

Court File No. _____

FEDERAL COURT

BETWEEN:

INDIGENOUS POLICE CHIEFS OF ONTARIO

Complainant

- and -

PUBLIC SAFETY CANADA

Respondent

NOTICE OF MOTION
SEEKING INTERIM RELIEF FOR PENDING MATTER UNDER THE *CANADIAN*
HUMAN RIGHTS ACT (R.S.C., 1985, c. H-6)

DATE: May 3, 2023

FALCONERS LLP

Julian N. Falconer (L.S.O. #29465R)
Jeremy Greenberg (L.S.O. #79486N)
Shelby Percival (L.S.O. #82855R)

Barristers-at-Law
10 Alcorn Avenue, Suite 204
Toronto, ON M4V 3A0

Tel.: 416-964-0495

Fax: 416-929-8179

E: julianf@falconers.ca

E: jeremyg@falconers.ca

E: shelbyp@falconers.ca

Lawyers for the Complainant

TO: PUBLIC SAFETY CANADA
c/o the Hon. Marco Mendicino, Minister of Public Safety;
Gina Wilson, Deputy Minister, Public Safety Canada;
Chris Moran, Assistant Deputy Minister (Indigenous Policing), Public Safety Canada

AND TO: This Honourable Court

TAKE NOTICE THAT THE COMPLAINANT will make an urgent motion to the Court, on a date to be determined by this Court, pursuant to s. 44 of the *Federal Courts Act* and Rules 372 and 373 of the *Federal Courts Rules*, and that the Complainant requests an expedited hearing, pursuant to Rules 373(3) and 385 of the *Rules*.

PROPOSED METHOD OF HEARING:

The motion is to be heard orally.

THE MOTION IS FOR:

- a) An order requiring the Respondent, Public Safety Canada (“PSC” or “Canada”), to immediately reinstate funding for three First Nations police services – Anishinabek Police Service (“APS”), Treaty Three Police Service (“T3PS”), and United Chiefs and Council of Manitoulin Island Anishnaabe Police Service (“UCCM”) – whose funding under the First Nations and Inuit Policing Program (“FNIPP”) expired on March 31, 2023;
- b) An order requiring PSC to suspend the effect of section six of the FNIPP “Terms and Conditions” (2017), and relieve all First Nations police services represented by the Complainant, the Indigenous Police Chiefs of Ontario (“IPCO”), from compliance with this section;
- c) Costs of this motion; and
- d) Such further and other relief as counsel may request and this Honourable Court may deem just.

THE GROUNDS FOR THE MOTION ARE:**Overview*****The Parties***

1. The Complainant, IPCO, represents the nine self-administered First Nation police services in Ontario, all of which receive funding under the FNIPP to provide policing to First Nations communities. Three of these police services have been operating without funding since March 31, 2023, when their FNIPP funding was cut off by the Respondent.
2. The Respondent, PSC, is the federal Ministry responsible for administering the FNIPP.

This Court's Jurisdiction to Grant Interim Relief

3. Under section 44 of the *Federal Courts Act* (R.S.C., 1985, c. F-7) (the “Act”), this Court has jurisdiction to order injunctive relief in matters pending before a federal board, commission, or other tribunal. This includes the jurisdiction to order interim relief in human rights complaints which are pending before the Canadian Human Rights Commission (the “Commission”), “in all cases in which it appears to the court to be just or convenient to do so.”¹
4. The Complainant presently has a matter pending before the Commission, in the form of a Complaint filed under the *Canadian Human Rights Act* (R.S.C., 1985, c. H-6) (the “CHRA”) on March 29, 2023.
5. This Complaint alleges discrimination, contrary to s. 5 of the CHRA, in the form of the discriminatory provision of a service, namely the provision of policing to First Nations communities under the federal government’s FNIPP. The Complaint pleads issue estoppel

¹ *Toutsaint v. Canada* (Attorney General), [2019 FC 817](#), at para 65 [*Toutsaint*]; *Drennan v. Canada* (Attorney General), [2008 FC 10](#) [*Drennan*], at paras 22-24.

and the findings of discrimination in relation to the FNIPP by this Court in *Canada (Procureur général) c. Première Nation des Pekuakamiulnuatsh*, [2023 CF 267](#) (“*Pekuakamiulnuatsh*”) and by the Canadian Human Rights Tribunal (“CHRT” or “Tribunal”) in *Dominique (on behalf of the members of the Pekuakamiulnuatsh First Nation) v. Public Safety Canada*, [2022 CHRT 4](#) (“*Dominique*”).

6. On April 19, 2023, after the filing of the Complaint with the Commission, the public sector union representing Commission employees, the Public Service Alliance of Canada (“PSAC”), went on strike, creating longer than usual wait times for the processing of complaints. As a result, the Complaint has not, as of the date of this filing, been assigned either an “Inquiry Number” or a “Complaint Number” by the Commission.

The Facts

Canada’s Discriminatory Implementation of the FNIPP

7. The FNIPP is administered by PSC on behalf of the federal government. Funding agreements with First Nations are cost-shared 52% by the federal government and 48% by the provincial government. All nine self-administered First Nation police services in Ontario receive funding through agreements jointly funded by Canada (Public Safety Canada) and Ontario (Ministry of the Solicitor General).
8. On January 31, 2022, the CHRT issued its decision in *Dominique*, holding that Canada discriminates against First Nations through the systemic underfunding of policing provided to First Nations communities via the FNIPP.
9. Among its key findings, the CHRT held that Canada’s implementation of the FNIPP violates the federal government’s underlying First Nations Policing Policy, 1996 (the

“Policy”), which commits Canada to ensuring policing at a standard comparable to what is available in non-Indigenous communities.

10. The CHRT also dismissed Canada’s longstanding excuse that it was “required” to restrict the quality of First Nations policing because the FNIPP is a “discretionary contribution program”, subject to Canada’s self-imposed restrictions. The CHRT found that this excuse was unacceptable and could no longer be offered as a justification for imposing restrictions on First Nations accessing funding under the FNIPP.
11. On February 27, 2023, this Court issued its decision in *Pekuakamiulnuatsh*, upholding, on judicial review, all findings of the Tribunal in *Dominique*. This includes, in particular, the findings that the FNIPP violates the underlying Policy adopted by the Respondent in 1996; that the FNIPP prevents First Nations from benefitting from the same quality of policing available to non-Indigenous communities in comparable circumstances; and that the Respondent could not justify its discriminatory funding restrictions by relying on the excuse that the FNIPP is a discretionary contribution program.
12. Additionally, on December 15, 2022, the Quebec Court of Appeal issued its ruling in a related case, *Takuhikan c. Procureur général du Québec*, 2022 QCCA 1699 (“*Takuhikan*”), concluding that Canada’s underfunding of First Nations policing was in direct violation of the Honour of the Crown and the Crown’s fiduciary duty towards Indigenous Peoples. (This case, brought by the same First Nation as in the Tribunal/Federal Court case, involved a successful civil claim for compensation by the First Nation which had been forced to cover the budget shortfalls of its police service every time FNIPP funding ran out.²)

² *Takuhikan c. Procureur général du Québec*, [2022 QCCA 1699](#) [*Takuhikan*].

13. Despite these rulings, PSC continues to perpetuate the same conduct which has already been held to be discriminatory. In particular, PSC has recently allowed the funding agreements for the three aforementioned First Nations police services – APS, T3PS, and UCCM – to expire, rather than negotiate reasonable terms for their new funding agreements. These actions are in stark defiance of the rule of law and are in flagrant disregard of the findings of both this Court and the Tribunal.

IPCO’s pending CHRA Complaint before the Canadian Human Rights Commission

14. On March 29, 2023, IPCO filed a complaint under the *CHRA*, alleging discrimination based on PSC’s ongoing discriminatory implementation of the FNIPP. The Complaint pleads that tactics employed by Canada evidence a clear failure to abide by the *Dominique* and *Pekuakamiulnuatsh* rulings.

15. PSC seeks to force First Nations to submit to a set of discriminatory “Terms and Conditions” – which are transparently designed to restrict the quality of policing in First Nations communities – in order for them to access funding under the FNIPP. PSC also refuses to negotiate terms for funding, instead deliberately allowing funding agreements to expire in order to force First Nations to sign onto the FNIPP’s discriminatory terms. This conduct is not only in stark contradiction to the rulings of the Tribunal and this Court, but also serves to aggravate the suffering of the communities as a result of the implementation of the discriminatory FNIPP.

16. To be clear, these discriminatory terms are unique to First Nations policing under the FNIPP, and do not apply to police services operating in non-Indigenous communities. Additionally, it is only in the Indigenous policing context that police services run the risk of having their funding expire and therefore being forced to cease operation. In any other

context, from municipal police services to the federally funded Royal Canadian Mounted Police (“RCMP”), the funding models are such that even where funding is up for renegotiation, the funds continue to flow uninterrupted while negotiations take place.

Canada’s Unconscionable Bargaining Tactics Create a Public Safety Crisis

17. This motion arises in the context of an emerging First Nations public safety crisis caused by PSC’s unconscionable bargaining tactics. In deliberately allowing the expiration of funding agreements for three police services, operating in 45 First Nations communities, PSC has demonstrated it is more interested in enforcing discriminatory funding terms than in ensuring the safety of these communities.
18. To begin with, PSC continues to restrict the ability to provide quality policing to First Nations communities by requiring First Nations to agree to discriminatory, highly restrictive “Terms and Conditions” in order to receive funding.
19. Section 6 of the Terms and Conditions (which were last updated in 2017) contains prohibitions unique to the First Nations policing context, blocking police services from aspects of policing that non-Indigenous communities take for granted. Specifically, section 6 prevents First Nations from accessing specialized policing services (such as canine units and emergency response teams), blocks First Nations police services from owning infrastructure (such as police detachments), and blocks First Nations from obtaining legal advice on FNIPP agreements. Section 6 states the following:

Ineligible expenditures for all streams include, but are not limited to, costs related to amortization, depreciation, and interest on loans; legal costs related to the negotiation of the agreement and any dispute related to the agreement or the funding received under the agreement; profit, defined as an excess of revenues over expenditures; and, costs for specialized policing services, such as ERT, Canine Units and Forensic Services. (FNIPP Terms and Conditions, 2017)

20. These restrictions are not found anywhere in the underlying 1996 Policy, and such restrictions do not apply to any police service operating in non-Indigenous communities.
21. These restrictions violate the commitments of the Policy, as they deliberately prevent access to the standards of policing guaranteed in the 1996 Policy.
22. PSC continues to falsely claim that these restrictions on First Nations policing are justified by the fact that the FNIPP is a “discretionary contribution program,” despite the CHRT’s ruling in *Dominique* and this Court’s decision in *Pekuakamiulnuatsh*.
23. At the same time, PSC has refused to engage in negotiations on renewed funding agreements for three IPCO member police services, namely APS, T3PS, and UCCM.
24. On March 31, 2023, the funding agreements of these three police services expired. With their last remaining funding running out, these three police services will shortly need to cease policing the communities they serve, consisting of 45 First Nations with a combined population of approximately 30,000 individuals.
25. PSC is deliberately defying this Court’s ruling in *Pekuakamiulnuatsh*, by attempting to force all three services to accept the discriminatory Terms and Conditions (described above), while also refusing to enter good faith negotiations based on culturally respectful Terms of Reference for negotiations. The Respondent’s refusal to negotiate Terms of Reference has been based on the claim that the FNIPP is a “discretionary contribution program” – an excuse which this Court has already rejected.

The Test For Interim Relief

26. Interim relief is appropriate where the court is satisfied that: (1) there is a serious issue to be tried; (2) there is a risk of irreparable harm; and, (3) the balance of convenience lies in favour of the Complainant.

There is a Serious Question to Be Tried

27. As of the filing of this motion, there are three police services whose funding agreements expired on March 31, 2023, after PSC refused to agree to baseline terms for the “tables” where long-term, multi-year funding agreements will be negotiated. It is now expected that the funding pools for these services – APS, T3PS, and UCCM – will be depleted within the coming weeks, at which point they will not have sufficient funds to continue operating.
28. The underlying issue in this case is one which this Court has already determined is a serious human rights violation, i.e., Canada’s discriminatory implementation of the FNIPP.

There is a Risk of Irreparable Harm

29. Once funding evaporates for these services, the consequences will be immediate and profound: 45 First Nations communities, with approximately 30,000 individuals, will no longer have access to police services. These are communities which, in many cases, are already dealing with ongoing, overlapping community safety crises related to inadequate resources, insufficient rosters of police officers, high crime rates, addictions and mental health challenges, and a range of other social problems.
30. Additionally, in the event that these three First Nations police services do cease to operate, even temporarily, there will be real prejudice to these communities in the prospect of a “return” to policing by non-Indigenous police services, since it is likely the Ontario Provincial Police (“OPP”) would be required to “step in”.
31. These communities have specifically chosen to adopt a model of First Nations policing because of the longstanding history of racist, colonial policing by non-Indigenous police forces in this country. The intergenerational trauma of Residential Schools, the

involvement of police services in the removal of children from their homes, the widely-recognized pattern of systemically racist policing of Indigenous communities – these are all reasons why the alternative, i.e., the presence of a non-Indigenous police service in these communities, is completely unacceptable and will cause serious, long-term harm.

32. In this case, no remedy or damages could ever repair the harm that would be caused if these First Nation communities lost access to policing from APS, T3PS, or UCCM. Even a temporary gap in police services would have significant, long-term consequences on the safety, security, and stability of these communities.

The Balance of Convenience Favours Preserving the Rights of Affected First Nations

33. Canada has already signaled that funding is presently available (as has its co-funder in the Ontario Ministry of the Solicitor General) which can be flowed at any time to the three police services with agreements that expired on March 31, 2023. However, Canada simply refuses to release this funding unless these services, and their respective First Nations, agree to submit to the discriminatory terms of the FNIPP.
34. On the one hand, the health and safety of some 45 First Nation communities and 30,000 individuals is now at risk. On the other hand, Canada faces only the mild “inconvenience” of having to extend funding (which it already has available) to three police services, without being able to impose one component – section 6 of the FNIPP “Terms and Conditions” – of a program which this very Court has already found to be discriminatory.

GENERAL

35. Section 44 of the *Federal Courts Act* (R.S.C., 1985, c. F-7).
36. Sections 3 and 5 of the *Canadian Human Rights Act* (R.S.C., 1985, c. H-6).

37. Rules 3, 4, 372, 373, and 385 of the *Federal Courts Rules* (SOR/98-106).

38. Such further and other grounds as counsel may advise and this Honourable Court may permit.

THE FOLLOWING DOCUMENTARY EVIDENCE will be used:

39. Affidavits to be served;

40. The human rights complaint filed by IPCO pursuant to the *CHRA*, on March 29, 2023; and

41. Such further and other materials as counsel may advise and this Honourable Court may permit.

May 3, 2023

FALCONERS LLP

10 Alcorn Ave, Suite 204
Toronto, ON M4V 3A9

Julian N. Falconer (LSO# 29465R)
Jeremy Greenberg (LSO# 79486N)
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