Docket: T1340/7008

CANADIAN HUMAN RIGHTS TRIBUNAL

BETWEEN:

FIRST NATIONS CHILD AND FAMILY CARING SOCIETY OF CANADA and ASSEMBLY OF FIRST NATIONS

Complainants

- and -

CANADIAN HUMAN RIGHTS COMMISSION

Commission

- and -

ATTORNEY GENERAL OF CANADA
(representing the Minister of Indigenous and Northern Affairs Canada)

Respondent

- and -

CHIEFS OF ONTARIO and
AMNESTY INTERNATIONAL CANADA and NISHNAWBE ASKI NATION

Interested Parties

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PART I – STATEMENT OF FACTS

A. Overview

1. This motion concerns consultations between Canada, the Assembly of First Nations (the "**AFN**"), and the First Nations Caring Society of Canda (the "**Caring Society**") on the national long-term reform of the First Nations Child and Family Services ("**FNCFS**") Program and Jordan's Principle.

2. First Nations in Ontario organize and govern themselves through the Chiefs of Ontario ("**COO**") and Nishnawbe Aski Nation ("**NAN**"), in line with their rights to participate in decision-making on matters that affect their rights, through representatives chosen by themselves in accordance with their own procedures, as recognized and affirmed in Article 18 of the *United Nations Declaration on the Rights of Indigenous Peoples* ("**UNDRIP**").

3. The negotiation and ratification of the Final Agreement on Long-Term Reform of the First Nations Child and Family Services Program in Ontario (the "**Ontario Final Agreement**") and Trilateral Agreement in Respect of Reforming the 1965 Agreement (the "**Trilateral Agreement**") is the collective expression of the self-governance and self-determination rights of the First Nations in Ontario through COO and NAN.

4. The Ontario Final Agreement and Trilateral Agreement and their contents are not at issue or before the Tribunal in this motion. While the Caring Society has made its views public on the reforms proposed in the defeated national agreement, and therefore by extension on the reforms proposed in the Ontario Final Agreement, COO is pleased to see the Caring Society acknowledge in its materials that the dispute concerning negotiations on long-term reform nationally does not concern First Nations in Ontario, who have concluded their consultations and approval processes.

5. COO supports the efforts of First Nations leadership outside Ontario to reach an agreement that addresses their unique needs and aspirations. It is not for COO to determine what happens in other regions, and the inverse is also true: other regions should not interfere with COO's aspirations nor the will of the Ontario Chiefs-in-Assembly.

6. As such, at this time and while COO pursues its own goals and directions, COO takes no position on the consultations between Canada, the AFN, and the Caring Society on the national long-term reform of the FNCFS Program or the path towards negotiations resuming on a national level. Since Jordan's Principle consultations have not commenced, COO understands the motion to be primarily about the FNCFS reform. COO expects to fully participate in Jordan's Principle reforms, including any consultations.

7. COO instead takes this opportunity to submit its views on the duty to consult, the honor of the crown, the recent Supreme Court decision *Quebec (Attorney General) v Pekuakamiulnuatsh Takuhikan* ("***Pekuakamiulnuatsh Takuhikan***") and the recent Federal Court decision *Indigenous Police Chiefs of Ontario v Canada (Public Safety)*, as requested by the Tribunal through its correspondence dated February 10, 2025. These are matters that are of considerable interest to COO and COO is pleased to provide its views to the Tribunal about these subjects.

B. Background

COO's involvement in the long-term reform of the FNCFS program

8. COO is a political advocacy group for the 133 First Nations in Ontario. COO's activities and advocacy are mandated through Resolutions passed by the Ontario Chiefs-in-Assembly. Guided by the Ontario Chiefs-in-Assembly, COO upholds the self-determination efforts of the Anishinaabek, Mushkegowuk, Onkwehonwe, and Lenape Peoples.

9. The implementation of adopted Resolutions is guided by the COO Leadership Council and the elected Ontario Regional Chief. The position of Ontario Regional Chief is currently held by Ontario Regional Chief Abram Benedict.

10. Children are the priority of the First Nations that belong to COO. COO has held many and varied mandates to address the discrimination against children resulting from Canada's unequal funding of on-reserve First Nations child and family services.

11. Guided by the authority of the All Ontario Chiefs Conference Resolution #09/21 and informed by their vision for First Nations child and family services reform, COO sought and obtained interested party status in the Tribunal proceedings in September 2009.[1]

12. COO was granted interested party status to address the particulars of on-reserve child welfare services in Ontario, which are funded in a way distinct from the funding under the FNCFS program in the rest of Canada, owing to The Memorandum of Agreement Respecting Welfare Programs for Indians (the "**1965 Agreement**").

The originating complaint and the Merit Decision

13. In 2007, the Caring Society and the AFN filed a human rights complaint with the Canadian Human Rights Commission (the "**Commission**"). They alleged that the Department of Indian and Northern Affairs Canada ("**Canada**") was violating the *Canadian Human Rights Act*[2] (the "***CHRA***") by discriminating against First Nations children and families on-reserve through the underfunding of child and family services and the failure to implement Jordan's Principle.[3]

14. On January 26, 2016, the Tribunal released its decision in *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 (the "***Merit Decision***").[4] The Tribunal found that Canada violated s. 5 of the *CHRA*'s prohibition against discrimination on the basis of race and nation or ethnic origin.[5] The Tribunal found that Canada's underfunding and implementation of the FNCFS Program and their narrow approach for eligibility for Jordan's Principle resulted in systemic discrimination.

15. The Tribunal ordered Canada to cease its discriminatory practices, implement actions to remedy and prevent its recurrence, and reform the FNCFS Program and the 1965 Agreement.[6] Canada accepted the Tribunal's decision, and committed to working with the

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[1] Affidavit of Grand Chief Joel Abram affirmed March 6, 2025 at Exhibit K.
[2] *Canadian Human Rights Act*, R.S.C., 1985, c. H-6 [*CHRA*].
[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)*, 2016 CHRT 2 at para 6 [Merit Decision].
[4] Merit Decision.
[5] Merit Decision at paras 456-459.
[6] Merit Decision at para 481.

Complainants; First Nations organizations, leadership, and communities; child and family service agencies and providers; and the provinces and territories on steps to meaningful change and program reform.[7]

The Consultation Protocol

16. In February 2018, the Tribunal ordered that Canada was to consult, not only with the Commission, but directly with the AFN, the Caring Society, COO, and NAN (collectively, the "**Parties**") on the implementation of orders made in that ruling, the *Merit Decision*, and other Tribunal rulings.[8] The Tribunal ordered that Canada enter into a consultation protocol with the Parties to ensure consultations would occur in a manner consistent with the honour of the Crown and to eliminate the discrimination found.[9]

17. Following this order from the Tribunal, the Parties developed and completed a Consultation Protocol on March 2, 2018.[10]

The Agreement-in-Principle

18. On December 31, 2021, the Parties signed the Agreement-in-Principle on Long-Term Reform of the First Nations Child and Family Services Program and Jordan's Principle (the "AIP").[11] The AIP committed $19.807 billion towards reform of the FNCFS Program, major capital relating to the FNCFS Program and Jordan's Principle, and was also meant to inform Final Settlement Agreement negotiations between the Parties. The AIP contemplated a Final Settlement Agreement being completed by December 31, 2022.[12]

19. After the AIP was signed, the Parties began negotiating a Final Settlement Agreement on long-term reform of the FNCFS Program and Jordan's Principle.

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[7] *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 10 at para 6 [2016 CHRT 10].
[8] *First Nations Child & Family Caring Society of Canada et al v Attorney General of Canada (representing the Minister of Indigenous and Northern Affairs Canada)*, 2018 CHRT 4 at para 400 [2018 CHRT 4].
[9] 2018 CHRT 4 at para 400.
[10] Affidavit of Amber Potts affirmed March 3, 2025 at para 8 [Potts Affidavit].
[11] Government of Canada, "Executive Summary of Agreement-in-Principle on Long-Term Reform" (updated September 13, 2023), online: <https://sac-isc.gc.ca/eng/1644518166138/1644518227229>.
[12] Government of Canada, "Executive Summary of Agreement-in-Principle on Long-Term Reform" (updated September 13, 2023), online: <https://sac-isc.gc.ca/eng/1644518166138/1644518227229>.

20. The negotiations continued until early 2023 when the Caring Society and the AFN advised the other parties in March 2023 of their joint proposal advocating for bifurcation of long-term reform of the FNCFS Program and Jordan's Principle.[13]

21. Negotiations were paused when Canada advised the Parties that it would need to seek a new mandate on long-term reform as a result of the joint proposal.[14]

22. In October 2023, Canada advised the Parties that it had secured a mandate to move ahead with the bifurcation and reach a Final Settlement Agreement on long-term reform of the FNCFS Program by March 31, 2024.[15]

23. In December 2023, the Caring Society announced to the other parties that it was removing itself from the AIP process to advance its non-compliance motion on Jordan's Principle.[16]

24. The remaining parties (COO, NAN, AFN and Canada) decided to carry on with negotiations. They established an intensive negotiation schedule with weekly meetings occurring from January until April 2024, with additional discussion happening between May and July 2024.[17]

25. The remaining parties shared their meeting times and agendas with the Caring Society. Although the Caring Society advised they were available for negotiations, they also confirmed to the remaining parties that they would not return to the negotiation table under the terms of the AIP. This made their involvement in the negotiations with the remaining parties, who wanted to continue under the AIP terms, practically infeasible.[18]

26. On July 11, 2024, COO, NAN, the AFN, and Canada finalized and announced a draft Final Agreement (the "national agreement"). Immediately thereafter, COO, NAN, and the AFN

[13] Potts Affidavit at para 22.
[14] Potts Affidavit at para 23.
[15] Potts Affidavit at para 24.
[16] Potts Affidavit at para 25.
[17] Potts Affidavit at para 27.
[18] Potts Affidavit at para 28.

organized and participated in a series of engagement sessions on the national agreement. Representatives from Indigenous Services Canada were often present at these sessions.

27. On October 9 and 10, 2024, respectively, NAN Chiefs-in-Assembly and Ontario Chiefs-in-Assembly ratified the national agreement at their Special Chiefs Assemblies.

28. On October 17, 2024, at an AFN Special Chiefs Assembly held in Calgary, after several days of discussion on the topic and many presentations from AFN, COO, NAN, other regional organizations, First Nations, FNCFS agencies, and the Caring Society, the national agreement was put to a vote by the First Nations-in-Assembly and was rejected. The First Nations-in-Assembly directed the AFN to take a series of steps to resume the negotiations on long-term reform and called upon Canada to obtain a new negotiation mandate to address the matters in its resolutions.[19] The First Nations-in-Assembly reconfirmed its resolutions from October 2024 in December 2024.[20]

The Ontario Final Agreement

29. Despite rejection of the national agreement by the First Nations-in-Assembly, First Nations in Ontario remained committed to reforming the FNCFS Program in Ontario. In November 2024, at COO's Annual General Assembly, the Ontario Chiefs-in-Assembly mandated COO to pursue an Ontario-specific agreement.

30. Shortly after, in a letter dated October 25, 2024, Ontario Regional Chief Abram Benedict and NAN Grand Chief Alvin Fiddler formally invited Canada to enter into negotiations to achieve a reformed FNCFS Program in Ontario.

31. On December 30, 2024, Canada announced it had received a mandate to negotiate with COO and NAN on long-term reform of the FNCFS Program in Ontario.

32. On February 7, 2025, after five weeks of negotiations, COO, NAN, and Canada reached a provisional Ontario Final Agreement and a provisional Trilateral Agreement.

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[19] Potts Affidavit at Exhibit E.
[20] Affidavit of Katherine Quintana-James affirmed Freburary 13, 2025 at Exhibit D.

33. COO and NAN made substantial efforts and worked extensively with First Nations, their leadership, political-territorial organizations in Ontario, and their appointed representatives and technicians to inform and seek feedback about the reforms outlined in the Ontario Final Agreement and Trilateral Agreement.

34. On February 25 and 26, 2025, the provisional Ontario Final Agreement and the provisional Trilateral Agreement were ratified by the NAN Chiefs-in-Assembly and the Ontario Chiefs-in-Assembly.

PART II – ISSUES

35. There are two issues that COO will address in these submissions:

   a. The source of the existing consultation obligations in these proceedings is the *CHRA*; and

   b. The honour of the Crown and how it is implicated in the Crown's dealings with Indigenous groups.

PART III – SUBMISSIONS

36. COO takes no position on the consultations between Canada, the AFN, and the Caring Society on the national long-term reform of the FNCFS Program and Jordan's Principle or the path towards negotiations resuming on a national level. Since Jordan's Principle consultations have not commenced, COO understands the motion to be primarily about the FNCFS reform. COO expects to fully participate in Jordan's Principle reforms, including any consultations.

37. These submissions will focus on clarifying that (1) the *CHRA,* including the Tribunal's statutory mandate to remedy discrimination and cease its recurrence, is the source of the consultation obligations in these proceedings; and (2) the honour of the Crown is a constitutional principle that is only engaged in Crown dealings with Aboriginal peoples as recognized under s. 35 of the *Constitution Act, 1982*.[21] As a result, the duties arising from the honour of the Crown—such as the duty to consult and accommodate and the duty to

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[21] *Constitution Act, 1982*, Part II of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11., s 35.

negotiate and perform contracts with integrity, openness, and a genuine commitment to reconciliation (as discussed in *Pekuakamiulnuatsh Takuhikan*)—are only owed by the Crown to Aboriginal peoples holding s. 35 rights, not individuals.

A. The consultation orders support the Tribunal's statutory mandate

38. The Tribunal has described its statutory mandate as a "quasi-constitutional mandate to protect fundamental human rights."[22] The dominant purpose of the *CHRA* is to give effect to the principle that "all individuals should have an opportunity equal with other individuals to make for themselves the lives that they are able and wish to have and to have their needs accommodated, consistent with their duties and obligations as members of society, without being hindered in or prevented from doing so by discriminatory practices".[23]

39. In this case, the Tribunal has interpreted its statutory mandate broadly and purposively, in line with reconciliation and principles of domestic and international law—namely, substantive equality and the best interests of the child—in exercising its remedial discretion and crafting its orders. The Tribunal's purposive interpretation of the *CHRA* informed its decision to order Canada to consult with the other Parties.[24]

40. In constructing meaningful and effective remedies to uphold its statutory mandate, the Tribunal adopted a flexible and innovative approach given the complexity of the proceedings and its findings of systemic discrimination against First Nations children.[25] The Federal Court upheld this approach, including the Tribunal's use of the dialogic approach and its retention of jurisdiction, as a means of fulfilling the Tribunal's statutory mandate.[26]

41. In line with the Tribunal's remedial jurisdiction, the Tribunal ordered Canada to consult with the other Parties to inform reform and construct meaningful remedies in accordance with the Tribunal's rulings and orders so as to eliminate the discrimination substantiated in

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[22] 2018 CHRT 4 at para 44.
[23] 2016 CHRT 10 at paras 12-13, citing *CHRA*, s. 2.
[24] *First Nations Child & Family Caring Society of Canada et al v Attorney General of Canada (representing the Minister of Indigenous and Northern Affairs Canada)*, 2017 CHRT 14 at para 115 [2017 CHRT 14].
[25] 2016 CHRT 10 at paras 15-16.
[26] *Canada (Attorney General) v First Nations Child and Family Caring Society of Canada*, 2021 FC 969 at paras 135-138.

the *Merit Decision*.[27] This order was contrary to the plain language of s. 53(2)(a) of the *CHRA* and the existing case law, which said that while the Tribunal has the authority to order consultation with the Commission under s. 53(2)(a) it "does not have the power to order consultation with other parties."[28] The Tribunal held that the factual matrix and unprecedented scope of this case required it to broaden its consultation requirements and order Canada to consult with the other Parties. It did so on the basis that, among other factors:

a. The individuals affected by this case are First Nations children;

b. The *CHRA* must be interpreted in light of its purpose;

c. The expertise of the other Parties is invaluable;

d. The provision of child welfare services to First Nations children and families is an area that directly affects the fundamental rights of First Nations children, families, and communities;

e. The best interests of the child are central to this case;

f. The honour of the Crown is at stake in Canada's dealings with Aboriginal peoples;

g. Canada's stated remedial approach;[29]

h. Consultation with Aboriginal peoples in the reform process is consistent with Canada's duty to consult.[30]

42. Throughout these proceedings, the Tribunal has relied on a range of mechanisms—including consultation orders, the retention of its jurisdiction, a dialogic and phased approach to remedies, and the interested party submissions—to ensure "the voices of First Nations and those with expertise could be heard via representative organizations" to inform immediate and long-term reform and to craft meaningful and effective remedies.[31] The consultation obligations imposed on Canada are one part of a complex, innovative, and

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[27] 2018 CHRT 4 at paras 399-400, citing to 2017 CHRT 14 at paras 113-120.
[28] 2017 CHRT 14 at para 114.
[29] 2018 CHRT 4 at paras 399-400, citing 2017 CHRT 14 at paras 113-120.
[30] See in particular, 2018 CHRT 4 at paras 399-400, citing 2017 CHRT 14 at para 116, citing *First Nations Child & Family Caring Society of Canada et al v Attorney General of Canada (representing the Minister of Indian and Northern Affairs)*, 2016 CHRT 16 at para 10 [2016 CHRT 16].
[31] *First Nations Child & Family Caring Society of Canada et al v Attorney General of Canada (representing the Minister of Indigenous and Northern Affairs Canada)*, 2022 CHRT 41 at para 465 [2022 CHRT 41].

flexible approach designed and implemented by the Tribunal to uphold its mandate to safeguard human rights and remedy the discrimination found in the *Merit Decision* and cease its recurrence.

Canada's consultation obligations arise from the CHRA

43. The Tribunal's consultation orders, and Canada's ensuing consultation obligations, are grounded in the Tribunal's remedial jurisdiction and statutory mandate under the *CHRA* to safeguard human rights by constructing meaningful and effective remedial orders. While the Tribunal has recognized Aboriginal rights as human rights,[32] the Tribunal's mandate to safeguard human rights under the *CHRA* is distinct from the protection of s. 35 collective rights contemplated in the duty to consult and accommodate (discussed below beginning at paragraph 49). The duty to consult and accommodate is a constitutional duty, rooted in the honour of the Crown, owed only to Aboriginal peoples as defined in s. 35(2) of the *Constitution Act, 1982*. While the Tribunal has identified consultation with the other Parties to inform reform as "necessary and consistent with the federal government's duty to consult Indigenous peoples",[33] Canada's consultation obligations in these proceedings are not grounded in the duty to consult and accommodate framework.

44. For example, in the Tribunal's decision on whether the Class Action Final Settlement Agreement on individual compensation satisfied the Tribunal's orders, the Tribunal considered the collective rights of First Nations despite the fact the compensatory remedies concerned individual human rights.[34] The Tribunal found that while individual and collective rights are not mutually exclusive, "collective rights ought to be determined in other fora, where the full scope and context of the nature and source of the right can be weighed and determined."[35] Hence, while the honour of the Crown can inform the Tribunal's assessment of Canada's compliance with the Tribunal's consultation orders, the constitutionally owed duty to consult and accommodate that protects collectively-held s. 35 Aboriginal and treaty rights is not in issue.

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[32] 2022 CHRT 41 at para 434.
[33] 2016 CHRT 16 at para 10.
[34] 2022 CHRT 41.
[35] 2022 CHRT 41 at paras 462, 464.

45. Correspondingly, COO's role in these proceedings is to advocate for the interests of the 133 s. 35 rights-holding members as an advocacy forum and secretariat for collective decision-making in the reform of the FNCFS system and Jordan's Principle. COO's role is to share the perspectives of its 133 rights-holding members to inform the Tribunal's remedies in this case. COO's role as an advocate for the interests of its members was similarly defined in the Consultation Protocol,[36] and is also framed by resolutions of the Chiefs-in-Assembly.

B. The honour of the Crown is at stake in Crown dealings with Aboriginal peoples

46. The honour of the Crown is specifically at stake in the Crown's dealings with Aboriginal peoples as recognized under s. 35.[37] The Crown's historic assertion of sovereignty over Indigenous societies gives rise to continuing obligations to their successors as part of an ongoing process of reconciliation.[38] The honour of the Crown arises out of the "special relationship" between Aboriginal peoples and the Crown as a result of the Crown's superimposition of European laws and customs on pre-existing Aboriginal societies.[39] The honour of the Crown is a "constitutional principle" because of its connection with s. 35(1) of the *Constitution Act, 1982*.[40]

47. The Supreme Court has been clear that a group must be an "Aboriginal peoples of Canada" within the meaning of s. 35 in order to hold Aboriginal or treaty rights under s. 35.[41] This is because the two purposes of s. 35 are (1) to recognize the prior occupation of Canada by Aboriginal societies and (2) to reconcile their modern-day existence with the Crown's assertion of sovereignty over them.[42]

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[36] Consultation Protocol (Entered into pursuant to an order of the Tribunal), File no. T1340/7008, March 2, 2018 at pp 2, 10.

[37] *Ontario (Attorney General) v Restoule*, 2024 SCC 27 at para 73 [*Restoule*], emphasis added; citing *R v Badger*, [1996] 1 SCR 771 at para 41; *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73 at para 16 [*Haida*]; *Mikisew Cree First Nation v Canada (Governor General in Council)*, 2018 SCC 40 at para 23 [*Mikisew Cree* (2018)]; see also Merit Decision at paras 89, 95.

[38] *R v Desautel*, 2021 SCC 17 at para 22 [*Desautel*].

[39] *Desautel* at para 30; citing *Manitoba Metis Federation Inc v Canada (Attorney General)*, 2013 SCC 14 at para 67 [*Manitoba Metis*]; see also Merit Decision at para 89.

[40] *Restoule* at para 72; citing *Beckman v Little Salmon/Carmacks First Nation*, 2010 SCC 53 at para 42; *Manitoba Metis* at para 69; *Mikisew Cree* (2018) at para 24.

[41] *Desautel* at paras 19-20.

[42] *Desautel* at para 22.

48. The honour of the Crown imposes a high standard of honourable dealing with Aboriginal peoples.[43] It is not a cause of action in itself, but speaks to how obligations that attract it must be fulfilled.[44] The Tribunal found the honour of the Crown must form part of the context of the Panel's analysis because the FNCFS program impacts First Nations children and families on reserves.[45] But whether the honour of the Crown gives rise to specific duties in these circumstances is a separate question, which depends heavily on the context in which that honour is engaged and has not been raised in these proceedings.[46]

The duty to consult and accommodate arises from the honour of the Crown

49. As discussed above, Canada's consultation obligations arising pursuant to the Tribunal's mandate and the *CHRA* in these proceedings are not sourced in s. 35 constitutional rights nor the duty to consult and accommodate framework. Whether the duty to consult and accommodate exists or has been met in these proceedings has not been put into issue, though its principles may be instructive to the Tribunal's analyses and approaches to consultation.

50. The duty to consult and accommodate exists to protect the collective rights of Aboriginal peoples. For this reason, it is owed to the Aboriginal group that holds the s. 35 rights.[47] The duty is grounded in the honour of the Crown and is constitutionalized by s. 35 of the *Constitution Act, 1982*.[48] The ultimate legal responsibility for consultation and accommodation always rests with the Crown because the honour of the Crown cannot be delegated.[49] The Crown has a duty to consult and accommodate First Nations when it has knowledge, real or constructive, of the potential existence of an Aboriginal or treaty right and contemplates conduct that might adversely affect it.[50]

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[43] *Restoule* at para 219; citing *R v Sparrow*, [1990] 1 SCR 1075 at p 1109; *Manitoba Metis* at para 69.
[44] *Restoule* at para 220; citing *Manitoba Metis* at para 73.
[45] Merit Decision at para 95.
[46] *Restoule* at para 220; citing *Mikisew Cree* (2018) at para 24; *Manitoba Metis* at para 74; *Taku River Tlingit First Nation v British Columbia (Project Assessment Director)*, 2004 SCC 74 at para 25.
[47] *Behn v Moulton Contracting Ltd*, 2013 SCC 26 at para 30.
[48] *Haida* at paras 16, 25, 27.
[49] *Haida* at para 53.
[50] *Haida* at para 35.

51. The scope of the duty to consult and accommodate is proportionate (1) to a preliminary assessment of the case supporting the existence of the Aboriginal right or title at issue; and (2) to the seriousness of the potentially adverse effect upon the right or title claimed.[51] The effect of consultation may be to reveal a duty to accommodate.[52]

52. The controlling question in all situations is what is required to maintain the honour of the Crown and to effect reconciliation between the Crown and the Aboriginal peoples with respect to the interests at stake.[53] Good faith on both sides of consultation is required at all stages of the consultation.[54] There is no duty to agree; rather, the commitment is to a meaningful process of consultation,[55] which in itself advances reconciliation.

Consultation informed by UNDRIP

53. In the recent Federal Court case, *Kebaowek First Nation v. Canadian Nuclear Laboratories* ("***Kebaowek***"),[56] the Court held that UNDRIP is part of Canadian law and can be used to interpret Canadian law, including by administrative decision-makers. [57] The Court held that UNDRIP attracts the presumption of conformity, the presumption of conformity applies to s. 35, and so s. 35 should be interpreted in a manner consistent with UNDRIP.[58] Therefore, the s. 35 duty to consult and accommodate must be informed by UNDRIP and the UNDRIP principle of free, prior, and informed consent ("**FPIC**").[59] Interpreting the s. 35 duty to consult and accommodate in light of UNDRIP and FPIC requires the Crown to engage in reasonable efforts to alter their consultation processes to account for "Indigenous perspectives, laws, knowledge and practices" and aims to obtain—but does not require—mutual agreement.[60]

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[51] *Haida* at para 39.
[52] *Haida* at para 47.
[53] *Haida* at para 45.
[54] *Haida* at para 42.
[55] *Haida* at para 42.
[56] *Kebaowek First Nation v Canadian Nuclear Laboratories*, 2025 FC 319 (under appeal) [*Kebaowek* (under appeal)].
[57] *Kebaowek* (under appeal) at paras 78-80.
[58] *Kebaowek* (under appeal) at paras 81-82, 84-85.
[59] *Kebaowek* (under appeal) at para 177.
[60] *Kebaowek* (under appeal) at paras 130, 133, 140, 177.

54. While the Tribunal in this matter is not tasked with determining the adequacy of the Crown's consultation under the s. 35 duty to consult and accommodate framework, it is notable that the Tribunal designed a process of consultation that is consistent with the heightened standard of consultation contemplated in *Kebaowek*. The Tribunal recognized that UNDRIP is part of the legal framework in these proceedings and applied UNDRIP as an interpretive lens, finding that the *CHRA* should be interpreted to be harmonious with UNDRIP.[61] This interpretation informs the Tribunal's remedial discretion, statutory mandate, and consultation orders as part of a robust process.

Quebec (Attorney General) v Pekuakamiulnuatsh Takuhikan

55. The Supreme Court's recent decision in *Pekuakamiulnuatsh Takuhikan* elaborates on the nature of the honour of the Crown and remedies for breaches of the honour of the Crown in a contractual context.[62]

56. In *Pekuakamiulnuatsh Takuhikan*, the Supreme Court found that the honour of the Crown can apply to contractual agreements between the Crown and an Aboriginal group. The Court set out a two-part test to determine whether the enforcement or renewal of a contract would attract the honour of the Crown.

57. First, "the agreement in question must be entered into by the Crown and an Indigenous group by reason and on the basis of the group's Indigenous difference, which reflects its distinctive philosophies, traditions and cultural practices."[63] The Supreme Court further clarified that the honour of the Crown will only apply "if the contract has a collective dimension."[64] Second, "contractual agreements will engage the honour of the Crown where they relate to an Indigenous right of self-government, whether the right is established or subject of a credible claim."[65]

58. The Supreme Court again makes clear in *Pekuakamiulnuatsh Takuhikan* that the honour of the Crown applies solely to Aboriginal peoples because the honour of the Crown "arises

[61] 2018 CHRT 4 at para 81.
[62] *Quebec (Attorney General) v Pekuakamiulnuatsh Takuhikan*, 2024 SCC 39 [*Pekuakamiulnuatsh Takuhikan*].
[63] *Pekuakamiulnuatsh Takuhikan* at para 161.
[64] *Pekuakamiulnuatsh Takuhikan* at para 162.
[65] *Pekuakamiulnuatsh Takuhikan* at para 163.

from 'the Crown's assertion of sovereignty over an Aboriginal people and *de facto* control of land and resources that were formerly in the control of that people'".[66] The Court explained that the underlying purpose of the honour of the Crown is to facilitate the reconciliation of the Crown's interests and those of Aboriginal peoples, including by promoting negotiation and the just settlement of Indigenous claims.[67]

59. Further, the Supreme Court held that the honour of the Crown requires the Crown to act honourably when performing, interpreting and negotiating any amendments to the contractual agreement:

> Once an agreement has been entered into, the Crown must conduct itself with honour and integrity in performing its obligations. This means, among other things, that it must construe the terms of the agreement generously and comply with them scrupulously while avoiding any breach of them. The Crown must act honourably in any negotiations to change or renew the agreement. It 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.[68]

60. This decision makes it clear that the Crown must act honourably to negotiate, implement and perform contractual agreements with Aboriginal groups, if the agreement meets the test in *Pekuakamiulnuatsh Takuhikan*.

C. Indigenous Police Chiefs of Ontario v Canada (Public Safety)

61. The Federal Court's decision in *Indigenous Police Chiefs of Ontario v Canada (Public Safety)* raises two distinct points relevant to these proceedings:[69]

   a. First, the Court emphasized it is important for all parties involved in consultation to refrain from unilaterally imposing conditions on consultation.

   b. Second, the Court reiterated the fundamental principle that the honour of the Crown is at stake in the Crown's dealings with Aboriginal peoples.

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[66] *Pekuakamiulnuatsh Takuhikan* at para 147.
[67] *Pekuakamiulnuatsh Takuhikan* at para 148.
[68] *Pekuakamiulnuatsh Takuhikan* at para 192 (citations omitted).
[69] *Indigenous Police Chiefs of Ontario v Canada (Public Safety)*, 2023 FC 916 [*IPCO*].

62. The Indigenous Police Chiefs of Ontario ("**IPCO**") brought a motion seeking, among other things, to compel Public Safety Canada ("**PSC**") to continue funding three specific self-administered Indigenous police services (the "**Three Police Services**") and to suspend the effects of s. 6 of the Terms and Conditions – Funding for First Nations and Inuit Policing ("**Terms and Conditions**") or relieve the Three Police Services from compliance with this section.[70] IPCO had also filed a complaint with the Canadian Human Rights Commission, arguing PSC forces Indigenous communities to accept the discriminatory Terms and Conditions or else lose funding.[71] Prior to the expiry of the funding agreements, the Three Police Services sent a joint letter to PSC outlining three "preconditions" for negotiation, which PSC refused to accept.[72] The Court granted the motion in part, reinstating—on a temporary basis and on certain conditions—the funding of the Three Police Services.[73]

63. The relevant portions of the case arise from the Federal Court's analysis of the irreparable harm element of the *RJR-MacDonald* injunction test. PSC argued that IPCO could have avoided the irreparable harm caused by PSC ceasing to fund the Three Police Services if:

   a. IPCO accepted to abide by the Terms and Conditions, including s. 6 of the Terms and Conditions, which was the subject to IPCO's complaint to the Canadian Human Rights Commission; and
   b. The Three Police Services retreated from their insistence that PSC agree to their preconditions before renewing the funding agreements.[74]

64. The Federal Court rejected PSC's submissions. The Federal Court found that PSC's insistence on maintaining the existing Terms and Conditions became the determinative element leading to the cessation of the funding agreements.[75] However, the Federal Court also noted that "IPCO's harm would constitute avoidable harm if the cessation of the

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[70] *IPCO* at para 4.
[71] *IPCO* at para 25.
[72] *IPCO* at para 23.
[73] *IPCO* at para 8.
[74] *IPCO* at para 127.
[75] *IPCO* at para 134.

funding and police services of [the Three Police Services] was strictly due to their own insistence that [PSC] accept the three Preconditions."[76]

65. The Federal Court's comments suggest that either party's insistence that the other comply with unilaterally imposed conditions would make the insistent party responsible for the failure of the negotiations. In this case, PSC's insistence on the Three Police Service's compliance with the Terms and Conditions was the determinative factor which led to the failure of negotiations.

66. Finally, the Federal Court reiterated the fundamental principle that the honour of the Crown is implicated in "its dealings with Aboriginal peoples" as a result of the special relationship between First Nations and the Crown.[77]

67. COO submits that this case can inform the Tribunal's decision-making on this and other matters before it. It is instructive to parties involved in consultations that engage the honour of the Crown by providing some guidance about the conduct of negotiations and participation of parties in negotiations.

D. No position on Canada's obligations pursuant to the Tribunal's orders or contract

68. COO takes no position on whether Canada has discharged its obligations to the Caring Society or the AFN pursuant to any of the Tribunal's orders or any contract that may exist.

PART IV – ORDER SOUGHT

69. COO seeks no relief on this motion.

70. COO submits that COO and NAN's joint motion for approval of the Ontario Final Agreement filed March 7, 2025 should proceed without delay and on a separate track from this motion. Any prospective interested parties should not be permitted to delay the motion for approval of the Ontario Final Agreement. The Ontario Chiefs-in-Assembly's ratification of the Ontario Final Agreement on February 26, 2025 represents the collective will of the 133 First Nations that comprise COO's membership. Approval of the Ontario

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[76] *IPCO* at paras 131, 133.
[77] *IPCO* at paras 139-140, 142-143.

Final Agreement would bring about long-term reform of the FNCFS program in Ontario, which is essential to the First Nations children, families, and communities in Ontario.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 31st day of March, 2025.

Maggie Wente
Olthuis, Kleer, Townshend LLP

Counsel for the Interested Party, Chiefs of Ontario

PART V – LIST OF AUTHORITIES

STATUTES	
1.	*Canadian Human Rights Act*, R.S.C., 1985, c. H-6
2.	*Constitution Act, 1982*, Part II of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11., s 35
CASE LAW	
3.	*Beckman v Little Salmon/Carmacks First Nation*, 2010 SCC 53
4.	*Behn v Moulton Contracting Ltd*, 2013 SCC 26
5.	*Canada (Attorney General) v First Nations Child and Family Caring Society of Canada*, 2021 FC 969
6.	*First Nations Child & Family Caring Society of Canada et al v Attorney General of Canada (representing the Minister of Indian and Northern Affairs)*, 2016 CHRT 16
7.	*First Nations Child & Family Caring Society of Canada et al v Attorney General of Canada (representing the Minister of Indigenous and Northern Affairs Canada)*, 2017 CHRT 14
8.	*First Nations Child & Family Caring Society of Canada et al v Attorney General of Canada (representing the Minister of Indigenous and Northern Affairs Canada)*, 2018 CHRT 4
9.	*First Nations Child & Family Caring Society of Canada et al v Attorney General of Canada (representing the Minister of Indigenous and Northern Affairs Canada)*, 2022 CHRT 41
10.	*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 10
11.	*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
12.	*Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73
13.	*Indigenous Police Chiefs of Ontario v Canada (Public Safety)*, 2023 FC 916
14.	*Kebaowek First Nation v Canadian Nuclear Laboratories*, 2025 FC 319 (under appeal)
15.	*Manitoba Metis Federation Inc v Canada (Attorney General)*, 2013 SCC 14

16.	*Mikisew Cree First Nation v Canada (Governor General in Council)*, 2018 SCC 40
17.	*Ontario (Attorney General) v Restoule*, 2024 SCC 27
18.	*Quebec (Attorney General) v Pekuakamiulnuatsh Takuhikan*, 2024 SCC 39
19.	*R v Badger*, [1996] 1 SCR 771
20.	*R v Desautel*, 2021 SCC 17
21.	*R v Sparrow*, [1990] 1 SCR 1075
22.	*Taku River Tlingit First Nation v British Columbia (Project Assessment Director)*, 2004 SCC 74
OTHER SOURCES	
23.	Consultation Protocol (Entered into pursuant to an order of the Tribunal), File no. T1340/7008, March 2, 2018
24.	Government of Canada, *Executive Summary of Agreement-in-Principle on Long-Term Reform*