

Supreme Court of Canada Decision on *Quebec (Attorney General) v. Pekuakamiulnuatsh Takuhikan* Briefing Note



On November 27, 2024, the Supreme Court of Canada released its decision in *Quebec (Attorney General) v. Pekuakamiulnuatsh Takuhikan*. The decision is an important step forward in protecting First Nations when they negotiate and implement contracts with the Crown for many essential services.

Facts

Pekuakamiulnuatsh Takuhikan (a band council that represents the Pekuakamiulnuatsh First Nation, residing in Mashteuiatsh, Quebec) entered into and renewed tripartite agreements concerning police services with Canada and Quebec.

The agreements were for an Indigenous police force adapted to the First Nation. However, Canada and Quebec underfunded the agreements and would not meaningfully renegotiate. This led to more than \$1.5 million in deficits for the First Nation.

Pekuakamiulnuatsh Takuhikan brought legal proceedings claiming the reimbursement of the deficits from Canada and Quebec. It alleged that the governments had refused to genuinely negotiate the funding clauses of the agreements, which was a breach of both governments' contract law duties and the duties flowing from the honour of the Crown.¹

The trial court dismissed Pekuakamiulnuatsh Takuhikan's claim, but the Court of Appeal overturned this decision and ordered damages. Canada accepted the decision and paid, but Quebec took the case to the Supreme Court of Canada.

Takeaways

The Court focused part of its decision on the honour of the Crown, a principle requiring the Crown to act honourably in its dealings with Indigenous peoples.

The types of agreements that engage "honour of the Crown"

The Court confirmed that the honour of the Crown can apply to agreements that are not constitutional in nature. Accordingly, the Crown has duties that extend well beyond the treaty context. The Court set out a test to determine if an agreement engages the honour of the Crown:

- **First**, the agreement must be entered into on the basis of the group's Indigenous difference. This means that the agreement must relate to the Crown's special relationship with Indigenous peoples and must have a collective dimension.
- **Second**, the agreement must relate to an Indigenous right of self-government, whether the right is established or is the subject of a credible claim.²

Application to the Case: The Court determined that the tripartite agreements met the two-part test for engaging the honour of the Crown. The agreements regarding policing were in the context of the nation-to-nation relationship between the parties, and they concerned the Indigenous right of self-government claimed by Pekuakamiulnuatsh Takuhikan in matters of public safety in the community.³

The Crown's obligations when negotiating and performing agreements that engage its honour

The Court clarified what duties the honour of the Crown imposes for contractual agreements. When the Crown decides to enter into a contract that engages the honour of the Crown, it must avoid "sharp dealing". This means more than just that the Crown cannot be dishonest:

- It cannot adopt an intransigent attitude

¹ Decision at paras 20–46.

² Decision at paras 160–68.

³ Decision at paras 170–84.

- It must 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
- It must enter into negotiations with the intention of keeping its promises
- It cannot attempt to coerce or unilaterally impose an outcome
- It cannot change its position for the sole purpose of delaying or ending negotiations
- It must act in a way as to maximize the chances of success in the negotiations; however, there is no requirement that the negotiations are ultimately successful and either party can withdraw from negotiations if an impasse is reached.⁴

The Court also clarified what duties the Crown must uphold once an agreement is reached and it comes time to *perform* the agreement. At this stage, the Crown must perform its obligations with honour and integrity. In particular:

- It must construe the terms of the agreement generously;
- It must comply with these terms while avoiding any breach of them;
- It 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 the Crown without having genuinely negotiated first.

Application to the Case: The Court focused on the renewal negotiations, because the tripartite agreements contemplated the renegotiation of their funding clauses. Quebec refused to negotiate, even though it knew the Indigenous police force was underfunded and despite Pekuakamiulnuatsh Takuhikan’s repeated complaints. As a consequence, it breached the honour of the Crown and jeopardized the very purpose of the agreements.⁵

The remedies available following a breach of the Honour of the Crown

The Court emphasized that when courts are determining how to remedy a breach of an obligation flowing from the honour of the Crown, the analysis is focused on “reconciliatory justice”, meaning that the focus is on restoring balance to the relationship and placing the parties back on the path to reconciliation. As a result, courts must be creative, adaptable and flexible. The full range of remedies is available, including financial compensation, and courts must put weight on the Indigenous perspective.⁶

Application to the Case: The Court determined that requiring Quebec to pay its share of the deficit under the contracts was consistent with reconciliatory justice.⁷

Implications for Child Welfare

The Court’s analysis is likely to have significant consequences for agreements in other service areas, including child welfare.

First, the duties flowing from the honour of the Crown are likely engaged by coordination agreements under *An Act Respecting First Nations, Métis and Inuit Children Youth and Families (C-92)*. They are also likely engaged during the negotiation and performance of agreements relating to long-term reform of the child welfare system.

Second, the Court’s decision provides a range of tools to assess whether the Crown is breaching its duties when negotiating and performing agreements. This guidance can assist First Nations in evaluating whether the Crown is acting honourably, and to convince courts that the Crown has not been doing so. For example, the Court made clear that the Crown cannot steadfastly refuse to renegotiate agreements that result in underfunding Indigenous services — a finding that could apply to not just policing services, but child welfare services as well.

Third, the Court’s decision empowers courts to consider Indigenous perspectives when determining how to remedy a breach by the Crown. It also confirms that remedies can include ordering financial compensation to the First Nation. This could make it easier for First Nations to obtain meaningful accountability in the courts.

⁴ Decision at paras 185–92.

⁵ Decision at paras 193–97.

⁶ Decision at paras 210–11, 219–20.

⁷ Decision at paras 214–32.