SUPREME COURT OF CANADA

CITATION: Quebec (Attorney General) *v.* Pekuakamiulnuatsh Takuhikan, 2024 SCC 39

APPEAL HEARD: April 23 and 24, 2024
JUDGMENT RENDERED: November 27, 2024
DOCKET: 40619

BETWEEN:

Attorney General of Quebec
Appellant

and

Pekuakamiulnuatsh Takuhikan
Respondent

- and -

Attorney General of Canada, Attorney General of Ontario, Attorney General of Saskatchewan, Attorney General of Alberta, Assembly of First Nations Quebec-Labrador, Congress of Aboriginal Peoples, Assembly of Manitoba Chiefs, Indigenous Police Chiefs of Ontario, First Nations Child & Family Caring Society of Canada, Okanagan Indian Band and Assembly of First Nations
Interveners

OFFICIAL ENGLISH TRANSLATION

CORAM: Wagner C.J. and Karakatsanis, Côté, Rowe, Martin, Kasirer, Jamal, O'Bonsawin and Moreau JJ.

REASONS FOR JUDGMENT: (paras. 1 to 240)	Kasirer J. (Wagner C.J. and Karakatsanis, Rowe, Martin, Jamal, O'Bonsawin and Moreau JJ. concurring)
DISSENTING REASONS: (paras. 241 to 325)	Côté J.

Attorney General of Quebec *Appellant*

v.

Pekuakamiulnuatsh Takuhikan *Respondent*

and

Attorney General of Canada,
Attorney General of Ontario,
Attorney General of Saskatchewan,
Attorney General of Alberta,
Assembly of First Nations Quebec-Labrador,
Congress of Aboriginal Peoples,
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2024 SCC 39

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2024: April 23, 24; 2024: November 27.

Present: Wagner C.J. and Karakatsanis, Côté, Rowe, Martin, Kasirer, Jamal, O'Bonsawin and Moreau JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR QUEBEC

Aboriginal law — Honour of the Crown — Contracts — Good faith — Remedy — Police services — Successive tripartite agreements entered into by governments of Canada and Quebec and band council to allow Indigenous community to establish and maintain Indigenous police force — Government funding provided for in agreements inadequate to ensure maintenance of police force — Council bringing legal proceedings against governments claiming reimbursement of accumulated deficits — Whether agreements engage principles of good faith and of honour of Crown — Whether Crown breached its obligations — Whether reimbursement of accumulated deficits can be appropriate remedy — Civil Code of Québec, arts. 1375, 1376, 1434.

Successive tripartite agreements concerning police services were entered into by the Government of Canada, the Government of Quebec and Pekuakamiulnuatsh Takuhikan, a band council that represents the Pekuakamiulnuatsh First Nation in Mashteuiatsh, Quebec. These agreements have three main objectives: to establish and maintain an Indigenous police force, Sécurité publique de Mashteuiatsh ("SPM"), providing services adapted to the Indigenous community of Mashteuiatsh; to set the maximum financial contribution by Canada and Quebec to the operation of that police force; and to entrust the management of the force to Pekuakamiulnuatsh Takuhikan. The contracting parties included a clause permitting the renewal of the agreements so as to ensure the maintenance of the police force over time.

Between 2013 and 2017, the government funding provided for in the agreements proved to be inadequate on its own to ensure the maintenance of the SPM. At the end of each fiscal year, the SPM incurred an operating deficit; from 2013 to 2017, Pekuakamiulnuatsh Takuhikan had to assume deficits totalling $1,599,469.95. It brought legal proceedings claiming reimbursement of the accumulated deficits from the governments of Canada and Quebec. It rested its claim on two main grounds: a contractual basis under private law, grounded in the provisions of the *Civil Code of Québec*, and a public law basis anchored in the principles of Aboriginal law. According to it, Canada and Quebec had refused to genuinely negotiate the funding clauses of the agreements, which was a breach of both the requirements of good faith and the obligations — heavier still for the State — flowing from the honour of the Crown.

The trial judge dismissed Pekuakamiulnuatsh Takuhikan's application, holding that the contract is the law of the parties and that the honour of the Crown did not apply. The Court of Appeal set aside that judgment and ordered Canada and Quebec to pay their share of the total amount of the accumulated deficits, $832,724.37 for Canada and $767,745.58 for Quebec. In the Court of Appeal's view, the governments' refusal to fund the SPM justified finding both a violation of the principle of good faith and a failure to uphold the honour of the Crown. Only Quebec appealed from the Court of Appeal's decision, Canada having paid the amount awarded against it by that court.

Held (Côté J. dissenting): The appeal should be dismissed.

Per Wagner C.J. and Karakatsanis, Rowe, Martin, **Kasirer**, Jamal, O'Bonsawin and Moreau JJ.: Quebec's refusal to renegotiate its financial contribution when the agreements were renewed was not in keeping with the principle of good faith, a source of private law obligations set out in art. 1375 *C.C.Q.*, which requires parties to conduct themselves in good faith in the performance of a contract. It was also a breach of the obligation to act in a manner consistent with the honour of the Crown, an obligation under public law that Quebec had to fulfill in the performance of the tripartite agreements. As to the manner in which the breach of the requirements of good faith should be redressed, the record does not make it possible to assess compensatory damages in conformity with the principles of corrective justice. However, with regard to the remedy meant to restore the honour of the Crown, which is rooted in reconciliatory justice, an award of damages equal to the accumulated deficits is an appropriate measure that will enable the contracting parties to undertake future negotiations with equanimity.

The first element of the applicable analytical framework to address the allegations that the Crown breached its undertakings under the tripartite agreements involves confirming that the general law of obligations, including the requirements of good faith, applies to contracts between an Indigenous community and the State. Under art. 1376 *C.C.Q.*, the general rules on obligations apply to the State, to the extent that they are not excluded or altered by other rules of law. The tripartite agreements in this case are therefore governed by the general law of obligations, including art. 1375

C.C.Q. on good faith; Quebec was required to perform its contractual undertakings toward Pekuakamiulnuatsh Takuhikan in good faith.

Good faith requires that every contracting party consider the other party's interests in the performance of the contract, but not that one party subordinate its own interests to those of the other. Parties to a contract must conduct themselves loyally by not unduly increasing the burden on the other party or behaving in an excessive or unreasonable manner. This is a duty of conduct that involves making the performance of the contract consistent with what was undertaken. After a contract is entered into, where the parties have provided through a clause that they will have to enter into negotiations, the obligation to conduct the negotiations in good faith flows directly from the contract. A breach of good faith in negotiating a renewal contemplated by a contract may thus be a source of contractual liability. When parties discuss a renewal clause, they must negotiate faithfully; if they begin renewal negotiations pursuant to the very terms of the contract, they are obliged to behave in a manner that is neither excessive nor unreasonable in this final stage of carrying out their agreement. Refusal to act in good faith in the negotiation of a renewal contemplated by the parties may jeopardize the very purpose of the contract where the achievement of that purpose depends on the existence of a relationship over time.

In this case, Quebec had an obligation to act in good faith, including when conducting the negotiations contemplated by the tripartite agreements, and it breached that duty. The parties had provided for an extension mechanism to facilitate renewal;

they therefore had an obligation to carry out any renewal negotiations in good faith. This obligation could not serve to require or impose specific outcomes from the negotiations. Moreover, Quebec had no obligation to renew the arrangement for another fiscal year. However, if it sought to do so, the agreements show that renewal would be achieved through negotiation. In such a case, Pekuakamiulnuatsh Takuhikan was not entitled to a specific level of funding, but, by the terms of the contract itself, it did have a legitimate expectation that Quebec would consider its perspective in negotiating the extent of its contribution. Quebec's refusal to discuss an increase in funding constitutes unreasonable conduct contrary to the requirements of good faith. Quebec chose to continue the contractual relationship while at the same time refusing to revisit its financial contribution, even though it knew that the SPM was underfunded. That conduct disregarded the context and its counterparty's interests. By adopting an intransigent position through its refusal to negotiate, Quebec acted contrary to what the agreements stipulated and to the binding force of contracts as enshrined in art. 1434 *C.C.Q.* Quebec caused injury to Pekuakamiulnuatsh Takuhikan by acting in conflict with the expectations raised by the contractual mechanism put in place by the parties for the renewal of the agreements. That conduct was unreasonable because it undermined Pekuakamiulnuatsh Takuhikan's legitimate expectations and disrupted the parties' contractual objective of maintaining the SPM. Quebec should have entered into genuine negotiations with its counterparty and should have listened and shown openness. The absence of genuine negotiations left Pekuakamiulnuatsh Takuhikan in a no-win situation: either it continued to impoverish itself to maintain the SPM and preserve the progress that the SPM represented in terms of self-government, or it

abolished the SPM, which meant both returning to the inadequate services of the Sûreté du Québec and suffering a setback with respect to self-government. Despite the difficulties, Pekuakamiulnuatsh Takuhikan chose, year after year, to preserve the SPM, which required it to use its own funds to absorb the annual deficits. The governments of Canada and Quebec turned a deaf ear to Pekuakamiulnuatsh Takuhikan's requests and complaints, and the quality of the SPM's services suffered as a result.

The second element of the framework involves establishing that the principle of the honour of the Crown also applies to the performance of Quebec's contractual undertakings in this case. While art. 1376 *C.C.Q.* provides that the private law of obligations applies to the State, it also specifies that this is subject to any other rules of law which may be applicable to it. This qualification thus refers implicitly to the idea that public common law rules may form a distinct liability regime for the State that supplements the one in the *Civil Code of Québec*. The principle of the honour of the Crown is one such public law rule that may, in some contexts, broaden the scope of state liability. However, there is no basis for concluding that the principle of the honour of the Crown is implicitly incorporated into contracts by operation of art. 1434 *C.C.Q*. Consequently, while the honour of the Crown is engaged where the State has contractual obligations, its source, unlike those contractual obligations, is anchored in public law rules.

As a common law rule originating in the special relationship between the Crown and Indigenous peoples, the principle of the honour of the Crown is itself

anchored to the goal of facilitating the reconciliation of the Crown's interests with those of Indigenous peoples, including by promoting negotiation and the just settlement of their claims. The honour of the Crown is a constitutional principle that looks forward to reconciliation in an ongoing, mutually respectful long-term relationship. Regardless of the means used by the Crown to advance the process of reconciliation, the principle of the honour of the Crown must be applicable when it is required.

Unlike good faith, the honour of the Crown does not apply to the performance of every contract or to every contractual undertaking given by the Crown to an Indigenous entity. Indeed, it applies only in the performance of contracts between the State and Indigenous groups that are intended to foster the modern-day reconciliation of pre-existing Indigenous societies with the Crown's historic assertion of sovereignty. The task is therefore to determine the legal test that can be used in this case to identify contractual undertakings that attract the honour of the Crown. First, the contract 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. Because the principle of the honour of the Crown rests on the special relationship between the Crown and Indigenous peoples, the honour of the Crown is engaged only by an obligation assumed by the Crown on the basis of this special relationship, which is different from the one it has with the population in general. Second, the contract in question must relate to an Indigenous right of self-government, whether the right is established or is the subject of a credible claim. It is not necessary, in order for the principle of the honour of the

Crown to apply, that such a right already be recognized by the courts or the Crown. A credible claim is sufficient to impose duties of honourable dealing on the Crown.

To ascertain whether the tripartite agreements in this case satisfy this test, it is necessary to undertake a characterization exercise, through which the contract at issue is linked to a normative category that can serve to determine the applicable legal regime. The purpose of characterizing a contract is to identify its legal nature. This exercise is not governed strictly by the intention of the parties and is based on the legal nature of the act created. It is a question of law. In this case, the characteristic prestation of the tripartite agreements has three aspects. The tripartite agreements provide for the establishment and maintenance of an Indigenous police force, set out a shared funding regime between the governments of Canada and Quebec and Pekuakamiulnuatsh Takuhikan, and provide for the independent management of the police force by Pekuakamiulnuatsh Takuhikan. In light of this characteristic prestation, it appears that the parties entered into the tripartite agreements on the basis and by reason of the Indigenous difference of the Pekuakamiulnuatsh. Only Indigenous communities may enter into an agreement with Quebec to establish or maintain an Indigenous police force. Moreover, the tripartite agreements were entered into in the context of the nation-to-nation relationship between Quebec and Pekuakamiulnuatsh Takuhikan, and the aim of the funding is to remedy the historical harm resulting from the imposition of the national police on Indigenous peoples and the difficulties experienced by Indigenous communities in managing their internal security.

The tripartite agreements also concern the Indigenous right of self-government claimed by the Pekuakamiulnuatsh First Nation in matters of public safety in the community. The establishment and maintenance of Indigenous police forces that are managed by the communities covered by an agreement and that provide culturally appropriate services to those communities distinguish these police forces from those serving the population in general. It was in the context of the claim by Indigenous peoples to the right of self-government and control over their institutions that Quebec recognized, in the *Police Act*, the possibility for First Nations to establish a culturally appropriate police force. The need of Indigenous peoples for such police services originates in the difficult, and at times even traumatizing, relationship that Indigenous peoples had, and in some cases continue to have, with the police services imposed on them over the years by the Crown. The opportunity to enter into agreements whose objective is to ensure the provision of culturally appropriate police services managed by the Indigenous communities served therefore contributes to reconciliation.

In sum, the tripartite agreements must be characterized as contracts that engage the honour of the Crown. The fact that the tripartite agreements are not treaties protected by s. 35(1) of the *Constitution Act, 1982* and that Pekuakamiulnuatsh Takuhikan is not seeking to establish a right protected by s. 35 of the *Constitution Act, 1982* makes no difference to the characterization of the contract. Even though the parties have agreed that there will be no final resolution of the claims of the Pekuakamiulnuatsh through the tripartite agreements, the fact remains that these agreements relate to the subject-matter of their claims, that is, the right of

self-government in matters of internal security. The question is not whether the agreement recognizes or modifies Indigenous rights, but only whether it relates to this claimed right.

Because it is not a cause of action itself, the principle of the honour of the Crown is expressed through the specific obligations to which it gives rise. The content of these obligations varies with the circumstances. When the honour of the Crown applies to a contract, the Crown must meet a standard of conduct that is higher than in the context of an ordinary contractual relationship and must act in a manner that fosters reconciliation. When the Crown decides to enter into a contractual relationship that engages its honour, it must negotiate, interpret and apply the contracts with honour and integrity while avoiding even the appearance of sharp dealing. This is an obligation that has long been recognized in the context of treaty making and implementation and that can be transposed to the contractual context. The Crown must also avoid adopting an intransigent attitude. 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 also act honourably in any negotiations to change or renew the agreement.

In this case, because the tripartite agreements contemplated the renegotiation of their funding clauses, the honour of the Crown imposed an obligation on the Crown to conduct itself honourably during the renewal negotiations. Quebec did

not comply with this obligation. Through its intransigent attitude, it acted dishonourably by refusing to negotiate the funding terms of the tripartite agreements. Quebec refused to consider Pekuakamiulnuatsh Takuhikan's repeated requests to renegotiate the level of funding for its police force even though it knew that the SPM was underfunded and that Pekuakamiulnuatsh Takuhikan would accept an inadequate level of funding to avoid resorting to the ill-adapted services of the Sûreté du Québec. That conduct represents a breach of the obligation to perform the tripartite agreements with honour and integrity. The honour of the Crown requires the Crown to meaningfully engage in genuine negotiations in a manner conducive to maintaining a relationship that can support the ongoing process of reconciliation. By refusing to renegotiate the level of funding despite Pekuakamiulnuatsh Takuhikan's repeated complaints and the precarious situation in which it found itself, Quebec conducted itself in a manner that fell well below the standard of honourable conduct. Through its breach, Quebec jeopardized the contractual equilibrium and the very purpose of the tripartite agreements. Quebec thus failed to comply with its obligation to act with honour, establishing a second independent basis of liability.

Quebec's conduct can therefore be characterized as both a civil fault and a breach of a public law obligation. These two legal regimes differ in nature, and the remedies associated with them are grounded in distinct conceptions of justice. The civil law regime is based on corrective justice, and its aim is to place the aggrieved party in the position it would have been in but for the fault committed. The public law regime is concerned instead with the long-term relationship between the Crown and Indigenous

communities, and its aim is to restore the honour of the Crown and thereby foster reconciliation; this is reconciliatory justice.

In the case of the civil law regime and the breach of good faith, once a failure to meet the requirements of good faith has been established, the plaintiff must prove the extent of the injury on the basis of the principle of *restitutio in integrum*, or full restitution. The damages awarded must not exceed the amount necessary to fully compensate for the injury suffered and place the plaintiff in the position it would have been in but for the breach of good faith. In this case, the Court is unable to carry out this assessment, as it has neither sufficient evidence nor an adequate factual foundation to perform this task properly.

A remedy meant to address the breach of an obligation flowing from the honour of the Crown rests on a basis other than corrective justice. Reconciliatory justice is not intended only to compensate the Indigenous claimant for harm suffered as a result of past wrongs; it serves above all to restore and improve the relationship between the Crown and Indigenous peoples. The aim is to impose a measure that places the parties back on the path to reconciliation. In this exercise, it is important to be sensitive to Indigenous perspectives and to be creative within a principled legal framework. A breach of the obligations flowing from the honour of the Crown makes available the full range of remedies, including damages and other coercive relief. The remedy relating to the honour of the Crown will vary with the circumstances of each case; no type of remedy takes precedence over the others.

In this case, the relationship between the parties was undermined by Quebec's intransigent attitude at the stage of renewing the tripartite agreements. That attitude benefited it and harmed Pekuakamiulnuatsh Takuhikan, not only in financial terms but also from the standpoint of the quality of policing and its dignity, as its freedom of choice was not respected. By imposing a difficult choice on Pekuakamiulnuatsh Takuhikan — either continue to impoverish itself to maintain the SPM, or abolish the SPM — Quebec did not deal with it on an equal footing and did not act in a spirit of cooperation and respect. This is also part of the damage caused to the relationship, which must now be repaired. In the circumstances, the Court of Appeal could conclude that repairing this damage requires an award of damages. The appropriate quantum of damages must be determined through an analysis focused on reconciliatory justice to ensure that the order made will have the effect of restoring the honour of the Crown. The correct amount to be awarded for a breach of an obligation flowing from the honour of the Crown is a highly contextual issue. In this case, the amount determined by the Court of Appeal should be upheld given the particular circumstances of the case, and having regard to the purpose of the damages, which serve not only to compensate for past injury but also to restore the relationship for the future.

Per **Côté** J. (dissenting): The appeal should be allowed and the trial judgment should be restored. The principle of good faith and the principle of the honour of the Crown do not allow a court to disregard or ignore certain express clauses of a contract and to impose obligations that are inconsistent with their unambiguous terms.

This case involves a contractual claim for damages in which Pekuakamiulnuatsh Takuhikan did not apply to have the agreements annulled or to have certain clauses in the agreements declared abusive. The agreements limit in express terms the governments' contribution to a maximum amount determined each year, such that Quebec undertook to contribute financially to the establishment and maintenance of the SPM but did not undertake to pay all of the costs incurred, or to fund services equal to those provided in communities in the region. Furthermore, pursuant to the agreements, Pekuakamiulnuatsh Takuhikan is responsible for deficits incurred in excess of the financial contribution that the governments wish to provide and the governments are not responsible for undertakings given by Pekuakamiulnuatsh Takuhikan. These clauses circumscribe and limit the scope of Quebec's undertaking.

There is agreement with the majority that the principle of the honour of the Crown is implicitly incorporated into how the contractual undertakings agreed to by the parties must be fulfilled. The tripartite agreements, which provide for the financial support of Indigenous police services by the governments, are not purely commercial contracts. It follows that the principle of the honour of the Crown cannot be ignored in the assessment of Quebec's conduct in the course of these agreements. Furthermore, Quebec's objective in enacting certain sections of the *Police Act* is based on the reconciliation of pre-existing Indigenous societies with the assertion of Crown sovereignty. Pursuant to art. 1434 *C.C.Q.*, the public law obligations derived from the tripartite agreements in conformity with law are added to the express stipulations of those agreements. The honour of the Crown and the obligations flowing therefrom are

therefore implicitly incorporated into the tripartite agreements by operation of art. 1434 *C.C.Q*. However, that provision does not permit the introduction of an implied obligation that would be inconsistent with the terms of the contract. Obligations that may flow from the principle of the honour of the Crown also cannot be excluded by the entire agreement clause stipulated in the agreements.

There is disagreement with the majority, however, concerning the scope of the contractual undertakings agreed to by Pekuakamiulnuatsh Takuhikan and Quebec. First, the government parties did not undertake to pay all of the costs related to the creation and maintenance of a police force that could ensure the same level of service as that found in communities in the region. Such an obligation appears nowhere in the language of the agreements. Quebec's undertaking flows strictly from the tripartite agreements given that the parties expressed their intent to be bound solely by the express terms of the tripartite agreements by stipulating an entire agreement clause to exclude any content external to the contract. This entire agreement clause excludes the application of arts. 1425 and 1434 *C.C.Q*.

Second, Quebec's undertaking cannot be defined in light of the objectives set out in the *First Nations Policing Policy* (1996) ("*Federal Policy*") and the First Nations Policing Program ("FNPP"). The *Federal Policy* and the FNPP could not bind Quebec for three reasons. First, Quebec did not undertake to implement the *Federal Policy*. Second, the *Federal Policy* does not establish binding rules and is therefore not

subject to judicial sanction. Third, nowhere in the *Federal Policy* is it stated that the governments will fund all of the costs of the police services.

Lastly, the principle of the honour of the Crown cannot serve as a basis for rewriting the terms of the tripartite agreements to introduce into them an obligation for Quebec to pay all of the costs related to the creation and maintenance of the SPM. There is therefore disagreement with the majority regarding their conclusions on the alleged breaches of contractual good faith and of the principle of the honour of the Crown. The majority's analysis expands the purpose of Quebec's undertaking to include the obligation to provide services adapted to the community comparable to those of communities in the region even though this objective is nowhere to be found in the agreements. This is tantamount to rewriting the terms of these agreements, which the principle of the honour of the Crown cannot be used to do. Such an approach is also contrary to the implied obligations regime in Quebec civil law. An implied obligation can only fill a gap in the terms of the contract. Article 1434 *C.C.Q.* cannot be used to frustrate other provisions of the agreement.

With respect to good faith, Quebec fulfilled all of its undertakings and did not abuse any right provided for in the contract, including regarding the renewal of the tripartite agreements. It was not unreasonable for Quebec to rely on the words of the agreements concerning the responsibility for the accumulated deficits. There is no evidence of any right provided for in the agreements that Quebec would have abused. Regarding the principle of the honour of the Crown, its application to how the

contractual undertakings must be fulfilled leads to the conclusion that Quebec acted honourably. The government parties proceeded to renew the agreements with the resources available and further to the appropriations given by Parliament and the Assemblée nationale, as contemplated in the agreements.

The evidence shows that, throughout their contractual relationship, Quebec listened attentively to its counterparty's grievances and was flexible in seeking solutions to the problem of the underfunding of its police force. Quebec provided additional financial support through a variety of measures, particularly to maintain the SPM and to contribute to funding the construction of the community's police station. Quebec went beyond what was required by the terms of the agreements by providing these additional amounts to financially support the SPM. This additional financial assistance must be taken into account in the assessment of Quebec's conduct with respect to the renewal of the tripartite agreements and with respect to the injury that may have resulted from it. Moreover, Pekuakamiulnuatsh Takuhikan had financial autonomy during the renewal of the agreements. Its contractual autonomy is particularly reflected in the free and informed choice it made to offer a level of service above the one provided for in the tripartite agreements. Pekuakamiulnuatsh Takuhikan is challenging Quebec's public policy decisions concerning the giving of financial support to Indigenous police forces. However, the role of the courts is not to interfere in this way in the budget decisions of government parties, which are reflected in the tripartite agreements at issue. Concluding otherwise has the effect of sanctioning a discretionary policy decision concerning the allocation of budgetary resources of the

State, which is something the Court cannot do without brushing aside the separation of powers doctrine.

With respect to the remedy, it is not necessary to create a remedial scheme based on reconciliatory justice. The rules of corrective justice under the civil liability regime can be adapted to consider the Indigenous perspective and the imperative of reconciliation. While the exercise of quantifying damages may pose additional difficulties for the courts when it comes to remedying a breach of the principle of the honour of the Crown, they are accustomed to using their discretion in determining an indemnity that is fair and reasonable. When faced with a largely unforeseeable and unquantifiable injury resulting from dishonourable conduct by the Crown, the court may use its discretion to establish a quantum that will take into account restoring the honour of the Crown and be somewhat creative in exercising its discretion. This approach avoids the trap posed by the highly discretionary nature of the remedy anchored in reconciliatory justice in a contractual context. Accepting such a remedial scheme could discourage governments from signing these kinds of agreements with Indigenous entities.

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By Kasirer J.

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APPEAL from a judgment of the Quebec Court of Appeal (Bich, Bouchard and Ruel JJ.A.), 2022 QCCA 1699, [2022] AZ-51901157, [2022] Q.J. No. 13803 (Lexis), 2022 CarswellQue 21485 (WL), setting aside a decision of Dufresne J., 2019 QCCS 5699, [2019] AZ-51660818, [2019] J.Q. nº 11652 (Lexis), 2019 CarswellQue 12186 (WL). Appeal dismissed, Côté J. dissenting.

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Julian N. Falconer, *Asha James*, *Jeremy Greenberg* and *Shelby Percival*, for the intervener the Indigenous Police Chiefs of Ontario.

Naiomi Metallic and *Logan Stack*, for the intervener the First Nations Child & Family Caring Society of Canada.

Claire Truesdale and *Mary (Molly) Churchill*, for the intervener the Okanagan Indian Band.

Julie McGregor, for the intervener the Assembly of First Nations.

English version of the judgment of Wagner C.J. and Karakatsanis, Rowe, Martin, Kasirer, Jamal, O'Bonsawin and Moreau JJ. delivered by

KASIRER J. —

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I. Overview

[1] Do obligations undertaken by contract between the Government of Quebec and an Indigenous group engage the principles of good faith and of the honour of the Crown? If it is found that, in the performance of the contract, Quebec is liable on either of these distinct grounds, what remedy should be granted to address the breach? Where damages are claimed, as in this case, the remedy under the private law of obligations will in principle be limited to the amount required to compensate for the injury caused to the creditor by the failure to meet the requirements of good faith. But where there has been a breach of the obligation to act in a manner consistent with the honour of the

Crown, can the public law remedy granted to the Indigenous group be distinguished from the private law remedy with a view to restoring the relationship between the contracting parties, both for the past and for the future, and thus placing them back on the constitutional path to reconciliation? These are the main questions raised by this appeal.

[2] The contracts in issue, which concern the police services provided to the Indigenous community of Mashteuiatsh in Quebec, are "tripartite" agreements: they were entered into by the Government of Canada, the Government of Quebec and Pekuakamiulnuatsh Takuhikan, an Indigenous band council established under the *Indian Act*, R.S.C. 1985, c. I-5, which is the respondent in this appeal. These agreements have three main objectives: "to establish and maintain" an Indigenous police force that provides services adapted to the community; to set the maximum financial contribution by Canada and Quebec to the operation of the force; and to entrust the management of the force, which is accompanied by financial responsibility, to the respondent. Given the short duration of each of the agreements, the contracting parties have included an extension clause permitting their renewal so as to ensure the maintenance of the police force over time. In addition, the agreements state that they do not serve to recognize Aboriginal or treaty rights and that they must not be interpreted to be agreements or treaties within the meaning of s. 35 of the *Constitution Act, 1982*.

[3] Between 2013 and 2017 — the period covered by Pekuakamiulnuatsh Takuhikan's amended originating application — the government funding provided for in the agreements proved to be inadequate on its own to ensure the maintenance of the Indigenous police force in Mashteuiatsh. At the end of each fiscal year, the police force incurred an operating deficit that did not result from any mismanagement or extraordinary expenses. The respondent therefore brought legal proceedings claiming reimbursement of the accumulated deficits from the governments of Canada and Quebec [TRANSLATION] "[b]ecause of [their] undertaking to pay 100%" of the police force's costs (amended originating application, at para. 84, reproduced in A.R., vol. I, at p. 148).

[4] The trial judge dismissed Pekuakamiulnuatsh Takuhikan's application, holding that the contract is the law of the parties and that the honour of the Crown did not apply. The Court of Appeal set aside that judgment and ordered Canada and Quebec to pay their share of the total amount of the accumulated deficits. In the Court of Appeal's view, the governments' refusal to fund the Indigenous police force in Mashteuiatsh justified finding both a violation of the principle of good faith and a failure to uphold the honour of the Crown.

[5] Sole appellant before this Court, Quebec refuses to cover any of the deficit. In Quebec's opinion, contrary to what the Court of Appeal stated, the honour of the Crown does not apply to the agreements. They do not contain "solemn promises" and do not deal with the reconciliation of distinctly Indigenous rights or interests with the

Crown's assertion of sovereignty. As for the agreements themselves, Quebec emphasizes that they set "maximum amounts" for the government contributions and that there is a contractual clause placing responsibility for deficits squarely on the shoulders of Pekuakamiulnuatsh Takuhikan. Citing the binding force of contracts, Quebec denies that it has an obligation to make up the difference, given that the respondent has not proved a breach of the contractual terms or of the requirements of good faith. Moreover, Quebec states that it has already provided additional assistance to the respondent through contract addenda and other means, which would reduce the quantum of the damages claimed.

[6] The debate therefore centres around the question of whether Quebec is responsible for the deficits resulting from the operation of the Mashteuiatsh police force in light of the contractual undertakings set out in the tripartite agreements. Pekuakamiulnuatsh Takuhikan rests its claim on two main grounds: a contractual basis under private law, grounded in the provisions of the *Civil Code of Québec* ("*C.C.Q.*"), and a public law basis anchored in the principles of Aboriginal law. According to the respondent, Quebec refused to genuinely negotiate the funding clauses of the agreements, which was a breach of both the requirements of good faith and the obligations — heavier still for the State — flowing from the honour of the Crown. The respondent is not seeking the annulment of the agreements or the recognition of any constitutional right. Rather, it demands reimbursement of the deficits accumulated during the period at issue. Canada has complied with the Court of Appeal's order to pay 52 percent of this amount, its share of the funding under the agreements. As for

Quebec, it asks the Court to set aside the Court of Appeal's judgment ordering that it pay 48 percent of the deficits, to restore the trial judgment and to dismiss Pekuakamiulnuatsh Takuhikan's application.

[7] This is the setting in which the Court must determine the applicable analytical framework to address allegations that the Crown has breached its undertakings under agreements relating to the establishment and maintenance of an Indigenous police force. The parties are asking the Court to clarify how the general law of obligations, set out mainly in the *Civil Code*, applies to contracts between an Indigenous community and the State. This appeal also calls upon us to develop, for the first time, a methodology for determining whether contractual undertakings given by a government to an Indigenous group that are not constitutional in nature may be subject to the principles of Aboriginal law, and more specifically to the honour of the Crown.

[8] Although the two main grounds relied upon — good faith and the honour of the Crown — are both principles of public order that may not be derogated from by contract, they cannot be conflated because of the distinct bases, in private law and public law, respectively, on which they rest.

[9] The first element of the framework proposed here is that the rules of the general law of obligations in Book Five of the *Civil Code* apply to the State, including when it enters into any contract with an Indigenous group, subject to any other rules of law applicable to it (art. 1376 *C.C.Q.*). The tripartite agreements are therefore subject to the principle, set forth in art. 1375 *C.C.Q.*, that parties must conduct themselves in

good faith in the performance of a contract. Good faith requires that every contracting party consider the other party's interests in the performance of the contract, but not that one party subordinate its own interests to those of the other in so doing (*Ponce v. Société d'investissements Rhéaume ltée*, 2023 SCC 25, at para. 76; *Churchill Falls (Labrador) Corp. v. Hydro-Québec*, 2018 SCC 46, [2018] 3 S.C.R. 101, at paras. 112-13, per Gascon J., and at para. 177, per Rowe J., dissenting, but not on this point).

[10] In my view, the proper analysis leads to the conclusion that Quebec's refusal to renegotiate its financial contribution when the agreements were renewed — even though it knew that the police force was underfunded and that a return to the services of the Sûreté du Québec ("SQ") would involve risks for the community — was not in keeping with the requirements of good faith. Quebec's intransigent behaviour despite the precarious situation of its counterparty constituted an abuse of right having regard to its right to seek the renewal of the agreement, notably through the extension clause. In other words, Quebec's conduct did not constitute a reasonable exercise of its right "as expressed by reference to the conduct of a prudent and diligent individual" (*Houle v. Canadian National Bank*, [1990] 3 S.C.R. 122, at p. 164; see arts. 6 and 7 *C.C.Q.*). Quebec's actions therefore give rise to civil liability under the ordinary rules of contract set out in Book Five of the *Civil Code*.

[11] A second element of the relevant framework is that the honour of the Crown is a public law principle originating in the special relationship with Indigenous

peoples and that it applies to the performance of Quebec's contractual undertakings in this case. While art. 1376 *C.C.Q.* provides that the private law of obligations applies to the State, it also specifies that this is "subject to any other rules of law which may be applicable to [it]". This qualification set out in art. 1376 *C.C.Q.* refers implicitly to the idea that "public common law" rules may form a distinct liability regime for the State that supplements the one in Book Five of the *Civil Code* (*Prud'homme v. Prud'homme*, 2002 SCC 85, [2002] 4 S.C.R. 663, at para. 46; see also *Sharp v. Autorité des marchés financiers*, 2023 SCC 29, at para. 58, per Wagner C.J. and Jamal J., and at para. 150, per Côté J., dissenting, but not on this point). These public common law rules can, of course, narrow the scope of the State's liability, as immunities do, but they can also alter it in other ways, and even intensify it.

[12] The principle of the honour of the Crown, which imposes a high standard of conduct on the State, is one such public law rule that may, in some contexts, broaden the scope of state liability. Unlike good faith, the honour of the Crown does not apply to the performance of every contract and is not an implied contractual obligation. As a common law rule originating in the *sui generis* relationship between the Crown and Indigenous peoples, the principle of the honour of the Crown is itself anchored to the goal of reconciliation. Indeed, it applies only in the performance of contracts between the State and Indigenous groups that are intended to foster the modern-day reconciliation of pre-existing Indigenous societies with the Crown's historic assertion of sovereignty (see *R. v. Desautel*, 2021 SCC 17, [2021] 1 S.C.R. 533, at para. 22). Once its application is established, the binding nature of the honour of the Crown is, it

seems to me, certain: as Binnie J. wrote in the context of a treaty, "the Crown cannot contract out of its duty of honourable dealing with Aboriginal people" (*Beckman v. Little Salmon/Carmacks First Nation*, 2010 SCC 53, [2010] 3 S.C.R. 103, at para. 61). The task before us is therefore to determine the legal test that can be used in this case to identify contractual undertakings that "attract" the honour of the Crown, the principle that will dictate "how [they] must be fulfilled" (*Manitoba Metis Federation Inc. v. Canada (Attorney General)*, 2013 SCC 14, [2013] 1 S.C.R. 623 ("*MMF*"), at para. 73 (emphasis deleted)).

[13] With regard to this test, the jurisprudence supports the proposition that a contractual obligation that is not constitutional in nature may engage the honour of the Crown when it is related to Indigenous difference and it concerns a credible claim by the Indigenous creditor to a right of self-government. This Court has never yet settled the question of whether there is a right of self-government protected by s. 35(1) of the *Constitution Act, 1982*. However, as the case law on the duty to consult shows, the honour of the Crown may give rise to duties for the State, even where there is no established right protected by s. 35(1) (see *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 S.C.R. 511, at para. 35). 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.

[14] In the circumstances of this case, Quebec and Canada, as contracting parties, have an obligation to act with honour and integrity toward Pekuakamiulnuatsh Takuhikan in the performance of the tripartite agreements. These agreements are intended to advance reconciliation through the establishment and maintenance of an Indigenous police force that offers culturally appropriate services whose quality is in line with the applicable standard for such services, and for which administrative responsibility is entrusted to an Indigenous entity. The agreements relate to a credible, albeit not yet established, claim to the right of self-government in matters of policing. As noted by the Minister who introduced the bill that authorized entering into such agreements in 1995 in the National Assembly, the establishment and maintenance of police forces managed by Indigenous peoples are part of a process [TRANSLATION] "assuring them the exercise of the right of self-government in Quebec" (*Journal des débats*, vol. 34, No. 19, 1st Sess., 35th Leg., January 27, 1995, at p. 1252 (S. Ménard)).

[15] Because the tripartite agreements provided for the renegotiation of their funding clauses, the Crown was required to conduct itself honourably during the renewal negotiations. Quebec's obstinate refusal to genuinely renegotiate the contract's funding terms is not only a breach of the requirements of good faith but also a breach of the obligation to act in a manner consistent with the honour of the Crown, a principle of public law based on a higher standard than the one relating to the obligation of good faith under private law. It bears repeating that these are two distinct bases. As I will endeavour to show, the breach of an obligation flowing from the honour of the Crown

alone, independently of the breach of the requirements of good faith, justifies holding Quebec liable.

[16] As to the manner in which these breaches should be redressed, the appropriate remedy associated with the obligation of good faith under the civil law must be distinguished from that associated with the honour of the Crown under public law. Like the distinct bases of liability to which they refer, these private law and public law remedies are grounded in distinct conceptions of justice — *corrective justice* for the breach of the obligation of good faith under general contract law and *justice linked to reconciliation* for the failure to uphold the honour of the Crown, a public common law principle whose foundation lies outside Book Five of the *Civil Code*.

[17] Once a breach of the requirements of good faith has been established, the plaintiff still bears the burden of proving the extent of the injury caused to it by the defendant's wrongful conduct in accordance with the basic rules of the law of civil liability grounded in the principle of *restitutio in integrum*, or full restitution. Here, the damages owed were not assessed at trial, because the judge did not find any fault on the part of the governments of Canada and Quebec. In my view, a precise calculation of damages, in conformity with the principles of corrective justice, must be undertaken. The damages awarded must not exceed the amount necessary to fully compensate for the injury suffered and place Pekuakamiulnuatsh Takuhikan in the position it would have been in but for the breach of good faith by the governments of Canada and Quebec in the renegotiation of the agreements (see arts. 1611 et seq. *C.C.Q.*). However, in this

case we have neither sufficient evidence nor an adequate factual foundation to perform this task properly, and particularly to determine the relevance of the contract addenda and other additional contributions that Quebec contends are relevant to the assessment of damages. Had there been no claim based on the principle of the honour of the Crown, I would therefore have proposed remanding the case to the Superior Court for an assessment of compensatory damages, pursuant to s. 46.1 of the *Supreme Court Act*, R.S.C. 1985, c. S-26.

[18] However, given the distinct public law basis for Quebec's liability, a remedy meant to address the breach of the Crown's obligation to carry out the agreements in an honourable manner rests on a basis other than corrective justice. Rooted in what might be described as reconciliatory justice, this remedy is not intended to compensate the Indigenous claimant only for harm suffered as a result of past wrongs. It serves here above all to restore and improve the relationship between the Crown and Indigenous peoples in order to support reconciliation, a process that not only takes the past into account but also "continues beyond formal claims resolution" (*Haida Nation*, at para. 32). In the determination of an appropriate remedy to preserve the honour of the Crown, Jamal J., writing for the Court, recently noted the importance of being "creative" within a principled legal framework (*Ontario (Attorney General) v. Restoule*, 2024 SCC 27, at para. 277, quoting P. W. Hogg and L. Dougan, "The Honour of the Crown: Reshaping Canada's Constitutional Law" (2016), 72 *S.C.L.R.* (2d) 291, at p. 292). In this case, I am of the view that an award of damages equal to the deficits indicated by Pekuakamiulnuatsh Takuhikan is an appropriate measure that will enable

the contracting parties to undertake future negotiations with equanimity. It also seems to me that remanding the case to the Superior Court would be contrary to considerations of proportionality, which warrant special attention where an obligation flowing from the honour of the Crown has been breached.

[19] I would therefore dismiss the appeal, with costs. I would also dismiss, but without costs, the respondent's motion to adduce new evidence, which is consequently moot.

II. Background

A. *Parties to the Tripartite Agreements*

[20] The Pekuakamiulnuatsh First Nation is based in Mashteuiatsh on the western shore of Lac Saint-Jean, near Roberval. Depending on the season, between 2,000 and 4,000 people reside in Mashteuiatsh, on approximately 16 square kilometres of land. This First Nation is represented by Pekuakamiulnuatsh Takuhikan, a band council within the meaning of the *Indian Act*. It is Pekuakamiulnuatsh Takuhikan that has entered into tripartite agreements with Canada and Quebec. These agreements are for the establishment and maintenance of an Indigenous police force providing culturally appropriate services to the community, Sécurité publique de Mashteuiatsh ("SPM").

[21] Pekuakamiulnuatsh Takuhikan is the respondent in these proceedings. Although both Canada and Quebec were defendants at trial and respondents on appeal, only the Attorney General of Quebec is appealing from the Court of Appeal's decision. Having paid the amount awarded against it by that court, Canada is taking part in the appeal only as an intervener.

B. *Policing in Indigenous Communities*

[22] Historically, policing in Indigenous communities in Canada was characterized first and foremost by the mistrust that these communities felt toward non-Indigenous police forces. As stated in the *Final report* of the Public Inquiry Commission on relations between Indigenous Peoples and certain public services in Québec chaired by the Hon. Jacques Viens (2019) ("Viens Commission"), that mistrust reflects the intergenerational trauma resulting from the implementation of the former policy of assimilation:

> . . . during the period when the newly formed dominion of Canada was shaping its identity, the Indigenous peoples' ways of life were being radically transformed. For example, under a wide range of new legislation, First Nations members were confined to reserves, limited in exercising their hunting and fishing rights, forced to renounce their language and spirituality, and cohabit with private companies (forestry, mining, etc.) that gradually made inroads into their territory. In that context, police officers, who had the authority to apply the legislation, quickly became symbols of repression. The rest of the story, including residential schools and police intervention making it possible to forcibly remove children from their families, crystallized that perception and fuelled a profound sense of mistrust. [p. 257]

[23] Quoting and adopting one participant's comments, the Viens Commission reported that, over the years, "that mistrust and repression generated various crisis situations that further amplified the tensions between Indigenous peoples and the general population, including police forces" (pp. 257-58). Those crisis situations included, in particular, the "Salmon war" episode in the late 1970s and early 1980s, the Oka crisis a decade later and the events in Val-d'Or, in which the mistreatment of Indigenous women by officers of the SQ came to light in 2015 (pp. 11 and 258).

[24] Another important feature of policing in these communities is the underfunding of Indigenous police forces, "a major, long-documented problem" (Viens Commission, at p. 267). Underfunding compromises the quality of policing as it affects the number of police officers, their salaries, their recruitment, the equipment available to them (which may be "obsolete or simply inadequate" (p. 271)), police facilities and the services provided. In some cases, underfunding can lead to a situation that "endangers personal safety" (p. 271). This observation is made even more forcefully in a 2010 report, quoted by the Court of Appeal, which stated that [TRANSLATION] "the safety of First Nations is compromised by a lack of resources in all respects: human, financial, material" (2022 QCCA 1699, at para. 115, quoting N. Bergeron, *L'autodétermination des services de police des Premières Nations au Québec: Rapport préliminaire* (2010), at pp. 58-59).

C. *Framework for Entering Into and Implementing Tripartite Agreements*

(1) Federal Framework

[25] In 1986, Canada established the Task Force on Policing on Reserves. In its final report published in 1990, that task force explained that Indigenous communities in Canada did not have access to the same level and quality of police services as other communities (*Indian Policing Policy Review: Task Force Report*). It called upon the federal and provincial governments to work together more cooperatively to provide quality police services to Indigenous populations and further advance Indigenous self-government in matters of public safety. It urged Canada to develop a cohesive policy based, among other things, on the principle that Indigenous communities "are entitled to the same level and quality of policing services as other similarly situated communities in the region" (p. 22).

[26] In 1991, in the wake of that report, Canada adopted the *First Nations Policing Policy* ("*Policy*") to "provide First Nations across Canada with access to police services that are professional, effective, culturally appropriate, and accountable to the communities they serve" (p. 1). The *Policy* states that, to this end, "the federal government, provincial and territorial governments and First Nations work together to negotiate tripartite agreements for police services that meet the particular needs of each community" (*ibid.*). The *Policy* clearly specifies that it is "a practical means to support the federal policy on the implementation of the inherent right and the negotiation of self-government" (p. 2; see also pp. 1 and 3). It also states that the policing services so provided should be "equal in quality and level of service to policing services found in communities with similar conditions in the region" (p. 4).

[27] With regard to funding, the *Policy* states that "[t]he federal and provincial governments, because they share jurisdiction, should share . . . the government contribution toward the cost of First Nations policing services" (pp. 5-6). The federal government pays 52 percent of the contribution, and the provincial or territorial government pays 48 percent (p. 6). In addition, it says "First Nations communities will, where possible, be encouraged to help pay for the cost of maintaining their police service, particularly for enhanced services" (*ibid.*). Under the *Policy*, these costs are calculated on the basis of costs "for policing arrangements in other communities with similar conditions in the region" (p. 7).

[28] The *Policy* is implemented through the First Nations Policing Program ("FNPP"), which is itself governed by the *Terms and Conditions for Contribution Funding Under the First Nations Policing Program*, December 9, 2015 (online) ("*Terms and Conditions*").

(2) Quebec Framework

[29] After the Government of Canada adopted the *Policy*, the Government of Quebec tabled Bill 57 in order to include provisions in the *Police Act*, R.S.Q., c. P-13, authorizing it to enter into agreements with Indigenous communities to establish or maintain police forces (see *An Act to amend the Police Act and the Act respecting police organization as regards Native police*, S.Q. 1995, c. 12).

[30] The *Police Act* was thus amended to add s. 79.0.1. That section provided that "[t]he Government may enter into an agreement with a Native community represented by its council to establish or maintain a police force in a territory determined under the agreement", and specified that "[a] police force thus established or maintained shall, for the duration of the agreement, be a police force for the purposes of this Act."

[31] In 2000, the provisions on Indigenous police forces were incorporated, with minor amendments, into the *Police Act*, CQLR, c. P-13.1 ("*Act*"). Section 79.0.1 of the former *Police Act* became s. 90 of the *Act*.

[32] The *Act* provides that the SQ is required to provide level 6 police services, the highest level, throughout Quebec (ss. 50 and 70, and Sch. G). In particular, the SQ must provide all levels of police services that are not or cannot be provided by municipal police forces, in collaboration with those forces (ss. 50, 70 and 79).

[33] With respect to Indigenous police forces, at the relevant time, s. 90 of the *Act* provided that "[t]he Government may enter into an agreement with one or more Native communities, each represented by its band council, to establish or maintain a police force in a territory determined under the agreement." In this regard, it should be noted that the use of the permissive word "may" clearly indicates that s. 90 authorized the State to enter into such agreements but did not impose an obligation on it to do so. That section, like the one it succeeded, specified that a police force "thus established

or maintained shall, for the duration of the agreement, be a police force for the purposes of this Act".

[34] At the relevant time, the *Act* gave each Indigenous police force the mission of "maintaining peace, order and public safety in the territory for which it is established, preventing and repressing crime and offences under the laws and regulations applicable in that territory and seeking out offenders" (s. 93). The congruence between that mission and the one assigned to all police forces by s. 48 of the *Act* suggests that Indigenous police forces established under the *Act* must provide services that are similar in quality to those provided to other communities, even if they are not required to provide all the same services (s. 72 para. 3).

[35] Indigenous communities that do not enter into an agreement with Quebec or that decide to abolish their police force are served by the SQ, at no cost, pursuant to its mandate as a national police force.

(3) Implementation of the Agreements

[36] In 1996, a first tripartite agreement for the establishment and maintenance of the SPM was concluded by Canada, Quebec and Pekuakamiulnuatsh Takuhikan. Thereafter, successive agreements were entered into, without interruption, to ensure the maintenance of the SPM. During the period at issue (2013 to 2017), the agreements were annual until 2015-2016, after which an addendum was signed extending the last agreement by two years.

[37] Under the agreements, which are all similar and whose content will be examined in detail below, Canada and Quebec make a financial contribution that is capped at a "maximum amount". The respondent is responsible for the administrative management of the SPM and for any deficits incurred. From 2013 to 2017, it had to assume deficits totalling $1,599,469.95. More specifically, the deficits were $214,288.08 in 2013-2014, $1,225,336.87 in 2014-2015, $137,629 in 2015-2016 and $22,216 in 2016-2017.

[38] On July 17, 2014, an arbitration award was issued against Pekuakamiulnuatsh Takuhikan (A.R., vol. III, at p. 121). That award, which granted the SPM's police officers a retroactive pay increase of $853,000, is the reason for the especially large deficit incurred during the 2014-2015 fiscal year. Quebec has confirmed that, [TRANSLATION] "for the period we are concerned with", that arbitration award "had caused most, the largest part of the deficit" (transcript, day 2, at p. 57).

[39] From time to time, Canada and Quebec, separately or jointly, provided additional assistance to the respondent. That assistance is largely documented in Exhibit DPGQ-21, a table that Quebec filed with the court four days before the hearing (A.R., vol. XIV, at p. 132).

[40] For example, in 2006, Quebec undertook to pay a maximum of $743,208 to help Pekuakamiulnuatsh Takuhikan relocate its police station. That amount represented 48 percent of the costs, with the remainder being funded by the respondent. During the period at issue, Quebec also undertook to pay it $125,000 in connection

with its participation in the Prévention jeunesse funding program, in addition to authorizing the secondment of SQ managerial officers to the SPM. Further, in 2014, Canada and Quebec agreed to give the respondent, on an exceptional basis, an additional maximum of $284,514, of which they were to pay 52 percent and 48 percent, respectively. Finally, in 2016, the respondent entered into two bilateral agreements with Canada and Quebec under which they undertook to pay it an additional maximum of $400,000 each to ensure the maintenance of the SPM.

[41] More recently, in the spring of 2018, the parties conducted negotiations that led to a funding offer that [TRANSLATION] "represents a significant increase of just over 35% from the funding paid in 2017-2018 under [the former] tripartite agreement" (R.R., at p. 343).

D. *2004 Agreement in Principle to Enter Into a Treaty*

[42] In 2004, in pursuit of achieving self-government, Pekuakamiulnuatsh Takuhikan reached an agreement in principle with Canada and Quebec (reproduced in R.R., at p. 72)[1] to enter into a treaty within the meaning of ss. 25 and 35 of the *Constitution Act, 1982*. The agreement in principle states, in particular, that self-government "is included among the aboriginal rights of the First Nations" (s. 3.3.3). It also provides that "[t]he legislative assemblies of the First Nations may enact laws to constitute, maintain and organize police corps" (s. 9.4.1). To date, the

1 English version available online: https://publications.gc.ca/collections/collection_2016/aanc-inac/R32-279-2004-eng.pdf.

respondent has not entered into any treaty with Canada and Quebec under this agreement in principle. The parties are thus [TRANSLATION] "in [a] specific context of transitioning to the establishment of a new relationship" (*Entente transitoire pour le maintien de la prestation des services policiers dans la communauté de Mashteuiatsh* (2016), preamble, reproduced in A.R., vol. XI, at p. 23).

E. *Amended Originating Application and Replies*

[43] In its amended originating application ("AOA"), Pekuakamiulnuatsh Takuhikan claims reimbursement of the deficits accumulated by the SPM for the period of April 1, 2013, to December 1, 2017. It says that the undertaking by Canada and Quebec to "pay 100%" of the funding for the SPM justifies requiring the reimbursement of the full amount of the deficits incurred during that period, $1,599,469.95 (AOA, at paras. 83-84).

[44] In support of its application, Pekuakamiulnuatsh Takuhikan alleges that Canada and Quebec [TRANSLATION] "breached their obligations to negotiate in good faith, act with honour and discharge their fiduciary duties to the . . . First Nation for the maintenance and funding of police services for the Mashteuiatsh territory" (AOA, at para. 11). In particular, it argues that the wording and content of the agreements [TRANSLATION] "were imposed" on it in a context where it had no "real bargaining power" and no real alternative (para. 33). Furthermore, Canada and Quebec [TRANSLATION] "renewed and concluded the Tripartite Agreements with impunity, knowing that the budgets and funding provided for in them [did] not correspond to the

actual costs of police services in Mashteuiatsh, without taking any action whatsoever with respect to these budget variances" (para. 57).

[45] In defence, Canada and Quebec deny any breach of their obligations and deny any liability for the accumulated deficits.

[46] Echoing Canada's arguments, Quebec acknowledges that the province knew that the budgets and funding provided for in the tripartite agreements did not correspond to the actual costs of police services in Mashteuiatsh. However, Quebec denies that it imposed the agreements on Pekuakamiulnuatsh Takuhikan, that it set the level of its financial contribution unilaterally and arbitrarily or that it undertook to fully fund the SPM together with Canada. Quebec also denies any bad faith. In this regard, it notes that its representatives [TRANSLATION] "listened to the [respondent's] grievances, discussed matters honestly and acted to the extent of their authority", and also agreed to a number of the respondent's requests, paying it additional amounts on several occasions (A.R., vol. I, at p. 176, para. 81). Quebec therefore states that it fulfilled its contractual obligations. It submits that Pekuakamiulnuatsh Takuhikan made the decision to renew the agreements *in extremis* year after year and cannot accuse Quebec of placing it in a precarious position with respect to concluding them. Quebec also disputes the amount claimed as an accumulated deficit, saying that it is [TRANSLATION] "not reconcilable" with the respondent's financial statements (para. 101). With regard to the public law remedies, Quebec argues that it did not owe any fiduciary obligation or any obligation flowing from the honour of the Crown to

Pekuakamiulnuatsh Takuhikan. In the alternative, Quebec maintains that it always acted with honour in its dealings with Pekuakamiulnuatsh Takuhikan.

III. Judicial History

A. *Quebec Superior Court, 2019 QCCS 5699 (Dufresne J.)*

[47] Before trial, Bouchard J. of the Superior Court dismissed the exceptions to dismiss raised by Canada and Quebec, explaining that the action raised new questions of law relating to the honour of the Crown that the court could not decide without evidence being presented. The judge also said evidence was required to consider Pekuakamiulnuatsh Takuhikan's argument that it had accepted the tripartite agreements without having any real choice (see 2017 QCCS 4787, at paras. 41 et seq.).

[48] Ruling on the merits, the trial judge (Dufresne J.) dismissed the claim, rejecting the allegations that Canada and Quebec were in breach of good faith, the obligations flowing from the honour of the Crown or any fiduciary obligation.

[49] The trial judge allowed the objection raised by Canada and Quebec to the evidence. He decided that the contested exhibits, which provided general information about the relationship between non-Indigenous police forces and Indigenous communities, were not relevant to the issues (para. 53).

[50] Beginning his analysis with an overview of the general principles of the law of obligations, the trial judge then noted in particular that good faith applies [TRANSLATION] "at every stage in the negotiation, performance and termination of a contract" (para. 55). With regard to the terms of the agreements, the judge found that the entire agreement clause prohibited defining the funded level of service on the basis of the FNPP. He noted that other clauses provided that the financial contributions of Canada and Quebec were "maximum amounts" and that Pekuakamiulnuatsh Takuhikan was responsible for any deficits incurred in the administration of the police force. This led him to reject the allegation that the federal and provincial governments had breached the obligation to [TRANSLATION] "pay 100%" of the SPM's costs (para. 61, quoting AOA, at para. 84).

[51] In the judge's view, Pekuakamiulnuatsh Takuhikan had freely bound itself knowing that the funding offered by the governments of Canada and Quebec was inadequate. He also found that the evidence [TRANSLATION] "does not support the allegations of bad faith", noting that "[r]ather, there was transparency in each communication" (para. 72).

[52] Returning to the public law grounds for the action, the judge began by rejecting the idea that the agreements gave rise to fiduciary obligations, explaining, among other things, that Pekuakamiulnuatsh Takuhikan had not identified any specific collective Indigenous interest in respect of which Canada and Quebec had exercised discretion. He held that the honour of the Crown did not entail any obligation for

Canada and Quebec in this case, as this principle can create obligations only in limited contexts arising from s. 35 of the *Constitution Act, 1982*.

[53] Having rejected good faith, fiduciary obligations and the honour of the Crown as bases for the claim, the judge concluded his reasons by giving [TRANSLATION] "full effect to the tripartite agreements" and dismissing the plaintiff's action (para. 88). Had he held otherwise, he would have subtracted $400,000 from the award against Quebec because of the supplemental assistance in the same amount that Quebec had provided to Pekuakamiulnuatsh Takuhikan in 2016 to ensure the maintenance of the SPM.

B. *Quebec Court of Appeal, 2022 QCCA 1699 (Bich, Bouchard and Ruel JJ.A.)*

[54] The Court of Appeal allowed Pekuakamiulnuatsh Takuhikan's appeal, holding that the judge had erred in his analysis of both the private law and the public law grounds raised in the amended originating application. The Court of Appeal set aside the trial judgment and ordered the governments of Canada and Quebec, respectively, to pay Pekuakamiulnuatsh Takuhikan $832,724.37 and $767,745.58, amounts corresponding to the accumulated deficits, along with interest at the legal rate and the additional indemnity. Bich J.A. and Bouchard J.A. each wrote reasons with which all members of the three-judge panel concurred.

(1) Bouchard J.A., Bich and Ruel JJ.A. Concurring

[55] Bouchard J.A. held that the trial judge had erred in allowing the objection to the evidence on the basis that the contested exhibits were not relevant to the case. Referring in particular to the inadequacy of the funding for Indigenous police forces and the legitimate mistrust felt by Indigenous communities toward non-Indigenous police forces, he noted that the exhibits' [TRANSLATION] "purpose . . . was . . . to provide context for" Pekuakamiulnuatsh Takuhikan's allegation that the governments of Canada and Quebec had breached their constitutional obligations (para. 64). In this sense, the exhibits were relevant to the analysis of liability.

[56] Bouchard J.A. then found that the honour of the Crown was engaged in this case, and accordingly decided that it was unnecessary to determine whether Canada and Quebec also had fiduciary obligations. In his view, the governments — Canada, by adopting its *Policy*, and Quebec, by agreeing to participate in the FNPP — [TRANSLATION] "solemnly undertook to fund [Pekuakamiulnuatsh Takuhikan's] police services at a level comparable to that of 'communities with similar conditions in the region'", a commitment that reflected "the objective of supporting First Nations in acquiring the tools to become self-sufficient and self-governing, one of the purposes of s. 35 of the *Constitution Act, 1982*" (para. 74). The trial judge had therefore erred in confining himself to the text of the agreements to adjudicate the dispute.

[57] Bouchard J.A. considered Pekuakamiulnuatsh Takuhikan's argument that the governments of Canada and Quebec had not acted with honour because they had [TRANSLATION] "maintained and renewed" the agreements on the basis of budgets that

were arbitrary and inadequate (para. 80). Bouchard J.A. concluded that the governments of Canada and Quebec were required to fund the police force [TRANSLATION] "in a manner that would allow for the same quality of service as that provided to non-Indigenous communities" (para. 118). By not doing so, they had created an impossible dilemma for Pekuakamiulnuatsh Takuhikan, namely choosing between the SQ's poorly adapted but free services and the SPM's appropriately adapted but underfunded services of lower quality. Bouchard J.A. characterized that government conduct as dishonourable, finding that the governments had turned [TRANSLATION] "a deaf ear to the grievances" of Pekuakamiulnuatsh Takuhikan (para. 124). He therefore proposed to order Canada and Quebec to pay the amounts corresponding to their share of the deficits claimed.

(2) Bich J.A., Bouchard and Ruel JJ.A. Concurring

[58] Agreeing [TRANSLATION] "unreservedly" with Bouchard J.A.'s reasons (para. 126), Bich J.A. wrote reasons in which she explained that, under the private law of obligations, her colleague's demonstration led to a finding of abuse of contractual rights.

[59] Bich J.A. found that the duties flowing from the honour of the Crown, a constitutional principle, apply to the State under art. 1376 *C.C.Q.* These duties, which have the force of law, form part of the obligational content of the agreements pursuant to art. 1434 *C.C.Q.* She was of the view that [TRANSLATION] "when the state contracts with an Indigenous person or entity, it must, in all aspects, do so in a manner that

respects the honour of the Crown", such that the State is held "to a standard of conduct, within the meaning of arts. 6, 7 and 1375 *C.C.Q.*, that is higher than that of ordinary contracting parties" (para. 130). This constitutional principle, she wrote, [TRANSLATION] "is entrenched in its contractual obligations" (*ibid.*). Contractual conduct that does not comply with this constitutional obligation [TRANSLATION] "therefore opens the door to a finding of civil abuse" (*ibid.*).

[60] The conduct identified by Bouchard J.A. led to such a finding of abuse [TRANSLATION] "by holding [Pekuakamiulnuatsh Takuhikan] captive in a contractual relationship which is financially unsustainable" (para. 131). The governments of Canada and Quebec committed an abuse of right, within the meaning of arts. 6 and 7 *C.C.Q.*, [TRANSLATION] "resulting from the violation of their obligation to act honourably, an obligation that forms part of the contractual agreements at issue" (para. 138). In particular, they engaged in [TRANSLATION] "contractual conduct that is objectively unreasonable" by creating false expectations or being indifferent to their counterparty's interests (para. 139).

[61] Bich J.A. concluded that the deficits were an appropriate reflection of the harm resulting from that abuse. An award of damages corresponding to the deficits incurred by Pekuakamiulnuatsh Takuhikan in the administration of the SPM would be [TRANSLATION] "a fair and reasonable remedy" (para. 140).

IV. Parties' Arguments and Issues on Appeal

[62] The arguments raised by the parties all concern the scope of Quebec's obligations and the manner in which its contractual undertakings were performed.

[63] Quebec submits that the trial judge's interpretation of the tripartite agreements is correct and is entitled to deference on appeal. The undertaking made by the governments of Canada and Quebec was always to fund the SPM in accordance with the terms of the agreements, not to provide [TRANSLATION] "100 percent" of the funding (transcript, day 1, at pp. 20, 23 and 38; see also A.F., at paras. 58 and 98). Pekuakamiulnuatsh Takuhikan takes the view that their undertaking was not limited to paying the amounts specified in the agreements, but was rather [TRANSLATION] "to establish and maintain a professional, effective and culturally appropriate Indigenous police force" (R.F., at para. 43; see also para. 86).

[64] With respect to contractual civil liability, Quebec acknowledges that it was required to perform its undertakings in good faith, as such an obligation attaches to every contract. However, Quebec argues that the trial judge held that it did not breach the duties flowing from this obligation and, here again, there is no reviewable error in that factual determination. In its opinion, the Court of Appeal erred in relying on the federal *Policy*, in not showing deference to the trial judge's conclusion that Quebec acted in good faith and in finding an abuse of right without identifying the right that Quebec had supposedly abused. Pekuakamiulnuatsh Takuhikan, for its part, adopts Bich J.A.'s analysis to the effect that Quebec's conduct, which reflected indifference to the Indigenous community's interests, was wrongful and constituted an abuse of

right. The respondent states that despite the precariousness of the funding — of which the governments of Canada and Quebec were well aware — the renewal process for the tripartite agreements left no room for negotiation. The governments' flat refusal to negotiate presented the respondent with a [TRANSLATION] "false choice": either it agreed to a renewal without any possibility of negotiation, sinking even further into deficit, or it gave up on maintaining the SPM and relied on the SQ's ill-adapted services (R.F., at para. 99 (emphasis deleted)).

[65] With respect to the public law basis for the claim, Quebec argues that it breached no obligation incumbent upon it. It submits that the tripartite agreements did not give rise to any obligation flowing from the honour the Crown or to any fiduciary obligation. Quebec reiterates its request to exclude exhibits on which the Court of Appeal relied in this regard, renewing its argument that they are not relevant to the case. More specifically, it adds, the honour of the Crown is engaged only in situations that relate to rights or interests specific to Indigenous peoples, where it is a matter of reconciling the pre-existence of Indigenous societies with the Crown's assertion of sovereignty, which is not the case here. In the alternative, if the honour of the Crown applies, Quebec argues that it discharged the obligations flowing from it.

[66] Pekuakamiulnuatsh Takuhikan counters on this point that, in the performance of the contractual undertakings, Quebec had obligations flowing from the honour of the Crown as well as fiduciary obligations. In particular, it argues that Quebec, which presented it with unilateral and arbitrary funding offers that left no room

for genuine negotiations and that failed to take the SPM's actual costs into account, did not act with honour and integrity when it came time to renew the agreements. In so doing, Quebec, which wanted to ensure the maintenance of the SPM, forced it to bear a significant portion of its costs while benefiting from the sums allocated by the federal government to the FNPP. This was dishonourable conduct.

[67] Turning to the question of remedy, Quebec acknowledges that, if it committed a contractual fault, an award of damages may be an appropriate remedy. However, it maintains that the Court of Appeal [TRANSLATION] "acted arbitrarily" in setting the quantum of damages at the value of the accumulated deficits "without further explanation" (A.F., at para. 127). Quebec therefore takes the view that if the order to pay damages is upheld, the case should be remanded to the Superior Court so that it can fix the quantum in accordance with the applicable principles and in light of all the evidence, including the contract addenda and the additional financial contributions provided by Quebec. In Pekuakamiulnuatsh Takuhikan's opinion, both the rules of public law and those of the civil law [TRANSLATION] "justify the reimbursement of the deficits" accumulated, and Quebec must pay its share, 48 percent, as the Court of Appeal held (R.F., at para. 149). This Court should therefore dismiss the appeal, it says, rather than remanding the case to the Superior Court.

[68] The respondent brought a motion to adduce new evidence, specifically a document entitled *Report 3 — First Nations and Inuit Policing Program: Independent Auditor's Report* (Office of the Auditor General of Canada (2024)). According to the

respondent, this evidence provides context for its constitutional arguments by highlighting the shortcomings of the federal *Policy*. The motion, which was referred to the panel by a judge of the Court, is contested by Quebec, which disputes the relevance of the evidence.

[69] In light of these arguments, it is appropriate to begin by clearly identifying the contractual undertakings of Quebec set out in the tripartite agreements in effect during the period at issue. We then proceed to answer the two main questions that shape the debate before this Court:

A. In performing the contractual undertakings it made to Pekuakamiulnuatsh Takuhikan, did Quebec breach (i) the requirements of good faith or (ii) the obligations flowing from the honour of the Crown, if it applies?

B. If so, what is the appropriate remedy for each of these breaches?

[70] I would note that the Crown's liability under a contract entered into with an Indigenous entity and governed by the common law in Canada would be analyzed using this same approach involving two distinct grounds for liability that are independent of each other, that is, liability under private law and liability under public law. Of course, the private law analysis of the requirements of good faith in the

performance of such a contract would be governed by the relevant common law principles (see, in particular, *Bhasin v. Hrynew*, 2014 SCC 71, [2014] 3 S.C.R. 494, at paras. 65-66). By contrast, since the obligations flowing from the honour of the Crown are anchored in public law, the analysis of the Crown's liability under this second distinct branch would proceed similarly to that set out in this case: "There is but one honour to which the Crown is bound . . ." (R. Mainville, *An Overview of Aboriginal and Treaty Rights and Compensation for Their Breach* (2001), at p. 115).

V. Analysis

Introduction: Contractual Undertakings Given in the Tripartite Agreements

[71] The scope of each party's undertakings should be clarified, by reference to the terms of the agreements, before it is determined whether Quebec breached the requirements of good faith and the obligations flowing from the honour of the Crown in carrying out the agreements.

[72] According to Quebec, the regime set forth in the *Police Act* [TRANSLATION] "is implemented through the agreements entered into" (A.F., at para. 54). These agreements show that Quebec [TRANSLATION] "promised to contribute financially to the establishment and maintenance of a police force by [Pekuakamiulnuatsh Takuhikan], in the amounts specified in the agreements and in compliance with the mandate conferred on other police forces by the [*Act*]" (para. 58). However, it never promised to provide "100 percent" of the funding for the SPM (transcript, day 1, at

pp. 20, 23 and 38), and the federal *Policy*, which does not have the force of law, creates no obligations for Quebec.

[73] As for the respondent, it argues that Quebec is giving a [TRANSLATION] "restrictive interpretation" to the promise it made (R.F., at para. 6). It anchors its own analysis of Quebec's promise in [TRANSLATION] "the State's responsibility to ensure the safety of its citizens" (para. 43) and in the legislative debates surrounding the enactment of the first version of what is now s. 90 of the *Act* (paras. 49 and 84). With regard to the federal *Policy*, the respondent explains that [TRANSLATION] "[Quebec's] actions relating to the establishment of the SPM were taken in conjunction with the implementation of the federal policy, such that [Quebec] implicitly adhered to the FNPP and its terms and conditions" (para. 78). For these reasons, it submits that Quebec's undertaking [TRANSLATION] "is not confined to the terms of the tripartite agreements" (para. 86).

[74] What in fact was the undertaking that Quebec gave to Pekuakamiulnuatsh Takuhikan in entering into the tripartite agreements covering the period of 2013 to 2017?

[75] It should be noted at the outset that Quebec's undertakings are contractual in nature. The tripartite agreements were entered into pursuant to the provisions of the *Act* that authorize the government — without making this a statutory obligation — to "enter into an agreement with one or more Native communities . . . to establish or maintain a police force in a territory determined under the agreement" (*Act*, s. 90). This

section was added to the *Act* in 1995 to permit Indigenous communities [TRANSLATION] "to have and to control, under agreements with the government, institutions that fit their needs" (*Journal des débats*, at p. 1252 (S. Ménard)).

[76] I turn now to the text of these agreements, which are all similar and based on the same general framework. Like the parties and the Court of Appeal, I will refer to the 2015-2016 agreement (reproduced in A.R., vol. III, at p. 58) to illustrate my comments, although there are minor variations from one agreement to another.

[77] To begin with, I note that there is an entire agreement clause. The agreement, including its preamble and certain schedules, [TRANSLATION] "constitutes the entirety of the parties' undertakings and responsibilities" (cl. 1.1). Unless the contrary is indicated elsewhere in the agreement, this clause prevents the federal *Policy* and *Terms and Conditions* from being considered part of the agreement and thus binding on Quebec. The only contrary indication is in the third recital of the preamble, but Quebec is not mentioned in that recital.

[78] The purpose of the agreement is made apparent in the preamble and the purpose clause, which I reproduce below:

> [TRANSLATION]
>
> **WHEREAS** the Parties agree on the importance for the Council of providing the community of Mashteuiatsh (hereinafter referred to as "community") with police services that are professional, dedicated and adapted to its needs and culture, in accordance with the applicable statutes and regulations;

> **WHEREAS** Canada and Quebec, in accordance with their respective jurisdictions, wish to provide financial support for the expenses incurred by the Council to establish and maintain police services for the community;
>
> **AND WHEREAS** Canada will provide its share of the financial contribution under this agreement in accordance with the *First Nations Policing Program* (FNPP) and in compliance with the policies and terms and conditions related thereto.
>
> . . .
>
> **1.5 OBJECTIVES OF THE AGREEMENT**
>
> The objectives of this agreement are as follows:
>
> a) to establish and maintain the "Mashteuiatsh Police Force" (hereinafter referred to as "police force") that will be responsible for ensuring the provision of police services in the community in accordance with the Police Act (CQLR, chapter P-13.1);
>
> b) to establish a contribution from Canada and Quebec to the funding for the provision of the police services covered by this agreement.

[79] These excerpts show that one purpose of the agreement is "to establish and maintain the 'Mashteuiatsh Police Force'" (cl. 1.5a)) so that it can provide the community with "police services that are professional, dedicated and adapted to its needs and culture, in accordance with the applicable statutes and regulations" (preamble, first recital; see also cl. 2.9.2).

[80] This purpose is achieved by attaining the goal set out in clause 1.5b), which is "to establish a contribution from Canada and Quebec to the funding for the provision of the police services covered by this agreement". This contribution represents "financial support for the expenses incurred by [Pekuakamiulnuatsh Takuhikan] to establish and maintain police services for the community" (preamble, second recital).

This purpose obviously depends on the first: in order for there to be a police force to fund, a police force must, of course, be established or maintained.

[81] The purpose of ensuring the maintenance of the SPM is also implemented through a series of obligations resting on Pekuakamiulnuatsh Takuhikan. Under the agreement, it is [TRANSLATION] "responsible for the administrative management" of the SPM and "shall see to its organization" (cl. 2.1.3). For example, it is the employer of the SPM's members, its chief of police and its support staff (cls. 2.1.3 and 2.3). It must prescribe the manner of dealing with criminal allegations made against them and must adopt an internal discipline bylaw (cls. 2.7 and 2.8). It may also establish internal policies and procedures for the administrative management of the SPM (cl. 2.1.4).

[82] The SPM is a police force within the meaning of the *Act* (cl. 2.1.1). It must carry out the mission assigned to Indigenous police forces by s. 93 of the *Act* in compliance with its internal discipline bylaw, the *Code of ethics of Québec police officers*, CQLR, c. P-13.1, r. 1, and s. 48 para. 2 of the *Act*, which states, among other things, that "[p]olice forces shall target an adequate representation, among their members, of the communities they serve" (cls. 2.2.1, 2.2.2 and 2.7.1). In particular, the SPM is responsible [TRANSLATION] "for ensuring a police presence that makes it possible to respond, within a reasonable time, to the requests for assistance made to it" (cl. 2.2.2a)). In addition, Pekuakamiulnuatsh Takuhikan has obligations relating to police facilities and equipment; for example, it supplies the equipment needed to

provide police services, paying the cost of its maintenance and arranging for its replacement (cls. 3.2 and 3.3).

[83] The agreement provides that Quebec and Canada must contribute to the SPM's funding. It sets the "maximum amount" of the costs of the police services funded by them:

> [TRANSLATION]
>
> 4.2.1 The maximum amount of the costs associated with the police services funded by Canada and Quebec is established:
>
> a) by fiscal year beginning on April 1 of a calendar year and ending on March 31 of the subsequent calendar year; and
>
> b) in accordance with the budget in Schedule A of this agreement, at $1,226,750 for fiscal year 2015-2016.

[84] This amount may vary from one agreement to another and may be reduced if other government funds are also used to achieve the purpose of the agreement (cl. 4.7.2). It is, however, a [TRANSLATION] "fixed contributio[n]", to use Bouchard J.A.'s expression (C.A. reasons, at para. 21). The funds must be spent in compliance with the allocation rules set out in the agreement (Sch. A; see also cls. 4.2.3 to 4.2.7 and 4.6). Pekuakamiulnuatsh Takuhikan is accountable for what has not been spent (cl. 4.3.5).

[85] Canada and Quebec share responsibility for the government contribution in a ratio of 52 percent for Canada and 48 percent for Quebec (cl. 4.2.2). Payment of

their respective contribution is conditional on the existence of the necessary annual appropriation (cls. 4.3.2, 4.3.3 and 4.4.1). Where appropriations are insufficient, the governments of Canada and Quebec may reduce their funding or terminate the agreement (cl. 4.4.2). If the funding is reduced, Pekuakamiulnuatsh Takuhikan may itself terminate the agreement (cl. 4.4.3).

[86] Clause 4.5.2 is a provision on which the parties disagree. It provides that the respondent [TRANSLATION] "shall be responsible for any budget deficits incurred during a fiscal year", and it specifies that a deficit "may not be carried forward to the next fiscal year". Therefore, according to the text of the agreements, the contribution of the governments of Canada and Quebec is capped and, if the SPM's costs are higher, it is the respondent that must pay the difference.

[87] While the 2015-2016 agreement is a one-year agreement, its content reveals that it contemplates a long-term contractual relationship, which, as noted above, has been in place since the initial 1996 agreement, as that agreement has been renewed through an uninterrupted series of agreements with varying terms. It goes without saying that the maintenance of a police force, with the associated staff, infrastructure and equipment, is by its very nature a long-term endeavour.

[88] The agreement therefore expressly provides that [TRANSLATION] "[w]here funds . . . received by [Pekuakamiulnuatsh Takuhikan] under a prior agreement . . . have not been spent", Canada and Quebec may authorize it "to retain that amount as

partial payment of their respective obligations", that is, as partial payment of a contribution owed under a subsequent agreement (cls. 4.3.5 and 4.3.6).

[89] Similarly, a number of clauses refer to the idea that the agreement, despite being annual, may extend over several fiscal periods of one year each. More specifically, certain clauses use the phrases [TRANSLATION] "each fiscal year" (cls. 3.2.2, 4.2.2, 4.9.1, 4.9.2 and 4.13.2), "a fiscal year" (cls. 4.2.5 and 4.9.3), "that fiscal year" (cl. 4.2.5) and "last fiscal year covered" (cl. 4.10.1). As well, clause 4.3.1, which deals with cash flow statements, refers to [TRANSLATION] "each fiscal year", the "only or the first fiscal year", the "fiscal year in question" and a "subsequent fiscal year". Finally, clause 4.5.2 expressly provides that budget deficits incurred during "a fiscal year" may not be carried forward "to the next fiscal year".

[90] These various provisions imply that there may be several fiscal years and therefore that the agreement may be renewable as long as no party chooses to avail itself of the termination clause. That clause gives the parties considerable latitude, including by stipulating that [TRANSLATION] "[t]he agreement may be terminated in any of the following situations: . . . d) at any time by any party, even if there is no default by another party" (cl. 6.6.1).

[91] Clause 6.10.2 specifies how an agreement may be extended so that it can be renewed by entering into a [TRANSLATION] "new agreement":

> [TRANSLATION]

> 6.10.2 However, if, before March 31, 2016, the parties expressly agree, by written notice sent to the other parties, to maintain the provisions of this agreement, these provisions, except the sections on funding in Part IV, shall remain in force until a new agreement on the provision of police services is entered into. Nonetheless, if such a new agreement is not entered into before March 31, 2017, the provisions of this agreement shall expire.

[92] By referring to the making of new agreements, this clause tends to show that each individual agreement fits into a long-term relationship punctuated by a series of successive agreements entered into to ensure the maintenance of the police force beyond the term of each agreement. Moreover, since a notice of extension does not have the effect of extending the funding provisions, the decision to prolong an annual agreement implies that the parties must renegotiate the funding provisions when a "new agreement" is entered into. Clause 6.10.2 therefore creates an obligation to negotiate the funding terms, but only if the parties decide to continue their contractual relationship, since they are free to end it at any time.

[93] I note that the agreement's interpretive provisions also include a clause stating that the agreement is governed by Quebec law, a severability clause and a clause setting out the legal scope of the agreement. Under the last of these clauses, the agreement does not affect Aboriginal or treaty rights and must not be interpreted to be an agreement or treaty within the meaning of s. 35 of the *Constitution Act, 1982* (cls. 1.2, 1.3 and 1.4).

[94] In conclusion, Quebec undertook to Pekuakamiulnuatsh Takuhikan by contract to help it establish and then maintain, particularly by means of limited financial

contributions, a police force serving the community of Mashteuiatsh. The terms of the agreements reveal that this undertaking contemplates a long-term relationship during which the funding for the police force will be reassessed and renegotiated before entering into each new agreement.

[95] Following this overview of the contractual undertakings, it must be determined whether Quebec performed them in compliance with the requirements of good faith and with the obligations flowing from the honour of the Crown, if this principle was in fact engaged.

A. *Bases for Quebec's Liability*

(1) Good Faith, a Source of Private Law Obligations

[96] Quebec invites the Court to decide the appeal on the basis of the contractual liability regime, as the Superior Court did. It relies first and foremost on the principle of the binding force of contracts and submits that the funding provisions of the tripartite agreements are clear: under clauses 4.2.1 and 4.5.2, the governments of Canada and Quebec undertook to fund the costs of the Indigenous police force up to a "maximum amount", and Pekuakamiulnuatsh Takuhikan accepted responsibility for any deficit incurred during each fiscal year. According to Quebec, the judge was correct in finding that [TRANSLATION] "[t]he contract is the law of the parties" and, given that there was no ambiguity making it necessary to interpret the freely chosen terms, he was right to "give full effect to the tripartite agreements" in order to dismiss the action (Sup. Ct.

reasons, at paras. 56 and 88). Citing, among other authorities, *Uniprix inc. v. Gestion Gosselin et Bérubé inc.*, 2017 SCC 43, [2017] 2 S.C.R. 59, Quebec argues that the Court of Appeal should not have intervened, since the trial judge's conclusions were entitled to deference on appeal.

[97] Furthermore, Quebec acknowledges that, like any other party to a contract, it was required to perform its contractual obligations [TRANSLATION] "in good faith" (A.F., at para. 37). However, the trial judge found that the evidence [TRANSLATION] "does not support the allegations of bad faith" made against the governments of Canada and Quebec, and wrote that their communications with Pekuakamiulnuatsh Takuhikan were characterized by "transparency", "respect" and "appreciation" (Sup. Ct. reasons, at para. 72). This highly factual determination was also entitled to deference on appeal. On the whole, Quebec takes the view that no fault engaging its liability could be attributed to it.

[98] As for Pekuakamiulnuatsh Takuhikan, it criticizes Quebec for [TRANSLATION] "[t]he absence of true negotiation, the sharp dealing, the imposition of an inadequate budget [and] the arbitrary and unilateral establishment of the terms of the tripartite agreements, without any real analysis of the needs in question" (R.F., at para. 140; see also paras. 5, 30, 105 and 128). This presented the respondent [TRANSLATION] "with a *false choice*": either it agreed to renew the agreements without negotiating their funding terms, thereby sinking further into deficit, or it relied on the SQ (para. 99 (emphasis in original)).

[99] While the respondent urges this Court to consider the agreements [TRANSLATION] "from the standpoint of public law" (R.F., at para. 144), it relies in the alternative on private law grounds, as it believes that the two regimes "are compatible" (para. 145). In this regard, it adopts (at para. 146) the analysis of Bich J.A., who found that the conduct of Canada and Quebec constituted an abuse of right under the civil law. According to the respondent, the federal and provincial governments thus engaged in contractual conduct that was unreasonable in the circumstances.

[100] Contrary to what Quebec contends, and with all due respect for the trial judge, I am of the view that his conclusions regarding the meaning to be given to the terms of the agreements and to contractual good faith were tainted by reviewable errors and, as a result, are not entitled to deference on appeal.

[101] First, the judge applied the wrong test in rejecting the argument that the governments of Canada and Quebec had breached the requirements of good faith. The judge's conclusion that the governments did not evince bad faith does not necessarily mean that they complied with the requirements of good faith, as a breach of these requirements can occur regardless of a party's intention or state of mind. It is true that acting dishonestly in the performance of a contract and knowingly engaging in unlawful acts are examples of conduct that is lacking in good faith (see, e.g., *Hydro-Québec v. Construction Kiewit cie*, 2014 QCCA 947, at para. 54; see also *Ponce*, at para. 79, citing *C.M. Callow Inc. v. Zollinger*, 2020 SCC 45, [2020] 3 S.C.R. 908, at para. 89). That being said, good faith also entails prohibitions that can be

analyzed objectively, such as those against unduly increasing the burden on the other contracting party, behaving in an excessive or unreasonable manner or jeopardizing the existence or equilibrium of the contractual relationship (see arts. 6, 7 and 1375 *C.C.Q.*; *Ponce*, at para. 76; *Construction Kiewit*, at paras. 55-56). The trial judge considered good faith only in the subjective sense of the term, and, with respect, this error of law led him to entirely overlook the objective aspect of good faith, thereby stripping the principle of much of its meaning.

[102] As for the trial judge's reading of the tripartite agreements, he was certainly correct in noting that Quebec had committed itself to pay maximum amounts and that Pekuakamiulnuatsh Takuhikan had agreed to assume the deficits incurred. However, these observations were not sufficient to address the argument that Quebec had breached its duties under arts. 6, 7 and 1375 *C.C.Q.* by failing to negotiate the renewal of the agreements in good faith. With respect, the trial judge ignored the fact that the scheme of the agreements reflects, in particular through the mechanism set out in clause 6.10.2, the idea that they must be renewed in order for the police force to be maintained. This clause is essential to understanding the allegation that the obligation to negotiate the renewal of the agreements in good faith was breached. It is in fact the making of new agreements, which clause 6.10.2 authorizes, that allows the contracting parties to achieve the objective of maintaining the police force over time. The failure to consider this aspect of the agreements is therefore a palpable error with an overriding effect, because the judge could not correctly assess whether Quebec had performed its obligations in accordance with the requirements of good faith without taking account

of the fact that, with each renewal, Quebec had an obligation to negotiate the funding clauses in good faith.

[103] These errors justify undertaking a fresh analysis, starting with the framework imposed by art. 1376 *C.C.Q.*, which applies to an action concerning the civil liability of the State.

[104] The tripartite agreements are contracts entered into by the governments of Canada and Quebec and Pekuakamiulnuatsh Takuhikan. Under art. 1376 *C.C.Q.*, the general rules in Book Five of the *Civil Code* — "Obligations" — apply to the State, to the extent that they are not excluded or altered by other rules of law. The tripartite agreements are therefore governed by the general law of obligations, including art. 1375 *C.C.Q.* on good faith. This Court recently noted that good faith is an enacted standard of public order that applies at every stage of the contractual relationship (*Ponce*, at para. 70, relying on arts. 1375 and 1434 *C.C.Q.*). This point is not in dispute here.

[105] No party argues that the public order rule of good faith is excluded by an incompatible rule of public law. In this regard, it should also be noted that the "entirety of the parties' undertakings and responsibilities" clause (cl. 1.1) does not exclude the public order standard of good faith (see *Développement Olymbec inc. v. Avanti Spa de Jour inc.*, 2019 QCCS 1198; C. Lebrun, "La clause d'intégralité au Québec" (2008), 67 *R. du B.* 39, at pp. 47 and 56). Commenting on Quebec jurisprudence, author Catherine Valcke writes that [TRANSLATION] "[s]uch a clause cannot . . . exclude the

obligation of good faith provided for in article 1375 C.C.Q." (J. Pineau et al., *Théorie des obligations* (5th ed. 2023), by C. Valcke, at No. 859, fn. 971).

[106] The parties are therefore correct in recognizing, as the trial judge did (at para. 55), that Quebec was required to perform its contractual undertakings in good faith.

(a) *Duties Flowing From the Obligation To Act in Good Faith*

[107] Although the obligation to act in good faith applies to every contract, "its implementation varies with the circumstances" (*Ponce*, at para. 71; see also *Churchill Falls*, at para. 104). The respondent's arguments in this regard are focused on the need to perform contractual obligations in accordance with the requirements of good faith pursuant to art. 1375 *C.C.Q.* In alleging that the governments of Canada and Quebec breached their obligation to "negotiate" in good faith, Pekuakamiulnuatsh Takuhikan is clearly not referring to the initial negotiation of their relationship during a pre-contractual phase going back to 1996 — in theory, a source of extracontractual liability and, in any event, far removed from the period at issue. The respondent is not focusing on a possible obligation to renegotiate a contract in good faith in the absence of any renewal mechanism set out in the contract. Nor is it relying on the unforeseeable occurrence of deficits to justify the need for good faith negotiation. Renewal was contemplated by the parties, who viewed it, in the very text of the tripartite agreements, as a means of ensuring the maintenance of the police force.

[108] Given that the maintenance of the SPM is a purpose of the agreements and that, for most of the period at issue, the agreements were annual, the parties specifically provided for an extension mechanism in clause 6.10.2 to facilitate renewal in the event that the negotiations were not completed before the agreements expired. Pekuakamiulnuatsh Takuhikan raises the renewal negotiations contemplated notably by clause 6.10.2, which were, however, not always conducted through that clause, in arguing that Quebec's refusal to discuss an increase in funding constitutes unreasonable conduct contrary to the requirements of good faith.

[109] After a contract is entered into, [TRANSLATION] "[t]he obligation to negotiate in good faith may . . . have a contractual basis and flow from the terms of the contract" (B. Lefebvre, *La bonne foi dans la formation du contrat* (1998), at p. 122), especially where the parties intend to renew the contract in a manner contemplated by it. In *Trizec Equities Ltd. v. Hassine* (1988), 27 Q.A.C. 167, which was decided under the *Civil Code of Lower Canada*, Monet J.A. explained that good faith must [TRANSLATION] "preside over the entire contractual realm . . . over both the performance and the formation of the contract" (para. 9). He held that the imposition of such an obligation was justified in the circumstances given the presence of a renewal clause in a commercial lease. Thus, where parties have provided through a clause that they will have to enter into negotiations, the obligation to conduct the negotiations in good faith flows directly from the contract. Pursuant to art. 1375 *C.C.Q.*, therefore, the performance of contractual provisions that contemplate negotiation must, as with any other contractual obligation, be in compliance with the standards of good faith. A

breach of good faith in negotiating a renewal contemplated by a contract may thus be a source of contractual liability (*Singh v. Kohli*, 2015 QCCA 1135, at para. 67; see also *Billards Dooly's inc. v. Entreprises Prébour ltée*, 2014 QCCA 842, at para. 98, and *Centre de santé et de services sociaux de l'Énergie v. Maison Claire Daniel inc.*, 2012 QCCA 1975, at para. 80).

[110] Although good faith requires more than the absence of bad faith, it does not require parties to subordinate their interests to those of the other parties (*Ponce*, at para. 77). It is well established that good faith does not serve to "transform the objectives of corrective justice [it is] intended to protect into a mechanism of distributive justice that would be unpredictable and contrary to contractual stability" (*Churchill Falls*, at para. 125). In the case at bar, good faith does not require the parties to forsake their own interests to benefit their counterparties in the performance of the agreement. But as the Court noted in *Ponce*, "in the pursuit of their interests and the exercise of their rights, parties to a contract must conduct themselves loyally by not unduly increasing the burden on the other party or behaving in an excessive or unreasonable manner" (para. 76).

[111] It is true that no effect can be given to a contractual clause that is contrary to public order, a concept that includes the implied obligation to act in good faith that applies to every contract through the combined operation of arts. 1375 and 1434 *C.C.Q.* However, enforcement of the rule requiring good faith performance of a contract does not amount to a mandate to [TRANSLATION] "rewrite" a contract freely entered into (see

J.-L. Baudouin and P.-G. Jobin, *Les obligations* (7th ed. 2013), by P.-G. Jobin and N. Vézina, at No. 415). In this sense, good faith in the performance of a contract must be seen as a standard that does not conflict with the binding force of contracts, but is its ally. Performing a contract in good faith does not require the debtor to renounce its rights.

[112] Similarly, good faith does not permit the creditor to go back on its word. As author Laurent Aynès writes about French law, good faith is [TRANSLATION] "a duty of conduct that involves making the performance of the contract consistent with what was undertaken" (preface by L. Aynès in R. Jabbour, *La bonne foi dans l'exécution du contrat* (2016), at p. VII). In the instant case, good faith performance of the clauses contemplating the renewal of the contract cannot serve, for example, to require or impose specific outcomes from the negotiations. That being said, a party that enters into negotiations in good faith must consider the interests of any other party to the negotiations and avoid behaving unreasonably (see *Singh*, at paras. 67 and 74; *Jolicoeur v. Rainville*, 2000 CanLII 30012 (Que. C.A.), at para. 51). Negotiating tenaciously in one's self-interest — an approach that can be entirely compatible with good faith — does not mean negotiating in an obstinate or intransigent manner that would undermine the counterparty's legitimate expectations. Good faith requires parties who discuss a renewal clause to negotiate faithfully. Parties are of course free — again, subject to the requirements of good faith — to end their existing contractual relationship. But when they begin renewal negotiations as permitted by the very terms of the contract, they are obliged to behave a manner that is neither excessive nor

unreasonable in this final stage of carrying out their agreement (see, e.g., *Société sylvicole de l'Outaouais v. Rasmussen*, 2005 QCCA 729, at paras. 27-28). Refusal to act in good faith in the negotiation of a renewal contemplated by the parties may jeopardize the very purpose of the contract where, as here, the achievement of that purpose depends on the existence of a relationship over time (see D. Lluelles and B. Moore, *Droit des obligations* (3rd ed. 2018), at Nos. 1979-80 and 1987).

(b) *Quebec's Breach of the Requirements of Good Faith in Negotiations*

[113] Did Quebec breach its duty to perform the tripartite agreements in good faith during the renegotiations contemplated by these agreements?

[114] Quebec argues that the Court of Appeal made several errors in arriving at the conclusion that it committed an abuse of right in performing its contractual obligations. First of all, the Court of Appeal could not find a breach on the basis of non-compliance with commitments set out in the federal *Policy*, as the *Policy* does not give rise to obligations and is not binding on Quebec. In addition, it could not find an abuse of right because it did not identify any right set out in the contract that Quebec had supposedly abused. Quebec submits that the Court of Appeal failed to show deference to the trial judge's conclusion that the evidence supported neither a finding that the governments of Canada and Quebec had acted in bad faith nor a finding that the community of Mashteuiatsh was receiving police services of lower quality than those received by comparable communities in the region.

[115] I agree with Quebec on two important points. First, Quebec is correct to say that the federal *Policy* does not give rise to obligations and does not bind it directly. It is true that, by entering into the tripartite agreements, Quebec voluntarily agreed to take part in the collaborative exercise contemplated by the *Policy* governing the FNPP. But that "adherence" to the model proposed by the federal government does not, legally speaking, entail acceptance of the actual terms of the *Policy* as a contractual obligation. Quebec's undertakings toward Pekuakamiulnuatsh Takuhikan find their source in the series of tripartite agreements, which are themselves governed by the *Act*, and not in federal documents or policies. Second, Quebec is also correct to say that the very text of the agreements stipulates that the federal and provincial governments were not committing themselves to fully fund the SPM. Rather, Quebec gave an undertaking to Pekuakamiulnuatsh Takuhikan to help it establish and then maintain the SPM through limited financial contributions. Consequently, the mere fact that Quebec made funding offers that were insufficient to cover the SPM's costs does not amount to a breach of contract.

[116] However, this does not dispose of the question. Like any other contracting party, Quebec had an obligation to act in good faith, including when conducting the negotiations contemplated by the agreements.

[117] The circumstances invite four comments.

[118] First, I disagree with Quebec that [TRANSLATION] "[t]he Superior Court's decision to allow the governments' objection to the filing in evidence of the 'Viens

report', released well after the agreements in question were entered into, should have been upheld on appeal" (A.F., at para. 103). Quebec has not indicated how Bouchard J.A. erred in finding that [TRANSLATION] "[t]he purpose of the exhibits contemplated in the . . . objection to the evidence [of Pekuakamiulnuatsh Takuhikan] was . . . to provide context for" the issues (C.A. reasons, at para. 64). There is therefore no basis for disturbing that finding by the Court of Appeal. Quebec's renewed objection seeking the exclusion of exhibits should be dismissed for the same reasons given by Bouchard J.A. These exhibits are relevant, and considering them would have enabled the trial judge to better understand the meaning to be given to the respondent's arguments on both good faith and the honour of the Crown.

[119] With regard to the decision itself, I begin by reiterating that the governments of Canada and Quebec knew, from year to year, that the Indigenous police force was underfunded. As will be seen below, Pekuakamiulnuatsh Takuhikan clearly communicated its funding needs to both governments at the time of each renewal. The governments also knew that the funding problems did not result from its mismanagement of police services. Moreover, they knew, at least through the inquiry reports, that the maintenance of the police force, one of the purposes of the agreements set out in clause 1.5a), had the great advantage of providing the community of Mashteuiatsh with policing that was both culturally appropriate and not tied to the SQ's troubled past. However, Quebec chose not to terminate the agreements but to continue the contractual relationship in order to maintain the SPM, while at the same time

refusing to revisit its financial contribution. That conduct disregarded the context and its counterparty's interests.

[120] Second, although most of the tripartite agreements in issue are annual, their content suggests, as we have seen, that they contemplated a long-term contractual relationship. This is apparent from the very purpose of the agreements, which includes establishing and maintaining a police station in Mashteuiatsh (preamble and cl. 1.5), but also from the clauses that indicate, through the concept of fiscal year, that the framework of the agreements can be extended to cover multiple years (see cls. 3.2.2, 4.2.2, 4.2.5, 4.3.1, 4.5.2, 4.9.1 to 4.9.3, 4.10.1 and 4.13), from the clauses referring to the existence or making of subsequent agreements (cls. 4.3.5, 4.3.6 and 6.10.2) and from the clause governing the renewal of the agreement (cl. 6.10.2).

[121] Third, the scheme of the agreements shows that the parties agreed to renegotiate the funding provisions if they chose to renew the agreements. In this regard, clause 6.10.2 states that if, before the expiry of an agreement, "the parties expressly agree, by written notice sent to the other parties, to maintain the provisions of th[e] agreement, these provisions, except the sections on funding in Part IV, shall remain in force until a new agreement on the provision of police services is entered into". Clause 6.10.2 thus lays down the rule that where written notice is given to the other parties, the provisions of an agreement will remain in force until a new agreement is entered into, apart from the funding clauses, which the parties will have to negotiate. Given the purpose of the contract, which aims to maintain the police force indefinitely, and the

presence of clause 6.10.2, which shows that the agreements contemplate renewal negotiations for the funding clauses, I am of the view that the parties had an obligation to carry out any renewal negotiations in good faith, whether they availed themselves of extension clause 6.10.2 or proceeded in some other manner.

[122] Fourth, a number of factors contributed to creating an atmosphere of trust between the parties. In this regard, I note in particular that the tripartite agreements are between the State and a band council representing a First Nation in pursuit of self-government and that the parties have maintained a contractual relationship continuously since 1996. There is also, of course, the extension clause referred to above. In addition, I am of the view that the federal documents are relevant at this stage of the analysis, not as a source of Quebec's undertakings but rather as part of the backdrop to the negotiations.

[123] Under the agreements, the parties were not required to continue their contractual relationship beyond the stipulated expiry date; they could even terminate the agreements at any time (cls. 6.6.1 and 6.6.2). That being said, any party choosing to continue the contractual relationship by entering into a new agreement with the other parties, through the renewal mechanism, was required to negotiate the funding terms of the new agreement in good faith and thus to consider the interests of the other parties.

[124] It is important to note that, in the case of the agreements, the parties themselves provided for the possibility of renewal to ensure the maintenance of police services over the long term. Quebec certainly had no obligation to renew the

arrangement for another fiscal year — the agreements included a generous option to terminate — but if it sought to do so, the agreements show that renewal would be achieved through negotiation. In such a case, Pekuakamiulnuatsh Takuhikan was not entitled to a specific level of funding, but, by the terms of the contracts themselves, it did have a legitimate expectation that Quebec would consider its perspective in negotiating the extent of its contribution. However, by adopting an intransigent position through its refusal to negotiate, Quebec acted contrary to what the agreements stipulated and to the binding force of contracts as enshrined in art. 1434 *C.C.Q.* In so doing, it failed to carry out the agreements in good faith.

[125] Indeed, through its obstinate refusal to negotiate, Quebec caused injury to Pekuakamiulnuatsh Takuhikan by acting in conflict with the expectations raised by the contractual mechanism put in place by the parties for the renewal of the agreements. Recognized in court decisions and legal scholarship under the umbrella of good faith, a duty to act in keeping with such expectations must, in principle, be fulfilled in the performance of a contract (see, e.g., *Construction Kiewit*, at para. 92; Baudouin, Jobin and Vézina, at No. 126). Quebec's conduct was therefore unreasonable because it undermined the respondent's legitimate expectations and disrupted the parties' shared contractual objective of maintaining the SPM. As one author has noted in an article discussing, among other things, the renegotiation of construction contracts, [TRANSLATION] "an inflexible or rigid stance could compromise the contractual relationship 'without regard for the contracting partner's legitimate expectations'" and would thus amount to a breach of good faith (M.-H. Dufour, "L'impact de la bonne foi

en droit de la construction" (2023), 57 *R.J.T.U.M.* 229, at p. 262, quoting *Churchill Falls*, at para. 118).

[126] Here, good faith works hand in hand with the binding force of contracts to sanction Quebec's obstinate refusal to negotiate the renewal of the agreements. In my view, by refusing to enter into genuine negotiations regarding the funding clauses despite knowing that its inadequate funding offers were causing difficulties for Pekuakamiulnuatsh Takuhikan and even jeopardizing the maintenance of the SPM, Quebec breached its contractual obligation of good faith in the renewal of the agreements. In short, the evidence in the record shows that the financial contribution of the federal and provincial governments was inadequate in light of the SPM's actual costs, that substantial deficits were incurred over the years and that Quebec refused to negotiate the funding level, thereby breaching its duty to consider the respondent's interests during the renewal negotiations. Through that conduct, Quebec endangered the very purpose of the agreements, which aim above all to ensure the maintenance of an Indigenous police force in Mashteuiatsh. It is true, as the respondent argues, that the absence of genuine negotiations left it in a no-win situation: renewing the agreement would add to the deficit, and failing to renew it would mean the end of the SPM and a return to the SQ's services, with the difficulties this would entail.

[127] Until 2009, the government contribution to the SPM's funding was sufficient to cover most of its costs without Pekuakamiulnuatsh Takuhikan having to assume very substantial deficits. For 2009-2010, it informed the governments of

Canada and Quebec that it needed additional funds. They replied that, because of the significant budgetary constraints faced by the FNPP, they were prepared to renew the 2008-2009 agreement on the same funding terms, and thus without increasing their contribution. In 2012, following other such refusals over the years, the respondent denounced the fact that the renewal of the agreement had, once again, [TRANSLATION] "taken place without due regard for the real needs of the community", noting that "for a third year in a row, [it] is forced to accept the proposed agreement" and that its acceptance of the offer "is not an acknowledgement that the funding meets [its] needs" (resolution of the Conseil des Montagnais du Lac-Saint-Jean dated March 29, 2012, reproduced in R.R., at p. 5).

[128] In its reply to the amended originating application, Quebec admits that it was aware of the fact that the budgets and funding provided for in the tripartite agreements did not correspond to the actual costs of the services (A.R., vol. I, at p. 172, para. 37). Furthermore, the federal and provincial governments were informed of the SPM's actual costs through Pekuakamiulnuatsh Takuhikan's yearly financial statements (Sup. Ct. reasons, at para. 34). At trial, a Quebec representative thus acknowledged that the government was [TRANSLATION] "very, very aware of the situation in Mashteuiatsh" with respect to the SPM's funding (A.R., vol. XVII, at p. 65).

[129] The quality of the SPM's services suffered as a result of that underfunding, which forced the SPM to operate [TRANSLATION] "at the very lowest of the lowest"

(C.A. reasons, at para. 99, quoting witness V. Tremblay). To make up for the inadequacy of the funding, Pekuakamiulnuatsh Takuhikan reduced the minimum number of police officers specified in the agreements, which thus fell from 11 to 10 officers for 2015-2016 (Sup. Ct. reasons, at para. 26). Despite that reduction, the inadequacy of the funding led it to announce that the SPM would be abolished as of April 1, 2016, a decision it communicated to Canada and Quebec in November 2015. It later reversed that decision after Quebec agreed to provide it with supplemental assistance.

[130] The governments of Canada and Quebec explained that the underfunding of the FNPP prevented them from significantly increasing their financial contribution. The budget allocated to that program grew by only 1.5 percent during the period of 2014 to 2017, whereas the RCMP's expenditures rose by 27 percent from 2008-2009 to 2016-2017 and those of the SQ by 15 percent from 2011 to 2017. Pekuakamiulnuatsh Takuhikan's requests were therefore flatly rejected, as the governments of Canada and Quebec turned [TRANSLATION] "a deaf ear to its requests and complaints" (C.A. reasons, at para. 136).

[131] In these circumstances, as Bouchard J.A. pointed out, Pekuakamiulnuatsh Takuhikan felt like there was a [TRANSLATION] "knife to the throat" (C.A. reasons, at para. 101 (emphasis deleted), quoting witness V. Tremblay): either it continued to impoverish itself to maintain the SPM and preserve the progress that the SPM represented in terms of self-government, or it abolished the SPM, which meant both

returning to the SQ's services and suffering a setback with respect to self-government (paras. 136-37, per Bich J.A.). That situation was particularly serious given the difficulties associated with the SQ's presence in Indigenous communities. The respondent was effectively presented "with a *false choice*", and the maintenance of the SPM depended on its acceptance of Quebec's proposals [TRANSLATION] "without any possibility of negotiating", which would "further exacerbat[e] its shortfall in funding" (R.F., at para. 99).

[132] Despite the difficulties this caused it, Pekuakamiulnuatsh Takuhikan made the choice, year after year, to preserve the SPM, which required it to use its own funds to absorb the SPM's annual deficits. It was known to the governments of Canada and Quebec that an arbitration award was issued against Pekuakamiulnuatsh Takuhikan on July 17, 2014. That award, which granted the SPM's police officers a retroactive pay increase of $853,000, is directly related to the program's underfunding and explains the especially large deficit incurred in 2014-2015. According to the SPM's chief of police, the representatives of the governments of Canada and Quebec acknowledged, at a meeting in November 2015, the financial hardship that had been caused by the arbitration award but stated that additional funding could not be offered for the coming years given the post-election context at the federal level (testimony of S. Vanier, reproduced in A.R., vol. XVI, at p. 169).

[133] No mismanagement by Pekuakamiulnuatsh Takuhikan has been alleged as an explanation for these deficits. Indeed, the respondent is recognized to be a model beneficiary under the FNPP, one that manages its finances well.

[134] In my view, Quebec's intransigence reflects indifference to Pekuakamiulnuatsh Takuhikan's interests and constitutes a breach of the obligation to negotiate the clauses relating to its financial contribution in good faith at the time of the renewal contemplated by the agreements. Quebec should have entered into genuine negotiations with its counterparty and should have listened and shown openness, which was not the case. Moreover, if Quebec was unable to proceed in this manner, it could have exercised its right of termination pursuant to clauses 6.6 and 6.7. In light of the circumstances, including the presence of an extension clause providing for the negotiation of the funding clauses and the existence of a long-term contractual relationship, Quebec could not simply make non-negotiable funding offers that took no account of Pekuakamiulnuatsh Takuhikan's interests.

[135] Such conduct constitutes an abuse of right within the meaning of *Houle* and art. 7 *C.C.Q.* I cannot accept Quebec's argument that it did not abuse any of its contractual rights. Both parties had the right to request the renewal of the annual agreements in order to ensure the maintenance of the police force. Quebec exercised that right in an unreasonable manner and, in so doing, abused the right to renew and extend the agreement in accordance with the terms of clause 6.10.2 or by any other means in the contract agreed on by the parties. The description of abuse of right given

by Forget J.A. in a leading Court of Appeal decision can, in my view, be transposed to this case: [TRANSLATION] ". . . the [respondent] exercised its rights in a manner that was blameworthy and contrary to the requirements of good faith. It acted unreasonably — even intransigently and obstinately — toward [the appellant], clearly departing from the standard of conduct of a prudent and diligent person" (*Développement Tanaka inc. v. Montréal (Commission scolaire)*, 2007 QCCA 1122, 65 C.L.R. (3d) 175, at para. 128).

[136] I am therefore of the opinion that the Court of Appeal made no reviewable error in finding an abuse of right, even if it did not specifically identify the right that Quebec abused, as the appellant points out.

[137] Though this is not strictly necessary, I would go further. In the circumstances, it was, in my view, also unreasonable for Quebec to insist on the terms of clauses 4.2.1 and 4.5.2, which, respectively, set out its right to limit its financial contribution and assign responsibility for deficits to Pekuakamiulnuatsh Takuhikan. Having exploited Pekuakamiulnuatsh Takuhikan's position of weakness at the time the agreements were renewed and having refused to really negotiate their funding terms, Quebec could not, for the current year, insist that the terms of the prior arrangement be adhered to in the "new agreement" as if they were not the product of its own abuse. In the circumstances, insisting on strict adherence to the terms of those clauses was also an abuse of contractual rights. As in *Houle*, where the bank's conduct prevented it from

strictly relying on its right to demand payment without notice, Quebec could not, in this case, insist on strict adherence to clauses 4.2.1 and 4.5.2.

[138] I would add that the fact that Quebec adopted a better attitude during the later renewal negotiations has no bearing on its liability for the manner in which it conducted these negotiations during the period in issue.

[139] As we will see below, the fact that Quebec allocated additional amounts to Pekuakamiulnuatsh Takuhikan from time to time through various contract addenda and agreements also does not alter the conclusion that it committed an abuse of right. For one thing, that additional funding, which a representative of Canada described as simply a "Band-Aid" (A.R., vol. XVII, at p. 9), was not related in its entirety to the tripartite agreements' purpose of "establish[ing] and maintain[ing]" an Indigenous police force. Moreover, that funding was not granted during the process of renewing the agreements but rather outside that process, in an irregular and unpredictable manner. In short, Quebec's subsequent contribution of additional financial support — with strict conditions that did not allow for any good faith negotiation concerning the recurring funding — does not change the fact that its refusal to abide by the contractual renewal mechanism was a breach of the requirements of good faith. If the addenda have any importance, it is in relation to the assessment of injury, not to the violation of arts. 6, 7 and 1375 *C.C.Q.*

(2) <u>The Honour of the Crown, a Source of Public Law Obligations</u>

[140] Pekuakamiulnuatsh Takuhikan submits that the tripartite agreements must be [TRANSLATION] "implemented" in a manner consistent with the honour of the Crown, which gives rise to obligations for Quebec (outline of argument, at p. 1, in respondent's condensed book, Tab 1), including the duty to negotiate the renewal of the tripartite agreements with honour and integrity (R.F., at para. 99). According to it, Quebec did not comply with this duty.

[141] Quebec, on the other hand, argues that the honour of the Crown does not apply to its undertakings under the tripartite agreements, because the agreements fall within a [TRANSLATION] "category of agreements relating to public administration [that] is not subject to the same constitutional requirements as the negotiation of treaties with Indigenous peoples or the implementation of explicit obligations set out in the Constitution" (A.F., at para. 24). According to Quebec, the provision of police services [TRANSLATION] "is a matter relevant to all Canadians and is not part of the distinctive way of life of the members of the Pekuakamiulnuatsh First Nation" (para. 36, quoting Sup. Ct. reasons, at para. 85). It is therefore not, Quebec says, a matter related to the reconciliation of Indigenous rights and interests, whether Aboriginal or treaty, and the Crown's assertion of sovereignty.

[142] In the alternative, Quebec submits that, in any event, it fulfilled the obligations flowing from the honour of the Crown because it acted honourably in the negotiation, interpretation and implementation of the agreements entered into with Pekuakamiulnuatsh Takuhikan. Pekuakamiulnuatsh Takuhikan counters that, rather

than engaging in real negotiations to renew the agreements, Quebec imposed arbitrary funding terms on it without considering the real costs of providing culturally appropriate police services of an acceptable quality. Not only does that conduct constitute a breach of the obligation to carry out the agreements in good faith, but, according to the respondent, it is also a violation of the principle of the honour of the Crown, which engages a higher standard of conduct.

[143] This fundamental disagreement raises, for the first time in this Court, the question of whether the principle of the honour of the Crown applies to a contractual undertaking given by the Crown to an Indigenous group.

[144] Although this question was not raised by the parties, I will note for the sake of clarity that the "Government of Quebec", as this term is used in the agreements, refers in this context to both the "State" within the meaning of art. 1376 *C.C.Q.* and the "Crown" in right of the province with respect to the honour of the Crown. There is no need to say any more about this here (see M.-F. Fortin, "L'État québécois et la Couronne canadienne: conception de la puissance publique à la lumière du droit de la responsabilité de la Couronne" (2022), 56 *R.J.T.U.M.* 379, at pp. 413-15).

[145] In what follows, we will see that, unlike good faith, the honour of the Crown does not apply to every contractual undertaking given by the Crown to an Indigenous entity. We must begin by identifying the test that can be used in this case to determine whether a contract is subject to the honour of the Crown. Once this test has been established, we will look at the tripartite agreements to ascertain whether they

satisfy it. For this purpose, the Court will have to determine the [TRANSLATION] "characterization" of the agreements, that is, it will have to carry out the legal exercise that leads to "the linking of the contract at issue to a normative category that can serve to determine the applicable legal regime" (Lluelles and Moore, at No. 1729). If the agreements satisfy this test, we must then conclude that Quebec was required to perform the tripartite agreements in an honourable manner, and the question will be whether Quebec complied with this obligation.

(a) *Application of the Honour of the Crown to Contractual Undertakings*

[146] Our task at this first stage of the analysis is to identify the relevant test in this case for determining whether the honour of the Crown applies to an agreement that is not constitutional in nature. As I noted above, not all contracts between the State and Indigenous peoples engage this principle. Since the Court has never addressed this question, I propose to proceed by analogy with the jurisprudence recognizing situations in which the honour of the Crown is engaged in order to draw therefrom the principles underlying its application.

[147] The honour of the Crown requires the Crown to act honourably in its dealings with Indigenous peoples. This principle arises 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" (*Mikisew Cree First Nation v. Canada (Governor General in Council)*, 2018 SCC 40, [2018] 2 S.C.R. 765, at para. 21, per Karakatsanis J., quoting *Haida Nation*, at para. 32, and citing *MMF*, at para. 66; see

also Hogg and Dougan). That practice gave rise to a "special relationship" between the Crown and Indigenous peoples (*MMF*, at para. 67, quoting *Beckman*, at para. 62).

[148] The underlying purpose of the principle of the honour of the Crown is to facilitate the reconciliation of the Crown's interests and those of Indigenous peoples, including by promoting negotiation and the just settlement of Indigenous claims (*Mikisew Cree*, at para. 22; see also *MMF*, at para. 66; *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, 2004 SCC 74, [2004] 3 S.C.R. 550, at para. 24; *Desautel*, at para. 22). This purpose transcends the corrective justice at the heart of private law to make room for repairing and maintaining the special relationship with the Indigenous peoples on whom European laws and customs were imposed (see *MMF*, at para. 67; *Haida Nation*, at para. 17). This is what I will call justice linked to reconciliation or reconciliatory justice.

[149] I hasten to add that the principle of the honour of the Crown is not a cause of action. It "speaks to *how* obligations that attract it must be fulfilled" (*MMF*, at para. 73 (emphasis in original)). The honour of the Crown is a constitutional principle that "looks forward to reconciliation between the Crown and Aboriginal peoples in an ongoing, 'mutually respectful long-term relationship'" (*Desautel*, at para. 30, quoting *Beckman*, at para. 10, and citing *Mikisew Cree*, at para. 21; *Newfoundland and Labrador (Attorney General) v. Uashaunnuat (Innu of Uashat and of Mani-Utenam)*, 2020 SCC 4, [2020] 1 S.C.R. 15, at paras. 21 and 28).

[150] This body of jurisprudence, which is well established, forms part of the "*jus commune*" to which the Preliminary Provision of the *Civil Code* refers. The Court has previously determined that this "*jus commune*" is not limited to private law but must be understood in an expansive manner so as to give the *Civil Code* "the broadest possible operational scope" (*Prud'homme*, at para. 29, citing A.-F. Bisson, "La Disposition préliminaire du *Code civil du Québec*" (1999), 44 *McGill L.J.* 539). More specifically, the honour of the Crown and the obligations flowing from it are part of the public law governing the liability of the State. As author Daniel Jutras observes, [TRANSLATION] "[i]t is public law that determines in what circumstances, and under what conditions, the State may be held liable" ("Regard sur la common law au Québec: perspective et cadrage" (2008), 10 *R.C.L.F.* 311, at p. 315; see also *Prud'homme*, at paras. 24-27; *Finney v. Barreau du Québec*, 2004 SCC 36, [2004] 2 S.C.R. 17, at para. 27).

[151] In this regard, the core of the analysis rests on art. 1376 *C.C.Q.*, which "is a public law" rule (*Prud'homme*, at para. 27). According to art. 1376 *C.C.Q.*, the rules in Book Five ("Obligations") of the *Civil Code* apply to the State, "subject to any other rules of law which may be applicable to [it]", whether these other rules are written or unwritten (see *Commentaires du ministre de la Justice*, vol. I, *Le Code civil du Québec — Un mouvement de société* (1993), at p. 833; see also Baudouin, Jobin and Vézina, at No. 11; *Hinse v. Canada (Attorney General)*, 2015 SCC 35, [2015] 2 S.C.R. 621, at para. 22; *Ludmer v. Canada (Attorney General)*, 2020 QCCA 697, 2020 DTC 5055, at

para. 41; *Restaurant Le Relais de Saint-Jean inc. v. Agence du revenu du Québec*, 2020 QCCA 823, at para. 67).

[152] Public law rules can thus "derogat[e]" from the general civil liability regime (*Kosoian v. Société de transport de Montréal*, 2019 SCC 59, [2019] 4 S.C.R. 335, at para. 106), for example by creating a form of immunity in favour of the State (see, e.g., *Ressources Strateco inc. v. Procureure générale du Québec*, 2020 QCCA 18, 32 C.E.L.R. (4th) 231, at para. 67). These rules can also change the nature of the State's private law obligations, or even intensify them. Author Daniel Jutras helpfully observes that this set of public law rules includes [TRANSLATION] "all rules that give a distinct scope to [the] liability [of the State] because of the public nature of [its] activity" ("Cartographie de la mixité: la common law et la complétude du droit civil au Québec" (2009), 88 *Can. Bar Rev.* 247, at p. 255).

[153] I therefore agree with Bich J.A.'s emphasis on the fact that art. 1376 *C.C.Q.* is the provision that makes Quebec subject to private law obligations [TRANSLATION] "without, however, releasing [it] from its public law obligations", including those flowing from the honour of the Crown, "in . . . its dealings with Indigenous peoples, even in contractual matters" (C.A. reasons, at paras. 128 and 130). However, in my respectful view, there is no basis for concluding that the principle of the honour of the Crown is implicitly incorporated into contracts by operation of art. 1434 *C.C.Q.* (see para. 130). The honour of the Crown applies to the contracts in this case, but this does not mean that the obligations flowing from it are contractual

obligations in the strict sense. Good faith is part of the implicit content of a contract or at least reflects a [TRANSLATION] "general attitude" imposed on contracting parties by law (Lluelles and Moore, at No. 1977). But the honour of the Crown is binding on Quebec as a principle of public law that is not part of the [TRANSLATION] "contractual matrix" associated by law with the individual will of the parties (see *Poitras v. Concession A25*, 2021 QCCA 1182, at para. 51). Unlike good faith under art. 1375 *C.C.Q.*, the obligations flowing from the honour of the Crown are not contractual obligations that have binding force by reason of a validly formed contract between an Indigenous entity and the State. Moreover, the remedy for a breach of the obligations flowing from the honour of the Crown is not governed by the rules of contractual liability or by the fundamental principle of *restitutio in integrum*. The honour of the Crown gives rise to public law obligations, anchored in the distinct logic of reconciliation (see G. Motard and B. Chartrand, "Négocier de bonne foi: les accords commerciaux, les sociétés d'État et le principe de l'honneur de la Couronne" (2019), 70 *U.N.B.L.J.* 172, at pp. 198-99). Failure to comply with these obligations requires the Crown to restore the nation-to-nation relationship damaged by the dishonourable conduct.

[154] In sum, under art. 1376 *C.C.Q.*, the principle of the honour of the Crown and the obligations that flow from it are part of the "other rules of law" relating to the civil liability of the State. These obligations intensify the State's liability in the circumstances where they apply. Consequently, while the honour of the Crown is engaged where the State has contractual obligations, its source, unlike those contractual

obligations, is firmly anchored in the public law rules that supplement the legal regime governing the liability of the State.

[155] I now turn my attention to the principles that guide the determination of whether the honour of the Crown applies in particular situations.

[156] The common element among the circumstances that the Court has so far recognized as engaging the honour of the Crown is that they relate to the reconciliation of specific Indigenous claims, rights or interests with the Crown's assertion of sovereignty (see *MMF*, at para. 73). In particular, the Court has established that the Crown has a duty to consult Indigenous peoples when their rights recognized and affirmed by s. 35 of the *Constitution Act, 1982* might be adversely affected by the Crown's conduct, whether the rights are established or claimed (*Tsilhqot'in Nation v. British Columbia*, 2014 SCC 44, [2014] 2 S.C.R. 257, at para. 78; *Haida Nation*, at para. 35). Where the Crown exercises control over specific Indigenous interests, the honour of the Crown may give rise to a fiduciary obligation (*Wewaykum Indian Band v. Canada*, 2002 SCC 79, [2002] 4 S.C.R. 245, at paras. 79 and 81; *MMF*, at para. 73). Similarly, the Crown has an obligation to act with integrity in the negotiation, interpretation and implementation of treaties entered into with Indigenous peoples (*Restoule*, at para. 73; *Beckman*, at para. 42).

[157] Some courts have recognized that the honour of the Crown may apply to contractual undertakings that are not constitutional in nature and that also relate to reconciliation. For example, the Manitoba Court of Appeal held that a contract whose

purpose was to resolve claims by the Métis people that, up to that point, had not been addressed constructively and in good faith engaged the honour of the Crown (*Manitoba Metis Federation Inc. v. Brian Pallister*, 2021 MBCA 47, 458 D.L.R. (4th) 625). The Ontario Superior Court of Justice approved an arbitration decision finding that the honour of the Crown was engaged by a gaming revenue-sharing agreement because the agreement "represents the reconciliation of the constitutionally protected Aboriginal right of self-government . . . with the Crown's sovereignty" (*Ontario First Nations (2008) Limited Partnership v. Ontario Lottery and Gaming Corporation*, 2020 ONSC 1516, at para. 110). That decision was affirmed by the Court of Appeal for Ontario, which found it unnecessary to address the question of the honour of the Crown (2021 ONCA 592, at para. 75).

[158] Similarly, the jurisprudence recognizes that the principle of the honour of the Crown applies to treaty land entitlement agreements that are not themselves treaties protected by s. 35(1) of the *Constitution Act, 1982* (*Saskatchewan (Attorney General) v. Witchekan Lake First Nation*, 2023 FCA 105, 482 D.L.R. (4th) 352, at paras. 127-30; *Long Plain First Nation v. Canada (Attorney General)*, 2015 FCA 177, 475 N.R. 142, at para. 118; *Pasqua First Nation v. Canada (Attorney General)*, 2016 FCA 133, [2017] 3 F.C.R. 3, at para. 64). Since their purpose is to rectify the Crown's broken treaty promises (*Long Plain*, at para. 117) and thus to promote reconciliation (*Witchekan Lake*, at para. 127), such agreements are interpreted as engaging obligations flowing from the honour of the Crown. As these cases show, contracts are one of the instruments available to governments for undertaking or continuing a process of reconciliation, in

addition to treaties (*Restoule*, at paras. 68-70) and legislation (*Reference re An Act respecting First Nations, Inuit and Métis children, youth and families*, 2024 SCC 5 ("*Reference*"), at paras. 20-21), even though reconciliation based on contract differs from reconciliation by treaty and from "legislative reconciliation".

[159] It is well settled that the Crown cannot contract out of its duty of honourable dealing with Indigenous peoples (*Beckman*, at para. 61). It follows, as Bouchard J.A. observed, that the obligations flowing from the honour of the Crown apply [TRANSLATION] "independently of the expressed or implied intention of the parties" and that this intention therefore cannot be a determinative consideration in the analysis (C.A. reasons, at paras. 63 and 117, citing *Beckman*, at para. 61). It also follows that the instrument employed by the Crown in its dealings, including a contract, cannot have the effect of excluding the obligations flowing from the honour of the Crown.

[160] That being said, not every agreement between the Crown and an Indigenous group will necessarily engage the honour of the Crown. For example, simple commercial contracts between a government and an Indigenous entity would not necessarily engage the principle of the honour of the Crown. However, the Court's jurisprudence and the circumstances of this case point to a way of differentiating agreements in this regard.

[161] 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 (*Dickson v. Vuntut Gwitchin First Nation*, 2024 SCC 10, at para. 51, quoting *Report of the Royal Commission on Aboriginal Peoples*, vol. 2, *Restructuring the Relationship* (1996), at p. 234).

[162] It is well settled that the principle of the honour of the Crown rests on the "special relationship" between the Crown and Indigenous peoples. As in the case of an explicit obligation owed to an Indigenous group and enshrined in the Constitution, the honour of the Crown is engaged only by an obligation assumed by the Crown on the basis of its "special relationship" with the Indigenous group, which is different from the one it has with the population in general (*Mikisew Cree*, at para. 21; *Haida Nation*, at para. 25). Moreover, the honour of the Crown will apply only if the contract has a collective dimension. Agreements relating to individual rights, even if they are between the State and an Indigenous contracting party, will generally not engage the honour of the Crown (see, e.g., *Waldron v. Canada (Attorney General)*, 2024 FCA 2, at para. 94, citing *Cree Nation of Eeyou Istchee (Grand Council) v. McLean*, 2019 FCA 185, at paras. 8 and 11; *Nunavut Tunngavik Inc. v. McLean*, 2019 FCA 186, at paras. 8 and 11; *Whapmagoostui First Nation v. McLean*, 2019 FCA 187, at para. 11).

[163] 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 is the subject of a credible claim. In the case at bar, Pekuakamiulnuatsh Takuhikan argues that having an Indigenous police force is an exercise of its right of

self-government. I therefore take care to limit my comments accordingly. While we do not have to decide the question in order to resolve this case, I am not, however, excluding the possibility of recognizing, in a different context, that other Indigenous rights or interests might also engage the honour of the Crown in connection with a contractual undertaking.

[164] It is not necessary, in order for the principle of the honour of the Crown to apply, that an implicated Indigenous right already be recognized by the courts or the Crown.

[165] In this regard, I do not agree with Canada that the honour of the Crown may be engaged [TRANSLATION] "where the Crown makes an undertaking that is not constitutional in nature for the implementation of the right of self-government protected by s. 35(1) of the *Constitution Act, 1982*" (I.F., at para. 3 (emphasis added)). The Court has never addressed the question of whether there is a right of self-government protected by s. 35(1) of the *Constitution Act, 1982* (*Reference*, at para. 112), and it is neither necessary nor appropriate to do so in this appeal.

[166] Clearly, an established right, which is to say a right recognized by judicial authority that is binding on the court, will suffice, but the same is true of a right that is the subject of a credible claim. To arrive at this conclusion, I propose to draw on the jurisprudence concerning the duty to consult. These cases plainly establish that a credible claim to an Indigenous right is sufficient to impose an obligation on the Crown to deal honourably with Indigenous peoples (*Haida Nation*, at para. 35; *Rio Tinto Alcan*

Inc. v. Carrier Sekani Tribal Council, 2010 SCC 43, [2010] 2 S.C.R. 650, at paras. 40-41). As McLachlin C.J. wrote for a unanimous Court: "The threshold, informed by the need to maintain the honour of the Crown, is not high . . . While the existence of a potential claim is essential, proof that the claim will succeed is not. What is required is a credible claim" (*Carrier Sekani*, at para. 40).

[167] The application of the honour of the Crown in such circumstances is made necessary by the imperative of preserving the rights of Indigenous peoples on an interim basis during the process of treaty negotiation and proof (*Haida Nation*, at para. 27). In its intervener's factum, Canada correctly points out that [TRANSLATION] "the honour of the Crown may give rise to obligations . . . even where the existence of a specific Indigenous right or interest has not been judicially affirmed" (I.F., at para. 17).

[168] The honour of the Crown advances the goal of reconciliation in particular "by promoting negotiation and the just settlement of Aboriginal claims as an alternative to litigation and judicially imposed outcomes" (*Mikisew Cree*, at para. 22, citing *Taku River*, at para. 24). This is a principle that is well established in the Court's jurisprudence (see, e.g., *Haida Nation*, at para. 17; *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, 2005 SCC 69, [2005] 3 S.C.R. 388, at para. 51). For the purposes of this appeal, it is the existence of an established right or a credible claim to a right of self-government in a particular situation that justifies the application of the principle of the honour of the Crown to some contracts and not to

others. Such a right or claim serves to situate the contract in circumstances similar to those that the Court has already recognized as engaging the honour of the Crown, circumstances that, as we have seen, relate to specific Indigenous rights or interests and involve their reconciliation with the Crown's assertion of sovereignty.

[169] Having identified the test governing the application of the principle of the honour of the Crown in this case, I turn to an analysis of the tripartite agreements. It is through a characterization exercise that contracts engaging the honour of the Crown under this test can be distinguished, on the basis of their true legal nature, from those that do not.

(b) *Characterization of the Tripartite Agreements*

[170] While identifying which contracts engage the principle of the honour of the Crown is an exercise that relates to public law concepts, it is helpful to draw inspiration, by analogy, from the exercise of characterizing contracts in the civil law, which serves to distinguish contracts on the basis of their legal category.

[171] Unlike the process of interpretation, the characterization of a contract in the civil law is described as a [TRANSLATION] "legal exercise" (A. Bénabent, *Droit des obligations* (20th ed. 2023), at No. 294): its purpose is to identify the [TRANSLATION] "legal nature" of the contract in order to place it in the appropriate category that serves to determine the rules applicable to it (P. Malinvaud, M. Mekki and J.-B. Seube, *Droit des obligations* (15th ed. 2019), at No. 84). Agreements can thus be characterized on

the basis of what author Adrian Popovici helpfully calls their [TRANSLATION] "characteristic prestation" (*La couleur du mandat* (1995), at p. 35, fn. 132). Transposed to this case, the question is whether the characteristic prestation of the tripartite agreements satisfies the test for the application of the principle of the honour of the Crown. As in private law, this characterization exercise is not governed strictly by the intention of the parties. Characterization is based on the legal nature of the act created and follows directly from the characteristic prestation of the contract. It is a question of law, whereas the interpretation of a contract generally includes a significant factual dimension (Lluelles and Moore, at No. 1726).

[172] In this case, the characteristic prestation of the tripartite agreements has three aspects. First, the tripartite agreements provide for the establishment and maintenance of an Indigenous police force. Second, they set out a shared funding regime between the governments of Canada and Quebec and Pekuakamiulnuatsh Takuhikan. Finally, they provide for the independent management of the police force by Pekuakamiulnuatsh Takuhikan.

[173] In light of this characteristic prestation, it appears that the parties entered into the tripartite agreements on the basis and by reason of Pekuakamiulnuatsh Takuhikan's Indigenous difference. The Indigenous contracting party is the band council, represented by its chief. The objective, as defined by the agreement, is to establish and maintain the "Mashteuiatsh Police Force" formed under the *Act*.

[174] Clause 2.2.1 of the agreement states that the mission of the police force so established is described in s. 93 of the *Act*. This section applies only to Indigenous police forces, like all the sections in Division IV (of Chapter I of Title II) of the *Act*. Section 93 (as it read at the relevant time) provides that Indigenous police forces have jurisdiction to maintain peace, order and public safety and to prevent and repress crime and offences under the laws and regulations applicable in the territory in which they are established. According to s. 90 of the *Act*, only Indigenous communities may enter into an agreement with Quebec to establish or maintain an Indigenous police force in a territory determined under the agreement. Under the applicable legislation, Quebec therefore bound itself on the basis and by reason of Pekuakamiulnuatsh Takuhikan's Indigenous difference, with a view to meeting its needs as a community.

[175] Moreover, if one is guided by the language used in the National Assembly by the Minister responsible for the *Act*, the tripartite agreements were entered into in the context of the nation-to-nation relationship between Quebec and the respondent. As Quebec acknowledges, non-Indigenous communities of a similar size in the province do not benefit from the FNPP or have local police forces. The aim of the funding is to remedy the historical harm resulting from the imposition of the national police on Indigenous peoples and the difficulties experienced by Indigenous communities in managing their internal security (see *Policy*, at p. 2; *Journal des débats*, at pp. 1252-54 (S. Ménard)).

[176] Quebec is wrong to say that the tripartite agreements do not engage the honour of the Crown because [TRANSLATION] "[t]he action does not relate to a claim to an Aboriginal right or to a specific Indigenous interest" (A.F., at para. 36).

[177] The honour of the Crown applies to the tripartite agreements because they concern the Indigenous right of self-government claimed by the Pekuakamiulnuatsh First Nation in matters of public safety in the community. The purposes of the tripartite agreements are to establish and maintain an Indigenous police force and to determine its funding. While it is true that the entire population benefits from police services, the establishment and maintenance of Indigenous police forces that are managed by the communities covered by an agreement and that provide culturally appropriate services to those communities distinguish these police forces from those serving the population in general.

[178] As we have seen, Canada, Quebec and certain First Nations, including the Pekuakamiulnuatsh, negotiated and entered into a broad-ranging agreement in principle that was to serve as the basis for drafting a treaty "which shall be a land claims agreement and a treaty within the meaning of sections 25 and 35 of the *Constitution Act, 1982*" (preamble, first recital). Section 2.1 of the agreement in principle states that "the Parties agree to ensure by way of treaty rather than by judicial means the recognition, confirmation and continuation of the aboriginal rights of the First Nations . . ., including aboriginal title, and not their extinguishment". Chapter 8 of the agreement in principle deals with self-government by the First Nations concerned,

authorizing them, among other things, to adopt their own constitutions and enact their own laws on "any matter related to the organization, general welfare, development and good government" of their communities, members and institutions (s. 8.3.1.1). Chapter 9, entitled "Administration of Justice", gives the "legislative assemblies of the First Nations" the right to enact laws "to constitute, maintain and organize police corps" (s. 9.4.1). The agreement in principle shows that the governments of Canada and Quebec consider Pekuakamiulnuatsh Takuhikan's claim to self-government in this area to be credible and that they take it seriously. Even if the right has not been established, a credible claim is sufficient to engage the honour of the Crown.

[179] Quebec's power to enter into tripartite agreements derives from s. 90 of the *Act*. The legislative debates concerning the *Act to amend the Police Act and the Act respecting police organization as regards Native police* indicate that the *Police Act* was amended in order to promote self-government for Indigenous peoples. In those debates, the Minister of Public Security stated, among other things, that the National Assembly had urged the government to enter into [TRANSLATIONS] "agreements on various subjects assuring them the exercise of the right of self-government in Quebec" with the nations that so wished, that "Indigenous nations have the right, under the laws of Quebec, to govern themselves on the lands allotted to them", and that they "have the right to have and to control, under agreements with the government, institutions that suit their needs in the areas of culture, education, language, health, social services and economic development" (*Journal des débats*, at p. 1252). It is clear from reading those debates that it was in the context of the claim by Indigenous peoples to the right of

self-government and control over their institutions that Quebec made the necessary amendments to the *Police Act* to make it possible for First Nations to have a culturally appropriate police force.

[180] During the hearing before this Court, Quebec pointed out that the tripartite agreements contain a clause stipulating that the agreement [TRANSLATION] "shall not serve to recognize, define, affect, limit or create Aboriginal rights or treaty rights" and "shall not be interpreted to be an agreement or treaty within the meaning of section 35 of the *Constitution Act, 1982*" (cl. 1.4.1). I also note that the respondent is not seeking, through this litigation, to establish a right protected by s. 35 of the *Constitution Act, 1982*, including a right of self-government in matters of policing.

[181] These facts are true, but they make no difference to the characterization of the contract. Even though the parties have agreed that there will be no final resolution of Pekuakamiulnuatsh Takuhikan's claims through the tripartite agreements, the fact remains that these agreements relate to the subject-matter of its claims, that is, its claimed right of self-government in matters of internal security. The question is not whether the agreement recognizes or modifies Indigenous rights, but only whether it relates to this claimed right. On this point, I agree with the Attorney General of Canada that [TRANSLATION] "[t]he existence of the right does not have to be determined; it is enough that this right and its implementation are sufficiently at stake" (I.F., at para. 17).

[182] Quebec argues that there is no link between the provision of police services and the reconciliation of the specific rights and interests of the Pekuakamiulnuatsh as

an Indigenous people (A.F., at para. 36). That position mistakenly disregards the fact that the tripartite agreements concern the maintenance of an Indigenous police force, which means that, for the reasons set out above, they relate to a claimed Indigenous right. Quebec admits that the honour of the Crown is engaged [TRANSLATION] "in matters involving [the] collective rights" of Indigenous peoples (para. 29). This is the case here. Moreover, the link between reconciliation and the agreements is plain from s. 90 of the *Act*, the statutory provision that authorizes the making of the agreements. Counsel for the appellant conceded this point herself, stating the following at the hearing: [TRANSLATION] ". . . section 90 of the *Police Act* is, in our view, a reconciliation provision"; "it allows for, it facilitates, it promotes reconciliation . . . of course, that it's what the governments wish" (transcript, day 1, at p. 47). I agree with Quebec on this point.

[183] It is therefore clear that the purpose of the tripartite agreements under consideration is to reconcile the Crown's assertion of sovereignty and the prior presence of the Pekuakamiulnuatsh on the territory concerned. The evidentiary record shows that the need of Indigenous peoples for culturally appropriate police services originates in the difficult, and at times even traumatizing, relationship that Indigenous peoples had, and in some cases continue to have, with the police services imposed on them over the years by the Crown. These difficulties and the resulting traumas are well documented. The final reports of the National Inquiry into Missing and Murdered Indigenous Women and Girls (*Reclaiming Power and Place* (2019)), the Viens Commission and the Ipperwash Inquiry (2007), among others, provide a

comprehensive account of them. Those reports refer in particular to the failure of police services to address violence against women and children in certain Indigenous communities, the overrepresentation of Indigenous people in detention centres, and racism and discrimination in the provision of services in certain communities. The opportunity to enter into agreements whose objective is to ensure the provision of culturally appropriate police services managed by the Indigenous communities served contributes to reconciliation by ensuring that these services meet their needs.

[184] To conclude on this point, the tripartite agreements must be characterized as contracts that engage the honour of the Crown, because they were entered into with Pekuakamiulnuatsh Takuhikan, on behalf of the Pekuakamiulnuatsh, for the establishment and maintenance of an Indigenous police force. These agreements are intended to promote reconciliation by allowing for the provision of services that are culturally adapted to the needs of the First Nation and anchored in its claim to self-government in matters of internal security. I will now consider the obligations that flow from the honour of the Crown in this context.

(c) *Obligation Flowing From the Honour of the Crown*

[185] Because it is not a cause of action itself, the principle of the honour of the Crown is expressed through the specific obligations to which it gives rise (*Restoule*, at para. 220; *MMF*, at para. 73; *Haida Nation*, at para. 18). The content of these obligations varies with the circumstances. On the basis of this Court's teachings with respect to treaties, I am of the view that the honour of the Crown imposes a duty on

Quebec to perform the tripartite agreements with honour and integrity. This duty alone is a sufficient basis for dismissing the appeal. Consequently, it is not necessary for the purposes of this case to decide whether Quebec also had a *sui generis* fiduciary obligation or an obligation to act with diligence in fulfilling any promise made.

[186] In the context of treaty making and implementation, this Court has long recognized the Crown's obligation to negotiate, interpret and apply treaties with honour and integrity while avoiding even the appearance of "sharp dealing" (*Haida Nation*, at paras. 19 and 42, quoting *R. v. Badger*, [1996] 1 S.C.R. 771, at para. 41). This obligation can be transposed to the contractual context when this context also involves reconciliation between the Crown and Indigenous communities.

[187] By this I do not mean to say that the agreement becomes a treaty like the treaties protected by s. 35 of the *Constitution Act, 1982*. Rather, it is a matter of recognizing that the honour of the Crown requires the Crown, in negotiating and performing an agreement that has reconciliation as its backdrop, to meet a standard of conduct that is higher than in the context of an ordinary contractual relationship (*Pallister*, at para. 56; *Witchekan Lake*, at para. 130; see also Motard and Chartrand, at p. 201).

[188] The higher standard of conduct to which the Crown is subject creates obligations that are superimposed on contractual obligations. The content of the contract is determined by its provisions and by the obligations attaching to it under the provisions of the *Civil Code*. Where the principle of the honour of the Crown applies,

not only is the content of the contract interpreted generously (*Badger*, at para. 41), but an additional public law obligation is superimposed on the contractual obligations, namely the Crown's obligation to act with honour and integrity in performing the contract. As this Court has observed in the treaty context, the honour of the Crown "lead[s] to requirements such as honourable negotiation and the avoidance of the appearance of sharp dealing" (*MMF*, at para. 73). In the contractual context, the honour of the Crown therefore does not change the terms of the agreement, but rather modifies how the obligations found therein are performed by requiring the Crown to act in a manner that fosters reconciliation. The honour of the Crown imposes this additional obligation only on the Crown, not on the Indigenous group that is also a party to the contract.

[189] What does it mean for the Crown to act with honour and integrity in negotiating and performing an agreement? The cases in which this question has been considered in the treaty context are instructive.

[190] 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).

[191] 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] 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.

[192] 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] 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).

(d) *Breach by Quebec of Its Obligation To Conduct Itself Honourably in Performing the Agreements*

[193] Pekuakamiulnuatsh Takuhikan alleges that Quebec, through its intransigent attitude, acted dishonourably by refusing to negotiate the funding terms of the tripartite agreements, thereby imposing on it an arbitrary level of funding that Quebec knew was inadequate. Quebec counters that, if the honour of the Crown gives rise to obligations for it, then it conducted itself honourably because it complied with its undertaking to fund the Mashteuiatsh police force in accordance with the agreements.

[194] Quebec is mistaken. As discussed above in the section on good faith, Quebec refused to consider Pekuakamiulnuatsh Takuhikan's repeated requests to renegotiate the level of funding for its police force even though it knew that the police force was underfunded and that the respondent would accept an inadequate level of funding to avoid resorting to the SQ's ill-adapted services.

[195] That conduct, which amounts to a breach of good faith, also represents a breach of the obligation to perform the tripartite agreements with honour and integrity, which imposes a higher standard. In addition to prohibiting the Crown from defrauding

or misleading another party, the honour of the Crown requires it to meaningfully engage in genuine negotiations in a manner conducive to maintaining a relationship that can support the ongoing process of reconciliation between the Crown and Indigenous peoples (see *Badger*, at para. 41; *Haida Nation*, at para. 19; *MMF*, at para. 73; *Chemainus*, at para. 26).

[196] By refusing to renegotiate the level of funding despite Pekuakamiulnuatsh Takuhikan's repeated complaints and the precarious situation in which it found itself, Quebec conducted itself in a manner that fell well below the standard of honourable conduct. Through its breach, Quebec jeopardized the contractual equilibrium and the very purpose of the tripartite agreements. That conduct is not made less dishonourable by the fact that Quebec subsequently complied with the terms resulting from its refusal to negotiate.

[197] Accordingly, I conclude that Quebec failed to comply with its obligation to act with honour, a breach that establishes a second independent basis of liability.

B. *Appropriate Remedy*

[198] The appropriate remedy for the breaches found on these two grounds must now be determined. Since Quebec's conduct can be characterized as both a civil fault and a breach of a public law obligation, the appropriate remedy can be ordered in accordance with the Quebec civil law regime and the public law regime.

[199] Quebec recognizes, in its alternative argument, that an award of damages is an appropriate remedy in the civil law. However, it submits that the Court of Appeal erred in the analysis that led it to order Quebec to pay Pekuakamiulnuatsh Takuhikan $767,745.58, an amount corresponding to 48 percent of the accumulated deficits, along with interest at the legal rate and the additional indemnity. In particular, Quebec argues that the Court of Appeal quantified the damages in an arbitrary manner, including by failing to determine whether the deficits were in fact the logical, direct and immediate consequence of the alleged fault. In Quebec's opinion, it is therefore necessary, if damages are awarded, to remand the case to the Superior Court so that it can fix the damages in accordance with the applicable principles and in light of the evidence that will then be presented. Finally, it submits that, in this case at least, the same principles govern an award of damages for a breach of the obligations flowing from the honour of the Crown.

[200] As for Pekuakamiulnuatsh Takuhikan, it argues that both the rules of public law and those of the civil law "justify the reimbursement of the deficits" it had to assume, such that there is no reason to remand the case to the Superior Court (R.F., at para. 149).

[201] In my view, Quebec is mistaken in arguing that the determination of the appropriate remedy in this case lends itself to the same analysis under the civil law and under public law. Although these two legal regimes can be applied to the same wrongful conduct, as in this case, they differ in nature.

[202] The civil law regime is based on corrective justice; its aim is to place the aggrieved party in the position it would have been in but for the fault committed by another. The injury must both be an immediate and direct consequence of that fault and have been foreseen or foreseeable (arts. 1607 and 1613 *C.C.Q.*).

[203] As for the public law regime associated with the principle of the honour of the Crown, it is concerned instead with the long-term relationship between the Crown and Indigenous communities (*Haida Nation*, at para. 32; *Carrier Sekani*, at paras. 37-38; K. Roach, *Constitutional Remedies in Canada* (2nd ed. (loose-leaf)), at § 15:20; B. Slattery, "Aboriginal Rights and the Honour of the Crown" (2005), 29 *S.C.L.R.* (2d) 433, at p. 440). The court must order any measure that is necessary to restore the honour of the Crown and thereby foster the goal of reconciliation (*Restoule*, at para. 277, quoting *Haida Nation*, at para. 45). This regime is much more flexible than that of the civil law: courts can and must be creative in finding a remedy that advances reconciliation (*Restoule*, at para. 277, quoting Hogg and Dougan, at p. 292). I would add that the high standard that applies to the honour of the Crown justifies, in part, the exercise of the courts' discretion to grant a remedy they consider appropriate, a discretion that does not exist under the good faith regime. In turn, this discretion militates against the position of the intervener the Attorney General of Canada that the Court of Appeal first had to consider issuing a declaration before it awarded damages against the governments of Canada and Quebec. Within the sphere of reconciliatory justice, flexibility, not rigidity, is the rule.

[204] Since the two regimes do not have the same purpose and are not governed by the same rules, they do not lend themselves to the same analysis. For these reasons, I will examine the civil law regime and the public law regime in turn.

(1) Breach of Good Faith: *Restitutio in Integrum*

[205] In the case of the civil law regime, I agree with Quebec that the quantum of damages cannot be established on the record before us.

[206] After concluding that the conduct of the governments of Canada and Quebec gave rise to civil liability and, more specifically, constituted an abuse of right — a conclusion with which I agree — the Court of Appeal turned to the question of the remedy. In this regard, it stated that [TRANSLATION] "in the present matter, the condemnation to pay damages that match the deficits incurred by [Pekuakamiulnuatsh Takuhikan] from 2013-2018 to operate its police service (even if unsatisfactorily) is a fair and reasonable remedy corresponding to the injury resulting from the abuse, which is a contractual fault" (para. 140).

[207] Certainly, the obstinate refusal of the two governments, including that of Quebec, to negotiate the level of funding during the renewal process contemplated by the very terms of the agreements constitutes a civil fault. However, the respondent — the plaintiff at first instance — also had the burden of proving exactly what injury resulted therefrom in order to support its claim in civil liability for breach of the requirements of good faith. It is not clear that, even if Quebec had acted in good faith

during the negotiations, it would, with Canada, have provided 100 percent of the funding for the SPM and the respondent would not have incurred any deficit; it is the very essence of negotiations that a party will not necessarily obtain everything it wishes, particularly in a context such as this, where political will and the available funds were limited. Similarly, it is not clear that the supplemental assistance provided by Quebec, whether through a contract addendum, a bilateral agreement or a secondment, is of no relevance in assessing the damages required to compensate for the injury suffered by the respondent. Nor does the record show whether the negotiations concerning the first agreement included in the period at issue took place during that period or before it, in which case the injury caused by the breach could not be taken into account by the court. In my view, and with respect, the Court of Appeal could not conclude, without a more thorough analysis of the evidence, that the injury suffered by Pekuakamiulnuatsh Takuhikan as a result of the failure to comply with arts. 6, 7 and 1375 *C.C.Q.* corresponded to the full amount of the accumulated deficits.

[208] In the circumstances, this Court is unable to carry out this assessment itself. The evidence concerning the injury suffered, and notably the relevance of the contributions that Quebec seeks to document in its table DPGQ-21, makes this task a hazardous one on appeal. If Pekuakamiulnuatsh Takuhikan's action were based solely on a civil fault, I would therefore find that the case should be remanded to the Superior Court so that it can determine the quantum of damages (*Supreme Court Act*, s. 46.1; *Saadati v. Moorhead*, 2017 SCC 28, [2017] 1 S.C.R. 543, at para. 45).

[209] I turn now to the question of the appropriate remedy in respect of public law.

(2) Breach of the Obligation To Act With Honour: Restoring the Honour of Crown

[210] A breach of the obligations flowing from the honour of the Crown makes available "the full range of remedies, including damages and other coercive relief, . . . to remedy that breach" (*Restoule*, at para. 276, citing Roach, at § 15:2). Under the public law regime, the analysis must be focused on restoring the honour of the Crown, which was marred by its wrongful conduct. The purpose of this exercise is not to remedy the consequences of a civil fault, but rather to impose a measure that restores balance to the relationship between the parties and thus places them back on the path to reconciliation.

[211] Given that the exercise is concerned with the relationship between the Crown and Indigenous peoples, it is important to be sensitive to Indigenous perspectives on the manner in which the relationship can be restored. In a leading text on the subject, author Robert Mainville, now a justice of the Quebec Court of Appeal, wrote that "[f]ull consideration should be given to the Aboriginal perspective, and measures should be taken to ensure that the decisions made are consistent with the long-term interests of the concerned Aboriginal community and with its survival as a viable, distinct culture and society" (p. 127). While these comments were made in the context of a discussion of court-supervised compensation schemes, they are also

helpful in determining the appropriate remedy for a breach of an obligation flowing from the honour of the Crown. This does not mean that the representatives of an Indigenous community can themselves decide, in the court's place, what remedy is appropriate in the circumstances. Rather, it is a matter of recognizing that the Indigenous perspective in this regard is a factor that the court must take into account. The more reasonable the Indigenous perspective is, the greater the likelihood that the court will accede to it.

[212] On completing his analysis focused on the honour of the Crown, Bouchard J.A. ordered Quebec to pay Pekuakamiulnuatsh Takuhikan $767,745.58, with interest at the legal rate and the additional indemnity, for its failure to comply with its obligation to act honourably in its contractual dealings with the respondent (C.A. reasons, at para. 125).

[213] Should this remedy be upheld?

[214] In this case, the relationship between the parties was undermined by the intransigent attitude adopted by Quebec at the stage of renewing the tripartite agreements during the period at issue. That attitude served Quebec's interests. Quebec, which is responsible for ensuring the safety of everyone in the province, knew that the SQ's services were ill-adapted to the realities of Indigenous communities and could even be harmful to them. By renewing the agreements without genuinely negotiating their funding terms, Quebec was able to give the community of Mashteuiatsh access to

Indigenous policing while at the same time limiting its own expenditures and ensuring that Canada continued to partially fund the police force.

[215] As I mentioned above, Quebec's intransigent attitude made Pekuakamiulnuatsh Takuhikan feel like there was a "knife to the throat" (C.A. reasons, at para. 101): either it continued to impoverish itself to maintain the SPM and preserve the progress that the SPM represented in terms of self-government, or it abolished the SPM, which meant both returning to the SQ's inadequate services and suffering a setback with respect to self-government (paras. 136-37). That "knife to the throat" was what made the respondent agree to renew the tripartite agreements on terms that it could not genuinely negotiate, which led to it assuming deficits totalling $1,599,469.95 during the period at issue. That state of affairs also forced the SPM to operate "at the very lowest of the lowest", as its officers were not even trained in the use of traffic radar or breathalyzers (paras. 99 and 114). This meant that the quality of the services provided to the community — and hence the community itself — suffered because of the intransigence and the underfunding that resulted therefrom.

[216] Thus, despite the "respect" and "transparency" noted by the trial judge — who did not consider the principle of the honour of the Crown — Quebec's attitude benefited it and harmed Pekuakamiulnuatsh Takuhikan, not only in financial terms but also from the standpoint of the quality of policing and its dignity, as its freedom of choice was not respected. By imposing such a difficult choice on the respondent despite knowing that the SQ's services were ill-adapted and possibly harmful, Quebec did not

deal with it on an equal footing and did not display the [TRANSLATION] "spirit of mutual cooperation and respect" referred to by the Minister and the federal *Policy* (*Journal des débats*, at p. 1254 (S. Ménard)). This is also part of the damage caused to the relationship, which must now be repaired.

[217] Given the fact that Quebec's dishonourable conduct served its interests and harmed Pekuakamiulnuatsh Takuhikan and the community it represents in financial terms and from the standpoint of public safety and dignity, and also given the perspective of this community, which has always sought an award of damages, I am of the view that the Court of Appeal could conclude that repairing this damage requires such a remedy.

[218] Canada, as an intervener, submits that the most appropriate remedy to give effect to the principle of the honour of the Crown is [TRANSLATION] "generally" a declaration (I.F., at para. 29). It notes that the Court of Appeal did not consider issuing a declaration rather than awarding damages. As an intervener, Canada takes no position on the appropriate remedy in this case.

[219] It is true, as noted for a unanimous Court by O'Bonsawin J., that this remedy "is especially appropriate given the non-adversarial, trust-like relationship Canadian governments are supposed to have with Aboriginal people" (*Shot Both Sides v. Canada*, 2024 SCC 12, at para. 72, quoting Roach, at § 15:31). A declaration helps parties resolve their dispute in a manner that is collaborative rather than conflictual and that upholds their respective rights and obligations. A measure of this kind is more

likely to move them closer to the goal of reconciliation than a remedy imposed by the courts following adversarial proceedings (see *Reference*, at para. 77; *Desautel*, at para. 87; *Haida Nation*, at para. 20; *Clyde River (Hamlet) v. Petroleum Geo-Services Inc.*, 2017 SCC 40, [2017] 1 S.C.R. 1069, at para. 24). In *MMF* and *Shot Both Sides*, this Court found that a declaration that would assist the Indigenous party in future negotiations with the Crown was a measure that would allow issues to be resolved in a practical way and was therefore an appropriate remedy.

[220] That being said, it is also true that other remedies, including an award of damages, are available to a court (*Restoule*, at para. 288; see also *Carrier Sekani*, at para. 37). The remedy relating to the honour of the Crown will vary with the circumstances of each case; no type of remedy takes precedence over the others. I reiterate that, from the start of the proceedings, Pekuakamiulnuatsh Takuhikan has been claiming damages for what it considers to be dishonourable conduct and that it has not asked for a declaration to be issued. This case thus differs from *Shot Both Sides*, in which the Indigenous party expressly sought such a declaration (para. 63). It should also be noted that, before this Court, Quebec has not challenged the fact that damages were awarded as a remedy in this case; rather, it is their quantum that it disputes (A.F., at paras. 126-28). In this sense, the case can also be distinguished from *Restoule*, in which a government party argued that only a declaration was available to remedy the breach in question (para. 269).

[221] Accordingly, I must now consider the quantum of damages relating to the honour of the Crown and whether the case should be remanded to the Superior Court as suggested by Quebec.

[222] With regard to the quantum, I note that Quebec's arguments on the question of damages are centred on the logic of contractual liability and corrective justice that it encourages us to adopt. Quebec has made no argument concerning the damages awarded by Bouchard J.A. further to his analysis relating to the principle of the honour of the Crown. Quebec says nothing about the function of damages as a remedy meant to repair its relationship with Pekuakamiulnuatsh Takuhikan. Nor does it say anything about the specific nature of the remedy required for a breach of an obligation flowing from the honour of the Crown, or about what the author Mainville describes as a "special approach that ensures that the reconciliation of Aboriginal and mainstream Canadian societies can be achieved in a context of fairness and justice for both societies" (p. 109).

[223] While calculating the quantum of damages in accordance with the rules of the civil law requires an assessment that the Court is not in a position to make, we are in an entirely different context here. The task is to determine the appropriate remedy for a breach of an obligation flowing from the honour of the Crown; in this sense, a court's analysis must instead be focused on reconciliatory justice to ensure that the order made will have the effect of restoring the honour of the Crown. Once again, I agree with Mainville, who explains in his text that "the use of the compensation monies

. . . should be consistent with the preservation of the honour of the Crown and with the interests of both present and future generations of the affected Aboriginal Peoples" (p. 127). As this Court recognized in *Restoule*, courts must be creative in determining the appropriate remedy where this is necessary to restore the honour of the Crown (para. 277).

[224] The correct amount to be awarded as damages for a breach of an obligation flowing from the honour of the Crown is a highly contextual issue. In this case, I am of the view that the amount determined by the Court of Appeal should be upheld given the particular circumstances of the case, having regard to the purpose of the damages, which serve not only to compensate for past injury but also to restore the honour of the Crown for the future. To this can be added the difficulty of quantifying the financial injury sustained by Pekuakamiulnuatsh Takuhikan and the relevance, in light of the principle of the honour of the Crown, of the additional financial contributions provided by Quebec in this case. Moreover, remanding the case to the Superior Court for this sort of assessment — as opposed to an assessment of the damages related solely to civil fault — would, in my opinion, be contrary to the principle of proportionality that must guide the courts as an organizing principle of the law of civil procedure.

[225] As a result of Quebec's conduct, the respondent was deprived of the opportunity to negotiate more favourable funding terms with the Government of Quebec, which resulted in recurring deficits related to the operating costs of the Mashteuiatsh police force. It is not possible to determine the position the respondent

would be in today but for the Crown's dishonourable conduct. However, since it is the Crown's dishonourable conduct itself that makes this impossible, Pekuakamiulnuatsh Takuhikan should not be penalized. The other injury caused to it, from the standpoint of the quality of policing and its dignity, is also difficult to quantify with any precision.

[226] The supplemental assistance provided by Quebec during the period at issue does not call into question the remedy awarded by the Court of Appeal. In fact, those additional resources did not actually remedy the injury sustained by Pekuakamiulnuatsh Takuhikan and its community in terms of finances, the quality of policing or respect for their dignity, nor did they serve to restore the relationship between the parties; rather, their effect was to prevent the SPM from being abolished while perpetuating its precarious situation and the consequences thereof.

[227] The witnesses for Canada and Quebec acknowledged that their contributions were only makeshift solutions. At trial, Canada's representative, Mr. Bourdage, described the $400,000 in supplemental assistance provided by Canada, an amount that corresponded to the supplemental assistance provided by Quebec at the same time, as a "Band-Aid" or [TRANSLATION] "small bandage" that would "buy a little time" or "stem the bleeding" in order to "keep the lights on a bit longer" and "prevent the police station from closing" (A.R., vol. XVII, at p. 9). He continued by stating that Canada [TRANSLATION] "wanted to avoid putting money directly on the salary item because . . . there was, after all, some reluctance to commit [to maintaining that level of funding]" (*ibid.*). Similarly, his colleague from Quebec stated that Quebec wanted

to provide additional support to Indigenous communities that needed it, [TRANSLATION] "but not with salaries, for the reasons [Mr. Bourdage] explained . . . in his testimony" (p. 66). These excerpts clearly show that the supplemental assistance was not intended to actually remedy the injury caused by the dishonourable conduct of the federal and provincial governments nor to restore the relationship with the respondent, but rather to maintain the SPM without providing any meaningful solutions to the persistent problems resulting from that conduct.

[228] In short, given the magnitude of the injury caused to Pekuakamiulnuatsh Takuhikan and the community it represents and given the relatively modest nature of its claim, I see no reason to vary the Court of Appeal's order so as to take into account the supplemental assistance provided by Quebec, which helped ensure the SPM's continued existence without, however, rectifying its precarious situation or repairing the relationship between the parties.

[229] I would also note that it is essential to pay particular attention to proportionality when a breach of an obligation flowing from the honour of the Crown is in issue. In such circumstances, the path to restoring the honour of the Crown does not always involve the strict application of private law principles. Nor does it always require insistence on following procedures that are burdensome, given the amount at stake, in order to establish the consequences of dishonourable conduct. Reconciliatory justice requires both adaptability and flexibility. This is an example of where a "culture shift" calls upon judges to manage the legal process "in line with the principle of

proportionality" (*Hryniak v. Mauldin*, 2014 SCC 7, [2014] 1 S.C.R. 87, at para. 32; see *Code of Civil Procedure*, CQLR, c. C-25.01, art. 18).

[230] It seems clear to me that the circumstances of this case raise issues of proportionality. In my view, the ends of justice — which here means reconciliatory justice — would not be served by remanding the case to the Superior Court. The deficits are not attributable to any mismanagement of the SPM. They have been accumulating for more than a decade, and Pekuakamiulnuatsh Takuhikan initiated these proceedings in December 2017, about seven years ago. It has already devoted an enormous amount of time and effort to asserting its rights under the tripartite agreements. Remitting the case to the trial court would add to the delays already experienced by the respondent (and Quebec) without any clear indication that the judge would arrive at a different quantum. In these circumstances, and given the amount at stake, it would not be in the interests of justice to prolong the process any further.

[231] In light of their distinct purposes, one cannot exclude the possibility that the private law remedy and the public law remedy could complement one another. I would note, however, that the determination of the quantum of damages awarded for a breach of the obligations flowing from the honour of the Crown should take into account any remedies granted concurrently under private law, notably in order to avoid double compensation (see, by analogy, *Vancouver (City) v. Ward*, 2010 SCC 27, [2010] 2 S.C.R. 28, at para. 36). It is true that the distinct nature of a claim for a breach of the obligation associated with the honour of the Crown means that this public law remedy

is not a complete substitute for that of private law. However, as authors Jean-Louis Baudouin, Patrice Deslauriers and Benoît Moore observe regarding the remedy under s. 24(1) of the *Canadian Charter of Rights and Freedoms*, the State may nonetheless argue in defence that the private law remedy is capable of sufficiently addressing the breach (*La responsabilité civile* (9th ed. 2020), at No. 1-140, citing *Ward*, at paras. 34-35). That being so, I note that upholding the amount awarded by the Court of Appeal for breach of the honour of the Crown is determinative of the outcome of the appeal in this case.

[232] In the end, I would rely on the flexibility inherent in the assessment of damages in this public law context and uphold, without interfering with the quantum, the remedy granted by the Court of Appeal, which is more conducive than any other measure to restoring the honour of the Crown. The grounds that have led me to find a breach by Quebec and to uphold the award made against it by the Court of Appeal suffice to identify Quebec's dishonourable conduct and to provide the parties with guidance for the future. For these reasons, and in light of the compensation awarded to Pekuakamiulnuatsh Takuhikan, I am of the view that a declaration would be of no practical utility in this case (see *Shot Both Sides*, at para. 68).

[233] In upholding the remedy granted by the Court of Appeal, I am not taking it upon myself to "rewrite" the tripartite agreements. I am sensitive to the argument put forward by the Attorney General of Saskatchewan, relying, *inter alia*, on *Witchekan Lake*, at paras. 127-31, that the honour of the Crown should not be used to add to a

contract, as an implied obligation, a "hitherto unknown constitutional funding obligation" that would conflict with the terms freely agreed upon by the parties (I.F., at para. 35). I am mindful of the fact that the honour of the Crown speaks to how agreements are to be carried out and is not a cause of action itself (*MMF*, at para. 73). Accordingly, I share the view expressed by Rennie J.A. in *Witchekan Lake*: even when the honour of the Crown applies to a contract, the court's role cannot be "to rewrite, under the guise of reconciliation, the bargain struck" (para. 131).

[234] That is certainly not what I propose to do here.

[235] I would not interfere with the Government of Quebec's contractual undertaking to fund the police force up to a "maximum amount" set for each fiscal year (cl. 4.2.1) or with Pekuakamiulnuatsh Takuhikan's contractual undertaking to assume responsibility for the deficits accumulated during the same period (cl. 4.5.2). Here, the remedy sought and granted by the Court of Appeal is intended to allow the endeavour of maintaining an Indigenous police force in Mashteuiatsh to regain momentum within a nation-to-nation relationship that is renewed for the future, and in accordance with the constitutional principle of reconciliation. In my view, this appears entirely appropriate.

[236] The relationship between the Crown and Pekuakamiulnuatsh Takuhikan is ongoing. As the Court stated in *Taku River*, "[i]n all its dealings with Aboriginal peoples, the Crown must act honourably, in accordance with its historical and future relationship with the Aboriginal peoples in question" (para. 24 (emphasis added)).

Quebec will be expected to conduct itself honourably in the future when carrying out similar agreements, in keeping with the principles laid down in this judgment.

VI. Conclusion

[237] For all these reasons, I would dismiss the appeal, with costs.

[238] The respondent brought a motion to adduce new evidence. The motion, which was referred to the panel by a judge of the Court, is contested by Quebec. Given that I would dismiss the appeal irrespective of this exhibit, I consider the motion to be moot. I would therefore dismiss it, but without costs.

[239] The respondent also asked this Court to award costs against Quebec on a solicitor-client basis. It argues that the appeal represents an exceptional circumstance because it had to [TRANSLATION] "prolong legal proceedings to have the Appellant's failure . . . sanctioned despite the fact that the Intervener [the Attorney General of Canada] did not seek to appeal the judgment sanctioning their concerted actions" (R.F., at para. 159). It says that following the usual rule would be contrary to the purposes of reconciliation.

[240] I cannot accept those arguments. In my opinion, this case does not involve exceptional circumstances within the meaning of the case law on costs. In exercising its discretion, the Court awards costs on a solicitor-client basis where a party has displayed "reprehensible, scandalous or outrageous" conduct or where an appeal raises

issues of general importance that go beyond the particular case of the successful party in the appeal (see, e.g., *Montréal (City) v. Octane Stratégie inc.*, 2019 SCC 57, [2019] 4 S.C.R. 138, at para. 95). Here, there are no such circumstances that would justify exercising our discretion. There is nothing to suggest that Quebec acted in a reprehensible, scandalous or outrageous manner in connection with these judicial proceedings. Likewise, Pekuakamiulnuatsh Takuhikan has not shown that it has "no personal, proprietary or pecuniary interest in the litigation that would justify the proceedings on economic grounds" or "that it would not have been possible to effectively pursue the litigation in question with private funding" (*Carter v. Canada (Attorney General)*, 2015 SCC 5, [2015] 1 S.C.R. 331, at para. 140; see also *Anderson v. Alberta*, 2022 SCC 6, at para. 73). I would not depart from the usual rule on awarding costs.

English version of the reasons delivered by

CÔTÉ J. —

PACTA SUNT SERVANDA
(Agreements must be kept)

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I. Overview

[241] Do the principle of good faith and the principle of the honour of the Crown allow a court to disregard or ignore certain express clauses of a contract — and in fact, to go completely against those clauses, by imposing obligations that are inconsistent with their unambiguous terms, when no annulment is sought and no defect of consent is alleged? That is the question at issue in this case.

[242] Under the tripartite agreements[2] entered into over the years with the governments of Canada and Quebec, the respondent, Pekuakamiulnuatsh Takuhikan ("Takuhikan"), the political and administrative organization of the Pekuakamiulnuatsh Innu First Nation, is responsible for police services for that First Nation, which is located in Mashteuiatsh near Roberval. These agreements govern the funding of the police force, the Sécurité publique de Mashteuiatsh, and various aspects of the police force's operation, but limit in express terms the governments' contribution to a maximum amount determined each year, according to the budget allocated through budgetary appropriations. Pursuant to the agreements, Takuhikan is responsible for deficits incurred in excess of the financial contribution that the governments wish to provide, and it is also specified in these same agreements that the governments are not responsible for undertakings given by Takuhikan in relation to the agreements (see art. 5.4.1).

[243] Since the entering into of the first agreement in 1996 and the establishment of the Sécurité publique de Mashteuiatsh, the police force has incurred deficits in certain years. Consequently, and as provided for in the agreements, Takuhikan regularly drew from its program funds and own-source revenue to cover the accumulated deficits — namely, in the 2004-2005, 2006-2007 and 2012-2013 fiscal years. Takuhikan applied to the Superior Court to have Canada and Quebec held liable for the deficits accumulated for the police services provided under the agreements

[2] Unless otherwise indicated, the specific references in these reasons are references to the 2015-2016 tripartite agreement (reproduced in A.R., vol. III, at p. 58).

entered into between 2013 and 2017, alleging that they breached their obligations to negotiate in good faith, act honourably and meet the strict standards of conduct incumbent upon a fiduciary. The Superior Court dismissed Takuhikan's application. However, the Court of Appeal found the governments liable for all of the deficits, concluding that their refusal to fund the police force in a manner that guaranteed a level of service equal to that provided to non-Indigenous communities was a breach of the honour of the Crown. Only the Attorney General of Quebec is before the Court today on appeal.

[244] There is no doubt that this appeal raises a very important issue for Indigenous peoples with respect to their quest for self-government, namely, that of providing their own public security and personal safety services to Indigenous populations. Financial support from Canada and Quebec for the establishment and maintenance of Indigenous police services unquestionably contributes to achieving this objective.

[245] I have had the benefit of reading my colleague's reasons, and I agree with a number of his statements. I am of the opinion that the principle of the honour of the Crown cannot be ignored when governments enter into tripartite agreements pursuant to the *Police Act*, CQLR, c. P-13.1 ("*PA*") to fund Indigenous police services such as those at issue here, even though it is expressly stated that these agreements are not subject to s. 35 of the *Constitution Act, 1982*. Such agreements are not purely commercial contracts. In negotiating and entering into the tripartite agreements,

Canada and Quebec wished to make a commitment to Takuhikan with a goal of reconciliation. In my view, the principle of the honour of the Crown, just like the principle of good faith, is engaged in the assessment of the non-Indigenous contracting party's conduct, conduct that must, however, be analyzed in light of the undertakings as given. Indeed, it is important to specify that the principle of the honour of the Crown cannot serve as a basis for rewriting this type of agreement, nor does it allow the express clauses of the agreement to be ignored.

[246] I do not, however, share my colleague's view concerning the scope of the contractual undertakings agreed to by Takuhikan and Quebec, and I disagree with his conclusions on the alleged breaches of contractual good faith and of the principle of the honour of the Crown. Like Bich J.A. in her concurring reasons in the Court of Appeal, I am of the opinion that the honour of the Crown and the obligations flowing therefrom are implicitly incorporated into the tripartite agreements by operation of art. 1434 of the *Civil Code of Québec* ("*C.C.Q.*"). However, that provision does not permit the introduction of an implied obligation that would be inconsistent with the terms of the contract (*Churchill Falls (Labrador) Corp. v. Hydro-Québec*, 2018 SCC 46, [2018] 3 S.C.R. 101, at para. 74). In this case, Quebec undertook to contribute financially to the establishment and maintenance of the Sécurité publique de Mashteuiatsh through maximum financial contributions expressly agreed to by the parties. Quebec did not undertake to pay all of the costs incurred, or to fund services equal to those provided in communities in the region. It is in light of the scope of this undertaking that Quebec's conduct toward Takuhikan must be assessed.

[247] With respect, finding Quebec liable for the deficits accumulated by Takuhikan in this case signifies rewriting the express terms of the tripartite agreements to impose obligations that are contrary to the agreements. The principle of the honour of the Crown cannot justify this.

[248] Furthermore, the mere fact that Quebec knew that the government contributions were not sufficient to cover all of the actual costs incurred by Takuhikan does not mean that there was any fault in the renewal of the agreements. The trial judge, who had the opportunity to examine the evidence in depth and to hear testimony, concluded that Takuhikan knew, as of 2008, that the level of funding offered by Quebec could not cover all of the costs generated by the quality of the services that it wished to provide to members of the community. The obligation to negotiate in good faith does not require agreeing to every request made by a counterparty, Indigenous or not, during the negotiation of the initial contract or during its renewal. The refusal to agree to those requests is not, in itself, indicative of a breach of the obligation to negotiate in good faith or indicative of dishonourable conduct. The evidence shows that Quebec listened attentively to its counterparty's grievances and was flexible in seeking solutions to the underfunding problem. The additional financial assistance Quebec provided to Takuhikan in the course of their contractual relationship must be considered in assessing both Quebec's conduct and the injury that could result from it. There is no evidence of any right provided for in the agreements that Quebec would have abused. There is no basis for concluding that Quebec breached its obligation to negotiate in

good faith, either when the initial contract was made, or when it was renewed, and that it did not act honourably.

[249] Lastly, I would add that this Court cannot endorse a remedial scheme that would allow courts to completely ignore the terms of agreements duly negotiated between the parties, such as those in this case, without risking discouraging governments from signing these kinds of agreements with Indigenous peoples, agreements that, incidentally, are frequently signed by Quebec and Indigenous peoples in various fields, including education, health and the administration of justice.

[250] For the reasons that follow, while I am in agreement with the reasons of my colleague with respect to the dismissal of the motion to adduce fresh evidence, I would allow the appeal.

II. Facts and Procedural Context

[251] Generally speaking, I agree with my colleague's summary of the facts and of the judicial history. However, I would clarify a few things to help circumscribe the issue raised before this Court.

[252] First, a few words should be said about the choice of the proceeding instituted by Takuhikan to claim the deficits accumulated in respect of the maintenance of its police force.

[253] There was no dispute by Canada and Quebec that the First Nations Policing Program ("FNPP"), which relies largely on funding from the federal government, suffers from a generalized problem of underfunding. Clearly, this underfunding undermines the ambitious objectives of the *First Nations Policing Policy* (1996) ("*Federal Policy*").

[254] In reaction to this underfunding, Takuhikan instituted two proceedings: the one before us, and a complaint to the Canadian Human Rights Commission on behalf of the chief of the Pekuakamiulnuatsh First Nation, Gilbert Dominique, in which he alleged having experienced adverse differential treatment in the course of the implementation of the *Federal Policy* and the FNPP, treatment resulting from the inadequate funding provided, the short duration of the agreements and the level of the police services provided to members of the community. The complaint was dealt with by the Canadian Human Rights Tribunal ("CHRT"), which separated the matter in two, deciding to first rule on whether there was any discrimination and then, if so, to determine the appropriate remedy. At the conclusion of the inquiry, the CHRT found that Mr. Dominique's complaint was substantiated (*Dominique (on behalf of the members of the Pekuakamiulnuatsh First Nation) v. Public Safety Canada*, 2022 CHRT 4). The Attorney General of Canada filed an application for judicial review of the CHRT's decision with the Federal Court pursuant to s. 18.1 of the *Federal Courts Act*, R.S.C. 1985, c. F-7. On February 27, 2023, Gagné A.C.J. dismissed the application for judicial review (*Canada (Attorney General) v. Pekuakamiulnuatsh First Nation*, 2023 FC 267). The Attorney General of Canada appealed that decision to the Federal Court

of Appeal. The matter was heard on February 20, 2024, and at the conclusion of the hearing, it was taken under reserve. A decision has yet to be rendered.

[255] In the present case, Takuhikan chose to bring a contractual claim for damages. In its amended originating application, Takuhikan accused Canada and Quebec of having [TRANSLATION] "breached their obligations to negotiate in good faith, act with honour and discharge their fiduciary duties . . . for the maintenance and funding of police services for [its] territory" (A.R., vol. I, at p. 137, para. 11). Takuhikan did not apply to have the agreements annulled or to have certain clauses in the agreements declared abusive; it instead argues that the government parties are responsible for all of the deficits accumulated. In its view, the tripartite agreements must be read as providing for the sharing between Canada and Quebec of all of the costs required to maintain a level of service equal to that provided in communities in the region, in accordance with the *Federal Policy* and the FNPP. The government parties' failure to take the measures required to fund such a level of service therefore constitutes, in Mashteuiatsh's opinion, a breach of both the obligation to negotiate in good faith and the principle of the honour of the Crown.

[256] At no time has Takuhikan alleged that the Pekuakamiulnuatsh Innu First Nation has an inherent right of self-government in respect of police services under s. 35 of the *Constitution Act, 1982*. To date, Takuhikan is also not a signatory of a treaty within the meaning of that provision, although a negotiation process was initiated in the course of which its jurisdiction over public security was recognized (see the general

agreement in principle of March 31, 2004, reproduced in R.R., at p. 72). Takuhikan has also not raised any consideration relating to the right to equality to challenge the constitutionality of the relevant provisions of the *PA* or to contest the alleged underfunding of Mashteuiatsh's police force by Quebec.

[257] Takuhikan also submits that the 2013 to 2017 tripartite agreements were imposed by the government parties for 12-month terms, with no possibility of negotiation, and that when the agreements were renewed, the increase given by Canada and Quebec was insufficient to meet its real needs and legitimate expectations. It follows, according to Takuhikan, that the government parties, by refusing to increase the funding, despite its repeated requests, breached both the obligation to negotiate in good faith and the principle of the honour of the Crown.

[258] I pause here to note that this appeal is not the appropriate vehicle for challenging the insufficient funding of Indigenous policing provided through the FNPP. A contractual action like the one brought in this case must not be turned into an action seeking to sanction a discretionary policy decision concerning the allocation of the state's budgetary resources, thereby disregarding the separation of powers (*Ontario v. Criminal Lawyers' Association of Ontario*, 2013 SCC 43, [2013] 3 S.C.R. 3, at paras. 27-31). In this context, the Court cannot allow an action brought by Takuhikan that would in reality challenge the public policy choices of Canada and Quebec.

[259] The trial judge rejected the interpretation of the tripartite agreements proposed by Takuhikan (2019 QCCS 5699). In contrast, the Court of Appeal, per

Bouchard J.A., found that Canada and Quebec [TRANSLATION] "solemnly undertook to fund [Mashteuiatsh's] police services at a level comparable to that of 'communities with similar conditions in the region'" by entering into the tripartite agreements, and thus concluded in favour of Takuhikan (2022 QCCA 1699, at para. 74). For her part, Bich J.A. expressed the view that Quebec's conduct constituted not only a breach of a constitutional obligation to act with honour, as was found by Bouchard J.A., but also, concurrently, an abuse of contractual rights by operation of art. 1434 *C.C.Q.* The judges of the Court of Appeal all concluded that such findings paved the way for an award of damages that matched the deficits accumulated during the 2013-2018 period.

III. Analysis

A. *The Principle of the Honour of the Crown Is Implicitly Incorporated Into the Tripartite Agreements*

[260] This appeal raises, for the first time in this Court, the issue of whether the principle of the honour of the Crown is engaged in the context of the negotiation and implementation of tripartite agreements for the funding of Indigenous police services. In particular, the issue is whether the principle of the honour of the Crown is engaged in the context of contractual agreements between an Indigenous community, Canada and Quebec. In addition, there is the fact that the parties have acknowledged that these agreements do not deal with a recognized Aboriginal right of self-government in matters of public security or with treaties within the meaning of s. 35 of the *Constitution Act, 1982*. Indeed, s. 35 of the *Constitution Act, 1982* does not apply to

the present appeal. However, in my view, that does not necessarily preclude the application of the principle of the honour of the Crown to how the contractual undertakings agreed to by the parties must be fulfilled.

[261] In *Manitoba Metis Federation Inc. v. Canada (Attorney General)*, 2013 SCC 14, [2013] 1 S.C.R. 623, at para. 68, this Court stated that "[t]he honour of the Crown imposes a heavy obligation, and not all interactions between the Crown and Aboriginal people engage it." Accordingly, it is well established that purely commercial dealings between Indigenous peoples and the Crown, for example, are unlikely to create particular obligations (*Mitchell v. Peguis Indian Band*, [1990] 2 S.C.R. 85, at p. 138). That said, the honour of the Crown is at minimum at stake in the government's "dealing" with Indigenous peoples (*R. v. Badger*, [1996] 1 S.C.R. 771, at para. 41; *Mikisew Cree First Nation v. Canada (Governor General in Council)*, 2018 SCC 40, [2018] 2 S.C.R. 765, at para. 23).

[262] To date, this Court has concluded that the Crown is indeed in dealings with Indigenous peoples when it comes to Aboriginal rights, treaty rights, a fiduciary duty owed to them by the state or an explicit obligation to an Indigenous group enshrined in the Constitution by constitutional promises (*Manitoba Metis Federation*, at paras. 68-73).

[263] None of these circumstances are present in this case. The agreements are not comparable to a treaty, and they do not [TRANSLATION] "serve to recognize, define, affect, limit or create Aboriginal rights or treaty rights", as expressly stated in the

tripartite agreements (art. 1.4.1). The relationship between the parties by the terms of the tripartite agreements more closely resembles a relationship that is based on private law contracts that create legally enforceable obligations (*Canada (Attorney General) v. British Columbia Investment Management Corp.*, 2019 SCC 63, [2019] 4 S.C.R. 559, at paras. 94-95). That being so, I agree with my colleague that the tripartite agreements, which provide for the financial support of Indigenous police services by the governments, are not purely commercial contracts. The principle of the honour of the Crown therefore cannot be ignored in the assessment of Quebec's conduct in the course of these agreements.

[264] In enacting s. 90 of the *PA*, Quebec legislated with the specific objective of offering Indigenous communities within its territory the possibility of providing services distinct from those provided to the population in general. I agree that this objective is based on the reconciliation of pre-existing Indigenous societies with the assertion of Crown sovereignty, thus engaging the "special relationship" between Indigenous peoples and the Crown (*Manitoba Metis Federation*, at paras. 66-67, quoting *Beckman v. Little Salmon/Carmacks First Nation*, 2010 SCC 53, [2010] 3 S.C.R. 103, at para. 62; *R. v. Desautel*, 2021 SCC 17, [2021] 1 S.C.R. 533, at para. 30).

[265] This same objective of reconciliation is evident by operation of s. 72 of the *PA*, which provides that an Indigenous community may, *if it so wishes*, be served by its own police force, whatever the size of its population, and states that Indigenous police forces are not required to provide service at the level offered to non-Indigenous

communities. In this context, the police force's responsibilities are defined in the tripartite agreements as including that of [TRANSLATION] "ensuring a police presence that makes it possible to respond, within a reasonable time, to the requests for assistance made to it" (art. 2.2.2). It was agreed by the parties that the Indigenous police force may be provided services or assistance from the Sûreté du Québec to carry out its mission pursuant to s. 93 of the *PA* (arts. 2.2.4 and 2.2.5).

[266] The obligations incumbent on the Crown under the tripartite agreements are part of the contractual civil liability regime established by the *Civil Code of Québec*. Article 1376 *C.C.Q.* makes the rules of Book Five applicable to actions in liability against legal persons established in the public interest, including the state, "subject to any other rules of law which may be applicable to them" (see *Prud'homme v. Prud'homme*, 2002 SCC 85, [2002] 4 S.C.R. 663, at paras. 27-28). Unlike my colleague, I am of the opinion, like Bich J.A., that to the express stipulations of the tripartite agreements are added, pursuant to art. 1434 *C.C.Q.*, the public law obligations derived from them in conformity with law. The preliminary provision of the *C.C.Q.* lays down the *jus commune* in the province. The provisions of that statute must be interpreted broadly so that their purpose can be achieved (*Doré v. Verdun (City)*, [1997] 2 S.C.R. 862); they must be given "the broadest possible" scope (*Prud'homme*, at para. 29). In this context, such obligations take on a contractual [TRANSLATION] "colouring", which gives rise to remedies that are contractual in nature in the event of a breach (P.-A. Crépeau, "Le contenu obligationnel d'un contrat" (1965), 43 *Can. Bar Rev.* 1, at pp. 21 and 28).

[267] The obligation to act honourably just like the obligation to act in good faith govern the conduct of the government parties, both at the time the obligation arises and at the time it is performed or extinguished. However, it is important to note that this is an obligation of means, not of result. I agree with my colleague when he states that the honour of the Crown is "not a cause of action" in itself, but "speaks to *how* obligations that attract it must be fulfilled" (para. 149, quoting *Manitoba Metis Federation*, at para. 73 (emphasis in original); see also *Mikisew*, at para. 60). Articles 6, 7 and 1375 *C.C.Q.* and the principle of the honour of the Crown require the Crown to negotiate in good faith even before an agreement is entered into (*Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, at para. 186; *Beckman*, at para. 108). However, negotiating in good faith, whether during the initial contract or its renewal, does not mean that the Crown must agree to all of the requests made by the Indigenous party (*Quebec (Attorney General) v. Moses*, 2010 SCC 17, [2010] 1 S.C.R. 557, at para. 116).

B. *Quebec Undertook To Contribute Financially to the Establishment and Maintenance of the Sécurité Publique de Mashteuiatsh*

[268] At the heart of the dispute between Quebec and Takuhikan is their respective understanding of the tripartite agreements and of the scope of the obligations flowing from them. Since the start of the proceedings, Takuhikan has argued that the government parties are responsible for all of the costs incurred by its police force, independently of the terms of the agreements. According to Takuhikan, Quebec implicitly adhered to the *Federal Policy* and the FNPP, from which such an obligation flows.

[269] With respect, I am of the opinion that the Court of Appeal erred in concluding as it did in this regard. First, the government parties did not undertake, solemnly or otherwise, to pay all of the costs related to the creation and maintenance of a police force that could ensure the same level of service as that found in communities in the region. Second, Quebec's undertaking cannot be defined in light of the objectives set out in the *Federal Policy* and the FNPP. Those documents could not bind Quebec, nor do they support the interpretation adopted by the Court of Appeal. Lastly, and contrary to the Court of Appeal's conclusion, the principle of the honour of the Crown could not serve as a basis for rewriting the terms of the tripartite agreements to introduce such an obligation into them and, in effect, contradict the plain terms of the agreements.

(1) Quebec's Undertaking Flows Strictly From the Tripartite Agreements

[270] The Court of Appeal's interpretation of the scope of Quebec's undertaking disregards the clear language in which the tripartite agreements are written. It is clear from reading these agreements that Quebec undertook to contribute financially to the establishment and maintenance of the Sécurité publique de Mashteuiatsh, in the amounts specified in the agreements, in compliance with the mandate conferred on other police forces by the *PA* and in accordance with the respective jurisdictions of Canada and Quebec.

[271] It is important first to note that the parties expressed their intent to be bound solely by the express terms of the tripartite agreements by stipulating an entire

agreement clause. It is the very first clause in the agreement, under the heading [TRANSLATION] "Content of the agreement": "This agreement . . . constitutes the entirety of the parties' undertakings and responsibilities" (art. 1.1). Nothing forbids the parties from stipulating a clause of this sort in order to exclude any content external to the contract, thus excluding the application of arts. 1425 and 1434 *C.C.Q.* (*Aéroports de Montréal v. Meilleur*, [1997] R.J.Q. 1516 (C.A.), at p. 1529; *Invenergy Wind Canada v. Éolectric inc.*, 2019 QCCA 1073, at para. 10).

[272] Bouchard J.A. stated that [TRANSLATION] "article 1426 *C.C.Q.* inevitably leads to a consideration of the particular nature of the tripartite agreements and the circumstances in which they were entered into" (C.A. reasons, at para. 62). No one is suggesting that an entire agreement clause such as the one stipulated in the tripartite agreements can override rules of public order or even those constitutional in nature. In particular, obligations that may flow from the principle of the honour of the Crown could not be excluded by such a clause, as this principle applies independently of the expressed will of the parties: " . . . the Crown cannot contract out of its duty of honourable dealing with Aboriginal people" (*Beckman*, at para. 61). That is not the case for the general objectives set out in the *Federal Policy* or those stated by the Quebec legislature when it enacted s. 90 of the *PA*. Those objectives are not rules of public order, nor are they even rules, strictly speaking.

[273] That being said, I will now turn to the clauses of the agreement that define the scope of Quebec's undertaking. The preamble states that [TRANSLATION] "Canada

and Quebec . . . wish to provide financial support for the expenses incurred" by Takuhikan (emphasis added).

[274] With respect, I disagree with the proposition that the objectives of the tripartite agreements include those of establishing and maintaining an Indigenous police force that provides services adapted to the community and of a quality comparable to those provided in communities in the region. The obligation to maintain a police force that provides services of a quality comparable to those provided in communities in the region appears nowhere in the language of the agreements. The parties defined the agreement's two objectives as being to [TRANSLATION] "establish and maintain the 'Mashteuiatsh Police Force' . . . that will be responsible for ensuring the provision of police services in the community" and to "establish a contribution from Canada and Quebec to the funding for the provision of the police services covered by this agreement" (art. 1.5 (emphasis added)). Moreover, the resolutions passed by Takuhikan to approve the 2013-2014, 2014-2015 and 2015-2016 tripartite agreements reflect this understanding of art. 1.5 in that they recognize that Canada and Quebec wished to provide financial support for the establishment and then the maintenance of the police force.

[275] Article 4.2.1 sets out the manner of determining the maximum amount of the costs to be funded. Takuhikan [TRANSLATION] "shall respect the budget set out in Schedule A" (art. 4.2.3), and this budget describes all of the amounts that are used to achieve the purpose of the agreement (art. 4.7.1); any other source of government

funding allows Canada and Quebec to reduce their respective contribution or request a total or partial reimbursement of it (art. 4.7.2). As indicated by the evidence, the budget in the schedule to the agreement was prepared by Takuhikan on the basis of the contributions provided by Canada and Quebec (A.R., vol. XVI, at pp. 108-10).

[276] In addition, it is clear from reading the agreements that the payment of the government contributions is conditional on the existence of the necessary annual appropriation, given by Parliament or by the Assemblée nationale (art. 4.4.1). It is expressly stipulated that [TRANSLATION] "[i]f there are no appropriations available to fund Indigenous police services or if those appropriations have been decreased, Canada or Quebec may reduce its funding or terminate [the] agreement" (art. 4.4.2).

[277] The scope of Quebec's undertaking is also circumscribed and limited in light of the clause that establishes Takuhikan's responsibility for any budget deficits that could be incurred, as well as the clause specifying that the governments are not responsible for undertakings given by Takuhikan in relation to the tripartite agreement, that is, arts. 4.5.2 and 5.4.1, which it is important to reproduce in full:

> [TRANSLATION]
>
> 4.5.2 The Council shall be responsible for any budget deficits incurred during a fiscal year and [the deficits] may not be carried forward to the next fiscal year.
>
> . . .
>
> 5.4.1 The Council, or one of its members, shall not make any representation, in an agreement with a third party or otherwise, that might suggest that it is an associate, partner, agent, joint venturer

> or employee of Canada or Quebec. Canada and Quebec shall not be responsible for any undertaking given by the Council in relation to this agreement, including, without limiting the generality of the foregoing, loans, capital loans or any other long-term obligations. [Emphasis added.]

[278] Takuhikan argues that the governments imposed such clauses knowing that the police force's budget in Schedule A to the agreements [TRANSLATION] "was unrealistic and did not represent [its] real needs" (R.F., at para. 30). Quebec's reply was that it complied with its undertaking to provide financial support to Mashteuiatsh's police force as agreed pursuant to the agreements (A.F., at paras. 97-98). That said, it has not been demonstrated that the clauses are abusive within the meaning of art. 1437 *C.C.Q.* (Sup. Ct. reasons, at para. 71).

(2) The *Federal Policy* Cannot Define Quebec's Undertaking

[279] I agree with the Attorney General of Quebec that the Court of Appeal could not impose on Quebec obligations flowing from the *Federal Policy* for three reasons.

[280] First, Quebec did not undertake to implement the *Federal Policy*. No such undertaking is found in the *PA* or in the agreements at issue. The only reference to this policy can be found in a recital of the preamble to the agreements which states that: [TRANSLATION] "Canada will provide its share of the financial contribution under this agreement in accordance with the [FNPP] and in compliance with the policies and terms and conditions related thereto" (emphasis added). The fact that Quebec is not mentioned in this recital of the preamble reflects the parties' intent that only Canada

commit itself under the FNPP and the *Federal Policy*. Such intent reflects the fact that, when Quebec enters into agreements with Indigenous communities, it does so pursuant to its own powers and in accordance with the terms of its legislative framework, that is, the *PA*.

[281] Second, the Court of Appeal was mistaken to consider the *Federal Policy* in defining Quebec's undertaking because, by its very nature, such a policy does not establish binding rules and is therefore not subject to judicial sanction. In *R. v. Beaudry*, 2007 SCC 5, [2007] 1 S.C.R. 190, at paras. 45-46, this Court concluded that a policy that did not spring from a statutory provision cannot have the force of law. Even on the assumption that the *Federal Policy* may have interpretive value, the terms of the agreements reached are clear with respect to funding and require no interpretation.

[282] Third, and I say this respectfully, the Court of Appeal distorted the content of the *Federal Policy*. As the Attorney General of Quebec points out, nowhere in the policy is it stated that the governments will fund all of the costs of the police services; it merely provides for financial "contributions" allocated to those services. Indeed, only the conclusion of agreements can create entitlement to such contributions. Further, the *Federal Policy* expressly provides for the financial participation of communities to cover certain police force expenses, in addition to containing various statements regarding the availability of funds. Section V, which is devoted to funding, specifies, in particular, that signatory communities will, where possible, be encouraged to "help

pay for the cost of maintaining their police service, particularly for enhanced services" (p. 6).

(3) The Honour of the Crown Cannot Serve as a Basis for Rewriting the Tripartite Agreements From the Standpoint of Either the Public Law Principle or the Implied Obligation Pursuant to Article 1434 *C.C.Q.*

[283] In order to determine whether the government parties acted honourably in performing their obligations under those agreements, the Court of Appeal had to properly determine the scope of the undertakings in the tripartite agreements and then consider whether the Crown acted with honour in the negotiation, carrying out and making of the agreements *actually* entered into.

[284] At first glance, I note that my colleague, too, seems to conclude that Quebec undertook to Takuhikan, by contract, to help it establish and then maintain, specifically by means of limited financial contributions, a police force serving the community of Mashteuiatsh (para. 94). As I have stated, I fully agree with him on this point. However, a careful reading of his reasons reveals that the purpose of Quebec's undertaking has been considerably and implicitly expanded to ultimately include an obligation for Quebec to provide services adapted to the community comparable to those of communities in the region (paras. 14, 34, 183-84 and 216). As this objective of providing services comparable to those provided to communities in the region is nowhere to be found in the agreements, this expanded purpose is inconsistent with the conclusion that the *Federal Policy* is not binding on Quebec, as well as with the assertion that the honour of the Crown cannot constitute a cause of action. I emphasize

this because such an expansion of the scope of Quebec's undertaking to Takuhikan is tantamount to rewriting the terms of these agreements, which is something that the principle of the honour of the Crown cannot be used to do.

[285] On this point, I agree with the appellant, the Attorney General of Quebec, and the intervening attorneys general that the honour of the Crown cannot serve as a basis for rewriting the terms of the agreements. If the Court must draw on the jurisprudence relating to the honour of the Crown to conclude that this principle can be applied to tripartite agreements such as those at issue in this case, then the Court should also draw inspiration from that jurisprudence in interpreting those instruments.

[286] The principles relating to the interpretation of modern treaties and treaty land entitlement agreements are particularly relevant and undisputed. It is well established that courts must "pay close attention" to the terms of treaties, defer to them and "strive to respect [the] handiwork" of the parties, bearing in mind that "[a]lthough not exhaustively so, reconciliation is found in the respectful fulfillment of a modern treaty's terms" (*First Nation of Nacho Nyak Dun v. Yukon*, 2017 SCC 58, [2017] 2 S.C.R. 576, at paras. 36-38, quoting *Moses*, at para. 7, and *Beckman*, at para. 54).

[287] I can put it no better than the Federal Court of Appeal did in *Saskatchewan (Attorney General) v. Witchekan Lake First Nation*, 2023 FCA 105, 482 D.L.R. (4th) 352. In that case, the court summarily dismissed an action brought by a First Nation against Saskatchewan and Canada for having breached what it argued to be implied obligations flowing from a treaty land entitlement agreement. Rennie J.A., writing for

a unanimous court, concluded that the action did not establish a serious issue, as the implied terms raised pursuant to the principle of the honour of the Crown were inconsistent with the plain language of the agreement:

> This interpretive frame or lens, however, does not entitle a court to reopen and rewrite the settled terms of a modern agreement negotiated between sophisticated parties over many years and with independent legal advice. Failing to respect the finality and legal certainty of the Framework Agreement undermines reconciliation by allowing parties to renegotiate and to seek more favourable terms than those originally settled on. Allowing the parties "[t]o seek ambiguities [in the agreement] at all costs" in the hopes of reinterpreting its provisions can only diminish the value of the settlement, and "other signing parties [must] not feel themselves at the mercy of constant attempts to renegotiate in the courts" (*Eastmain Band v. Canada (Federal Administrator)*, [1993] 1 F.C. 501, [(C.A.)] at 518-519). A paradigm under which each generation can reopen, renegotiate, and rewrite previously settled matters is untenable (see also *Goodswimmer* [*v. Canada (Attorney General)*, 2017 ABCA 365, 418 D.L.R. (4th) 157], at para. 49; *Manitoba Metis Federation Inc v. Brian Pallister et al.*, 2021 MBCA 47, 458 D.L.R. (4th) 625 . . . at para. 56).
>
> While the Crown can never contract out of its constitutional responsibilities, the honour of the Crown cannot be used to read in obligations supplementary to or different from those that have been expressly agreed to by the parties, or to renegotiate a better deal than that agreed to. The point was made in [*Saskatchewan (Attorney General) v. Pasqua First Nation*, 2018 FCA 141] at paragraph 13:
>
> > Counsel for the respondents repeated several times that the Crown cannot contract out of constitutional and treaty rights. This is not disputed. However, in my view it follows that one cannot later "contract in" constitutional and treaty rights arguments into every term of a modern agreement between the parties even where the parties agreed on specific terms to address outstanding issues, in a way that fundamentally changes the terms of the agreement retrospectively. Rather, the honour of the Crown requires that the Crown adhere to and implement the terms of the agreement in an open and fair manner ([*Wewaykum Indian Band v. Canada*, 2003 SCC 45, [2003] 2 S.C.R. 259]). [Emphasis added; paras. 128-29.]

[288] I would add that such an approach is also contrary to the implied obligations regime in Quebec civil law. With respect, I am of the opinion that the Court of Appeal erred in relying on art. 1434 *C.C.Q.* to add to the agreement obligations inspired by the *Federal Policy*, obligations that it characterized as "implied", and which are inconsistent with the explicit funding clauses of the agreements, including the clause relating to the responsibility for deficits. Article 1434 *C.C.Q.* does not authorize such an outcome, nor can it be used to frustrate other provisions of the agreement. An implied obligation can only fill a gap in the terms of the contract (D. Lluelles and B. Moore, *Droit des obligations* (3rd ed. 2018), at No. 1542; J.-L. Baudouin and P.-G. Jobin, *Les obligations* (7th ed. 2013), by P.-G. Jobin and N. Vézina, at No. 431; *Churchill Falls*, at para. 74), not outright modify an explicit obligation of the contract.

[289] At the very beginning of these reasons, I referred to the Latin locution *pacta sunt servanda* ("agreements must be kept"). This locution, which reflects the binding force of the contract, is part of both contract law and public law. It means that the parties are bound by the contract that they have entered into and that, accordingly, they cannot derogate from the obligations resulting therefrom.

[290] I therefore conclude that Quebec did not breach its obligation to act honourably in performing an obligation that was not incumbent upon it under the terms of the contracts. With respect, the approach adopted by the Court of Appeal is erroneous in that it imposes on the government parties, through the principle of the

honour of the Crown and art. 1434 *C.C.Q.*, an obligation of result that has no basis in the terms of the tripartite agreements.

C. *Quebec Did Not Act Dishonourably or Abusively*

[291] The absence of an assessment by the Court of Appeal on the scope of Quebec's undertaking had the effect of skewing its analysis as regards the abusive and/or dishonourable nature of its conduct, like through a distorting lens. It is in light of the undertakings upon which the parties actually agreed that Quebec's conduct toward Takuhikan must be assessed. The analysis should therefore be done again.

[292] I disagree with the proposition that Quebec acted abusively and dishonourably in the implementation of art. 6.10.2, which concerns the renewal of the agreement. Neither good faith nor the honour of the Crown serves as a basis for expanding the scope of the contractual undertakings agreed to by the parties.

[293] With respect to good faith, Quebec fulfilled all of its undertakings and did not abuse any right provided for in the contract, including regarding the renewal of the tripartite agreements. I am of the view that *Houle v. Canadian National Bank*, [1990] 3 S.C.R. 122, does not support the conclusion that it was unreasonable in this case for Quebec to insist on respecting the words of the agreements. It should first be noted that the circumstances of *Houle* were very different from those in this case. In *Houle*, L'Heureux-Dubé J., writing for the Court, found that the bank had committed an abuse of right in requiring the payment of a loan within a very short timeframe when it was

well aware that the shareholders, the Houle brothers, were in the middle of negotiating the sale of their family business. In that context, any precipitous action, such as recalling the loan, would have resulted in a reduction in the value of their shares. L'Heureux-Dubé J. emphasized that the parties had been in a long-term contractual relationship and that the bank had never informed the Houle brothers of any concerns regarding the repayment of the loan. In those circumstances, while the recall of the loan did not constitute in itself an abuse of the bank's contractual rights, the quick liquidation of the company's assets did amount to an abuse of right. This Court drew on L'Heureux-Dubé J.'s comments when it stated in *Churchill Falls*, at para. 118, that good faith does not prevent a party from relying on the words of the contract unless that insistence is unreasonable in the circumstances.

[294] In the case at bar, we will see that it was not unreasonable for Quebec to rely on the words of the agreements concerning the responsibility for the accumulated deficits.

[295] Furthermore, applying the principle of the honour of the Crown to how the contractual undertakings given by Quebec must be fulfilled insofar as this principle is implicitly incorporated into them, I find that Quebec acted honourably.

[296] Let me explain.

[297] While it is true that Quebec had to negotiate in good faith when renewing the agreements, it was not required to enter into a renewed contract commensurate with

Takuhikan's expectations and to agree to all of its requests. The obligation to negotiate in good faith did not compel the parties to enter into an agreement or to agree on a maximum contribution amount covering all of the costs of Mashteuiatsh's police force. While it is clear that Takuhikan was disappointed with the outcome of the negotiations following the renewal of the agreements, this does not mean that Quebec acted in bad faith or that its conduct resulted from an abuse of right (*Singh v. Kohli*, 2015 QCCA 1135, at para. 75).

[298] As LeBel and Deschamps JJ. stated, dissenting in the result in *Moses*, at para. 116, the Crown must try "to reconcile Aboriginal rights and interests with those of the public more generally, because the Crown must be mindful of Aboriginal interests but must also consider the public interest. Modern agreements thus reflect a mixture of rights, obligations, payments and concessions that have already been carefully balanced."

[299] Accordingly, even though the government parties were aware of their counterparty's grievances and the deficits accumulated by it, they proceeded to renew the agreements with the resources available and further to the appropriations given by Parliament and the Assemblée nationale, as contemplated in the agreements in force. Criticizing Quebec for not exercising the right to terminate the agreement constitutes, in my opinion, a moot point, as it was clear from reading the agreements that Quebec could either terminate them or reduce the funding (art. 4.4.2).

[300] Although my colleague also acknowledges that Takuhikan was not entitled to a particular result at the end of the negotiations by virtue of the obligation to negotiate in good faith, respectfully, his conclusion suggests the opposite. In fact, confirming the quantum of damages claimed by Takuhikan amounts to granting it all of the funding requests that it made during the renewals. However, Takuhikan had accepted that Quebec's financial contributions did not fully meet its needs and that it would be required to assume any deficits. Concluding in this way amounts to rewriting the terms of the agreement entered into by the parties and to making the principle of the honour of the Crown a cause of action.

[301] At the risk of repeating myself, Quebec was not required to fund the police force in a manner that would allow for the provision of services of the same quality as those provided to non-Indigenous communities or to pay all of the costs of the police force.

[302] It is true that Takuhikan made the decision to abolish its police force as of April 1, 2016, because of a lack of funding, a decision that was announced to Canada and Quebec in November 2015, but that was ultimately not carried out. However, a review of the circumstances surrounding that decision does not support a finding of abuse of right or dishonourable conduct on the part of Quebec during the renewal of the agreements. On the contrary, the evidence instead shows that, throughout their contractual relationship, including the period during which Takuhikan intended to abolish its police force, Quebec listened attentively to its counterparty's grievances and

was flexible in seeking solutions to the problem of the underfunding of its police force. In that regard, Quebec proposed and implemented a variety of additional measures providing Mashteuiatsh's police force with financial support, which attest to the fact that Quebec's conduct was in compliance with the standards imposed by good faith and the principle of the honour of the Crown. It is essential to review these measures.

(1) Quebec's Additional Measures To Support Mashteuiatsh's Police Force

[303] I begin by noting that from 2006, Quebec contributed, up to a maximum amount of $743,208, to funding the construction of the community's police station (capital funding agreement under the Aboriginal Development Fund, reproduced in A.R., vol. XIV, at pp. 19-25; loan repayment agreement of March 24, 2006, reproduced in A.R., vol. XIV, at pp. 126-29).

[304] In 2013, Quebec was well aware that Mashteuiatsh's police force was experiencing financial difficulties. Thus, in the 2013-2014 fiscal year, Takuhikan was given $284,514 in additional financial support to be allocated to training and the purchase of equipment, including $136,567 from Quebec. It is important to bear in mind that this additional financial support was not taken from the funding envelope dedicated to the tripartite agreements, which was strictly limited by Parliament and the Assemblée nationale, but rather from other government programs. The testimony of Quebec's representative, Richard Coleman, shows that Quebec listened to the difficulties expressed by Takuhikan and was flexible and creative in finding alternative solutions (A.R., vol. XVII, at pp. 65-66).

[305] In 2014, Quebec made efforts to help Takuhikan with the financial difficulties arising from the arbitration award rendered in July 2014 concerning a retroactive pay increase for the police officers of the Mashteuiatsh police force. Although the increase in government contributions proposed during the renewal of the tripartite agreement did not meet the needs expressed by Takuhikan (only 1.5 percent), Quebec and Takuhikan entered into subsequent agreements to reduce operational and management costs. In fact, Quebec loaned personnel from the Sûreté du Québec for two years to offset the elimination of a management position between 2013 and 2015, and gave Mashteuiatsh police officers access to the indoor firing range at the Sûreté du Québec headquarters in Chicoutimi (testimony of Richard Coleman, A.R., vol. XVII, at p. 63; testimony of Dannye Bonneau, A.R., vol. XV, at pp. 7 and 20-21).

[306] After Takuhikan announced the shutdown of its police force in November 2015, Quebec (Quebec alone, without Canada) and Takuhikan entered into a transitional agreement in March 2016 for the maintenance and provision of police services. That agreement provided for a fixed additional contribution of $400,000 that could be used [TRANSLATION] "to cover any deficit related to the provision of police services in the community of Mashteuiatsh" (art. 4.1, reproduced in A.R., vol. XI, at p. 25). That agreement therefore gave Takuhikan considerable flexibility to lessen the impact of the deficits incurred in previous years.

[307] At trial, Takuhikan essentially argued that the amount in that transitional agreement could not be deducted from the amount claimed because that contribution

could have been used to absorb the deficits accumulated for periods that are now prescribed (testimony of Valérie Tremblay, A.R., vol. XVI, at p. 148). Yet, art. 3.3 of the transitional agreement states the following: [TRANSLATION] "The parties agree that, at the conclusion of any complaint process or any other proceeding relating to the funding of the police force, the amounts paid under this agreement will be deducted from any amount that Quebec could be ordered to pay to the Council." Moreover, I note that art. 6.1 specifies the following: [TRANSLATION] "The parties agree that the fixed additional contribution mentioned in article 2.1 of this agreement does not constitute recognition by Quebec of a recurring need for additional funding."

[308] Finally, in 2017, an agreement providing for the payment of $375,000 at the rate of $125,000 per year, spanning the years 2016, 2017 and 2018, was entered into by the Ministère de la Sécurité publique and Takuhikan in connection with the Prévention Jeunesse funding program. One of that program's objectives is to support partner organizations, including Indigenous police forces, in order to prevent crime among Indigenous youth (A.R., vol. XIV, at p. 1).

[309] In light of the foregoing, I cannot bring myself to describe these various measures as "supplemental assistance" as does my colleague, or even as a "Band-Aid", to use the words of the representative of Canada in this regard (para. 227). I would like to emphasize here that these comments by Canada's representative are surprising, in a context where it is up to the federal government to ensure the majority of the funding to support First Nations self-government as regards their police services. In any event,

the argument that Quebec turned a deaf ear to Takuhikan's financial difficulties in maintaining its police force is not supported by the evidence. Therefore, the alleged abusive or dishonourable conduct of Quebec has not been established by Takuhikan.

[310] I also disagree with my colleague's view that the additional financial support provided by Quebec cannot be considered in the assessment of its conduct, given that it is supposedly "outside" the contractual renewal mechanism of the agreements (para. 139). I find that Quebec went beyond what was required by the plain terms of the agreements, including the renewal clause, by providing these additional amounts to financially support Mashteuiatsh's police services. The additional financial assistance provided by Quebec to Takuhikan as part of their contractual relationship to maintain Mashteuiatsh's police force must be taken into account in the assessment of Quebec's conduct with respect to the renewal of the tripartite agreements and with respect to the injury that may have resulted from it.

(2) Deference towards Takuhikan's Contractual and Financial Autonomy

[311] I also cannot bring myself to conclude that Quebec's conduct during the renewal of the agreements was contrary to good faith because it apparently "exploited [the] position of weakness" (Kasirer J.'s reasons, at para. 137) of its counterparty or that this conduct was dishonourable because of "the precarious situation in which [Takuhikan] found itself" (para. 196; see also para. 10). With respect, such an approach completely ignores the capacity to act, the agency and the contractual and financial

autonomy of Takuhikan, which, moreover, has not alleged any defect of consent with respect to the renewal of the agreements.

[312] Takuhikan's contractual autonomy is particularly reflected in the free and informed choice it made to offer a level of service above the one provided for in the tripartite agreements, rather than terminate the agreements (Sup. Ct. reasons, at paras. 63-69, in particular paras. 66-68). The trial judge, who had the opportunity to examine the evidence in depth and to hear testimony, concluded that Takuhikan renewed the agreements [TRANSLATION] "knowingly because of the fact that the level of funding [from the governments] is not commensurate with the quality of the service that [Takuhikan] wishes to provide to the member[s] of the Pekuakamiulnuatsh First Nation" (para. 67). As the trial judge noted, this is clear from a letter dated December 8, 2008 (P-8), which states that the funding provided by Quebec at that time represented an [TRANSLATION] "acceptable compromise considering [Quebec's] financial limitations and [Takuhikan's] concern for maintaining and developing a quality police force" (para. 67; A.R., vol. II, at p. 32). This finding of fact is entitled to deference.

[313] The precarious situation described by my colleague totally disregards the financial autonomy Takuhikan had during the renewal of the agreements. In this regard, it is helpful to reproduce the remarks of Binnie J., who wrote on behalf of the majority in *Moses*, that agreements negotiated between government and Indigenous parties must be considered on the basis of the terms that the parties actually agreed to, particularly because they have the resources necessary to act the way they do:

> In *R. v. Badger*, [1996] 1 S.C.R. 771, Cory J. pointed out that Aboriginal "[t]reaties are analogous to contracts, albeit of a very solemn and special, public nature" (para. 76). At issue in that case was an 1899 treaty. The contract analogy is even more apt in relation to a modern comprehensive treaty whose terms (unlike in 1899) are not constituted by an exchange of verbal promises reduced to writing in a language many of the Aboriginal signatories did not understand (paras. 52-53). The text of modern comprehensive treaties is meticulously negotiated by well-resourced parties. As my colleagues note, "all parties to the Agreement were represented by counsel, and the result of the negotiations was set out in detail in a 450-page legal document" (para. 118). The importance and complexity of the actual text is one of the features that distinguishes the historic treaties made with Aboriginal people from the modern comprehensive agreement or treaty, of which the James Bay Treaty was the pioneer. We should therefore pay close attention to its terms. [para. 7]

[314] In the present case, Takuhikan's financial statements show accumulated budget surpluses totalling several million dollars. The trial judge concluded from the evidence that the council had own-source revenues that were much greater than its police force's deficit (para. 83). With all due respect to the Court of Appeal, no palpable and overriding error was demonstrated to warrant its intervention with respect to this finding of fact.

[315] In addition, in its annual report for the 2014-2015 fiscal year, Takuhikan stated the following: [TRANSLATION] " . . . Pekuakamiulnuatsh Takuhikan reiterates the importance of remaining vigilant in this situation of an underfunding of programs and services and notes that the community <u>has a solid own-source revenue base</u> and [has] <u>flexibility [under] certain funding agreements</u> to achieve its financial objectives" (A.R., vol. XIII, at p. 19 (emphasis added)). Although the own-source revenues do not necessarily reflect the flexibility Takuhikan actually had, it is important to mention

that, as of March 20, 2013, they totalled $12,452,727 (testimony of Valérie Tremblay, A.R., vol. XVI, at p. 92-93; A.R., vol. XIII, at p. 207). With respect, the contractual imbalance resulting from Quebec's conduct described by my colleague provides no basis for concluding that Quebec breached its obligations to act in good faith and honourably.

[316] As I stated at the outset, given the responsibility incumbent upon Takuhikan to assume the deficits pursuant to the agreements and its approval regarding the scope of the funding provided by Quebec, it appears that, before this Court, Takuhikan is challenging Quebec's public policy decisions concerning the giving of financial support to Indigenous police forces. However, the role of the courts is not to interfere in this way in the budget decisions of government parties, which are reflected in the tripartite agreements at issue. Concluding otherwise has the effect of sanctioning a discretionary policy decision concerning the allocation of budgetary resources of the state, which is something the Court cannot do without brushing aside the separation of powers doctrine in doing so (*Criminal Lawyers' Association of Ontario*, at paras. 27-31).

D. *Comments on the Remedy*

[317] Given my finding regarding Quebec's conduct, it is not necessary for me to determine the remedy to which Takuhikan would have been entitled. I will nonetheless say a few words on the approach suggested by colleague, about which, and I say so with all due respect, I have some serious reservations.

[318] I am not convinced that it is necessary to create a remedial scheme based on "reconciliatory justice". I fail to see why the rules of corrective justice could not be adapted to consider the Indigenous perspective and the imperative of reconciliation when a court finds that the Crown has not acted in good faith and with honour in the context of a contractual relationship with an Indigenous party.

[319] In my opinion, the civil liability regime already makes it possible to respect the objective of reconciliation through the principle of full compensation (that is, *restitutio in integrum*). Accordingly, I do not agree with the idea that reconciliatory justice "transcends the corrective justice at the heart of private law to make room for repairing and maintaining the special relationship with the Indigenous peoples on whom European laws and customs were imposed" (para. 148, citing *Manitoba Metis Federation,* at para. 67, and *Haida Nation v. British Columbia (Minister of Forests),* 2004 SCC 73, [2004] 3 S.C.R. 511, at para. 17).

[320] Damages awarded for breach of the obligation of good faith (and, incidentally, for breach of the principle of the honour of the Crown) are generally compensatory in nature, in order [TRANSLATION] "to restore an economic balance upset by the contracting party's breach" (Lluelles and Moore, at No. 2018). Injury can be compensated for if it is the logical, direct and immediate consequence of the alleged fault (art. 1607 *C.C.Q.*). Furthermore, in contractual matters, art. 1613 *C.C.Q.* provides that the debtor is liable only for damages that were foreseen or foreseeable at the time the obligation was contracted. If the fault committed is gross or intentional, the creditor

will be entitled to all damages, including those that were not foreseeable at the time of the meeting of the parties' minds.

[321] This exercise may pose some additional difficulties when it comes to remedying a breach of the principle of the honour of the Crown. Indeed, if the court chooses to resort to damages as appropriate compensation, identifying and precisely quantifying injury, such as the loss of a police force culturally adapted to the needs of the community, can sometimes be complex. That being so, these difficulties are nothing new for the courts, which have long been required to use their discretion in determining an indemnity that is fair and reasonable having regard to all the circumstances (*Vidéotron, s.e.n.c. v. Bell ExpressVu, l.p.*, 2015 QCCA 422, at paras. 86-87). Indeed, on an assessment of the injury involving largely unforeseeable or unquantifiable factors, courts must, in making this calculation, [TRANSLATION] "rely on a certain amount of approximation and estimation, as well as [their] own discretion" (*Provigo Distribution Inc. v. Supermarché A.R.G. Inc.*, 1997 CanLII 10209 (Que. C.A.), at p. 65). In fact, [TRANSLATION] "[u]ncertainty regarding the damage in itself must be distinguished from uncertainty caused by the difficulty of precisely measuring the damage because of the nature of the legal dispute, the realities of the proceedings, or the complexity of the facts" (p. 43). In other words, gaps in the evidence generally do not relieve the court from ruling on the quantum of damages.

[322] The principle of the honour of the Crown is anchored in the objective of reconciliation between prior occupation of the land by Indigenous peoples and the

Crown's assertion of sovereignty. It therefore seems entirely logical and coherent that when faced with a largely unforeseeable and unquantifiable injury resulting from dishonourable conduct by the Crown, the court may use its discretion to establish a quantum that will take into account restoring the honour of the Crown and achieving the objective of reconciliation. As regards corrective justice, nothing also prevents the court, in the exercise of its discretion, from giving consideration to the Indigenous perspective proposed by Robert Mainville, now a justice at the Court of Appeal of Quebec, in his work *An Overview of Aboriginal and Treaty Rights and Compensation for Their Breach* (2001), at p. 127, without it being necessary to create a new remedial scheme under the name "reconciliatory justice". Even though such is not the case at the determination of liability stage, I am of the opinion that the courts can be somewhat creative in exercising their discretion in order to quantify damages (*Ontario (Attorney General) v. Restoule*, 2024 SCC 27, at para. 277). This creativity must nonetheless be exercised within the principled legal framework, namely, that of corrective justice under Quebec civil law.

[323] This more circumscribed approach also avoids the trap posed by the highly discretionary nature of the remedy anchored in reconciliatory justice in the case of a breach of the honour of the Crown demonstrated in a contractual context. It is important to bear in mind that agreements like those at issue help ensure predictability, stability and transparency in relationships between the Crown and Indigenous peoples. Accepting a remedial scheme that would allow courts to ignore provisions of

agreements duly negotiated between the parties could discourage governments from signing these kinds of agreements with Indigenous entities.

[324] It seems clear to me that the principles of corrective justice, when applied to the present case, cannot justify compensating Takuhikan for all of the deficits accumulated by its police force. Deduction should be made from the damages awarded to Takuhikan for the amounts paid by Quebec in 2014 and in 2016, the amount of the acquittance given under the transitional agreement, as well as any prescribed amount. If I had concluded that Quebec's conduct was dishonourable or contrary to good faith, I would have remitted the matter to the trial judge for consideration of the extent of the injury and of the causal connection. The government parties undertook to contribute financially to the maintenance of Mashteuiatsh's police force, not to all of its operational costs. In this regard, I agree with Quebec that the Court of Appeal could not fix the damages at an amount exactly equal to that of the deficits accumulated by Takuhikan, because, in any event, Takuhikan gave a contractual undertaking to assume those deficits and because the governments did not undertake to fund all of the costs generated by the police force.

IV. Conclusion

[325] For these reasons, I would allow the appeal and restore the trial judgment, with costs.

Appeal dismissed with costs, CÔTÉ J. *dissenting.*

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