)
17.	*Reference re An Act respecting First Nations, Inuit and Métis children, youth and families*, 2024 SCC 5	12, 15

	Authority	Paragraph reference
18.	*R v Desautel*, 2021 SCC 17	12, 14
19.	*Saskatchewan (Attorney General) v Pasqua First Nation*, 2018 FCA 141	26, 35, 37(b)
20.	*Saskatchewan (Attorney General) v Witchekan Lake First Nation*, 2023 FCA 105	13, 15, 25, 31, 32, 37(c), 37(d), 41, 43
21.	*Waldron v Canada (Attorney General)*, 2024 FCA 2	25, 32, 37(c)

Legislation

		Paragraph reference
22.	*An Act respecting First Nations, Inuit and Métis children, youth and families*, SC 2019, c 24 *Loi concernant les enfants, les jeunes et les familles des Premières Nations, des Inuits et des Métis*, LC 2019, ch 24	15