Court File No. 40619

IN THE SUPREME COURT OF CANADA
(On Appeal from the Court of Appeal of Québec)

B E T W E E N:

ATTORNEY GENERAL OF QUÉBEC

Appellant

-and-

PEKUAKAMIULNUATSH TAKUHIKAN

Respondent

-and-

ATTORNEY GENERAL OF CANADA

Intervener

MOTION RECORD OF THE PROPOSED INTERVENER, FIRST NATIONS CHILD & FAMILY CARING SOCIETY OF CANADA

(Pursuant to Rules 47, 55 & 56 of the *Rules of the Supreme Court of Canada*)

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**NOTICE OF MOTION OF THE PROPOSED INTERVENER,
FIRST NATIONS CHILD AND FAMILY CARING SOCIETY OF CANADA**
(Pursuant to Rule 55 of the *Rules of the Supreme Court of Canada*)

TAKE NOTICE that First Nations Child and Family Caring Society of Canada ("the Caring Society") hereby brings this motion to a judge of this Honourable Court pursuant to Rule 55 of the *Rules of the Supreme Court of Canada* for an order granting them:

1. leave to intervene in this appeal;

2. such further or other relief as counsel may advise and this Honourable Court deems just.

AND FURTHER TAKE NOTICE THAT the said motion shall be made on the following grounds:

1. The Caring Society has a direct interest in this appeal:

    (a) The Caring Society's national mandate regarding the welfare of First Nations children and families is inextricably linked to the provision of

culturally appropriate policing services, and to the federal and provincial governments' approach to funding these services.

(b) This Court's guidance on when the honour of the Crown is engaged and the duties that flow from it will affect Canada's negotiation and implementation of numerous funding and coordination agreements for First Nations communities in related areas, with which the Caring Society is involved.

(c) This Court's analysis of the honour of the Crown will impact the Caring Society's ongoing litigation in *First Nations Child and Family Caring Society et al v Attorney General of Canada* and Canada's implementation of its obligations.

(d) This Court's pronouncements will also affect Canada's approach to its ongoing negotiations and engagement with the Caring Society regarding long-term reform and funding of First Nations child and family services.

2. The Caring Society has specialized expertise that will assist the Court:

(a) The Caring Society has unique experience through navigating both the viewpoints of First Nations agencies and communities, and the internal operations of the federal government in negotiating and implementing funding promises.

(b) Through the CHRT litigation as well as its engagement with courts, administrative decision-makers, Parliament, and the executive branch, the Caring Society has thoroughly considered the interplay between courts and the other branches of government in the implementation of Crown promises.

(c) The Caring Society has assisted courts as an intervener in numerous cases, including appearing before this Court on several occasions.

3. The Caring Society will provide useful and distinct submissions on the issues raised in this appeal:

    (a) First, the Caring Society will submit that the honour of the Crown is engaged when Crown conduct amounts to a promise made to a First Nations, Inuit or Métis group that accords them a tangible benefit, with the overarching purpose of reconciling the interests of First Nations, Inuit or Métis groups, peoples, and Nations with the Crown.

    (b) Second, the Caring Society will submit that the Court's analysis of the honour of the Crown should be anchored in two duties that flow from it: the duty of diligence and the duty to negotiate honourably.

    (c) Third, the Caring Society will submit that the debate over whether the Crown's conduct should be evaluated based on constitutional duties or provisions of the *Civil Code of Québec* represents a false dichotomy. The duties flowing from the honour of the Crown, the *Civil Code*, and First Nations, Inuit or Métis legal orders may take their colour from each other, but none represent the exclusive lens through which the Crown's conduct can be evaluated.

4. If granted leave to intervene, Caring Society will confine itself to the issues raised by the parties and will not seek to expand the existing record. It will provide focused submissions and will endeavour to avoid duplication. The Caring Society will not take a position on the outcome of the appeal. It will not seek costs.

5. The Caring Society will comply with the *Rules of the Supreme Court of Canada* and any terms and conditions that this Honourable Court may set in granting leave to intervene.

6. Such further and other grounds as counsel may advise and this Honourable Court may permit.

AND FURTHER TAKE NOTICE THAT the following documents will be referred to in support of the said motion:

1. The affidavit of Cindy Blackstock, affirmed February 12, 2024;

2. The Memorandum of Argument of the Caring Society dated February 12, 2024; and

3. Such further and other material as counsel may advise and this Honourable Court may permit.

Dated at Ottawa, Ontario this 12th day of February, 2024.

Signed:

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NOTICE TO THE RESPONDENT TO THE MOTION: A respondent to the motion may serve and file a response to this motion within 10 days after service of the motion. If no response is filed within that time, the motion will be submitted for consideration to a judge or the Registrar, as the case may be.

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AFFIDAVIT OF CINDY BLACKSTOCK
(MOTION FOR LEAVE TO INTERVENE OF THE PROPOSED INTERVENER, FIRST NATIONS CHILD AND FAMILY CARING SOCIETY OF CANADA)

I, Cindy Blackstock, of the City of Ottawa, in the Province of Ontario, AFFIRM THAT:

1. I am a member of the Gitxsan Nation and a professor at McGill University's School of Social Work. I am also the Executive Director of the proposed intervener, the First Nations Child and Family Caring Society of Canada (the "Caring Society") and have held this position since 2002. As such, I have personal knowledge of the facts deposed to in this affidavit, except where stated to be on information and belief, and where so stated, I believe them to be true.

2. I have worked in the field of child and family services for over thirty-five years. I hold a doctorate in social work from the University of Toronto (2009), a Master of Management from McGill University (2003), a Master of Jurisprudence in Children's

Law and Policy from Loyola University Chicago (2016) and a Bachelor of Arts from the University of British Columbia (1987).

3. I have received honorary doctorates from Blue Quills First Nations University, the University of Western Ontario, the University of Saskatchewan, the University of Waterloo, Thompson Rivers University, the University of Northern British Columbia, Mount Saint Vincent, the University of Winnipeg, the University of Manitoba, Toronto Metropolitan University, Osgoode Hall Law School, St. John's College, Memorial University, Dalhousie University, the University of Ottawa, the University of Toronto, the University of Victoria, Trent University, the University of Lethbridge, Laurentian University and the University of Calgary.

4. I was an Honourary Witness for the Truth and Reconciliation Commission in 2014. I was appointed an Officer of the Order of Canada in 2018. I received Amnesty International's Ambassador of Conscience Award, the Law Society of Upper Canada's Human Rights Award and the Janusz Korczak Medal for Children's Rights Advocacy. In 2018, I was the inaugural recipient of the Children's Aid Foundation of Canada's Lynn Factor Stand Up for Kids National Award. In 2019, I was also awarded the Canadian Public Health Association's National Public Health Hero Award and in 2020 I was admitted as an Honorary Member to the Canadian Paediatric Society and received the National Indian Child Welfare Association (U.S.A.) Champion for Native Children Award. In 2021, I received the Canadian Psychological Association's Humanitarian Award and in 2022 I received the Key to the City of Winnipeg. Also in 2022, I was named Chancellor of the Northern Ontario School of Medicine. In 2023, I received the Social Sciences and Humanities Research Council Gold Medal and was named the Canada Research Chair for First Nations Child and Family Services Implementation. I was also honoured to receive the World Children's Prize voted on by millions of children around the globe for our collective work with, and for, First Nations children in 2023.

5. Prior to working at the Caring Society, I was the Executive Director at the Caring for First Nations Children Society in British Columbia (1999-2002), Assistant to the Social Development Director for the Squamish First Nation Ayás Mémen Program (1995-1999), and a senior social worker with the Province of British Columbia (1987-1995).

6. I have also served on international committees and working groups focusing on the rights of Indigenous children with a particular emphasis on culturally based equity. Most recently, I served as a Commissioner for the Pan American Health Commission's study on Health Equity and Inequity, which had a particular focus on Indigenous peoples and persons of Afro-descent.

7. Through my various positions and education, I have gained significant knowledge regarding the intersecting and compounding barriers experienced by First Nations children, youth and their families, the rights of Indigenous children, youth and peoples, and the development of equality and human rights in Canada and abroad, particularly as they affect First Nations children, youth, families and their communities.

8. I affirm this affidavit in support of the Caring Society's motion for leave to intervene in this appeal. I am authorized by the Caring Society to affirm this affidavit.

The Caring Society

9. First founded in 1998, the Caring Society is a national non-profit organization committed to research, training, networking, policy, and public education to promote the well-being of First Nations children, youth, and families, including those living on reserve. The Caring Society believes First Nations communities are in the best position to design and implement their services. The Caring Society's services cross provincial lines: it is the only national organization whose mandate is to promote the wellbeing of First Nations children, youth and families.

10. With respect to our public engagement and policy activities, the Caring Society works closely with First Nations and First Nations child-serving agencies, assisting them in working with the provincial and federal governments to address the funding needs of their communities. It also provides resources for First Nations communities to draw upon in developing community-focused, culturally tailored solutions.

11. In addition, the Caring Society has developed extensive knowledge on issues relating to reconciliation as it is a nationally recognized leader in reconciliation education. This includes through our Reconciling History initiative, which is a partnership between

Beechwood Cemetery, former Truth and Reconciliation Commissioner Marie Wilson, historians John Milloy, Amber Johnson, Project of Heart and the Assembly of 7 Generations Indigenous youth organization. The Caring Society also created and delivers the Touchstones of Hope program, a reconciliation framework used by many First Nations across Canada and internationally. It was cited as a best practice in the Truth and Reconciliation Commission's final report.

12. The Caring Society has been heavily involved in advocating for the rights of First Nations children and families in court and administrative proceedings. This involvement has taken the form of serving as an expert witness, intervening in proceedings, and co-filing a historic case with the Assembly of First Nations pursuant to the *Canadian Human Rights Act* to address Canada's discrimination toward First Nations children, youth and families.

13. For more than 15 years, the Caring Society and the Assembly of First Nations ("AFN") have successfully litigated a discrimination complaint against Canada pertaining to the government's practices in funding child and family services for First Nations children and families, including Canada's failure to implement Jordan's Principle (the "First Nations Children's Discrimination Complaint"). This litigation led to numerous decisions benefiting First Nations children, youth and families from the Canadian Human Rights Commission, the Canadian Human Right Tribunal ("CHRT"), the Federal Court, and the Federal Court of Appeal.

14. In a historic decision issued in 2016, the CHRT found that Canada discriminated against First Nations children, youth, and families by providing flawed and inadequate funding for First Nations child and family services. From 2016 to 2023, the CHRT made more than 20 non-compliance and procedural orders relating to Canada's failure to fully implement the CHRT's 2016 order. Canada's failure to end this discrimination had real and devastating consequences on the affected individuals: for example, Canada's non-compliance was linked to the deaths of three children in 2018. It continues to retain jurisdiction, and in December of 2023, the Caring Society brought another motion of non-compliance before the CHRT.

15. As explained below, the Caring Society has a long-standing history of making meaningful contributions as an intervener in cases before the CHRT, Federal Court, Federal Court of Appeal, Quebec Court of Appeal and Supreme Court of Canada.

The Caring Society's history of assisting courts

16. The Caring Society recognizes that its distinct perspective and special expertise can assist courts in delineating the scope of Crown obligations towards First Nations. It has therefore intervened in numerous cases, including before this Court:

    a. The Caring Society was a respondent on the Attorney General of Quebec's appeal, and an intervener as-of-right on the Attorney General of Canada's cross-appeal, in *Reference re An Act respecting First Nations, Inuit and Métis children, youth and families*, 2024 SCC 5. It had previously been granted leave to intervene by the Québec Court of Appeal (Court File No. 500-09-028751-196, 2022 QCCA 185).

    b. The Caring Society was granted leave to intervene by the Supreme Court of Canada in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65.

    c. The Caring Society was granted leave to intervene at the Supreme Court of Canada in *Canadian Human Rights Commission v Attorney General of Canada,* 2018 SCC 31.

    d. The Caring Society was granted leave to intervene at the Supreme Court of Canada in *Moore v British Columbia (Education),* 2012 SCC 61.

    e. The Caring Society was granted leave to intervene at the Federal Court of Appeal in *Alliance for Equality of Blind Canadians v Canada (Attorney General)* (Court File No. A-242-21, 2023 FCA 31).

    f. The Caring Society was granted leave to intervene at the Federal Court of Appeal in *Canada (Attorney General) v Pictou Landing Band Council et al (Court File No. A-158-13,* 2014 FCA 21*)*.

g. The Caring Society was granted leave to intervene at the Court of King's Bench of Manitoba in *Manitoba Human Rights Commission v The Government of Manitoba, et al and The Government of Manitoba v Manitoba Human Rights Commission, et al* (Court File Nos. CI20-01-28360 and CI20-01-28403).

h. The Caring Society was granted leave to intervene at the Federal Court in *Shiner (in her personal capacity and as guardian of Josey K. Willier) v Canada (Attorney General)* (Court File No. T-492-16, 2017 FC 515).

The Caring Society's interest and expertise with the matters raised in this appeal

17. The Caring Society seeks leave to intervene in this appeal because the Court's decision will have a significant impact on our ongoing community and policy work with First Nations communities, our litigation before the CHRT, and our negotiations and engagement with Canada.

18. As the Truth and Reconciliation Commission found, Canadian law and law enforcement have often been used as colonial tools to harm First Nations children, such as the use of the *Indian Act* to force children into residential schools and the engagement of federal and provincial police to aid in these removals. The Final Report on Murdered and Missing Indigenous Women and Girls (MMIWG) identifies law enforcement as a key focus of its recommendations for reform.

19. Police continue to play a significant role in child and family services across Canada. They are mandatory reporters of child maltreatment and frequently accompany child protection professionals to investigate child maltreatment cases where there is a potential breach of the *Criminal Code* and/or to keep the peace during the investigation. This is especially true for incidents involving younger children. In some jurisdictions, they even perform child removals in emergency situations.

20. The Caring Society views the development of First Nations policing services as a very positive development to aid in the provision of culturally-based child and family services in First Nations communities.

21. By extension, the Caring Society's critical work with First Nations, First Nations child and family services agencies and allied service providers has been, and will continue to be, directly impacted by the federal and provincial governments' funding approaches to policing, which are directly engaged in this appeal.

22. Moreover, the Court's legal analysis will have an impact on related subject areas which are central to the Caring Society's mandate, including the provisions and funding of child and family welfare services. For decades, Canada has chosen to ignore evidence-informed recommendations to remedy chronic under funding of First Nations children's services (or has chosen to implement such recommendations in a piecemeal, haphazard manner). This has contributed to the dramatic over-representation of Frist Nations children in the child welfare system. Canada's deficiencies in this regard included adopting arbitrary funding pools and allocating them in a manner that had serious and discriminatory effects on First Nations child and family service providers and the children, youth, and families they served.

23. As the Caring Society observed and as confirmed by the CHRT's findings, Canada evidenced a pattern of ignoring clear evidence of harms flowing from its discriminatory conduct, including its under-funding of First Nations children's services. Canada's rigid approach to structuring and funding First Nations child welfare programs disregarded growing evidence of the consequences of this system for First Nations, including the Joint National Policy Review in 2000 (with which I was personally involved) and the Wen:de series of reports in 2005 (of which I was a co-investigator).

24. The present case on First Nations policing also shows a similar pattern of Canada being aware of, and not responding adequately to, its discriminatory conduct. In this sense, the Court's analysis of Crown obligations in the policing context will have significant consequences for the Caring Society's ongoing engagement in related areas.

25. Recently, Canada also adopted *Act respecting First Nations, Inuit and Métis children, youth and families (the Act)*. The Caring Society provided comments on the draft legislation and appeared before both the Standing House of Commons Committee on Indigenous Peoples and Northern Affairs and the Standing Senate Committee on

Aboriginal Peoples. One of our focuses was on the importance of substantively equal funding to enable the implementation of the Act, including to support First Nations jurisdictional models. While the Act has many positive features, the lack of clear federal and provincial funding obligations to enable its implementation is a serious shortcoming.

26. Whether the Act is fully realized will largely depend on Canada's approach to negotiating coordination agreements with individual communities, providing adequate and substantively equal funding, and working with communities to implement these agreements. The Caring Society has been involved throughout this process with various First Nations communities. I am advised by our counsel that this appeal raises issues that could deeply affect Canada's approach to negotiating, implementing and enforcing this type of agreement. More generally, it could set the stage for how the federal and provincial governments fund child and family welfare services which is a core focus of the Caring Society's work. The Caring Society therefore has a genuine interest in the appeal.

27. I also understand from our counsel that this Court's reasoning could alter the trajectory of the Caring Society's ongoing litigation against Canada before the CHRT. The Caring Society continues to raise concerns before the CHRT about whether Canada has diligently implemented its legal obligations and the CHRT's prior orders. The assessment of Canada's conduct is necessarily informed by the scope of its constitutional duties.

28. Moreover, outside of the courtroom, we have been involved in negotiations with Canada on the long-term reform of its provision of First Nations child and family services and Jordan's Principle, which includes its funding principles, structures, agreements and allocations for child and family services as well as its implementation of Jordan's Principle. Canada's approach to these negotiations stands to be affected by the Court's analysis of the honour of the Crown.

The Caring Society's proposed submissions and commitment to respecting the role of interveners before this Court

29. As outlined in the Memorandum of Argument in this application, the Caring Society's proposed submissions would differ from those that we expect the parties to make.

30. The Caring Society's aim is to provide meaningful assistance to the Court in analyzing the complex issues raised by this appeal. If granted leave to intervene, the Caring Society's submissions will be informed by its unique perspective and its deep experience in the subject matter of this appeal.

31. The Caring Society will not add to the issues on appeal. It will not add to the evidence as intervener and will adhere to any schedule set by the Court.

32. The Caring Society will not take a position on the outcome of this appeal and will focus on the legal issues raised by the parties.

33. The Caring Society will endeavour to avoid duplication and provide distinctive submissions.

34. The Caring Society does not seek costs in the proposed intervention and asks that no costs be awarded against it.

35. I affirm this affidavit in support of the Caring Society's application for leave to intervene in this appeal.

AFFIRMED by Cindy Blackstock of the City of Ottawa, before me at the City of Ottawa, in the Province of Ontario, on February 12, 2024 in accordance with O. Reg. 431/20, Administering Oath or Declaration Remotely.

Commissioner for Taking Affidavits
(or as may be)

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LSO#: 88265W

Cindy Blackstock

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PART I - OVERVIEW AND FACTS

A. *Overview*

1. This appeal raises important issues regarding the circumstances in which the honour of the Crown is engaged and the scope of the duties that flow from it, particularly in the context of funding arrangements for public services between the Crown and First Nations, Inuit and Métis communities. The First Nations Child and Family Caring Society ("the Caring Society") seeks leave to intervene in this appeal.

2. The Caring Society has a direct interest in the appeal, as the issues before the Court strike at the core of the Caring Society's mandate. The Court's decision will affect the Caring Society's long-standing work with First Nations communities, agencies and service providers, its ongoing litigation before the Canadian Human Rights Tribunal ("CHRT"), and associated negotiations and engagement with Canada on long-term funding and program reform. The Caring Society also possesses a unique expertise and perspective on the complex issues in this appeal. Finally, the Caring Society will make useful and distinct submissions that will assist the Court in providing clear guidance on the legal issues before the Court.

B. *The proposed intervener: First Nations Child and Family Caring Society of Canada*

3. Founded in 1998, the Caring Society is a national non-profit organization committed to research, training, networking, policy, and public education to promote the well-being of First Nations children, youth, and families.[1] The Caring Society is the only national organization with the specific mandate to promote the wellbeing of First Nations children, youth and families.[2]

4. In undertaking this mandate, the Caring Society engages in a variety of national and international initiatives. Notably, the Caring Society assists First Nations, First Nations child and family services agencies and other service providers in working with the provincial and federal governments to address their communities' funding needs. It also provides resources to inform effective community-focused solutions.[3]

5. In addition, the Caring Society promotes the rights and interests of First Nations children,

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[1] Affidavit of Cindy Blackstock affirmed February 12, 2024 at para 9 [Blackstock Affidavit], Motion Record of the Proposed Intervener First Nations Child and Family Caring Society of Canada, Tab 2.
[2] Blackstock Affidavit at para 9.
[3] Blackstock Affidavit at para 10.

youth and families by contributing its knowledge and experience to judicial processes. The Caring Society has been regularly involved as a party and an intervener before courts and tribunals regarding Crown obligations and access to services for First Nations communities, including as a respondent and intervener before this Court.[4]

6. Further, for nearly 17 years, the Caring Society, along with the Assembly of First Nations ("AFN"), has successfully litigated a challenge before the Canadian Human Rights Tribunal ("CHRT") concerning Canada's inadequate and flawed funding programs for First Nations child and family services and its treatment of Jordan's Principle requests. Since the successful merits decision in 2016,[5] the Caring Society has been advocating for the implementation of evidence-informed immediate, mid-term and long-term reforms to rectify Canada's conduct and meet the needs of First Nations children, youth, families and their communities, including by implementing adequate funding for these services.[6]

PART II - STATEMENT OF QUESTION IN ISSUE

7. Should the Caring Society be granted leave to intervene in this appeal?

PART III - STATEMENT OF ARGUMENT

8. On an application for leave to intervene, an applicant must establish that they have an interest in the appeal and that they will provide submissions which are useful and different from those of the parties.[7] The Caring Society has a direct interest in this appeal, possesses specialized expertise, and will provide useful and distinct legal submissions on the issues before the Court.

A. *The Caring Society has a direct interest in this appeal*

9. The Caring Society has a direct stake in this Court's pronouncements on when the honour of the Crown is engaged and what duties flow from it, particularly in relation to the Crown's design and implementation of funding arrangements that aim to advance self-governance.

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[4] Blackstock Affidavit at paras 12, 16.
[5] *First Nations Child and Family Caring Society of Canada et al. v Attorney General of Canada (for the Minister of Indian and Northern Affairs Canada),* 2016 CHRT 2 ["CHRT Merits Decision"].
[6] Blackstock Affidavit at paras 13-15.
[7] See e.g. *Reference re Workers' Compensation Act, 1983 (Nfld.) (Application to intervene),* 1989 CanLII 23 (SCC) at p. 339; *R v Finta,* 1993 CanLII 132 (SCC) at p. 1142. See also *R v McGregor,* 2023 SCC 4 at para 103 (per Rowe J., concurring).

10. First, the Caring Society's involvement in child and family services is inextricably linked to the policing context at issue in this appeal. Police are frequently responsible for reports of child abuse and neglect, which are then investigated by children's aid societies.[8] Moreover, law enforcement officials are often involved at the scene of domestic incidents relating to child welfare to investigate possible breaches of the Criminal Code, to keep the peace and, in some jurisdictions, perform child removals in emergency circumstances.[9] The federal and provincial governments' obligations relating to promises of funding culturally appropriate policing services fall squarely within the Caring Society's mandate and ongoing work.

11. Second, this Court's guidance will affect areas that extend well beyond the policing context. Indeed, the history of the federal government's First Nations Child and Family Services Program bears important similarities to the First Nations Policing Program. Both rested on a central promise to provide greater autonomy to First Nations in the provision of community services, while leaving the implementation to agreements with and funding allocations to First Nations service providers.[10] Canada's overarching promises are now contained within the federal *Act respecting First Nations, Inuit and Métis children, youth and families*. However, even with this statute, the fulfilment of these promises is highly dependent on Canada's approach to negotiating and implementing coordination agreements with Indigenous Governing Bodies (as defined in the legislation).[11]

12. The Caring Society played a significant role in discussions and consultations leading to the enactment of the *Act respecting First Nations, Inuit and Métis children, youth and families*, participated in the reference proceedings that upheld its validity (including as a full party before this Court), and continues to support certain First Nations governments and agencies regarding the conclusion and implementation of coordination agreements.[12] It therefore has a clear stake in how the Court's sets out the analytical framework for this appeal. Indeed, the Caring Society's ongoing work will be greatly affected by this Court's pronouncements on the Crown's obligations in fulfilling its promises and in negotiating funding and coordination agreements.[13]

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[8] Blackstock Affidavit at paras 18–19.
[9] Blackstock Affidavit at para 19.
[10] Blackstock Affidavit at para 22.
[11] S.C. 2019, c. 24, ss. 20–21; Blackstock Affidavit at paras 25–26.
[12] Blackstock Affidavit at paras 25–26.
[13] Blackstock Affidavit at para 26.

13. Third, this Court's approach to the honour of the Crown will alter the playing field in the Caring Society's continuing litigation in *First Nations Child and Family Caring Society et al v Attorney General of Canada*. The CHRT continues to retain jurisdiction, notably over the long-term reform of the First Nations Child and Family Services Program and Jordan's Principle, to ensure that Canada respects its *quasi*-constitutional obligations under the *Canadian Human Rights Act* by eradicating discrimination and ensuring it does not recur.[14] The Caring Society has had to make numerous motions of non-compliance in order to rectify Canada's systematic underfunding of First Nations child and family services and Canada's discriminatory approach to Jordan's Principle.[15] Insofar as the honour of the Crown speaks squarely to "how obligations that attract it must be fulfilled",[16] the Court's analysis in this appeal will influence Canada's conduct throughout its dealings with First Nations. This is especially so because the CHRT found that the honour of the Crown was engaged by Canada's dealings with First Nations.[17] The Court's statements on the scope of the Crown's obligations will be of critical importance to the Caring Society going forward.

14. The Caring Society has also been actively involved in negotiations for Canada to implement substantively equal funding arrangements and long-term program reform.[18] This Court's analysis of the Crown's constitutional obligations, particularly in relation to implementing commitments to service funding and reform, will clearly affect these negotiations and any settlement that ensues. This appeal therefore strikes at the core of the Caring Society's interests and mandate.

B. *The Caring Society has specialized expertise that will assist the Court*

15. The issues raised by the parties require a complex analysis of when the honour of the Crown is engaged, the extent of the obligations that flow from it, and the interplay between constitutional norms and legal norms found in the *Civil Code* or Indigenous legal orders. The Caring Society has

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[14] See e.g. *First Nations Child & Family Caring Society of Canada et al. v Attorney General of Canada (representing the Minister of Indigenous and Northern Affairs Canada),* 2021 CHRT 41 at para 541 ["2021 CHRT 41"].
[15] Blackstock Affidavit at para 14. See also 2021 CHRT 41.
[16] *Manitoba Metis Federation Inc. v Canada (Attorney General),* 2013 SCC 14 at para 73 [*Manitoba Métis Federation*].
[17] See e.g. CHRT Merits Decision at para 95; *First Nations Child and Family Caring Society of Canada et al. v Attorney General of Canada,* 2017 CHRT 14 at para 116; *First Nations Child and Family Caring Society of Canada et al. v Attorney General of Canada,* 2019 CHRT 39 at para 232.
[18] Blackstock Affidavit at para 28.

developed a unique expertise that can assist the Court in providing guidance on these issues.

16. The Caring Society sits in a unique position. As a national, non-profit organization that regularly assists First Nations agencies across provincial lines, while engaging in long-standing negotiations with Canada on governmental funding and program reform, [19] the Caring Society has developed a deep understanding of *both* the viewpoints of First Nations agencies and communities, and the internal operations of the federal government in negotiating and implementing funding arrangements. This dual perspective provides the Caring Society with a distinct vantage point on the analytical approach that must be brought to the principle of the honour of the Crown.

17. Moreover, the issues raised on this appeal will require this Court to navigate nuanced questions regarding the role of the courts in this area. These are questions that the Caring Society has considered deeply throughout its history. Indeed, they have been a fixture of the CHRT litigation in many of the procedural and non-compliance motions that have followed the 2016 merits decision.[20] More broadly, the Caring Society has engaged in (a) the court system; (b) proceedings before administrative decision-makers; (c) consultations leading to legislation; and (d) the negotiation of program reforms implemented by the executive branch.[21] It is uniquely positioned to provide thoughtful submissions informed by the complex interplay between constitutional imperatives and governmental action in the area of reconciliation.

18. Finally, the Caring Society has built significant expertise through its long history of assisting courts on complex issues relating to the Crown's obligations. Indeed, it has appeared before this Court on multiple occasions, most recently in *Reference re An Act respecting First Nations, Inuit and Métis children, youth and families*.[22] The Caring Society is thus attuned to the role of interveners and will ensure that its submissions assist the Court in analyzing the legal issues before it.[23]

C. *The Caring Society will provide useful and distinct submissions*

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[19] Blackstock Affidavit at paras 9–10, 13–14, 23, 25, 28.
[20] CHRT Merits Decision, *supra*; see also *First Nations Child and Family Caring Society of Canada et al. v Attorney General of Canada,* 2018 CHRT 4 at paras 45–54; 2021 CHRT 41 at paras 30–32.
[21] Blackstock Affidavit at paras 15–16, 25–26, 28.
[22] 2024 SCC 5 [*Reference*]; Blackstock Affidavit at para 16.
[23] Blackstock Affidavit at paras 31–32; November 2021 – Interventions, Notices to the Profession.

19. If granted leave to intervene, the Caring Society expects to make the following submissions.

20. **First,** the Caring Society will submit that the honour of the Crown is engaged when Crown conduct amounts to a promise to a First Nations, Inuit or Métis group that accords them a tangible benefit, with the overarching purpose of reconciling their interests with the Crown.

a) The honour of the Crown is a *sui generis* constitutional principle.[24] It anchors the special relationship between First Nations, Inuit and Métis peoples and the Crown.[25] As such, it must be construed generously.[26]

b) The circumstances to which the honour of the Crown attaches flow logically from this Court's existing pronouncements on the origins and purposes of this principle. The honour of the Crown emerged following the "'superimposition of European laws and customs' on pre-existing Aboriginal societies".[27] It imposes corollary obligations on the Crown to treat their modern-day successors fairly and honourably "as part of an ongoing process of reconciliation".[28] The honour of the Crown is therefore directly engaged when the Crown makes promises that form part of the project of "reconciliation between the Crown and Aboriginal peoples in an ongoing, 'mutually respectful long-term relationship'".[29]

c) Importantly, the recognition of, and respect for, Aboriginal rights and treaties under s. 35 of the *Constitution Act, 1982* is *one* aspect of reconciliation, but the honour of the Crown is not subsumed by it. To the contrary, s. 35 is a specific manifestation of the honour of the Crown.[30] The honour of the Crown is a broader principle that predates even the *Constitution Act, 1867*.[31] Moreover, this Court has recognized that it generates duties — including fiduciary duties — that exist outside of the paradigmatic rights under s. 35.[32]

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[24] *Toronto (City) v Ontario (Attorney General),* 2021 SCC 34 at para 62.
[25] *R v Desautel*, 2021 SCC 17 at para 30 [*Desautel*]; *Manitoba Métis Federation* at para 67.
[26] *Haida Nation v British Columbia (Minister of Forests),* 2004 SCC 73 at para 17 [*Haida Nation*].
[27] *Manitoba Métis Federation* at para 67.
[28] *Desautel* at para 22.
[29] *Desautel* at para 30; *Beckman v Little Salmon/Carmacks First Nation*, 2010 SCC 53, [2010] 3 S.C.R. 103, at para 10 [*Beckman*].
[30] Paul Daly, "The Doré Duty: Fundamental Rights in Public Administration", 2023 CanLIIDocs 1256, p. 6.
[31] *Mikisew Cree First Nation v Canada (Governor General in Council),* 2018 SCC 40 at para 21.
[32] See e.g. *Southwind v Canada*, 2021 SCC 28 at para 61.

d) Consequently, whether the honour of the Crown is engaged by a given promise does not depend on whether or not that promise is protected by s. 35.[33] Funding and coordination agreements implementing Crown promises in relation to self-government represent an area that requires clear guidance to ensure that the Crown is accountable for its conduct pursuant to the honour of the Crown.

e) In *Manitoba Métis Federation,* this Court was faced with a promise enshrined in the *Manitoba Act*, rather than a s. 35 treaty.[34] While the obligation at issue was of a constitutional nature, the majority rested its analysis on a broader framework. The honour of the Crown attached to s. 31 of the *Manitoba Act* because the promise evidenced an "intention to create obligations"; it connoted a "certain measure of solemnity"; it was made "for the overarching purpose of reconciling Aboriginal interests with the Crown's sovereignty"; and it was "explicitly owed to an Aboriginal group".[35]

f) These criteria continue to provide a workable framework. To that end, a promise made for the overarching purpose of reconciling First Nations, Inuit or Métis interests with the Crown necessarily encompasses the Crown's commitments relating to their autonomy and self-government.

g) What remains ambiguous, after *Manitoba Métis Federation*, is what constitutes a "solemn obligation".[36] The majority did not have to decide this because, on any definition, a constitutionally-entrenched obligation was clearly a promise of the highest order.[37]

h) The answer to the foregoing question reveals itself through a close reading of the majority's reasons and of this Court's jurisprudence more generally. "Solemnity" was not intended to be a formalistic term. What matters is not the *instrument* in which the promise is enshrined — be it a treaty, statute or agreement — but the *substance* of the promise.[38]

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[33] See also *Reference* at paras 60, 64–67, 117; *Teslin Tlingit Council v Canada (Attorney General),* 2019 YKSC 3 at para 44.
[34] *Manitoba Métis Federation* at paras 4–6.
[35] *Manitoba Métis Federation* at paras 70–72.
[36] See also *Manitoba Métis Federation* at paras 205–208 (per Rothstein J., dissenting).
[37] *Manitoba Métis Federation* at para 92.
[38] Sacha R Paul, "A Comment on Manitoba Metis Federation Inc v Canada" Man L J 37:1, 2013 CanLIIDocs 320, p. 330 [Paul, "Comment on MMF"].

i) A solemn obligation is better understood as a promise that confers a clear and tangible benefit to First Nations, Inuit or Métis groups as part of the project of reconciliation. This formulation is in keeping with the Court's existing jurisprudence, alongside developments flowing from the *United Nations Declaration on the Rights of Indigenous Peoples*.[39] Both historically and today, when the Crown makes commitments to provide tangible benefits to First Nations, Inuit or Métis peoples for the purpose of reconciliation, its honour is clearly at stake. The honour of the Crown attaches as an implicit term to such promises.[40]

21. **Second,** the Caring Society will submit that the Court's analysis should be anchored in two duties that flow from it: the duty of diligence and the duty to negotiate honourably.

a) The honour of the Crown is an overarching principle that gives rise to various applications.[41] Those identified to this point include: the use of the honour of the Crown as an interpretive aid;[42] the duty to consult and accommodate;[43] the Crown's fiduciary duty when the Crown assumes "discretionary control over cognizable Indigenous interests";[44] the duty to negotiate and (in the course of such negotiations) to negotiate honourably and to avoid the appearance of sharp dealing;[45] the duty to act in a way that "accomplishes the intended purposes of treaty and statutory grants to Aboriginal peoples"; and the duty of diligence when fulfilling Crown promises.[46]

b) The list of applications is not closed. Indeed, Aboriginal law jurisprudence remains in a developing state and a principle as fundamental as the honour of the Crown cannot be frozen in time. However, the present case does not necessarily require this Court to apply the honour of the Crown in a novel way.

c) This Court has already recognized the duty of diligence,[47] which serves as an appropriate anchor to assess the Crown's implementation of promises that engage its honour.

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[39] OCHR, 33rd Sess (2007) UN Doc A/Res/61/295 [*UNDRIP*].
[40] Paul, "Comment on MMF", p. 330.
[41] See e.g. *Haida* at paras 16–18.
[42] *Manitoba Métis Federation* at paras 76–77; *Beckman* at para 7.
[43] *Haida Nation* at para 25.
[44] *Southwind* at para 61.
[45] *Desautel* at para 88; *Haida Nation* at para 25.
[46] *Manitoba Métis Federation* at para 73; *R v Marshall*, 1999 CanLII 665 (SCC) at para 43.
[47] *Manitoba Métis Federation* at para 80–83; *Reference* at para 65.

d) The duty to negotiate honourably is also well recognized.[48] It should be given a particularly robust application for negotiations that occur pursuant to binding renewal or renegotiation provisions.

e) The scope of these duties can be interpreted harmoniously with the other duties flowing from the honour of the Crown and with the role of the courts. At a minimum, when the means of implementing a Crown promise are not only failing to fulfill the purposes of this promise, but are actively perpetuating harm to one or more First Nations, Inuit or Métis communities, it is incumbent upon the Crown to diligently work with those First Nations, Inuit or Métis communities to reasonably accommodate their concerns — particularly when the agreements through which the promise is implemented are subject to periodic renegotiation and renewal. Conversely, it is dishonourable for the Crown to refuse to make adjustments when a promise of greater autonomy instead becomes a set of shackles for the First Nations, Inuit or Métis group, people or Nation.

22. **Third**, the Caring Society will submit that the debate over whether the Crown's conduct should be evaluated based on constitutional duties or provisions of the *Civil Code of Québec* represents a false dichotomy. The duties flowing from the honour of the Crown, the *Civil Code*, and First Nations, Inuit or Métis group's legal orders may take their colour from each other, but none represent the exclusive lens through which the Crown's conduct can be evaluated.

a) Art. 1434 C.C.Q. provides an additional mechanism through which the duties flowing from the honour of the Crown attach to agreements between the Crown and First Nations, Métis or Inuit groups, peoples or Nations.[49] The honour of the Crown therefore operates in addition to the more general notions of good faith and abuse of rights set out in arts. 6, 7 and 1375 C.C.Q. Moreover, arts. 6, 7 and 1375 C.C.Q. rely on normative standards of behaviour and, accordingly, they are informed by the normative context in which these agreements are concluded. This normative context is infused—through a "braiding" of state, Indigenous and international legal norms[50]—with the ongoing obligations flowing from the honour of the Crown, as well as the legal traditions of the First Nations, Inuit or

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[48] See e.g. *Desautel* at para 88; *Haida Nation* at para 25.
[49] Art. 1434 C.C.Q.; *Takuhikan v Procureur général du Québec*, 2022 QCCA 1699 at para 130 (per Bich J.A., concurring); see also Paul, "Comment on MMF", p. 329.
[50] See also *Reference*, at para 7.

Métis group since their long-term agreements with the Crown reflect a reconciliation of different legal cultures.

b) Conversely, while the honour of the Crown can draw on the *Civil Code*, it is also informed by First Nations, Inuit and Métis perspectives. When discussing s. 35 rights, this Court has regularly emphasized that both the "aboriginal perspective and the common law perspective" must be considered, because "[o]nly in this way can the honour of the Crown be upheld".[51] The explicit connection to the honour of the Crown is telling. It underscores that this principle, and the scope of the duties that flow from it, must be informed by both European and Indigenous traditions.

23. If granted leave to intervene, the Caring Society will confine itself to the issues raised by the parties and will endeavour to avoid duplication. It will not take a position on the outcome of the proceeding. It will not adduce additional evidence before the court, nor will it seek costs.[52]

24. Rather, the Caring Society will provide focused, distinctive and useful submissions that are grounded in its unique expertise.[53] In this way, the Caring Society can offer meaningful assistance to the Court as it grapples with the complex issues in this appeal.

PART IV - SUBMISSIONS ON COSTS

25. The Caring Society seeks no costs and requests that none be awarded against it.

PART V - ORDER SOUGHT

26. The Caring Society respectfully requests that this Court order that:

a) The Caring Society be granted leave to intervene in this appeal, to file a factum not exceeding 10 pages in length, and to make oral submissions of such a length as this Court deems appropriate; and

b) Costs will not be awarded for or against the Caring Society on this motion or on the appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 12th day of February, 2024.

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[51] *R v Marshall; R v Bernard,* 2005 SCC 43 at para 46; *UNDRIP,* art. 40.
[52] Blackstock Affidavit at paras 31–34.
[53] Blackstock Affidavit at para 30.

SIGNED BY

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PART VI - TABLE OF AUTHORITIES

TAB	AUTHORITY	CITED IN PARA(S)
	JURISPRUDENCE	
1	*Beckman v Little Salmon/Carmacks First Nation*, 2010 SCC 53, [2010] 3 S.C.R. 103	20, 21
2	*First Nations Child and Family Caring Society of Canada et al. v Attorney General of Canada (for the Minister of Indian and Northern Affairs Canada)*, 2016 CHRT 2	6, 13, 17
3	*First Nations Child and Family Caring Society of Canada et al. v Attorney General of Canada (for the Minister of Indian and Northern Affairs Canada)*, 2017 CHRT 14	13
4	*First Nations Child and Family Caring Society of Canada et al. v Attorney General of Canada (for the Minister of Indian and Northern Affairs Canada)*, 2018 CHRT 4	17
5	*First Nations Child and Family Caring Society of Canada et al. v Attorney General of Canada (for the Minister of Indian and Northern Affairs Canada)*, 2019 CHRT 39	13
6	*First Nations Child and Family Caring Society of Canada et al. v Attorney General of Canada (for the Minister of Indian and Northern Affairs Canada)*, 2021 CHRT 41	13, 17
7	*Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73	20, 21
8	*Manitoba Métis Federation Inc. v Canada (Attorney General)*, 2013 SCC 14	13, 20
9	*Mikisew Cree First Nation v Canada (Governor General in Council)*, 2018 SCC 40	20
10	*R v Desautel*, 2021 SCC 17	20, 21
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12	*R v Marshall*, 1999 CanLII 665 (SCC)	21
13	*R v Marshall; R. v Bernard*, 2005 SCC 43	22
14	*R v McGregor*, 2023 SCC 4	8
15	*Reference re An Act respecting First Nations, Inuit and Métis children, youth and families*, 2024 SCC 5	18, 20, 21 22
16	*Reference re Workers' Compensation Act, 1983 (Nfld.) (Application to intervene)*, 1989 CanLII 23 (SCC)	8
17	*Southwind v Canada*, 2021 SCC 28	20, 21