Tribunal File No.: 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, AMNESTY INTERNATIONAL CANADA, and NISHNAWBE ASKI NATION

Interested Parties

RESPONDING FACTUM OF THE INTERESTED PARTY, NISHNAWBE ASKI NATION

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I. Statement of Facts

A. Overview

1. The Ontario Final Agreement ("**OFA**") and the Trilateral Agreement in Respect of Reforming the 1965 Agreement (the "**Trilateral Agreement**") are not at issue or before the Tribunal on this motion. As the moving party's materials specifically provide, this motion concerns national or Canada-wide (excluding Ontario) negotiations on the long-term reform between the First Nations Child and Family Caring Society of Canada (the "**Caring Society**"), the Assembly of First Nations ("**AFN**"), and Canada. As such, it does not concern First Nations in the Ontario region.

2. Indeed, even as the OFA and Trilateral Agreement represent an expression of the political will of First Nations in Ontario for the long-term reform of the First Nations Child and Family Services ("**FNCFS**") Program, First Nations outside of Ontario have expressed their political will and will continue to do so, in their efforts to reach long-term reform of the FNCFS program.

3. The rights of self-determination and self-government direct non-interference and mutual respect in these efforts. For this reason, Nishnawbe Aski Nation ("**NAN**") takes no position on this motion.

4. This factum, therefore, only concerns the duty to consult, the honour of the Crown, the Supreme Court decision in the matter of *Quebec (Attorney General) v Pekuakamiulnuatsh Takuhikan* ("***Pekuakamiulnuatsh Takuhikan***")[1] and the Federal Court decision in the matter of *Indigenous Police Chiefs of Ontario v Canada (Public Safety)* ("***IPCO v Canada***").[2]

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[1] *Quebec (Attorney General) v Pekuakamiulnuatsh Takuhikan*, 2024 SCC 39 ["*Pekuakamiulnuatsh Takuhikan*"].
[2] *Indigenous Police Chiefs of Ontario v Canada (Public Safety)*, 2023 FC 916 ["*IPCO v Canada*"].

B. Background

5. NAN was established in 1973, as a political-territorial organization with a mandate to represent the socioeconomic and political interests of its forty-nine (49) First Nation communities to all levels of government on a nation-to-nation basis. NAN has a total population of membership (on- and off-reserve) estimated at around 45,000 people. NAN's territory encompasses James Bay Treaty No. 9 and Ontario's portion of Treaty No. 5, with a total land mass covering two-thirds of Ontario, spanning an area of 210,000 square miles. The Chiefs of the forty-nine (49) First Nations represented by NAN are the members of the NAN not-for-profit corporation. The NAN Chiefs-in-Assembly meet two (2) to three (3) times a year to mandate, by resolution, the direction and initiatives of NAN. NAN's Board of Directors is comprised of a Grand Chief and three (3) Deputy Grand Chiefs.

6. The Chiefs' Committee on Children, Youth and Families (the "**CCCYF**") was established by NAN to develop a NAN-specific Aboriginal Child and Youth Strategy. The CCCYF's mandate was later revised to include supporting the development of First Nations laws and governance mechanisms, as well as developing a Children and Youth Services Model. Under the direction of the CCCYF, NAN sought intervention as an interested party in the remedies phase of the *First Nations Child and Family Caring Society v Canada* proceedings before the Tribunal and was granted this status by the decision of 2016 CHRT 11.[3]

7. NAN sought standing as an interested party to address specific issues facing remote Indigenous communities in Northwestern Ontario. This work was soon seen to apply to remote Indigenous communities more generally.

[3] *First Nations Child and Family Caring Society et al. v Canada*, 2016 CHRT 11.

8. NAN adopts the facts as laid out in the factum of Chiefs of Ontario ("**COO**") on this motion, dated March 31, 2025, reflected by paragraphs 13 – 34. These paragraphs contain a timeline of events from the filing of the initial complaint by the Caring Society and the AFN with the Canadian Human Rights Commission in 2007, until the ratification of the then provisional OFA and provisional Trilateral Agreement by the NAN Chiefs-in Assembly and the Ontario Chiefs-in-Assembly on February 25 and 26, 2025.

II. Issue

9. The issue to be addressed in these submissions is the honour of the Crown, and its grounding of different duties in different circumstances.

III. Submissions

A. NAN Takes No Position on the Motion

10. NAN takes no position on the consultations between Canada, the AFN, and the Caring Society on the national long-term reform of the FNCFS Program. However, NAN expects to participate in any consultations about the long-term reform of Jordan's Principle when consultations on long-term reform have commenced.

B. The Duty to Consult Protects Established or Asserted Aboriginal and Treaty Rights as Grounded in the Honour of the Crown

11. In *Haida Nation v British Columbia (Minister of Forests)*[4] ("***Haida***") the Supreme Court extended the duty to consult as a protection for established rights, and to be a protection for asserted rights (pending negotiations of treaties or litigation to establish their validity). It has

[4] *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73 ["*Haida*"].

been pointed out that the duty to consult, "resembles the administrative law duty of fairness imposed upon the Crown's dealings with all its subjects,"[5] but it is set apart as arising from a different source: the honour of the Crown.

12. As the Supreme Court set out in *Haida*:

> … the Honour of the Crown requires that [the rights protected by Section 35] be determined, recognized, and respected. This in turn, requires the Crown, acting honourably to participate in the processes of negotiation. While this process continues, the Honour of the Crown may require it to consult and, where indicated, accommodate Aboriginal interests.[6]

13. The honour of the Crown thus underpins the duty to consult. This is its general role in Aboriginal law. Thus, the honour of the Crown is not a distinct legal doctrine, or a body of law, but a constitutional principle.[7] As an anchor or at its foundation, the honour of the Crown gives rise to different duties under different circumstances: "a core precept that finds its application in concrete practices."[8]

C. The Honour of the Crown Gives Rise to Different Duties Under Different Circumstances

14. This current matter arises outside of the existing jurisprudence related to the duty to consult and accommodate, as there is no conduct that might adversely affect an established Aboriginal or Treaty right, a Treaty being implemented, or an asserted Aboriginal or Treaty right. For clarity, Section 35 of the *Constitution Act*, *1982*, has not been engaged here.

15. However, the honour of the Crown has been held to have application outside of these contexts. Of assistance is the *Pekaukamiulnuatsh Takuhikan* decision, which applied the honour of the

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[5] Thomas Isaac and Anthony Knox, "The Crown's Duty to Consult Aboriginal People" (2003) 41-1 Alta. L. Rev. 49.
[6] *Haida*, *supra* note 4, at para 25.
[7] *Ontario (Attorney General) v Restoule*, 2024 SCC 27, at para 72.
[8] *Haida, supra* note 4, at para 16.

Crown to certain contractual relationships. This case found that the Canadian and Quebec governments inadequately funded an Indigenous police service, the Sécurité Publique de Mashteuiatsh. More importantly, the Supreme Court found that by refusing to discuss increased funding during its negotiations, the government of Quebec breached the duty to act in good faith and the honour of the Crown.

16. The Supreme Court held for the first time that the honour of the Crown may arise in certain contract relationships, specifically, those contracts that are based on Indigenous differences and involve a right to self-government. In these circumstances, the honour of the Crown gave rise to different and specific duties in the contractual relationship, outlined below. It is of note that in considering what it might mean for the Crown to act with honour and integrity in negotiating and performing an agreement, the Supreme Court considered cases from the Treaty context.

17. The specific duties arising out of the honour of the Crown in a contract relationship were outlined as follows:

> When the Crown decides to enter into a contractual relationship that engages its honour, it must act honourably, with integrity and in such a way as to avoid even the appearance of "sharp dealing" (*Haida Nation*, at para. 19; *Badger*, at para. 41). As the expression "sharp dealing" suggests, this standard of conduct demands more than the mere absence of dishonesty. In particular, it requires the Crown not to adopt an intransigent attitude. The Crown must therefore come to the negotiating table with an open mind and with the goal of engaging in genuine negotiations with a view to entering into an agreement. The Crown should not enter into negotiations without intending to keep its promises, nor should it attempt to coerce or unilaterally impose an outcome (A. F. Martin and C. Telfer, "The Impact of the Honour of the Crown on the Ethical Obligations of Government Lawyers: A Duty of Honourable Dealing" (2018), 41 *Dal. L.J.* 443, at p. 459). Similarly, the Crown cannot change its position for the sole purpose of delaying or ending negotiations (*Kaska Dena Council v. Canada*, 2018 FC 218, at para. 43).
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> Of course, the honour of the Crown does not require that the negotiations ultimately be successful; as is the case in any negotiation, either party may withdraw where an impasse is reached (*Chemainus First Nation v. British Columbia Assets and Lands*

> *Corp.*, 1999 CanLII 6298 (BC SC), [1999] 3 C.N.L.R. 8 (B.C.S.C.), at para. 26). However, when it is involved in such a process, the Crown must adopt a standard of conduct higher than the one it would adopt in the private law context and must act in such a way as to maximize the chances of success.
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> 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 (*Badger*, at para. 41). The Crown must act honourably in any negotiations to change or renew the agreement (see, e.g., *Gitanyow First Nation v. Canada*, 1999 CanLII 6180 (BC SC), [1999] 3 C.N.L.R. 89 (B.C.S.C.)). 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 (see F. Hoehn, "The Duty to Negotiate and the Ethos of Reconciliation" (2020), 83 *Sask. L. Rev.* 1, at p. 20).[9]

18. In applying this precedent, to determine when the principle of the honour of the Crown is imposed on the state, the following reasoning from the Supreme Court is relevant. First, the principle of the honour of the Crown is itself anchored to the goal of reconciliation.[10] In fact, as the Supreme Court recognized, the common element underlying all contexts in which the Court has already recognized the honour of the Crown as being engaged relates to "the reconciliation of specific Indigenous claims, rights or interests with the Crown's assertion of sovereignty".[11] As the Supreme Court held:

> Regardless of the means used by the Crown to advance the process of reconciliation, whether it be negotiating treaties, drafting legislation or entering into a contract as in the present case, the principle of the honour of the Crown must be applicable when it is required, and in accordance with the terms of the instrument that engages it.[12]

19. Similar to the matter of *Pekaukamiulnuatsh Takuhikan, IPCO v Canada* arose out of a complaint to the Canadian Human Rights Commission under the *Canadian Human Rights Act*, RSC 1985, c H-6 ("**CHRA**"), alleging discrimination against the First Nations and Inuit

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[9] *Pekaukamiulnuatsh Takuhikan, supra* note 1, at paras 190-2.
[10] *Pekaukamiulnuatsh Takuhikan, supra* note 1, at para 6.
[11] *Pekaukamiulnuatsh Takuhikan, supra* note 1, at para 12.
[12] *Pekaukamiulnuatsh Takuhikan, supra* note 1, at para 13.

Policing Program (the "**Program**"), and the Terms and Conditions it imposes in respect of the funding for Indigenous police services.

20. The decision specifically concerned a request for declaratory and injunctive relief to compel Public Safety Canada ("**PSC**") to continue funding three (3) specific self-administered Indigenous police services pending the CHRA complaint and to relieve those services from certain restrictive, and allegedly discriminatory, Terms and Conditions imposed unilaterally by Canada. The Indigenous Police Chiefs of Ontario ("**IPCO**") claimed that the PSC refused to enter into good faith negotiations before the expiry of funding agreements. With the looming threat of losing funding and leading to the end of policing services in forty-five (45) Indigenous communities, interlocutory relief was sought to prevent that harm.

21. In their submissions, IPCO raised the issues of reconciliation and the honour of the Crown. Specifically, the conduct of PSC in its dealings with funding agreements for the three (3) specific Indigenous police services was not in keeping with the overarching principles of reconciliation and honour of the Crown. To this end, the Federal Court spoke to the applicability of the honour of the Crown as follows:

> The controlling question in all situations involving First Nations 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" (*Haida* at para 45). Canada always has an obligation to act in ways that maintain the honour of the Crown vis-à-vis Indigenous peoples and that are in line with the objective of reconciliation.[13]

22. IPCO's submissions were put forth in a motion for injunctive relief. Echoing prior decisions, Justice Gascon of the Federal Court observed that the "contextual analysis" on the injunctive relief test necessarily must take into account the Indigenous perspective, as well as the "historical, social, and legal context", observing that "…when reconciliation and the honour

[13] *IPCO v Canada*, *supra* note 2, at para 178.

of the Crown are involved, the injunction test has to be viewed through the lens of these guiding principles".[14]

23. With that in mind, the Court then considered the claim that Canada, in administering its First Nations and Inuit Policing Program, had failed to act honourably in its dealings with the First Nations beneficiaries of the Program. Finding the First Nations' allegations to be valid, the Court observed that "the readiness and willingness of PSC to determine IPCO's need for additional funding is one thing, but PSC's outright refusal to negotiate the Terms and Conditions of such funding is quite another,"[15] before reiterating the well-known maxim:

> Where the honour of the Crown applies, there is a special duty on Canada to negotiate honourably: "[t]his fiduciary relationship must form part of the context of the Panel's analysis, along with the corollary principle that in all its dealings with Aboriginal peoples, the honour of the Crown is always at stake" [emphasis added] (*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 95).[16]

24. On the facts of the case, the Court went on to hold that Canada's "unwillingness… to negotiate or even discuss the Terms and Conditions" of funding under the Program was arguably "not an honourable conduct and encroaches on" the principles of reconciliation and honour of the Crown.[17]

25. Finally, emphasizing the public interest dimension of promoting reconciliation and the Crown's honourable duties, the Federal Court ultimately ordered the injunctive relief, requiring Canada to maintain funding for the three (3) specific First Nations police services, and relieving those police services from the most restrictive Terms and Conditions of the Program.[18]

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[14] *IPCO v Canada*, *supra* note 2, at para 140.
[15] *IPCO v Canada*, *supra* note 2, at para 142.
[16] *Ibid*.
[17] *IPCO v Canada*, *supra* note 2, at para 143.
[18] *IPCO v Canada*, *supra* note 2, at paras 175 and 198.

IV. Order Sought

26. NAN seeks no relief on this motion.

27. NAN adopts the submission of COO regarding NAN and COO's joint motion for approval as outlined at paragraph 70 of COO's factum on this motion, dated March 31, 2025.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 7th day of April, 2025.

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V. List of Authorities

STATUTES	
1.	*Canadian Human Rights Act*, RSC 1985, c H-6
2.	*Constitution Act, 1982*, Schedule B to the Canada Act 1982 (UK), 1982, c 11, s 35
CASE LAW	
3.	*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 11
4.	*Haida Nation v British Columbia (Minister of Forests),* 2004 SCC 73
5.	*Indigenous Police Chiefs of Ontario v Canada (Public Safety)*, 2023 FC 916
6.	*Ontario (Attorney General) v Restoule*, 2024 SCC 27
7.	*Quebec (Attorney General) v Pekuakamiulnuatsh Takuhikan*, 2024 SCC 39
OTHER SOURCES	
8.	Thomas Isaac and Anthony Knox, "The Crown's Duty to Consult Aboriginal People" (2003) 41-1 Alta. L. Rev. 49