SCC clarifies how the honour of the Crown affects (re)negotiation of “reconciliation-based” agreements with Indigenous groups

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Case Summary - *Québec (Attorney General) v. Pekuakamiulnuatsh Takuhikan*, 2024 SCC 39

In *Québec (Attorney General) v. Pekuakamiulnuatsh Takuhikan (Pekuakamiulnuatsh)*, the Supreme Court of Canada (SCC) ruled that Québec’s refusal to renegotiate funding terms violated the principles of good faith and the honour of the Crown. The SCC ordered Québec to pay damages in line with reconciliatory justice to restore the relationship between the parties.

I. Background

This case concerns successive tripartite agreements (the Tripartite Agreements) between the Government of Canada (Canada), the Government of Québec (Québec), and the band council, Pekuakamiulnuatsh Takuhikan (the Band Council), representing the Pekuakamiulnuatsh First Nation (PFN). The Tripartite Agreements aimed to establish and maintain the Sécurité publique de Mashteuiatsh (SPM), an Indigenous police force funded by Canada and Québec.

Broadly put, the Tripartite Agreements sought to address historical harm caused by the imposition of national police services and to promote culturally appropriate policing as a step toward reconciliation. To achieve this, the Tripartite Agreements had three primary objectives: to establish and maintain a police force tailored to the community's needs; to set the maximum financial contributions from Canada and Québec; and to entrust PFN with managing the police force, including bearing some financial responsibility.

While the Tripartite Agreements explicitly capped government contributions at a maximum annual amount, they also included a clause permitting contract extensions (the Renewal Clause). The Renewal Clause reflected an expectation of renewal and renegotiation to ensure the ongoing operation of the police force.

Between 2013 and 2017, the funding provided under the Tripartite Agreements proved insufficient to sustain the SPM. Each fiscal year, the police force incurred operating deficits unrelated to mismanagement or extraordinary expenses. Despite being aware of the funding shortfall, Canada and Québec refused to renegotiate funding terms, presenting the Band Council with a “false choice”: agree to renew the agreement without negotiation and deepen the deficit or abandon the SPM and rely on the (previously rejected) services of the Québec provincial police.

As a result of Canada and Québec’s refusal to renegotiate, the respondent initiated legal proceedings to recover the accumulated deficits from both governments. The Band Council’s claim rested on two grounds: a private law contractual basis rooted in the provisions of the Civil Code of Québec (the C.C.Q.) and a public law basis founded on the principles of Aboriginal law.

II. Judicial history

At trial, the judge dismissed the Band Council’s claim, rejecting the allegations that Canada and Québec had breached their duties of good faith, the honour of the Crown, or any fiduciary obligations. The trial judge determined that the Band Council had knowingly agreed to the terms of the Tripartite Agreements despite the inadequate funding. Furthermore, the judge found no evidence of bad faith and therefore concluded that the parties had acted in good faith.

With respect to the claim based on the honour of the Crown, the trial judge held that the Tripartite Agreements did not establish fiduciary obligations. The judge reasoned, among other factors, that the Band Council had not identified a specific collective Indigenous interest over which Canada and Québec had exercised discretion, thereby failing to engage the honour of the Crown. The Band Council appealed.

At the Québec Court of Appeal (the QCCA), the Band Council’s appeal was allowed on the grounds that the trial judge had erred in his analysis of both the private law and the public law arguments raised.

In its analysis, the QCCA determined that the honour of the Crown was engaged in this case, and accordingly decided it was unnecessary to consider whether Canada and Québec also had fiduciary obligations. The QCCA characterized Québec and Canada’s refusal to renegotiate funding in light of the known inadequacies as dishonourable, finding that the governments had ignored the concerns of the Band Council. Canada and Québec were consequently ordered to pay the amounts corresponding to their share of the deficits claimed.

Following the decision of the QCCA, Canada paid their portion of the deficits, while Québec appealed to the SCC.

III. The SCC analysis

The two main issues before the SCC were as follows:

1. In performing the contractual undertakings it made to the Band Council, did Québec breach (i) the requirements of good faith or (ii) the obligations flowing from the honour of the Crown, if it applies?
2. If so, what is the appropriate remedy for each of these breaches?

The SCC determined that the Crown's liability under the requirements of good faith is governed by the relevant provisions of the C.C.Q. In analogous circumstances outside of Québec, the analysis of good faith in the performance of such a contract would be guided by relevant common law principles. Those principles are similar but not identical to those enshrined in the C.C.Q. and are summarized in the leading case of *Bhasin v. Hrynew*, 2014 SCC 71 (at paras. 65-66) and discussed below.

The analysis of the Crown's liability under the honour of the Crown would proceed similarly to that set out in this case, since the obligations flowing from the honour of the Crown are anchored in public law.

A. Good faith under the C.C.Q.

Good faith in the context of the C.C.Q. refers to the expectation that parties act honestly, fairly, and with integrity in their dealings. Under the C.C.Q., articles 6, 7, and 1375 explicitly require parties to act in good faith at all stages of a contract, including negotiation, performance, and termination. In this case, the applicability of the principle was undisputed; rather, the issue was whether Québec had breached its obligation of good faith.

The SCC disagreed with the trial judge's interpretation of good faith. Indeed, the SCC emphasized that good faith involves both subjective and objective considerations. While dishonesty and knowingly engaging in unlawful acts clearly violate good faith, the SCC stressed that good faith also prohibits objectively unreasonable conduct, such as unduly increasing the burden on the other contracting party, behaving in an excessive or unreasonable manner, or jeopardizing the existence or equilibrium of the contractual relationship.

The SCC concluded that the trial judge's failure to consider the Renewal Clause prevented a proper evaluation of Québec's compliance with its duty of good faith. The Renewal Clause imposed an obligation to negotiate in good faith, stemming directly from the contract. It was Québec's refusal to engage in genuine negotiations over funding terms, despite being aware that its inadequate funding jeopardized the maintenance of the SPM, that constituted a breach of this obligation. In other words, Québec's conduct was a breach of good faith because it threatened the very foundation of the Tripartite Agreements.

Given the above, the SCC held that that the QCCA made no reviewable error in finding a breach of good faith.

It is important to note that the same outcome would not necessarily follow in a common law jurisdiction on the same facts. Generally speaking, the common law does recognize a duty of good faith performance analogous to the C.C.Q. obligations. But at common law, a clause that an agreement is to be renegotiated at the conclusion of its term, on its own, is a bare "agreement to agree" that is generally not enforceable. Only where a contract provides an objective around which the parties are to negotiate, such as to

renegotiate an agreement at a “market rate”, will the common law treat the renegotiation clause as enforceable and will expect the parties to have made a good faith offer reflective of their view of the “market rate,” using that example.[1] The renegotiation clause in *Pekuakamiulnuatsh* may not include a sufficiently clear objective basis around which the parties could exchange good faith positions to be given enforcement at common law. In short, the *Pekuakamiulnuatsh* analysis of good faith under Québec’s civil code should be used with caution in common law jurisdictions.

B. The honour of the Crown

The honour of the Crown is a constitutional principle aimed at facilitating reconciliation between the Crown and Indigenous peoples, focusing on negotiation and just settlement of claims.[2] Unlike good faith, the honour of the Crown does not apply to every contractual undertaking given by the Crown to an Indigenous entity.

This case marks the first time the SCC has had to consider whether the principle of the honour of the Crown applies to a contractual undertaking given by the Crown to an Indigenous group. As such, the SCC was tasked with establishing the test for determining whether the honour of the Crown applies to an agreement that is not constitutional in nature.

i. When does it apply?

To begin, the SCC considered the evolution of the honour of the Crown in Canadian jurisprudence, noting that this requires some degree of connection to the reconciliation of specific Indigenous claims, rights, or interests with the Crown’s assertion of sovereignty.

Considering the above, the SCC determined that the first step of the test requires the agreement in question to be entered into by the Crown and an Indigenous group based on the group’s Indigenous difference, reflecting its distinctive philosophies, traditions, and cultural practices.[3] However, the honour of the Crown will only apply if the contract has a collective dimension.[4] Agreements related to individual rights, even if made between the Crown and an Indigenous contracting party, will generally not engage the honour of the Crown.[5]

The second part of the test requires that, to engage the honour of the Crown, said agreement must relate to an Indigenous right of self-government, whether the right is established or is the subject of a credible claim.[6] The SCC left open the question of what other types of rights or interests might also engage the honour of the Crown in connection with a contractual undertaking:

> “In the case at bar, Pekuakamiulnuatsh Takuhikan argues that having an Indigenous police force is an exercise of its right of self government. I therefore take care to limit my comments accordingly. While we do not have to decide the question in order to resolve this case, I am not, however, excluding the possibility of recognizing, in a different context, that other Indigenous rights or interests might also engage the honour of the Crown in connection with a contractual undertaking.” (para 163)

The SCC went on to clarify that, like the duty to consult, “a credible claim to an Indigenous right is sufficient to impose an obligation on the Crown to deal honourably with Indigenous peoples” in contractual dealings.[7]

When applying this two-step test, courts must assess whether the contract’s core obligation satisfies the test. Characterization of the contract’s core obligation is a question of law, unlike contract interpretation, which typically involves a significant factual component.[8]

ii. Did the Tripartite Agreements attract the honour of the Crown?

The SCC held that the honour of the crown was engaged when renegotiating the Tripartite Agreements because:

- They were entered into with the Band Council, on behalf of PFN, for the establishment and maintenance of an Indigenous police force.
- They were intended to promote reconciliation by allowing for the provision of culturally adapted services for PFN and anchored in its claim to self-government in matters of internal security.

iii. What is the standard of conduct for the honour of the Crown?

When the honour of the Crown is engaged, this means, among other things, that the Crown entity must “construe the terms of the agreement generously and comply with them scrupulously while avoiding any breach of them.”[9] The SCC specified that the Crown “must avoid taking advantage of the imbalance in its relationship with Indigenous peoples by, for example, agreeing to renew its undertakings on terms that are more favourable to it without having genuinely negotiated first.”[10]

In addition to prohibiting the Crown from defrauding or misleading another party, the honour of the Crown requires it to “meaningfully 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.”[11] As such, the SCC held that Québec’s conduct also constituted a breach of the obligation to perform the Tripartite Agreements with honour and integrity.

C. Remedy

Since Québec’s conduct was deemed both a civil fault and a violation of a public law obligation, the remedy could be granted under both the Québec civil law regime and the public law framework.

The civil law regime is grounded in corrective justice, aiming to restore the aggrieved party to the position it would have been in but for the fault committed. In contrast, the public law regime, tied to the principle of the honour of the Crown, focuses on reconciliatory justice, emphasizing the long-term relationship between the Crown and Indigenous communities. The high standard associated with the honour of the Crown grants courts a degree of discretion in awarding remedies, a flexibility not present under the good faith regime.

In determining the appropriate remedy, the SCC underscored the importance of considering the Indigenous perspective. The Court clarified that its decision on damages was not intended to rewrite the Tripartite Agreements or impose new obligations inconsistent with its terms, thereby respecting the contractual undertakings of both Québec and the Band Council. However, the SCC emphasized that it is essential to pay particular attention to proportionality when a breach of an obligation flowing from the honour of the Crown is in issue, as reconciliatory justice requires both adaptability and flexibility.

Ultimately, the SCC upheld the Court of Appeal's decision to award $767,745.58, with interest at the legal rate, representing Québec's portion of the deficit. The SCC deemed this appropriate to compensate for past harm but also to restore the honour of the Crown moving forward.

IV. Broader implications

Over the past several decades, agreements between the Crown and Indigenous groups have expanded in both volume and scope. Many modern treaties and self-government agreements—including "sectoral" self-government agreements in policing, education, health, and child and family services—include provisions for negotiating funding arrangements to support Indigenous groups in exercising self-government powers. Almost all of these types of agreements have an indefinite duration but are supported by renewable funding agreements that cover only 5–10 year periods. While the initial funding agreement is usually negotiated alongside the main self-government agreement, future funding arrangements must be periodically renegotiated. The *Pekuakamiulnuatsh* decision provides additional guidance on how these funding agreements should be negotiated, renewed, or renegotiated.

Discerning the implications of *Pekuakamiulnuatsh* on any specific negotiation is challenging for a few reasons. The SCC was careful to ground its decision in the specific facts of the case before it and neither extend the principles broadly nor foreclose the potential that the honour of the Crown could affect a broader set of situations.

At a higher level, parallels can be drawn between *Pekuakamiulnuatsh* and the evolution of case law on the duty to consult, which is also grounded in the honour of the Crown. The duty to consult does not dictate specific outcomes, nor does it require the Crown to ignore or even subordinate its interests, but it does require meaningful and responsive engagement. This is in contrast to the Crown's fiduciary duty—applicable in specific contexts such as reserve land and trust fund management—which imposes stricter obligations on how the Crown must engage with First Nations. The honour of the Crown does not prescribe a particular outcome in funding negotiations, nor does it require the Crown to put the First Nation's interests ahead of those of the Crown, but nonetheless obligates Crown agencies to consider the First Nation's unique circumstances, interests, and concerns.

The SCC in *Pekuakamiulnuatsh* also left open the possibility that the honour of the Crown could apply to negotiations under other types of agreements, besides those dealing with self-government. The honour of the Crown may, for example, guide the periodic renegotiation of fishing agreements, hunting and harvesting plans, land-use

plans, or archaeology protocols that are contemplated by many modern modern treaties and reconciliation agreements.

Case law on the duty to consult has evolved over decades to provide clarity - and often consensus - on its application across various situations. Similarly, further litigation and judicial decisions will likely refine how the honour of the Crown applies to a wide range of negotiations between the Crown and Indigenous groups beyond the facts in *Pekuakamiulnuatsh*.

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Footnotes

[1] See for example *Empress Towers Ltd. v Bank of Nova Scotia*, 1990 CarswellBC 226 (BCCA) at paras 7-9; *Mannpar Enterprises Ltd. v Canada*, 1999 BCCA 239 at para 52.

[2] *Pekuakamiulnuatsh* at para 148; see also *Mikisew Cree First Nation v. Canada (Governor General in Council)*, 2018 SCC 40, [2018] 2 S.C.R. 765, at para. 22; *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, 2004 SCC 74, [2004] 3 S.C.R. 550, at para. 24; *R. v. Desautel*, 2021 SCC 17, [2021] 1 S.C.R. 533, at para. 22.

[3] *Pekuakamiulnuatsh* at para 161.

[4] *Pekuakamiulnuatsh* at para 162.

[5] *Ibid*; see also *Waldron v. Canada (Attorney General)*, 2024 FCA 2, at para. 94, citing *Cree Nation of Eeyou Istchee (Grand Council) v. McLean*, 2019 FCA 185, at paras. 8 and 11; *Nunavut Tunngavik Inc. v. McLean*, 2019 FCA 186, at paras. 8 and 11; *Whapmagoostui First Nation v. McLean*, 2019 FCA 187, at para. 11.

[6] *Pekuakamiulnuatsh* at para 163.

[7] *Ibid* at para 166; see also *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, at para. 35; *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, 2010 SCC 43, at paras. 40 41.

[8] *Pekuakamiulnuatsh* at para 171.

[9] *Ibid* at para 192.

[10] *Ibid*.

[11] *Ibid* at para 195.

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