Quebec (Attorney General) v. Pekuakamiulnuatsh Takuhikan: How Reconciliatory Justice Remedies Craft an Illusion of a Progressive Court

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I. OVERVIEW

"Restor[ing] the relationship for the future" reigns supreme with the British Crown and The Canadian Supreme Court.[1] Both leapt without looking, falling into the illusion of progress without remembering their nation's past. The Government of Canada, the Government of Quebec, and Band Council of the Pekuakamiulnuatsh First Nation (hereinafter, Pekuakamiulnuatsh), reached a tripartite agreement regarding culturally competent and adequate Aboriginal police services.[2] At the end of each fiscal year between 2013 and 2017, the funding amount set by the government for the tripartite agreement was insufficient for the Pekuakamiulnuatsh to maintain the goals of the agreement.[3] The Pekuakamiulnuatsh set three objectives for the tripartite agreement: "to establish and maintain an Indigenous police force," "to set the maximum financial contribution," and to have the Pekuakamiulnuatsh manage an independent police force.[4] Over those four years, the Pekuakamiulnuatsh incurred a deficit of CAD 1,599,469.45 because the amount the

1. Quebec (Attorney General) v. Pekuakamiulnuatsh Takuhikan, 2024 SCC 39 (Can.).
2. *Id.*
3. *Id.*
4. *Id.*

governments of Canada and Quebec gave to execute the objectives of the agreement was not enough.[5] The agreement contained a clause permitting the renewal of the agreement to ensure the Pekuakamiulnuatsh could maintain the police force over time, and the Pekuakamiulnuatsh attempted to negotiate the renewal clause with the governments of Quebec and Canada.[6]

The Pekuakamiulnuatsh Band Council claimed that the Canadian and Quebec governments violated the requirements of good faith and the Crown's obligation of the Honour of the Crown by refusing to "meaningfully" negotiate the funding clauses that led to a severe accumulation of deficits.[7] The Pekuakamiulnuatsh's claim was based upon both private law under the Civil Code of Quebec (CCQ) and in public law under Aboriginal law principles.[8] The trial judge of the Superior Court of Quebec dismissed the Pekuakamiulnautsh's claim, and held that the Honour of the Crown did not apply to the tripartite agreement, while declining to apply Aboriginal law principles.[9] According to the Court, contract law is the proper legal framework for assessing this issue.[10] The Court of Appeal reversed the trial court's judgment, ordered Canada to pay its share of the deficits, and ruled that both governments violated good faith and failed to uphold the Honour of the Crown.[11] Canada agreed to pay its share while Quebec appealed.[12] The Supreme Court of Canada *held* that the Honour of the Crown applied to the tripartite agreement, that Quebec violated principles of good faith by refusal to negotiate, and that the applicable remedy was found in public law through reconciliatory justice, where Quebec pays its portion of deficits to the Pekuakamiulnuatsh, to restore a future relationship with the Crown. 2024 SCC 39 (Quebec (Attorney General) v. Pekuakamiulnuatsh Takuhikan).

5. *Id.*
6. *Id.*
7. Quebec (Attorney General) v. Pekuakamiulnuatsh Takuhikan, 2024 SCC 39 (Can.).
8. *Id.*
9. *Id.*
10. *Id.* at para. 16.
11. *Id.* ("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").
12. *Id.* ("set aside" is analogous to reverse and remand).

II. BACKGROUND

A meaningful examination of the interactions between the Canadian government and First Nations requires an explicit acknowledgment of Canada's colonial history.[13] Canada assimilated Aboriginal peoples, diminished their legal statuses, established residential schools, and terminated Aboriginal treaties as a means of genocide.[14] Addiction, cycles of child abuse, and the overrepresentation of survivors of genocide and their descendants in prisons are just some of the devastating legacies of residential schools.[15] Canada, through its judiciary, is attempting reconciliation. Still, the Commission for Truth and Reconciliation protests that history must be adequately consulted before effective and meaningful remedies are created.[16]

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13. Eve Tuck and K. Wayne Yang, *Decolonization Is Not a Metaphor*, 1 DECOLONIZATION: INDIGENEITY, EDUCATION, AND SOCIETY 1 (2012) (asserting that decolonization is not a metaphor; it is a vessel for Indigenous "sovereignty and futurity," and must be viewed as an "elsewhere;" a destination to look towards involving unsettlement rather than recreating Indigenous culture(s) in a Western view of liberation); *see generally, Terminology Style Guide,* NATIVE GOVERNANCE CTR, https://nativegov.org/resources/terminology-style-guide/ (last visited Oct. 28, 2025) (emphasizing the need to decolonize language through capitalizing certain words after Native, capitalizing Indigenous, and other descriptors regarding Indigenous peoples).

14. TRUTH AND RECONCILIATION COMM'N OF CAN., HONOURING THE TRUTH, RECONCILING FOR THE FUTURE: SUMMARY OF THE FINAL REPORT OF THE TRUTH AND RECONCILIATION COMMISSION OF CANADA 1 (2015); Antonio Voce, Leyland Cecco and Chris Michael*, 'Cultural Genocide': The Shameful History of Canada's Residential Schools—Mapped,* THE GUARDIAN, (Sep. 6, 2021), https://www.theguardian.com/world/ng-interactive/2021/sep/06/canada-residential-schools-indigenous-children-cultural-genocide-map (as of September 2022, there were more than 1,300 unmarked graves of First Nations children uncovered from boarding schools enacted by the Indian Act that forcibly removed them from their homes. These schools had the "explicit aim of stripping away their culture, language and identity"); Convention on the Prevention and Punishment of the Crime of Genocide, arts. II(c), II(e), Dec. 9, 1948, 78 U.N.T.S. 277 (stating that the definition of genocide includes "deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part" and "forcibly transferring children of the group to another group").

15. TRUTH AND RECONCILIATION COMM'N OF CAN., *supra* note 14, at 183-84.

16. *Id.* at 184 ("the Commission is convinced that genuine reconciliation will not be possible until the complex legacy of the schools is understood, acknowledged, and addressed"); *see generally, Indian Residential Schools Settlement Agreement*, GOV'T OF CAN., https://www.rcaanc-cirnac.gc.ca/eng/1100100015576/1571581687074#sect1 (last visited Oct. 28, 2025) (implementing the resolutions of five elements: "a Common Experience Payment (CEP) for all eligible former students of Indian Residential Schools, an Independent Assessment Process (IAP) for claims of sexual or serious physical abuse, measures to support healing such as the Indian Residential Schools Resolution Health Support Program, and an endowment to the Aboriginal Healing Foundation, commemorative activities, the establishment of a Truth and Reconciliation Commission (TRC)").

The Canadian Supreme Court *has* used its discretion in the past to recognize the consequences of colonization. For example, criminal courts consider the additional factor of residential school descendancy if the defendant is Aboriginal.[17] This approach demonstrates the Court's and the legislature's willingness to consider past colonization through a criminal lens. In relation to the criminal justice system, the act of policing itself is a method of enforcing colonization.[18]

Colonization and its legacy manifested itself in the over-policing of Aboriginal peoples through outlawing spiritual practices, imprisoning spiritual leaders, and separating Aboriginal children from their parents.[19] This history has produced a "colonial trauma response" that passes from survivors to their descendants.[20] Any interaction, whether charged or not, with a non-Aboriginal police officer triggers an Aboriginal person to feel the collective history of trauma and injustice.[21] The most prominent examples of the colonial trauma response today are the violence against Aboriginal women and girls, the failures of non-Aboriginal police investigations, and the stigmas that surround Aboriginal women or girls who decide to report any violence against them.[22] This history of hurt and

17. *Id.* at 219-20; *see also* GRAEME MCCONNELL, INDIGENOUS PEOPLE AND SENTENCING IN CANADA (BACKGROUND PAPER) (2020), https://publications.gc.ca/collections/collection_2021/bdp-lop/bp/YM32-2-2020-46-eng.pdf (summarizing the effectiveness and legislative history to "consider the unique background and circumstances of Indigenous offenders, as well as all available alternatives to incarceration that may be appropriate").

18. Eric Laming, "*I Just Took the Beating": Indigenous Peoples' Experiences with Police Use of Force,* 75 INT'L J. OF L., CRIME, AND JUST. 1, 2, 12 (2023).

19. TRUTH AND RECONCILIATION COMM'N OF CAN., *supra* note 14, at 2.

20. Teresa Evans-Campbell, *Historical Trauma in American Indian/Native Alaska Communities: A Multilevel Framework for Exploring Impacts on Individuals, Families, and Communities*, 23 J. OF INTERPERSONAL VIOLENCE 316, 332-33 (2008) (defining that CTR [colonial trauma response] as a complex set of both historical and contemporary trauma responses to collective and interpersonal events).

21. *Id.* at 332.

22. *Id.* at 332-33; *see* Susan Strega et al., *Never Innocent Victims: Street Sex Workers in Canadian Print Media,* 20 VIOLENCE AGAINST WOMEN 6, 13-14 (2014) (quoting a parent of an Aboriginal Victim: "The Downtown Eastside women were portrayed as being prostitutes, hookers, drug addicts. They weren't—they were our daughters, our sisters, mothers"); *see also* Don Sabo, *Highway of Tears*, THE CANADIAN ENCYCLOPEDIA (Feb. 6, 2025), https://thecanadianencyclopedia.ca/en/article/highway-of-tears (the Highway of Tears refers to a 724-kilometer-long stretch of Yellowhead Highway 16 in British Columbia where many women (mostly Indigenous) have disappeared or been found murdered. The Highway of Tears is part of a larger, national crisis of missing and murdered Indigenous women and girls); *see also* PROGRESS ON BREATHING LIFE INTO THE CALLS FOR JUSTICE: A CFJ PROGRESS REPORT 10 (2024) (finding the First Nations and Inuit Policing Program is mismanaging funds, "further exasperating the gap between what First Nations

distrust in non-Aboriginal police and the Canadian government's legislative power over First Nations land contextualizes the Pekuakamiulnuatsh's decision to choose crippling debt over losing an ounce of their sovereignty.[23]

A. The Intricacies of the Honour of the Crown and Obligations

The Honour of the Crown is a category under Canadian constitutional law that governs Indigenous interactions with the Crown and establishes a "special relationship" between Indigenous peoples and the Crown, reflecting the colonial power differences between them. Recently, in *R. v.* Desautel, the Court decided the nature of the Crown's interactions with First Nations.[24] The Court outlined the Honour of the Crown's twin aims, one retrospective and the other forward-looking: to recognize its genocidal history and to reconcile the relationship between Aboriginal peoples and the Crown.[25] The Honour of the Crown requires accommodation of Aboriginal tights when negotiating contracts, also referred to as tripartite agreements, if a party is Aboriginal and the contract involves an issue of self-governance.[26]

While the Honour of the Crown governs the relationship between the Aboriginal peoples and the Crown, First Nations bands remain subject to the law of obligations under the CCQ when contracting with either the

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are calling for and what is being offered" and declaring it a "Step Backward" that requires immediate action).

23. INDIGENOUS CTR. FOR CUMULATIVE EFFECTS, *Pekuakamiulnuatsh Takuhikan,* https://www.icce-caec.ca/portfolio/pekuakamiulnuatsh-takuhikan/ (describing the Pekuakamiulnuatsh as "strongly committed to asserting and preserving Aboriginal rights, including Ilnu title, advancing the interests and aspirations of its people, and exercising their inherent right to self-government"); *see* HUM. RTS. WATCH, *Those Who Take Us Away: Abusive Policing and Failures in Protection of Indigenous Women and Girls in Northern British Columbia, Canada*, (Feb. 13, 2013), https://www.hrw.org/report/2013/02/13/those-who-take-us-away/abusive-policing-and-failures-protection-indigenous-women (demanding action from the Canadian government to prevent, solve, and reconcile cases of missing and murdered Indigenous women and girls, and condemning the sexual violence, brutality, and apathy of non-Aboriginal police towards Aboriginal women and the subsequent lack of justice because these complaints are investigated by the very police who are their causes); *Indian Act*, 1876, 39 Vict., c. 18 (Can.) ("The Minister of the Interior shall be Superintendent-General of Indian Affairs, and shall be governed in the supervision of the said affairs, and in the control and management of the reserves, lands, moneys and property of Indians in Canada by the provisions of this Act.").

24. R. v. Desautel, [2021] 1 S.C.R. 533, 535 (Can.).

25. *Id.* at para. 30.

26. *Id.*

governments of Quebec or Canada.[27] Under the private law of obligations, good faith may be interpreted under the C.C.Q. or under the public law of obligations, where good faith flows from the Honour of the Crown. The private law obligation, contained in 1375 C.C.Q., requires the parties to conduct themselves in good faith.[28] Public law, which also requires good faith from both parties, includes additional heightened duties that are contained in the Honour of the Crown.[29]

This dynamic between public and private law is unified in 1376 C.C.Q., which requires that laws in the code be bound to any other laws that may apply to that specific agreement.[30] The law that applies to 1375 C.C.Q. is the Honour of the Crown, which prompts the public law of obligations to apply to tripartite agreements when there is an issue regarding an Indigenous "claim" to the inherent right to self-government.[31] Policing falls under this "claim."[32]

The scope of the heightened duty to accommodate, articulated in *Haida Nation v. British Columbia*, is to be proportionate to the strength of

27. Self-Government, GOV'T OF CAN., https://www.rcaanccirnac.gc.ca/eng/1100100032275/1529354547314 (last visited Oct. 28, 2025) ("Self-government is negotiated within the Canadian constitutional framework and federal legislation is passed before the negotiated agreement takes effect.").

28. Civil Code of Québec, S.Q. 1991, c. 64, s. 1375 (Can.) ("The parties shall conduct themselves in good faith both at the time the obligation arises and at the time it is performed or extinguished.").

29. *Id.* at s. 1376 ("The rules set forth in this Book apply to the State and its bodies, and to all other legal persons established in the public interest, subject to any other rules of law which may be applicable to them.").

30. *Desautel*, [2021] 1 S.C.R. 533, para. 88 (Can.).

31. *See The Government of Canada's Approach to Implementation of the Inherent Right and the Negotiation of Aboriginal Self-Government*, GOV'T OF CAN., https://www.rcaanc-cirnac.gc.ca/eng/1100100031843/1539869205136 (last visited Oct. 20, 2025).

32. *Id.*

Additionally, other claims include: the

> establishment of governing structures, internal constitutions, elections, leadership selection processes, membership, marriage, adoption and child welfare, adoption and child welfare, Aboriginal language, culture and religion, education, health, social services, administration/enforcement of Aboriginal laws, including the establishment of Aboriginal courts or tribunals and the creation of offences of the type normally created by local or regional governments for contravention of their laws, policing, property rights, including succession and estates, land management, including: zoning; service fees; land tenure and access; and expropriation of Aboriginal land by Aboriginal governments for their own public purposes, natural resources management, agriculture, hunting, fishing and trapping on aboriginal lands, taxation in respect of direct taxes and property taxes of members, transfer and management of monies and group assets, management of public works and infrastructure, housing, local transportation, licensing, regulation and operation of businesses located on Aboriginal lands.

the supported existence of the "claim" of right, and the "seriousness" of the potential adverse effect upon the "claim" asserted.[33] The application of the Honour of the Crown emphasizes a heightened nature of good faith that encourages a "meaningful process" of consultation rather than simply reaching an agreement.[34] That "meaningful process" creates a duty to accommodate, which this Court has relied on in previous decisions concerning good faith under the Honour of the Crown.[35]

B. The Crown's Fiduciary Duty and Its Discretion to Employ Remedies of Reconciliatory Justice, Corrective Justice, or Declaratory Relief

The applicable legal principle for determining appropriate compensation when treaty rights and fiduciary duties are infringed—flowing from the Honour of the Crown—is that compensation awarded for the benefit of the First Nations does not need a precise mathematical test to determine the proper amount of compensation.[36] In *Guerin v. The Queen*, the Court decided that the discretionary nature of the Crown's power over First Nations peoples creates a fiduciary duty for the Crown to act in the interest of First Nations peoples.[37] The notion of a "high standard of dealing" appeared again when the judiciary exercised its

33. Haida Nation v. British Columbia (Minister of Forests), [2004] S.C.R. 511, 513 (Can.) (ruling that the Crown has a duty to accommodate Aboriginal interests when discussing agreements to harvest red cedar, because this would directly affect Aboriginal rights and title).

34. *Id.*

35. *Id.* at 513-14; *Desautel*, [2021] 1 S.C.R. 533, para. 30 (Can.) (describing how the Honour of the Crown may be required to "consult and accommodate" during the negotiation processes).

36. Robert Mainville, *Compensation in Cases of Infringement to Aboriginal and Treaty Rights* (Nov. 1999) (LL.M. thesis, McGill University) (on file with the National Library of Canada), at Abstract ("a) compensation is to be determined in accordance with a methodology which takes into account fiduciary law principles; b) compensation is to be determined in accordance to federal common law and will thus be governed by rules which apply uniformly throughout Canada; c) compensation is to be assumed by the Crown buy may be paid by third parties; d) relevant factors in determining compensation include the impact on the effected aboriginal community and the benefits derived by the Crown and third parties from the infringement; e) compensation is to be provided through structured compensation schemes which need not meet mathematical accuracy tests; f) compensation is normally to be awarded for the benefit of the affected aboriginal community as a whole").

37. Guerin v. The Queen, [1984] 2 S.C.R. 335, 336 (Can.); Maria Morellato et al., *The Crown's Fiduciary Obligation Toward Aboriginal Peoples*, CTR. FOR FIRST NATIONS GOVERNANCE. (1999), at 4.1, https://fngovernance.org/wp-content/uploads/2020/09/obligation.pdf.

discretionary powers as a manifestation of the Court's fiduciary duty as an executor of the Honour of the Crown.[38]

Recently, in 2023, the Court held in *Ontario* (*Attorney General*) *v. Restoule* that when the Crown has breached a duty that flows from the Honour of the Crown, the full range of remedies are available at the Court's discretion.[39] The Court therefore has discretion to determine which remedies to pursue: reconciliatory justice, corrective justice, or a declaratory judgment.

Reconciliatory justice is a court-developed remedy that states the Honour of the Crown applies to the "special relationship" between Canada and First Nations, and the objective is to further and "reconcile" the Aboriginal relationship with the Crown.[40] This remedy enforces a contract and remedies civil fault.[41] Historically, reconciliation is the goal once the Honour of the Crown applies to a First Nation's "claim."[42] "Reconciliatory justice" entails balancing the interests of the Aboriginal people's execution of their rights and the Crown's interest in furthering their relationship.[43] In other words, a compromise is required to complete reconciliation.[44]

"Corrective justice" is based on notions of civil fault for the party at fault to correct the harm they have caused.[45] Remedies based on corrective justice are not limited to monetary damages; rather, they are determined by "the nature of the wrong."[46] Remedies are meant to restore what existed before, or "ex ante."[47] The independence and rights via self-governance that existed before colonization are "ex ante," and healing from colonization and encouragement of First Nations independence is

38. Maria Morellato et al., *supra* note 37, at 4.3-4.4.

39. Ontario (Attorney General) v. Rastoule, 2024 SCC 27, para. 276 (Can.).

40. Manitoba Metis Fed'n Inc. v. Canada (Attorney General), [2013] 1 S.C.R. 623, paras. 67-68 (Can.).

41. *Id.* at para. 73.

42. Haida Nation v. British Columbia (Minister of Forests), [2004] S.C.R. 511, 513 (Can.) ("The historical roots of the principle of the Honour of the Crown suggest that it must be understood generously in order to reflect the underlying realities from which it stems").

43. *Id.* at paras. 17, 45.

44. *Id.* at para. 45.

45. *See* Thomas D.C. Bennett, *Privacy, Corrective Justice, and Incrementalism: Legal Imagination and the Recognition of a Privacy Tort in Ontario*, 59 MCGILL L.J. 51, 71 (2013).

46. Nicolas Cornell, *What Do We Remedy?*, *in* CIVIL WRONGS AND JUSTICE IN PRIVATE LAW 209, 215 (Paul B. Miller and John Oberdiek eds., 2020).

47. *Id.* at 212 (defining the term "ex ante" as what was once there but has been taken).

the remedy.[48] Treaties and contracts related to "claims" of rights aim to restore the rights that Aboriginal people once had.[49]

While it is difficult to imagine how to place a First Nations Group back in the position it would have been in had not their rights been infringed, there is an alternative solution: declaratory judgments.[50] In *Shot Both Sides v. Canada,* declaratory relief demanded that the Court explicitly state a right or a legal duty that First Nations parties are entitled to.[51] Declaratory relief therefore serves a corrective function, particularly in the context of treaties, to publicly demonstrate that the Crown has infringed on an Aboriginal right.[52]

C. Over-Policing of Aboriginal Peoples

Modern-day policing prolongs and enforces the legacy of colonization.[53] Another type of colonial repression in Canada is the government's intentional influx of white and European administrators and settlers into First Nations' land who advance the Crown's interests.[54] The administrators are typically non-Aboriginal people, serving as police officers, investigators, or other public safety officers.[55]

Aboriginal people in Canada experience a disproportionate use of force and over-policing of their lands.[56] Although there are reporting disparities on these events, the available research contains many first-hand accounts of hostile and violent experiences with non-Aboriginal officers in both rural and urban settings.[57] Additionally, there is a fraught relationship between Aboriginal women and police because of the alarmingly high amount of violence against Aboriginal women and the

48. *Id.* at 212; *see* Tuck & Yang, *supra* note 13, at 36.

49. GOV'T OF CAN., *supra* note 31.

50. *See* Horace Krever & Urszula Kaczmarczyk, Declaratory Judgments 1 (Aug. 23, 1984) (unpublished paper) (on file with the Canadian Inst. for the Admin. of Justice).

51. Shot Both Sides v. Canada, 2024 SCC 12 (Can.).

52. *Id.*; *see* Malcolm Rowe & Diane Shnier, *The Limits on the Declaratory Judgment*, 67 MCGILL L.J. 295, 317 (2022) (describing how declaratory judgments have been used in the context of treaty violations to declare a scope of rights the Aboriginal party is entitled to).

53. MARTIN THOMAS, VIOLENCE AND COLONIAL ORDER 17, 41 (2012) (illustrating how police were the ones to prevent uprisings against colonization, and that that role has not changed, but rather has taken a different form through non-lethal violence and policymaking).

54. *Id.* at 19-20.

55. *Id.*

56. Eric Laming, *supra* note 18, at 1 (accounting Indigenous peoples' experiences with non-Indigenous police and highlighting their stories to create progressive and culturally competent reform).

57. *Id.* at 8-10.

lack of sufficient investigation into this.[58] A study analyzing media language and police reactions to murders of Aboriginal sex workers found evidence that police do not view sex workers as victims; rather these deceased sex workers are seen as "vermin" that have been removed from the street, a natural consequence of their lifestyles.[59]

Control over policing is a core foundation of self-governance and independence.[60] First Nations peoples need legislation by First Nations peoples.[61] The Canadian Human Rights Tribunal investigated the underfunding of Canada's police. The tribunal concluded that there is a violation of human rights, and without adequate funding, there cannot be an Aboriginal police force to heal their communities from these violations.[62]

III. THE COURT'S DECISION

In the noted case, the Supreme Court of Canada stated that the remedy for Quebec's violation of the tripartite agreement does not warrant corrective justice remedies to place the Pekuakamiulnuatsh where they would have been had the contract been fulfilled.[63] Instead, the Court relied on reconciliatory justice to determine that the damages could be satisfied by what the Government of Quebec owed from the deficits.[64] This Court upheld the amount stated by the Court of Appeals as the appropriate remedy,[65] and found that the tripartite agreement satisfied the two-part test that determined the Honour of the Crown applied to this agreement, ensuring the future of the Crown's relationship with the Pekuakamiulnuatsh.[66]

The Court ruled that this issue is to be governed by the "general law of obligations," which requires the element of good faith to apply to contracts between the Pekuakamiulnuatsh and the governments of

58. Strega et al., *supra* note 22, at 7, 20.

59. *Id.* at 14 ("Although street sex workers might be murder victims, dominant vermin discourses preclude their movement into the subjective space reserved for innocent victims. Vermin and victim are not binary categories, and even after fatal victimization, the discursive space between innocent victim and verminous sex worker proves difficult to traverse").

60. *Id.*; Tuck & Yang, *supra* note 13, at 36.

61. Naomi Metallic and Kent Elson, *First Nations Policing Legislation Misses the Mark,* POL'Y OPTIONS (June 17, 2024), https://policyoptions.irpp.org/2024/06/first-nations-policing/.

62. Evans-Campbell, *supra* note 20, at 332.

63. Quebec (Attorney General) v. Pekuakamiulnuatsh Takuhikan, 2024 SCC 39 (Can.).

64. *Id.*

65. *Id.*

66. *Id.*

Canada and Quebec.[67] Tripartite agreements are not to be confused with treaties protected under s. 35(1) of the Constitutional Act of 1982.[68] The tripartite agreement in question was a contract, and the Honour of the Crown therefore applied.[69] The Crown is held to a higher standard of conduct that would not be required of an "ordinary contractual relationship" because this contract entailed issues of reconciliation with First Nations peoples.[70] This higher standard of conduct clearly manifested itself in the form of heightened expectations of good faith when discussing the renewal clause.[71] When Quebec refused to negotiate, it violated its obligation of good faith and breached its fiduciary duty due to the heightened nature of the tripartite agreements.[72] While the funding clause was strictly set out in the contract, the Pekuakamiulnuatsh were still entitled to expect their concerns to be heard during negotiations.[73]

To determine whether or not a tripartite agreement warrants the inclusion of the Honour of the Crown, two criteria must be satisfied.[74] First, the contract must be entered into by a First Nations group and the Crown based on the group's specific differences arising from its special status as a First Nations group.[75] The court ruled that this contract satisfied this criterion because it was based on the government's reconciliatory efforts to grant the Pekuakamiulnuatsh's sovereignty over their policing.[76] Policing here was regarded as an "Indigenous difference" between the government and the Pekuakamiulnuatsh because of the tense history of the issue.[77]

Second, the contract must relate to a First Nations self-governance issue if the right is established or a credible claim to such a right.[78] The Court found that the right to self-governance regarding policing was established.[79] It found that this contract satisfied the criterion because its subject matter involved the Pekuakamiulnuatsh's ability to run their own

67. *Id.*
68. *Id.*; *see* Canada Act, 1982, c. 11 (U.K.), *reprinted in* R.S.C. 1985, app II, no. 35 (Can.).
69. Quebec (Attorney General) v. Pekuakamiulnuatsh Takuhikan, 2024 SCC 39 (Can.).
70. *Id.*
71. *Id.*
72. *Id.*
73. *Id.*
74. *Id.*
75. Quebec (Attorney General) v. Pekuakamiulnuatsh Takuhikan, 2024 SCC 39 (Can.).
76. *Id.*
77. *Id.*
78. *Id.*
79. *Id.*

independent police force, while subject to the Honour of the Crown.[80] The tripartite agreement met the higher standards of conduct required of the government of Quebec to encourage reconciliation.[81]

The chosen remedy to uphold the Honour of the Crown was reconciliatory justice rather than corrective justice.[82] Reconciliatory justice in this instance required the government of Quebec to pay its share of the deficits.[83] Corrective justice was seen as unnecessary because of the Court's inability to quantify damages outside what the government of Quebec owed and to further the Pekuakamiulnuatsh's relationship with the Crown to restore the Pekuakamiulnuatsh to what would have been their rightful position, had the contract not been breached.[84]

The dissenting opinion alluded to the risk of bringing the Honour of the Crown into play to rewrite the terms of a contract between the governments of Canada, Quebec, and the Pekuakamiulnuatsh.[85] While the dissent wished to remand this case to the trial court to assess damages, it expressed a failure to understand why corrective justice could not be adapted to "consider the Indigenous perspective" at the Court's discretion.[86] Regarding good faith, the dissent felt it was reasonable for Quebec to expect the contract to be fulfilled as written rather than to entertain negotiations outside its literal meaning.[87] It also cautioned against dismissing the separation of powers doctrine through a discretionary policy decision sanctioned by the government, because the state should have the power to decide where its money goes.[88] When examining the remedy, according to the dissent, the damages are unquantifiable and unforeseeable.[89] Finally, in the opinion of the dissent, the decision will discourage governments from signing agreements with First Nations entities because it elevated the obligation of good faith rather than promoting reconciliation.[90]

80. *Id.*
81. Quebec (Attorney General) v. Pekuakamiulnuatsh Takuhikan, 2024 SCC 39 (Can.).
82. *Id.*
83. *Id.*
84. *Id.*
85. *Id.*
86. *Id.*
87. Quebec (Attorney General) v. Pekuakamiulnuatsh Takuhikan, 2024 SCC 39 (Can.).
88. *Id.*
89. *Id.*
90. *Id.*

IV. ANALYSIS

Reconciliatory remedies were created by this Court through its powers of discretion.[91] The flow of the Honour of the Crown that regards claims of Aboriginal issues is at the discretion of this Court.[92] The Crown's fiduciary duty is meant to serve the best interests of Aboriginal people and their relationships by the acknowledgment of Aboriginal self-government.[93] The Court feared using its discretion too broadly to rewrite a contract that was freely entered into by the Pekuakamiulnuatsh and the governments of Quebec and Canada.[94] The total deficit incurred because of Quebec's refusal to negotiate and accommodate the Pekuakamiulnuatsh's special Aboriginal status was evidently alarming.[95] The evaluation for a proper remedy required this Court to exercise broad discretion, like it had with factoring legacies of residential schools for sentencing in criminal cases.[96] Policing should be no different, and the decision here was inconsistent with the amount of discretion used in the past.[97]

The purposes of the Honour of the Crown are to be forward-looking and to restore Aboriginal claims of rights. The Court exhibited biased due to the deeply-rooted colonial history present in Canada's judicial structure.[98] Aboriginal people are not governed by Aboriginal law; they are governed by Canadaian law, and the remedy of reconciliatory justice was created by *this Court*, resulting in an inherent bias and an environment ripe for contradictions when interpreting a contract between Quebec's government and the Pekuakamiulnuatsh.[99]

Quebec's hostility during negotiations did not uphold the Honour of the Crown's higher standards of dealing with encouraging accommodations.[100] A "meaningful process" was not reached here either.[101]

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91. Manitoba Metis Fed'n Inc. v. Canada (Attorney General), [2013] 1 S.C.R. 623, para. 131 (Can.).

92. Haida Nation v. British Columbia (Minister of Forests), [2004] S.C.R. 511, 513 (Can.).

93. Guerin v. The Queen, [1984] 2 S.C.R. 335, 336 (Can.); *see* Morellato et al., *supra* note 37, at 4.1.

94. *Pekuakamiulnuatsh Takuhikan*, 2024 SCC 39 (Can.).

95. *Id.*

96. TRUTH AND RECONCILIATION COMM'N OF CAN., *supra* note 14, at 219-20.

97. Guerin v. The Queen, [1984] 2 S.C.R. 335, 336 (Can.).

98. TRUTH AND RECONCILIATION COMM'N OF CAN., *supra* note 14, at 1.

99. *See* Haida Nation v. British Columbia (Minister of Forests), [2004] S.C.R. 511, 513 (Can.); Shot Both Sides v. Canada, 2024 SCC 12 (Can.).

100. *Pekuakamiulnuatsh Takuhikan*, 2024 SCC 39 (Can.).

101. *Haida Nation,* [2004] S.C.R. 511, 532 (Can.).

Because this agreement implicated the Honour of the Crown, a multitude of remedies could be applied through this Court's wide discretion.[102]

It was found that declaratory relief was not applicable in this instance because of the case's distinguishing factors from *Shot Both Sides*.[103] The Pekuakamiulnuatsh did not seek a declaratory remedy; they sought compensation for the harm suffered due to the lack of funding and their ongoing struggles with the government of Quebec.[104] The first contradiction thus presents itself: the Court has the discretion to decide the type of relief; it is not limited because the Pekuakamiulnuatsh did not ask for declaratory relief.[105]

This Court did not believe that corrective justice would be the proper course as the remedy of harm; it wished to repair the rift in the relationship between the Pekuakamiulnuatsh and the Crown caused by Quebec's refusal to negotiate.[106] Inherently, the calculation of damages will not be straightforward, because despite previous attempts by the Court, such as class action lawsuits against residential schools and reconciliatory commissions acting as remedies,[107] how can one quantify the legacies of colonialism?

The second contradiction is that the record of hurt provided by the Pekuakamiulnuatsh was deemed as insufficient by this Court to quantify to receive corrective justice damages.[108] While the Court simultaneously states that the debt the police force incurred forced them to operate "at the very lowest of the lowest" standard, it also acknolwedged that the Pekuakamiulnuatsh people as a whole suffered from this underfunding.[109]

The Court correctly noted the sensitive nature of policing in Aboriginal communities, but did not assess whether the breach constituted civil fault.[110] With the addition of the Honour of the Crown, it shifted the issue towards a restoration of the Honour of the Crown rather than a civil

102. Ontario (Attorney General) v. Rastoule, 2024 SCC 27, para 276 (Can.).

103. *Shot Both Sides*, 2024 SCC 12 (Can.) (describing how "declaratory relief" as a possible remedy was demanded by the First Nation's party in the breached contract).

104. *Pekuakamiulnuatsh Takuhikan*, 2024 SCC 39 (Can.).

105. *Id.* at para. 220 ("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").

106. *Id.*

107. *Id.*

108. *Id.* at paras. 205-208.

109. *Id.* at para. 215.

110. *Id.* at paras. 22, 24.

breach of the government of Quebec's duties to the Pekuakamiulnuatsh.[111] The reasoning was to uphold a future relationship that needed the compromise of both parties, with the Pekuakamiulnuatsh in an unequal position that made them compromise more than the Crown.[112]

The final contradiction rests in the narrow enforcement of CCQ 1376 which states that any higher governing laws apply to contracts, and because this tripartite agreement is a contract, the higher standard of dealing and discretion of remedies via the Honour of the Crown applies to this agreement.[113] This Court could have referred to its fiduciary duty towards the Aboriginal people when faced with the conflict between maintaining the balance of powers.[114] Remedies are to be approached broadly and are not limited to monetary solutions.[115] The discretion the Court receives through the Honour of the Crown to implement corrective justice applies to this agreement.[116] Despite all of this, the Court ruled that the restoration of "claimed" rights does not warrant a corrective justice remedy because of the difficulty to quantify them while at the same time using its discretion to quantify the monetary amount to restore the Honour of the Crown.[117]

The Court asserted that the breach of the tripartite agreement was a traditional contracts issue that can be reconciled with the Honour of the Crown because it is meant to acknowledge the restoration of Aboriginal claimed rights. Yet it is impossible to separate the history of colonialism and policing from what this tripartite agreement is based on, ironically, because this Court enforced the Honour of the Crown.[118] It must be emphasized that the Pekuakamiulnuatsh would rather go into deficits and participate in negotiations that left them feeling as if there was a "knife to the throat" just to ensure that the government of Quebec did not police their people.[119] The Crown's treatment and relationship with the Aboriginal people is special for a reason. If the Crown once used its discretion to take the Pekuakamiulnuatsh's legal personhood away, the Crown could use its

111. Quebec (Attorney General) v. Pekuakamiulnuatsh Takuhikan, 2024 SCC 39, at paras. 205-208 (Can.).

112. *Id.*; Haida Nation v. British Columbia (Minster of Forests), [2004] 3 S.C.R. 511, 513 (Can.).

113. Civil Code of Québec, S.Q. 1991, c. 64, art 1376 (Can.); *Pekuakamiulnuatsh Takuhikan*, 2024 SCC 39, para. 154, 184. (Can.).

114. *Pekuakamiulnuatsh Takuhikan*, 2024 SCC 39, para. 192, 210 (Can.).

115. Mainville, *supra* note 36, at 54.

116. Guerin v. The Queen, [1984] 2 S.C.R. 335, 336 (Can.); Morellato et al., *supra* note 37, at 4.1.

117. Morellato et al., *supra* note 37, at 4.1.

118. *Pekuakamiulnuatsh Takuhikan*, 2024 SCC 39, para. 184 (Can.).

119. *Id.* at para. 215.

discretion through the Court to restore the power the Pekuakamiulnuatsh should have had since the very beginning.[120]

V. CONCLUSION

This decision falls into the illusion of progress and decolonization. Reconciliatory remedies appear as a way for First Nations groups to regain and exercise their sovereignty by gaining some power in negotiations based on their special Aboriginal status. The Crown's discretion reigns supreme, but contractual disputes can be a way for First Nations groups to hold their local governments accountable for the breaches when the Honour of the Crown applies to that agreement.

Corrective remedies, rather than reconciliatory remedies, should have been the preferred approach for holding the government of Quebec responsible for its hostility during negotiations. Specifically, because this issue is about policing, which has a long history of being a method of colonization resulting in generational trauma, the Pekuakamiulnuatsh's decision to go into debt is reasonable to keep their people safe. The question of how to restore the Pekuakamiulnuatsh to where they were before, had this contract not been breached, will not have a single, clear answer. If the Crown seeks to truly reconcile their relationship with Aboriginal peoples, the Crown must value the First Nations as an equal. Aboriginal self-governance is a strength; it is not a reflection of any weakness of the Crown.

The Pekuakamiulnuatsh are the ones who know what the *Pekuakamiulnuatsh* need for progress. This leads to future negotiations being welcomed because of the equal footing of the parties, rather than requiring the Pekuakamiulnuatsh to remain dependent on the negotiation attitudes of Quebec. Canada's Supreme Court leapt forward with reconciliatory justice, but without the foundation of decolonization, there is nowhere for this Court to land aside from back where it began.

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120. TRUTH AND RECONCILIATION COMM'N OF CAN., *supra* note 14, at 1.

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