Court File No. 40619

SUPREME COURT OF CANADA

(ON APPEAL FROM THE QUEBEC COURT OF APPEAL)

BETWEEN:

PROCUREUR GÉNÉRAL DU QUÉBEC

Applicant

and

PEKUAKAMIULNUATSH TAKUHIKAN

Respondent

and

PROCUREUR GÉNÉRAL DU CANADA

Intervenor
(Respondent)

FACTUM OF THE INTERVENER, ASSEMBLY OF FIRST NATIONS

(Rule 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 Assembly of First Nations ("AFN") is a national organization representing more than 634 First Nations who have Treaties, inherent rights and title in their lands and traditional territories.
2. The AFN advocates and promotes the unique and respective nation-to-nation relationship between the Crown and diverse First Nations. This relationship is manifested in treaties and other legal instruments and the inherent rights of First Nations as Peoples who have the internationally recognized rights of self-determination.

B. Statement of Facts

3. The matter before this Court involves the determination of the source of the Crown's obligations owed to a First Nation under an agreement to provide funding for a First Nations police service in accordance with the First Nations and Inuit Policing Program (FNIPP). [1] From the perspective of the AFN, the case emphasizes the significance of the constitutional duty of the Crown to act honourably in supporting First Nations self-governance through adequately funded police services.
4. The FNIPP was created in 1992 to support the establishment of First Nations police services in First Nations communities. However, as noted by numerous decisions and commissions of inquiry, the program has been chronically and discriminatorily underfunded for the last 30 years resulting in a lack of support and resources for First Nations and their police services.[2] This discriminatory under funding of First Nations policing has led to numerous tragic incidents and loss of life in First Nations communities.

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[1] *First Nations Policing Policy*, Minister of Supply and Services Canada, 1996, Cat. No.: JS42-76/1996, ISBN: 0-662-62631-1, p. 1.

[2] *Public Inquiry Commission on relations between Indigenous Peoples and certain public services in Québec: listening, reconciliation and progress*, Final Report, ISBN: 978-2-550-84789-2 (printed version) ISBN: 978-2-550-84790-8 (PDF version), Government of Quebec, 2019. *Reclaiming Power and Place: The Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls*, Final Report, ISBN 9780660292748/9780660304885, Vancouver, Privy Council Office, 2019, found at https://www.mmiwg-ffada.ca/final-report

5. The FNIPP is a federal contribution program that allows for the negotiation of funding agreements for First Nations policing between the federal government, provincial/territorial governments, and First Nations. It provides contribution funding for policing that endeavors to be professional, dedicated and responsive to the communities, respecting cultural and linguistic specificities, while recognizing and upholding First Nations inherent, Treaty and Constitutional rights. [3] However, the federal and provincial governments' application of the FNIPP too often falls short of the intentions of the program.
6. First Nations leadership and First Nations Chiefs of Police have for decades, raised concerns about unfair negotiation tactics that Public Safety Canada (PSC) employs when negotiation these funding agreements. First Nations leadership have stated that the negotiation of funding agreements are tantamount to "take it or leave it" deals that perpetuate the underfunding and under resourcing of First Nations policing, endangering the communities they serve.
7. Throughout the decades since the FNIPP's inception, the AFN Chiefs-in-Assembly have passed over 43 resolutions concerning police services and funding for First Nations policing. This gives an indication of the pervasiveness and scope of the issues with the inadequate funding of First Nations policing.
8. First Nations communities across Canada continue to suffer major public safety crises, including disproportionate levels of crime, violent crime, and the ongoing crisis of Missing and Murdered Indigenous Women and Girls ("MMIWG").[4] The realities of this public safety crisis and urgent need for more culturally appropriate policing have in recent years received national attention. Furthermore, recent events have drawn renewed focus on the devastating consequences of underfunding First Nations police services.[5]
9. The discriminatory funding of First Nations police services puts First Nations as well as non-First Nations lives at risk. There is immeasurable risk to First Nations peoples' health, safety and wellbeing if their police services are forced to cease operations due to lack of funding. First Nations should not be forced agree to discriminatory terms and conditions for funding

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[3] *Supra* at note 1. *Takuhikan v Procureur général du* Québec, *2022* QCCA 1699, at para 10.
[4] *Reclaiming Power and Place: The Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls*, Final Report, ISBN 9780660292748/9780660304885, Vancouver, Privy Council Office, 2019, found at https://www.mmiwg-ffada.ca/final-report
[5] *Supra*

in order to maintain their police services and exercise their rights to self-governance. This scenario would be unfathomable if it were applicable to non-Indigenous police services. Often in First Nations communities, the police are the only first responders available when any type of an emergency occurs.

10. There are numerous examples of unnecessary and tragic deaths that have occurred in First Nations because of a lack of police officers, and lack of adequate infrastructure or equipment.[6] Too many First Nations police officers suffer from burn out or leave to work for non-Indigenous police services. This has resulted in a crisis in First Nations policing and a lack of community oriented and culturally appropriate police services.

11. Nowhere in Canada, would it even be contemplated that police services, that service so many communities in large, rural and northern territories, be forced to accept funding that has been proven discriminatory and inadequate to meet their operational needs.[7] However, the ways in which governments apply the FNIPP demands that First Nations accept outright systemic discrimination as a condition for receiving basic services that the rest of Canada takes for granted.[8] This is the reality for First Nations whether the circumstance be policing, child welfare, health care or education.

12. Despite pronouncements and commitments to policing reform, the federal, provincial and territorial governments continue to ignore the findings of the Canadian Human Rights Tribunal ("CHRT") and the courts, while willfully disregarding their own stated intentions to recognize and uphold First Nations self-governance.[9] The Crown's actions in forcing First Nations to accept discriminatory funding agreements and ignoring CHRT orders or

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[6] *Supra*

[7] *Takuhikan v Procureur général du* Québec, 2022 QCCA 1699, at para 116.

[8] *Supra* at para 122.

[9] *Pekudakamiulnuatsh Takuhikan c. Procureure générale du Canada*, 2017 QCCS 4787. Exhibit D-14, which is an agreement signed by the community of Mashteuiatsh for emergency additional funding in 2016. When Mashteuiatsh announced its police service had to shut down due to lack of funding, the Government of Québec agreed to provide additional funding. In the preamble of the agreement, Québec refers to the treaty process of which Mashteuiatsh is part of and acknowledges the right to self-government. See also the FNIPP at *Supra* note 1.

continuously appealing CHRT decisions, is the anthesis of upholding the honour of the Crown. The governments of Canada and Quebec are clinging to antiquated, paternalistic and discriminatory policies and agreements which they seek to force upon First Nations, to the detriment of First Nations peoples who rely heavily on their police services to ensure safety and security in their communities.

PART II – ISSUES IN DISPUTE

I. Whether the principle of the honour of the Crown and fiduciary duty applies to agreements entered into with the federal and provincial Crown?

II. Whether the Crown has an obligation to support First Nations self-governance in relation to administering police services?

PART III – SUBMISSIONS

I. Applicability of the Honour of the Crown and Fiduciary Duty

13. The Quebec Court of Appeal found that the Government of Quebec failed to uphold the honour of the Crown. Quebec failed to provide adequate funding for the First Nation's unique policing needs and refused to negotiate equitable terms while taking full advantage of the federal government's discriminatory administration and application of the FNIPP.

14. When determining whether the Crown has met its obligations to a First Nation in a contractual agreement, the Quebec Court of Appeal correctly found that the appropriate approach is to canvas the applicable constitutional principles and apply those principles to consideration of the agreement and its wording. The Crown cannot rely on the strict terms of agreements, including express terms intended to limit liability (e.g., funding based upon budgetary constraints), to determine the scope of their obligations to a First Nation. The Quebec Court of Appeal provided thoughtful guidance for determining whether the respondents acted honourably. It found that the starting point for the analysis:

> "must begin with the relationship between the parties, and then, in light of the exhibits in question, applied those principles to his consideration of the context that led to the signing of the tripartite agreements and to their

> wording. Only after such a process could he have truly ruled on the appellant's claim and determined whether or not the respondents acted honourably in the circumstances."[10]

15. The Court's emphasis on the source for determining the Crown's obligations being its relationship with the First Nations is significant, as it speaks to an understanding of First Nations historical relationship with the Crown as well as the current realities and systemic barriers First Nations experience in exercising self-governance. It is an important shift away from the types of paternalistic attitudes which have led to the long-standing discriminatory under funding of First Nations police services.

16. Limiting the Crown's obligations to a strict contractual analysis ignores the reality that Canada and Quebec's application of the FNIPP is financially self-motivated and that they intentionally excluded the First Nation's participation in determining its community safety needs. Quebec and Canada's obligations go beyond the strict terms of the tripartite agreement to a constitutional duty to adequately fund First Nations police services for effective self-governance. True negotiation of funding agreements must be built upon a foundation of understanding of the unique needs of the community, respect for First Nations rights and First Nations' ability to administer culturally appropriate policing.

17. This Court has noted the benefits of negotiation, speaking to how the honour of the Crown requires the Crown to participate in processes of negotiation and additionally how reconciliation speaks to the Crown and First Nations being required to work together to reconcile their interest, premised on the Crown's obligation to achieve just settlement. [11]

18. This is further supported by this Court's statement in the *Reference re An Act Respecting First Nations, Inuit and Métis children, youth and families* in relation to legislation recognizing First Nations self-governance over child welfare:

> "the application of legislation which recognizes the inherent right to self-determination, facilitates and encourages, from a forward-looking perspective, the negotiation of agreements between the Crown and Indigenous communities is a concrete measure that may move Canada closer to the goal of "*establishing and maintaining a mutually respectful relationship between Aboriginal*

[10] *Supra*, note 8 at para 77.
[11] *R. v. Desautel*, 2021 SCC 17, paras. 87-89 ["*Desautel*"].

> *and non-Aboriginal peoples in this country"* as called for by the Truth and Reconciliation Commission.[12]

19. By "turning a deaf ear to the grievances of the appellant" and failing to engage in a true negotiation process, the Quebec Court of Appeal correctly found that Quebec and Canada acted in bad faith and were in breach of their duties to act honourably, ultimately undermining the goal of self-governance.[13]

20. The Quebec Court of Appeal declined to rule on whether the Crown owed a fiduciary duty to the First Nation. The Court noted that "Given that the Supreme Court's jurisprudence on the fiduciary duty of the Crown is not settled, I consider it risky to base my analysis thereon. This is so because the commitment to contribute funding to the police services of a public body does not give rise to a duty on the part of the respondents that, at first glance, is 'in the nature of a private law duty'."[14] Furthermore, stating the "Supreme Court has not had to rule on a matter involving a fiduciary duty in the context of Crown conduct in relation to Aboriginal interests other than land, although it does not appear closed to the idea of recognizing the application of this principle to other types of dealings between the Crown and First Nations."[15] The Court of Appeal's reasoning drew upon the decision in *Wewaykum* noting that existence of a public law duty necessarily exclude the creation of a fiduciary relationship. However, it depends on identification of a "cognizable Indian interest", and the Crown's undertaking of discretionary control in a way that invokes responsibility "in the nature of a private law duty".[16] However, this Court in *Williams Lake Indian Band*, was clear that restrictions regarding the applicability of fiduciary duty relationships does not mean that governments can restrict their due diligence to the existence of land rights and the duty to consult.[17] The Crown must also consider whether, in exercising

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[12] Reference re *An Act respecting First Nations, Inuit and Métis children, youth and families*, 2024 SCC 5 at para 14.
[13] *Supra* at para 124.
[14] *Supra* at note 8, para 72,
[15] *Supra* note 8 at para 58.
[16] *Wewaykum Indian Band v. Canada,* 2002 SCC 79 (CanLII), [2002] 4 SCR 245, <https://canlii.ca/t/1fwx2>
[17] *Williams Lake Indian Band v. Canada (Aboriginal Affairs and Northern Development),* 2018 SCC 4 (CanLII), [2018] 1 SCR 83, <https://canlii.ca/t/hq5df>,

discretionary powers under the law, they have fiduciary obligations to First Nations and if so, whether they are fulfilling that duty.

21. This Court determined that there are two ways in which a fiduciary obligation may arise between the Crown and First Nations; (1) When the Crown has discretionary control over a specific or cognizable aboriginal interest, (the "sui generis fiduciary obligation") and, (2) where the Crown has undertaken to exercise its discretionary control over a legal or substantial practical interest in the best interests of a beneficiary (the "ad hoc fiduciary relationship").[18]

22. The First Nation's interests in ensuring public safety and administering culturally appropriate police services rises to the level of a cognizable First Nations interest, and moreover, it is a substantial and practical interest in the best interests of the beneficiary First Nation. Given the substantial failure of the justice system and non-Indigenous police services in relation to First Nations people, which has been well documented by many commissions of inquiry, First Nations ability to provide their own culturally appropriate police services is certainly a substantial and practical interest. The Crown also exercises a very high degree of discretionary control over First Nations with respect to policing. It unilaterally determines the policing and funding needs of First Nations with zero consultation or input from First Nations. This behavior necessary attracts fiduciary obligations on the part of the Crown.

II. *First Nations Self-Governance and Policing*

23. First Nations hold the right to self-determination as peoples and their relationships with the Crown are founded on the inherent self-governing authority of First Nations. The inherent, Treaty and section 35 Constitutional rights of First Nations as Peoples include the right to self-governance as supported by the *United Nations Declaration on the Rights of Indigenous Peoples* (hereinafter the "*UN Declaration*"), which states that First Nations should freely determine their political status and freely pursue their economic, social and cultural development and that in exercising this right of self-determination, have the right to self-

[18] *Supra* note 8 at para 54 and *Wewaykum* at para 162.

government in matters relating to their local affairs, as well as ways and means of financing these autonomous functions.[19]

24. The articles of *UN Declaration* make it clear that First Nations have a general right to self-determination, which includes the exercise of autonomy in relation to their internal and local affairs, which must include the provision of police services over their lands and territories. They also have the right to strengthen and maintain these distinct legal, i.e. policing, institutions, while also participating fully in such aspects of policing that overlap with federal and provincial jurisdiction.[20] In accordance with the *UN Declaration*, the Crown is under an onus to provide financial and technical assistance for First Nations to freely exercise their self-governance rights over policing. [21]

25. The passage of Bill C-15, *An Act respecting the United Nations Declaration on the Rights of Indigenous Peoples* ("UNDA") provides foundational support for the applicability of *UN Declaration* and recognition to First Nations self-governance over policing. UNDA's preamble states that the role of *UN Declaration* is as "a source for the interpretation of Canadian law" and section 4 states that its purposes include affirming *UN Declaration* as "a universal international rights instrument with application in Canadian law".[22]

26. This Court has affirmed that when considering the division of constitutional powers, that the Constitution is a "living tree" and that the determination of jurisdictional powers and how they interrelate must evolve and must be tailored to the changing political and cultural realities of Canadian society.[23] The very functioning of Canada's federal system must continually be reassessed in light of the fundamental values it was designed to serve.[24]

27. Pekuakamiuatsh Takuhikan must determine for itself what resources its needs to administer its own police services - not be dependent on the arbitrary and unilateral determinations of Canada or Quebec. The policing crisis affecting so many First Nations will not be solved

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[19] *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res. 61/295 (Annex), UN GAOR, 61st Sess., Supp. No. 49, Vol. III, UN Doc. A/61/49 (2008) 15.
[20] *Supra at Articles 4-5.*
[21] *Supra.*
[22] *An Act respecting the United Nations Declaration on the Rights of Indigenous Peoples.* 2nd Session; 43rd Parliament, 2021 (Royal Assent June 21, 2021).
[23] *Canadian Western Bank v. Alberta*, [2007] 2 SCR 3 at para. 23.
[24] *Supra* at para. 23.

until First Nations rights to self-governance over policing are recognized and upheld. The application of laws and policies which seek undermine First Nations self-governance by purposely discriminating and underfunding essential services like policing, no longer have a place in the values of Canadian society. The Crown not only has an obligation to fund First Nations policing, it also has an obligation to support the goal of First Nations self-governance in relation to policing.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

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

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PART IV – TABLE OF AUTHORITIES

1. Statutes

United Nations Declaration on the Rights of Indigenous Peoples Act, S.C. 2021, c.14. https://laws-lois.justice.gc.ca/eng/acts/U-2.2/	Para 25

2. Case Law

Canadian Western Bank v. Alberta, [2007] 2 SCR 3.	Para 26
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Public Inquiry Commission on relations between Indigenous Peoples and certain public services in Québec: listening, reconciliation and progress, Final Report, ISBN: 978-2-550-84789-2 (printed version) ISBN: 978-2-550-84790-8 (PDF version), Government of Quebec, 2019.	Para 4
Reclaiming Power and Place: The Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls, Final Report, ISBN 9780660292748/9780660304885, Vancouver, Privy Council Office,	Para 4