

Supreme Court finds that the honour of the Crown applies to certain Indigenous-Crown contracts, and indicates broad remedial discretion for its breach

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In *Québec (Attorney General) v. Pekuakamiulnuatsh Takuhikan*¹, the Supreme Court of Canada set out a two-part test to determine when the honour of the Crown applies to contracts between Indigenous peoples and the Crown. The Supreme Court held that courts have discretion to craft a “creative” remedy designed to achieve reconciliation when the honour of the Crown has been breached. This decision will have implications for the negotiation, interpretation and implementation of certain types of contracts between Indigenous peoples and governments.

What you need to know

- The honour of the Crown will apply to contracts between Indigenous peoples and the Crown when the agreement is “related to Indigenous difference” and “concerns a credible claim to a right of self-government”.
- The Supreme Court indicated that “[r]egardless 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... 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”.
- Where the honour of the Crown applies to a contract, the Crown must “negotiate, interpret and apply contracts with honour and integrity and avoid even the appearance of sharp dealing” or “an intransigent attitude”, “construe the terms of the agreement generously and comply with them scrupulously while avoiding any breach of them”, and “act honourably in any negotiations to change or renew the agreement”.
- Courts have remedial discretion to address a breach of the honour of the Crown. The remedy will be “focused on reconciliatory justice to ensure that the order made will have the effect of restoring the honour of the Crown”. The remedy may include, but is not limited to, compensation. Courts may be creative in finding a remedy that advances reconciliation.

Background

The Government of Canada, the Government of Québec and the Pekuakamiulnuatsh First Nation entered into tripartite agreements concerning police services. The parties agreed to establish and maintain an Indigenous police service, Sécurité publique de Mashteuiatsh (SPM), in order to provide culturally appropriate police services to the community.

From 2013 to 2017, government funding under the agreements was inadequate. SPM incurred an operating deficit each year. Pekuakamiulnuatsh commenced an action claiming compensation for its accumulated deficits on the basis that the Governments of Canada and Québec refused to negotiate the funding clauses of the agreements, which was a breach of both (1) requirements of good faith among contracting parties under the *Civil Code of Québec*, and (2) the honour of the Crown.

Decision

The Supreme Court upheld the decision of the Québec Court of Appeal, and held that Québec breached its good faith obligations under the *Civil Code of Québec*, as well as its obligation to act in a manner consistent with the honour of the Crown. Canada did not appeal the Québec Court of Appeal's decision that it had breached the Civil Code and honour of the Crown.

Obligation to uphold the honour of the Crown

Not all contracts between Indigenous communities and the Crown will be subject to the honour of the Crown. The Court set out the following test to determine whether a contract engages the principle:

1. The contract in question must be entered into by the Crown and an Indigenous group by reason of the group's Indigenous difference. The honour of the Crown will apply only if the contract has a collective dimension: agreements pertaining to individual rights or interests do not engage this principle.
2. The contract in question must relate to an Indigenous right of self-government. That self-government right may be claimed or established.

Applying this test, the Court determined that the honour of the Crown applied to the policing agreements entered into on the basis that (1) the agreements were executed invoking a nation-to-nation relationship; and (2) on the basis of Indigenous difference, as only Indigenous peoples can enter into agreements with government to establish an Indigenous police service. The agreements concern a claimed Indigenous right of self-government in relation to matters of public safety.

The Court stated that, where the honour of the Crown applies to a contract, the Crown must “negotiate, interpret and apply contracts with honour and integrity and avoid even the appearance of sharp dealing” or “an intransigent attitude”, “construe the terms of the agreement generously and comply with them scrupulously while avoiding any breach of them”, and “act honourably in any negotiations to change or renew the agreement”.

The Court held that by refusing to consider Pekuakamiulnuatsh's requests to renegotiate policing funding, Québec conducted itself in a manner that fell below the required standard of honourable conduct. In doing so, Québec jeopardized the “contractual equilibrium” and the “very purpose” of the agreements to maintain an Indigenous police service.

Obligation of good faith under the *Civil Code*

The Court also determined that Québec was required to act in good faith in its dealings with Pekuakamiulnuatsh Takuhikan, pursuant to article 1376 of the *Civil Code of Québec*. Applying this obligation, the Court found that Québec's refusal to renegotiate its financial contribution to SPM when the agreements were being renewed

threatened the purpose of the agreements: to maintain an Indigenous police force. The Court held that Québec breached its good faith obligations.

Remedy

The Court stated that a remedy for breaching the honour of the Crown is intended to place the parties “back on the path to reconciliation” and improve the relationship between the Crown and Indigenous peoples. Courts have broad discretion and can be “creative” in that exercise. Damages and other forms of relief are available. What is appropriate will depend heavily on context.

In this case, the Court upheld the Court of Appeal’s award of \$767,745.58 in damages, which was meant to reflect the extent of underfunding of the police service. According to the Court, this award served to compensate for past injury and to restore the honour of the Crown.

FOOTNOTES

1. *Québec (Attorney General) v. Pekuakamiulnuatsh Takuhikan*, 2024 SCC 39.

To discuss these issues, please contact the author(s).

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