SCC Court 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
(Respondents)

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

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PART I – OVERVIEW AND FACTS

1. Alberta is committed to the process of reconciliation flowing from the rights guaranteed by section 35 of the *Constitution Act, 1982*. Reconciliation involves not only addressing historic wrongs between the Crown and Aboriginal peoples but also balancing Aboriginal interests with competing societal interests. As a result of this complex balancing of interests and resulting necessary compromise, the Crown may not always be able to meet the expectations of Aboriginal groups but that does not mean it has not acted honourably and that judicial intervention is appropriate.[1]

2. The question on this appeal is what the law requires when the federal government, provincial government, and an Aboriginal group have negotiated and signed a funding agreement that the Aboriginal group asserts does not meet its needs. It is Alberta's position that the honour of the Crown cannot be relied upon by the courts to reopen and rewrite the agreement. Such an approach is inconsistent with reconciliation and the proper role of the courts.

3. Alberta accepts the facts as stated in the Attorney General of Quebec's (Quebec) Factum.

PART II – ISSUES

4. Alberta will address the first and second issues raised by Quebec in its Factum.

PART III – ARGUMENT

A. NO BASIS TO EXPAND THE ROLE OF THE HONOUR OF THE CROWN

5. The concept of reconciliation is inextricably tied to the constitutional principle of honour of the Crown embedded within section 35 of the *Constitution Act, 1982* (Section 35).[2] The ultimate purpose of the honour of the Crown is the reconciliation of the Crown and Aboriginal peoples in an ongoing mutually respectful relationship.[3] As a result, the honour of the Crown is always at

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[1] *Haida Nation v BC (Minister of Forests)*, 2004 SCC 73 at paras 32, 45, 50 [*Haida*]; *Nunavut Tunngavik Incorporated v Canada (AG)*, 2014 NUCA 2 at paras 39-40 [*NTI*]; *Manitoba Metis Federation v Canada (AG)*, 2013 SCC 14 at para 82 [*MMF 2013*].
[2] *Haida* at para 32; *R v Desautel*, 2021 SCC 17 at paras 29-30 [*Desautel*]; *Ktunaxa Nation v BC (Forests, Lands and Natural Resource Operations)*, 2017 SCC 54 at para 78 [*Ktunaxa*].
[3] *Desautel* at para 30; *Beckman v Little Salmon/Carmacks First Nation*, 2010 SCC 53 at para 10 [*Beckman*].

stake in Crown dealings with Aboriginal peoples, although it is not always engaged.[4] The honour of the Crown speaks to the way in which specific Crown obligations must be fulfilled. It does not guarantee a particular result and is not itself a freestanding cause of action.[5]

6. In *Manitoba Metis Federation* v *Canada* (*MMF 2013*), this Court previously recognized the need for greater certainty about the role of the honour of the Crown. The Court identified situations engaging the honour of the Crown including the reconciliation of Aboriginal rights with Crown sovereignty, when Section 35 is involved, and when an explicit obligation to an Aboriginal group is enshrined in the Constitution or a treaty.[6]

7. This Court further confirmed a non-exhaustive list of duties flowing from the honour of the Crown to help guide ongoing Crown-Aboriginal relations. The honour of the Crown:

- Gives rise to a fiduciary duty when the Crown assumes discretionary control over a specific Aboriginal interest.
- Informs the purposive interpretation of Section 35 and gives rise to a duty to consult when the Crown contemplates action that will adversely impact proven or credibly asserted Section 35 rights.
- Governs treaty-making and implementation requiring the Crown to negotiate honourably and avoid the appearance of sharp dealing.
- Requires the Crown to act in a way that accomplishes the intended purposes of treaty and statutory grants to Aboriginal peoples.
- Requires the Crown take a broad purposive approach to the interpretation of a constitutional obligation and act diligently to fulfill it.[7]

8. In ordering Canada and Quebec to pay the deficits incurred by the Respondent's police force, the Quebec Court of Appeal (QCA) held that the Trial Judge erred in not analyzing the "constitutional principles applicable to the relationship between the parties" and relying solely on the terms of the tripartite funding agreements (Agreements). The QCA then pivoted to rely on the honour of the Crown to reopen and rewrite the clear terms of the Agreements.[8] The QCA's

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[4] *Haida* at paras 16, 18-20; *MMF 2013* at paras 68-69.
[5] *MMF 2013* at para 73; *Ktunaxa* at paras 79, 83; *Haida* at paras 49-50, 60.
[6] *MMF 2013* at paras 68-72.
[7] *MMF 2013* at paras 73-74.
[8] *Takuhikan c Procureur General du Quebec*, 2022 QCCA 1699 at paras 73-79 [QCA Decision].

approach is not only contrary to this Court's guiding authority but it also undermines reconciliation and increases legal risk to both government and Aboriginal peoples.

9. While not clearly stated, it appears the QCA held that the honour of the Crown "was at stake" in this case given its findings that Canada and Quebec made "solemn undertakings" to fund the Respondent's policing services at a level "comparable to that of communities with similar conditions in the region" as set out in the federal *First Nations Policing Policy* (*Policy*). The QCA further held that Canada's solemn undertaking derived from the objective of its *First Nations Policing Program* (FNPP) to support First Nations in acquiring the tools to become self-sufficient and self-governing. The QCA noted this is an objective of Section 35. Quebec's solemn undertaking resulted from its consent to participate in the FNPP and enter into a tripartite funding agreement pursuant to its *Police Act.*[9]

10. An aspirational federal policy anticipating the negotiation of administrative funding agreements does not give rise to a constitutional obligation or solemn promise that engages the honour of the Crown within the meaning of *MMF 2013.*[10] The specific undertakings of the parties are contained in the resulting negotiated and signed Agreements which should be interpreted pursuant to general principles of contractual interpretation.[11]

11. Even if the honour of the Crown informed the interpretation of the Agreements, it did not provide a basis for the Court to reopen and rewrite their clear terms. The courts have long recognized that reconciliation is best achieved by the Crown and Aboriginal peoples working collectively to negotiate and settle their issues. Negotiated agreements promote certainty and

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[9] QCA Decision at paras 73-74.
[10] *MMF 2013* at paras 70-72, 91-94; *Peter Ballantyne Cree Nation v Canada (AG)*, 2016 SKCA 124 at paras 42-51.
[11] *Quebec (AG) v Moses*, 2010 SCC 17 at paras 1, 4, 6-13; *Canada (AG) v Fontaine*, 2017 SCC 47 at paras 2-3, 37; *George Gordon First Nation v Saskatchewan*, 2022 SKCA 41 at paras 177-178, leave to appeal to the SCC dismissed 2023 CanLII 19734 (SCC) [*George Gordon*]; *Corporation de négociation Ashuanipi c Canada (PG)*, 2014 QCCA 920 at paras 1-6, 24, 29-30, 54-67, 72.

finality. The judiciary has a limited supervisory role in the negotiation process. Once an agreement is reached, the courts' role is to ensure the parties are implementing its terms.[12]

12. The Agreements are administrative funding agreements. They were negotiated prior to any potential self-government agreement or modern treaty. The Agreements do not engage the honour of the Crown.[13] Nor do they represent an attempt to "contract out" of the honour of the Crown given they do not settle any claimed rights and do not include terms relieving the Crown of any future duty of honourable dealing.[14]

13. Even where the courts have held an agreement engages the honour of the Crown - such as in a challenge to a modern treaty or treaty land entitlement agreement - the judiciary has recognized that its role is circumscribed. The courts can assess whether the parties are abiding by the terms of the agreement but cannot lose sight of the fact that an enforceable agreement was signed. As a result, contrary to the QCA's approach, the starting point in assessing a challenge to a negotiated agreement must be the terms of the agreement itself which are to be interpreted in a fair and forthright manner.[15]

14. A court cannot rewrite the terms of a settled agreement between the Crown and Aboriginal peoples even when interpreting the agreement through the lens of the honour of the Crown. Nor can a court exempt any party from honouring its own contractual undertakings.[16] Surrounding circumstances cannot "overwhelm" the terms of the Agreements.[17] Parties on both sides are entitled to legal certainty and should not find themselves facing repeated attempts to reopen,

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[12] *Desautel* at paras 87-91; *Mikisew Cree First Nation v Canada (Governor General in Council)*, 2018 SCC 40 at paras 21-22; *Saskatchewan (AG) v Witchekan Lake First Nation*, 2023 FCA 105 at para 130, leave to appeal dismissed 2023 CanLII 122410 (SCC) [*Witchekan*]; *George Gordon* at para 172.
[13] *MMF 2013* at paras 68-74; *Ta'an Kawach'an Council v Yukon*, 2008 YKSC 60 at paras 69-75.
[14] QCA Decision at paras 17, 25, 63; *Beckman* at paras 3-5, 7, 58-71.
[15] *Witchekan* at paras 127-131; *George Gordon* at paras 169-178, 185, 188-190; *Manitoba Metis Federation Inc v Brian Pallister*, 2021 MBCA 47 at para 56, leave to appeal dismissed 2022 CanLII 14382 (SCC) [*Pallister*]; *First Nation of Nacho Nyak Dun v Yukon*, 2017 SCC 58 at paras 36-38 [*Nacho Nyak Dun*]; *Saskatchewan (AG) v Pasqua First Nation*, 2018 FCA 141 at paras 12-13 [*Pasqua No. 2]*; *Pasqua First Nation v Canada (AG)*, 2016 FCA 133 at paras 58-65, leave to appeal dismissed 2016 CanLII 89832 (SCC) [*Pasqua No. 1*].
[16] *Waldron v Canada (AG)*, 2024 FCA 2 at paras 84, 95-96 [*Waldron*]; *Witchekan* at paras 127-131; *George Gordon* at paras 172, 174; *Pasqua No. 2* at paras 12-13; *Beckman* at paras 106-107.
[17] *Witchekan* at paras 66-67; *Waldron* at paras 74-75.

renegotiate, and rewrite finalized agreements based on what a particular court determines is honourable.[18] The role of the courts is not to resolve political issues and they cannot reject the terms of a negotiated agreement outright in an attempt to do so.

15. To apply the concept of the honour of the Crown in a manner that allows the courts to reopen and rewrite the terms of negotiated agreements between the Crown and Aboriginal peoples represents a significant shift in the law inconsistent with the guiding authorities. Any such shift should be approached cautiously with clear guidance as to why it is occurring and how the law should be applied moving forward. However, that is not what occurred in this case.

16. The QCA's decision leaves unclear how an aspirational federal policy can be considered a solemn promise engaging the honour of the Crown. Moreover, how such a policy statement can take precedence over the clear terms of a resulting negotiated tripartite agreement between the Crown and Aboriginal peoples and empower the court to rewrite the agreement to find liability on the part of both Canada and the province.

17. Ambiguity about when the honour of the Crown may apply to allow the courts to rewrite the terms of negotiated agreements between the government and Aboriginal peoples raises legal risk for all parties, disincentivizes negotiations, and undermines the objectives of certainty and finality essential to reconciliation.[19] As Justice Slatter held in *R v Lefthand,* the principle of honour of the Crown should not be so imprecise and vague that it has no real legal meaning and provides no meaningful yardstick against which to measure what is honourable.[20]

B. PROVINCE NOT BOUND BY CANADA'S POLICY COMMITMENTS

18. The rights guaranteed by Section 35 operate as a limitation on both federal and provincial legislative powers.[21] In the exercise of provincial jurisdiction, the honour of the Crown may give

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[18] *Witchekan* at paras 127-130; *Goodswimmer v Canada (AG),* 2017 ABCA 365 at paras 49-50, leave to appeal dismissed 2018 CanLII 61050 (SCC) [*Goodswimmer*].
[19] *Witchekan* at para 130; *Goodswimmer* at paras 49-50; *Métis Nation of Alberta Association v Alberta (Indigenous Relations),* 2024 ABCA 40 at para 50 [*MNAA*]; *NTI* at paras 75-77; *Eastmain Band v Canada (Federal Administrator)*, [1993] 1 FC 501 at pp. 518-519 [*Eastmain*].
[20] *R v Lefthand,* 2007 ABCA 206 at para 75, leave to appeal dismissed 2008 CanLII 6384 (SCC). See also the dissent of Rothstein J in *MMF 2013* at paras 204-205, 208, 214.
[21] *Tsilhqot'in Nation v BC*, 2014 SCC 44 at paras 139, 141-142.

rise to obligations on the part of the province depending on the particular facts. Canada has no right or obligation to supervise a province regarding matters within its exclusive jurisdiction.[22]

19. Provincial obligations arising from the honour of the Crown should be assessed in light of the specific authority exercised by the province and any express commitments it has made. In this matter, Quebec had authority to enter into agreements with Aboriginal communities pursuant to its *Police Act*.[23] Participation in collaborative processes with Canada and Aboriginal groups should not lead to the conclusion that the province has implicitly endorsed or adopted positions found in federal policy or legislation. Such a result may make provinces hesitant to participate in such processes – a result antithetical to reconciliation.[24]

20. This decision has implications for collaborative processes well beyond those related to First Nations policing. Provinces enter into agreements with Canada and Aboriginal groups in a variety of contexts. As noted by this Court in *Reference re An Act Respecting First Nations, Inuit and Métis children, youth and families* (*Reference Decision*), there are areas where cooperation is required by both the federal and provincial governments to address pressing societal concerns. Often – in addressing issues related to Aboriginal peoples – there will be overlapping federal and provincial jurisdiction.[25] The provision of children's services to Aboriginal children provides such an example. *An Act Respecting First Nations, Inuit and Métis children, youth and families* (Federal Act) anticipates that coordination agreements may be entered into between an Aboriginal group, Canada, and a province.[26]

21. In the *Reference Decision*, the Court considered the affirmation in the Federal Act regarding the scope of Section 35. It was noted that Parliament could not bind the courts, or the

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[22] *Grassy Narrows First Nation v Ontario (Natural Resources)*, 2014 SCC 48 at paras 30, 32-33, 50-51; *Haida* at paras 57-59; *George Gordon* at paras 162-164.

[23] The QCA concluded that the funding available to the Respondent did not allow it to meet the mission of a police force found in the *Police Act*: QCA Decision at paras 106, 116, 135. Alberta takes no position on this issue.

[24] *MNAA* at para 50.

[25] *Reference re An Act Respecting First Nations, Inuit and Métis children, youth and families*, 2024 SCC 5 at para 99 [*Reference Decision*].

[26] *An Act Respecting First Nations, Inuit and Métis children, youth and families*, SC 2019 c 24, s. 20 [Federal Act].

provinces, regarding the definitive interpretation given to Section 35. It is not clear to what extent the affirmation in the Federal Act is meant to bind the provincial governments. However, this Court indicated that courts may give narrow meaning to legislation that would otherwise exceed the jurisdiction of the government that enacted it.[27]

22. The *Reference Decision* acknowledged that provinces may have differing views on the scope of Section 35 and may challenge Parliament's understanding.[28] Despite differing viewpoints, provinces may still be willing to enter into tripartite agreements relating to the provision of children's services to Aboriginal children. In doing so, the province is acting pursuant to its own jurisdiction and in accordance with its own policy statements. Participation in such cooperative arrangements should be encouraged and should not be an implicit adoption by a province of positions contained in the federal legislation or policy documents.

C. REMEDIES SHOULD FURTHER RECONCILIATION

23. The QCA found that Quebec and Canada violated their obligation to act with honour and directed the payment of amounts equal to the budgetary deficits incurred by the Respondent.[29] In relation to a breach of the honour of the Crown, Alberta submits that the appropriate relief is for the Court to grant a declaration and send the matter back to the parties to work towards resolution.[30] Alberta submits that such relief is (i) consistent with the guiding case law; (ii) advances reconciliation; and (iii) respects governmental decision-making.

24. In granting relief in relation to the honour of the Crown, courts are reluctant to dictate a particular result. The honour of the Crown does not necessitate a particular outcome; rather, it promotes reconciliation by imposing obligations of manner and approach.[31] The relief granted by the QCA is not consistent with the general approach taken by courts when crafting remedies in this context.

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[27] Federal Act, ss. 8, 18; *Reference Decision* at paras 59-60, 118.
[28] *Reference Decision* at paras 59-60.
[29] QCA Decision at paras 124-125.
[30] Alberta takes no position on the appropriate relief should the Court determine a breach of contract.

[31] *Clyde River (Hamlet) v Petroleum Geo-Services Inc*, 2017 SCC 40 at para 41; *Kainaiwa/Blood Tribe v Alberta (Energy)*, 2017 ABQB 107 at paras 67, 117.

25. In relation to the duty to consult, this Court has noted that the Crown's failure to consult may lead to a number of remedies.[32] However, the most common remedy is the quashing of the challenged decision and declaratory relief. In granting relief, courts have cautioned against assuming a supervisory role over ongoing consultations.[33] Further, the courts decline to dictate a particular form of consultation or accommodation. Rather, the parties should be left to consider the broadest range of possible outcomes.[34]

26. When issuing declarations related to the Crown's duty to negotiate in good faith, the courts craft declaratory relief narrowly to ensure that it does not impact on the ongoing negotiations or mandate the Crown take a specific negotiating position. There is no obligation for negotiations to achieve a specific end.[35]

27. This Court has confirmed that, when reviewing the implementation of modern treaties, the court should assess the legality of the decisions rather than supervise the conduct of the parties. If a decision is invalid, the relief granted should return the parties to the position they were in prior to that decision. Courts should leave room for the parties to work out their differences.[36]

28. Declaratory relief can advance reconciliation. Such relief enables the parties to know their rights and to avoid future disputes. Declaratory relief provides the parties the opportunity to work together to resolve their issues. This Court has noted that close judicial management may undermine meaningful dialogue and long-term relationships and that "… reconciliation often demands judicial forbearance."[37]

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[32] *Rio Tinto Alcan Inc v Carrier Sekani Tribal Council*, 2010 SCC 43 at para 37.
[33] *K'omoks First Nation v Canada (AG)*, 2012 FC 1160 at para 47; *Adams Lake Indian Band v Lieutenant Governor in Council*, 2012 BCCA 333 at para 63 leave to appeal dismissed 2013 CanLII 18837 (SCC).
[34] *Wii'litswx v HMTQ*, 2008 BCSC 1620 at para 23; *Da'naxda'xw/Awaetlala First Nation v BC (Environment)*, 2011 BCSC 620 at paras 230-232; *Chartrand v BC (Forests, Lands and Natural Resource Operations)*, 2015 BCCA 345 at para 99.
[35] *Mohawks of the Bay of Quinte v Canada (Indian Affairs and Northern Development)*, 2013 FC 669 at paras 7-8, 48, 60, 67; *Luuxhon v Canada*, (1999) 66 BCLR (3d) 165 (BC SC) at paras 69-70, 75; *Teslin Tlingit Council v Canada (AG)*, 2019 YKSC 3 at paras 57-61.
[36] *Nacho Nyak Dun* at paras 4, 33, 58, 60, 63.
[37] *Nacho Nyak Dun* at paras 33, 60.

29. In addition, declaratory relief avoids an unacceptable intrusion into government decision-making. The relief granted by the QCA relates to the expenditure of public funds. Both the Policy and the tripartite agreement reflect the fact that available funding is subject to budgetary allocations.[38] Generally, policy decisions related to funding are the responsibility of government and are matters that the courts will not review or implicitly dictate. Declaratory relief provides guidance to the parties while still allowing the government to balance a variety of societal interests in arriving at policy decisions related to the expenditure of public funds.

30. The government has the right to allocate its funds as it sees fit and may choose to adopt or amend policies related to funding. The distribution of government funds is a political not a judicial function.[39] In the absence of a constitutional right requiring funding, or a contractual obligation, the government is not obliged to provide any type of funding.[40] If a party is of the view that a policy does not provide sufficient funding, redress should be sought from the government – not the courts.[41]

31. In addressing an isolated case, a court has no understanding of the overall financial issues faced by the government in making funding decisions. In determining how to expend public funds, the government balances a variety of societal interests and directs funds towards initiatives most compatible with its public policy decisions.[42] An obligation to act honourably does not displace the Crown's obligation to take into account the public interest and balance other societal interests. The Crown has many responsibilities and answers to more than one constituency.[43]

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[38] QCA Decision at paras 11, 13, 20.
[39] *Manitoba Metis Federation v Manitoba*, 2018 MBQB 131 at paras 48-69 [*MMF 2018*]; *Bowman v Her Majesty the Queen*, 2019 ONSC 1064 at paras 35-49, 53, 58; *30 Bay ORC Holdings Inc v City of Toronto*, 2021 ONSC 251 at paras 46-48 [*30 Bay*]; *Deskin v Ontario*, 2023 ONSC 5584 at paras 67-68, 71, 78.
[40] *Southeast Child and Family Services v Canada (AG)*, [1997] 9 WWR 236 (QB) at paras 22-23, affirmed at [1998] 9 WWR 583 (CA); *MMF 2018* at paras 60-61, 71, 78; *Shriner v Canada (AG)*, 2017 FC 515 at para 18 [*Shriner*].
[41] *Shriner* at para 32.
[42] *30 Bay* at paras 47-48.
[43] *Pallister* at paras 81-82; *Eastmain* at p 518.

PART IV – COSTS

32. The Attorney General of Alberta does not seek costs and submits that the ordinary rule that costs are not awarded against an Intervener should apply.

DATED at the City of Edmonton, in the Province of Alberta, this 28th day of March, 2024.

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PART VII – TABLE OF AUTHORITIES & LEGISLATION

CASE LAW	PARAGRAPH REFERENCES
30 Bay ORC Holdings Inc v City of Toronto, 2021 ONSC 251	30 and 31
Adams Lake Indian Band v Lieutenant Governor in Council, 2012 BCCA 333	25
Beckman v Little Salmon/Carmacks First Nation, 2010 SCC 53	5, 12 and 14
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Da'naxda'xw/Awaetlala First Nation v BC (Environment), 2011 BCSC 620	25
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Kainaiwa/Blood Tribe v Alberta (Energy), 2017 ABQB 107	24
Ktunaxa Nation v BC (Forests, Lands and Natural Resource Operations), 2017 SCC 54	5
Luuxhon v Canada, (1999) 66 BCLR (3d) 165 (BC SC)	26
Manitoba Metis Federation Inc v Brian Pallister, 2021 MBCA 47	13 and 31
Manitoba Metis Federation v Canada (AG), 2013 SCC 14	1, 5, 6, 7, 10, 12 and 17
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STATUTES, REGULATIONS, LEGISLATION	PARAGRAPH REFERENCES
An Act Respecting First Nations, Inuit and Métis children, youth and families, SC 2019 c 24 English: ss. 8, 18, 20 French: ss. 8, 18, 20	20 and 21