YELLOWHEAD BRIEF #161 | JAN 15, 2025

Yellowhead Institute

Does the Honour of the Crown Apply to Funding Agreements? Case Comment - Quebec (Attorney General) v. Pekuakamiulnuatsh Takuhikan, 2024

by Scott Franks

IN ***PEKUAKAMIULNUATSH TAKUHIKAN***, a majority of the Supreme Court of Canada held that Quebec breached the honour of the Crown in its negotiation of a funding agreement with the government of the Pekuakamiulnuatsh First Nation, and awarded the First Nation damages equal to the amount of the funding deficit created by Quebec's breach. This case is important for First Nations, Métis and Inuit governments that are exercising their inherent right to self-government to provide services to their communities, such as the provision of child and family services, water, and policing, and where an Indigenous government is engaged in the negotiation of agreements, including service coordination and funding, with the provinces or Canada.

In this comment, I outline three parts of the majority's reasons that may be relevant to Indigenous governments that are exercising their inherent governmental powers to provide services for their members. First, the majority clarifies that the Honour of the Crown is associated with "Indigenous difference", which includes the exercise of the inherent right to self-government. Second, the majority confirms that the Honour of the Crown may be engaged in the negotiation and performance of agreements between the Crown and Indigenous governments. Third, the majority confirms that compensation may be available where the Honour of the Crown is breached in the negotiation, performance and renegotiation of an agreement. I close with a snapshot of the Crown's dishonorable and bad faith conduct in the case.

Although this case concerns the negotiation and performance of an agreement for the provision and funding of policing services on reserve, the reasons in this case may be more broadly applicable to other services provided by Indigenous governments, both on and off-reserve.

This decision may be helpful for Indigenous governments that are in the process of negotiating or renegotiating service or funding agreements with the provinces or Canada. In particular, this decision can be useful for Indigenous governments where the province or Canada proposes terms that are inequitable or that result in inadequate funding for services, or where the government relies on tactics such as delay, intransigence and stonewalling, lowballing, coercion, or ultimatums.

More broadly, the majority's reasons point towards the importance of the Crown's role in advancing reconciliation and supporting the inherent right of self-government through contractual agreements – not just treaties, constitutional amendments and legislation – with Indigenous governments. Finally, the majority clarifies that reconciliation may require compensation where the

Honour of the Crown has been breached; this may also apply to the breach of other duties, such as the duty to consult and accommodate.

Indigenous Difference and the Inherent Right to Self-Government

In early 2024, a majority of the Supreme Court of Canada affirmed the exercise of the inherent right to self-government as an activity associated with "Indigenous difference." "Indigenous difference" includes four aspects:

(1) cultural difference;
(2) prior occupation;
(3) prior sovereignty; and
(4) treaties.

"Indigenous difference" also reflects the "distinctive philosophies, traditions and cultural practices" and legal orders of an Indigenous people. It includes Aboriginal and treaty rights under s. 35 of the *Constitution Act, 1982*, the "other rights and freedoms" under s. 25 of the *Charter*, and "distinctly Indigenous interests" that might be the subject of a *sui generis* fiduciary duty. It is already clear that this concept will become central to the Court's future jurisprudence and its application in this case indicates a potential shift in the Court's approach to the inherent right to self-government.

In *Pekuakamiulnuatsh Takuhikan*, the majority found that the First Nation had a credible claim to policing as a component of its right to self-government and that the province and Canada had entered into agreements with the First Nation on this understanding. The reasoning in this case may be applied in other contexts. For example, in *An Act Respecting First Nations, Métis and Inuit Children Youth and Families*, Parliament recognizes and affirms Indigenous peoples' inherent right to self-government over child and family services. In doing so, Parliament has likely bound itself to the Honour of the Crown in its engagement with Indigenous governments that are exercising their right to self-government over child and family services. This may mean that the duties described by the majority in *Pekuakamiulnuatsh Takuhikan* may also apply to the negotiation of coordination agreements under s. 20(2) of the *Children, Youth and Families Act*. Similarly, the Honour of the Crown may be relevant to agreements under s. 23(1) of the proposed *First Nations Clean Water Act*. Although the Honour of the Crown is not engaged in every contractual undertaking with Indigenous governments, agreements that relate to an exercise of the right to self-government, whether proven or credibly asserted, will engage the Honour of the Crown. The majority explicitly confirmed that the Honour of the Crown even applies where an agreement states that it does not create or establish a s. 35 right.

The Honour of the Crown and Contractual Negotiation, Performance and Renegotiation

It is well-established that the Honour of the Crown gives rise to several different duties. In *Pekuakamiulnuatsh Takuhikan*, the Court adds the duty to act with honour and integrity in negotiating, interpreting and performing its contractual agreements to this list of duties, which includes:

- the duty to consult and accommodate;
- the duty to diligently fulfill a solemn promise;
- the duty to act with integrity in the negotiation, interpretation, and implementation of treaties.

The majority also affirmed the application of the Honour of the Crown to agreements related to treaty land entitlements and gaming revenue-sharing agreements.

The majority explains that when the Crown chooses to enter into an agreement that engages Indigenous difference, the Crown must negotiate with honour and integrity. It cannot engage in "sharp dealing", "adopt an intransigent attitude", or enter into negotiations "without intending to keep its promises" or with the intent to "coerce or unilaterally impose an outcome".

The Crown must "engage in genuine negotiations in a manner conducive to maintaining a relationship that can support the ongoing process of reconciliation between the Crown and Indigenous peoples." This is a higher standard of conduct than that which is expected of parties in a regular contract negotiation.

Once the Crown has entered into an agreement, it must also "conduct itself with honour and integrity in performing its obligations". It must be generous in interpreting the terms of the agreement and "comply with

[those terms] scrupulously while avoiding any breach of them". It must also act with honour and integrity when it is renegotiating the agreement. In doing so, the Crown cannot "take advantage" of the power imbalance between itself and Indigenous peoples; the Court gives the example of "agreeing to renew its undertakings on terms that are more favourable to it without having genuinely negotiated first."

Although the majority distinguishes treaties, which create s. 35 rights, from non-treaty agreements, principles related to the Honour of the Crown will likely apply to both types of agreements. Much like treaties, which require an understanding of the surrounding context, non-treaty agreements should also be interpreted within the context of the relationship between the Indigenous government and the Crown, and with an understanding of the connection between that agreement and its promotion of "Indigenous difference". Courts should always prefer the interpretation that is most consistent with the honour of the Crown. The majority's reasons also suggest that courts will not uphold terms, even though they might be unambiguous, that are inconsistent with the honour of the Crown.

The extension of the honour of the crown to non-treaty agreements may take some of the pressure off of Indigenous governments in their negotiation of treaties with the Crown. Although the formal ratification of an agreement as a treaty brings additional constitutional protections, the Honour of the Crown ensures that the Crown's conduct in the negotiation and implementation of a non-treaty agreement will be held to a higher standard. In turn, this should remove the incentive for the Crown to delay treaty negotiations, where previously it may have preferred non-treaty agreements because of their perceived "mainstream" nature as regular contracts.

Compensation and Reconciliatory Justice

When the Honour of the Crown is breached, compensation may be required to advance what the majority calls "reconciliatory justice". The majority explains that the purpose of the Honour of the Crown is to "facilitate the reconciliation of the Crown's interests and those of Indigenous peoples, including by promoting negotiation and the just settlement of Indigenous claims." Where the Honour of the Crown is breached, compensation advances reconciliation by "repairing and maintaining the special relationship with the Indigenous peoples on whom European laws and customs were imposed."

Reconciliatory justice goes beyond corrective justice – putting the parties back to where they were before the breach – it extends to the restoration of the relationship between the Crown and Indigenous peoples and "places them back on the path to reconciliation".

The majority clarifies that its order for compensation is not intended to require Quebec to fund policing at a certain level. It is a reality that Indigenous governments often receive less funding than necessary to provide levels of service that are comparable to services for non-Indigenous populations. The majority's order for compensation is not, however, intended to alter the terms of Quebec's agreement with the First Nation to require a certain level of funding. Rather, the majority is careful to note that its order for compensation is intended to address Quebec's dishonorable conduct and to restore the relationship between the parties. The Crown's inequitable funding of services, however, may be relevant to the standard of conduct required by the Honour of the Crown.

In some ways, the majority's decision to order compensation in this case is difficult to square with its decision to send the issue of compensation back to negotiation in *Ontario v. Restoule*. In *Restoule*, the Court granted a declaration that the Crown had breached the terms of the Robinson-Huron and Robinson-Superior treaties and clarified the meaning of the augmentation clause under those treaties. The Court did not, however, order compensation based on the amounts calculated at trial. Given the large amount of money at issue in *Restoule*, the Court may have been concerned that an order for compensation in *Restoule* would have been disruptive to the relationship between the parties – and to reconciliation (as the Court understands it). It may be that the basis for compensation in *Restoule* and *Pekuakamiulnuatsh Takuhikan* are distinguishable: in *Restoule,* the issue of compensation related to an annuity clause under a treaty, whereas in *Pekuakamiulnuatsh Takuhikan*, compensation was intended to restore the relationship between the parties after the Crown's breach. If anything, the majority's decision to order compensation in *Pekuakamiulnuatsh Takuhikan* but not in *Restoule* might illustrate the Court's anxiety about the negative public perception and political

impacts of its decisions, particularly where the financial costs are high. These concerns appear in Justice Côté's dissenting opinion in *Pekuakamiulnuatsh Takuhikan*, where she argues that the Court should not provide remedies that limit the discretionary policy and budgetary decisions of Parliament or the legislatures. "Reconciliation", it appears, is a boat that can only handle certain winds.

A Snapshot of Dishonourable and Bad Faith Conduct

In *Pekuakamiulnuatsh Takuhikan*, the majority found that Quebec's conduct in the negotiation, performance and renegotiation of the agreement breached the honour of the Crown. Indigenous governments have seen this type of conduct before. The majority's reasons offer a snapshot of bad faith negotiation tactics and dishonourable conduct that is all too common in the negotiation of funding agreements between the Crown and Indigenous governments.

The majority found that Quebec negotiated in an "obstinate" and "intransigent" manner, failed to consider the context of First Nations policing and the First Nation's interest and needs, failed to consider the First Nation's perspective on the level of funding that it required, and that Quebec's conduct was unreasonable and undermined the legitimate expectations of the parties.

The majority went so far as to cast doubt on Quebec's negotiation of terms that limited Quebec's financial contribution (a maximum amount) and that made the First Nation responsible for any deficit. The majority explains its concerns with Quebec's conduct:

> **Having exploited Pekuakamiulnuatsh Takuhikan's position of weakness at the time the agreements were renewed and having refused to really negotiate their funding terms, Quebec could not, for the current year, insist that the terms of the prior arrangement be adhered to in the "new agreement" as if they were not the product of its own abuse. In the circumstances, insisting on strict adherence to the terms of those clauses was also an abuse of contractual rights.**

The majority also found that Quebec's refusal to renegotiate funding, despite the First Nation's precarious situation, "jeopardized the equilibrium and the very purpose of tripartite agreements." Quebec's conduct made the First Nation "feel like there was a 'knife to the throat'": it had to either impoverish itself by reallocating funding to make up the deficit or let the province take control over policing on reserve. Quebec's conduct benefited itself and harmed the First Nation, "not only in financial terms but also from the standpoint of the quality of policing and its dignity."

Conclusion

In the last year, the Court has affirmed Parliament's capacity to recognize an inherent right to self-government through legislation, and has upheld a First Nation's constitutional law related to leadership. Over the past two decades, Parliament and the provinces have entered into non-treaty agreements with the intention of supporting and advancing Indigenous self-government. The majority's decision in *Pekuakamiulnuatsh Takuhikan* is consistent with this trend. Its clarification of the duty to act with honour and integrity in negotiating and performing its contractual agreements will be useful for those Indigenous governments that are working with the provinces and Canada to coordinate culturally appropriate services.

CITATION

Franks, Scott. "Does the Honour of the Crown Apply to Funding Agreements? Case Comment - Quebec (Attorney General) v. Pekuakamiulnuatsh Takuhikan, 2024" *Yellowhead Institute.* 15 January 2025. https://yellowheadinstitute.org/2025/01/15/does-the-honour-of-the-crown-apply-to-funding-agreements/