Federal Court Cour fédérale

Date: 20230630

Docket: T-961-23

Citation: 2023 FC 916

Montréal, Québec, June 30, 2023

PRESENT: Mr. Justice Gascon

BETWEEN:

INDIGENOUS POLICE CHIEFS OF ONTARIO

Complainants / Moving Party

and

PUBLIC SAFETY CANADA

Respondent

and

ASSEMBLY OF FIRST NATIONS

Intervener

ORDER AND REASONS

I. **Overview**

[1] The Complainants, the Indigenous Police Chiefs of Ontario [IPCO], bring an urgent motion for interlocutory relief under section 44 of the *Federal Courts Act*, RSC 1985, c F-7 [FC Act]. The motion arises out of the implementation of a federal program administered by the government of Canada [Canada] through Public Safety Canada [PSC], namely, the First Nations and Inuit Policing Program [FNIPP]. Pursuant to the FNIPP, agreements are adopted between provincial and federal governments and First Nations for the funding of self-administered Indigenous police services.

[2] On March 29, 2023, IPCO filed a complaint to the Canadian Human Rights Commission [Commission] under the *Canadian Human Rights Act*, RSC 1985, c H-6 [CHRA], in which it alleges discrimination in the FNIPP and the terms and conditions it imposes for the funding of Indigenous police services [Complaint].

[3] In this motion, IPCO requests declaratory and injunctive relief against the Respondent, PSC, in order to circumvent the alleged discriminatory effects of the FNIPP and compel PSC to continue funding three specific self-administered Indigenous police services. These are the Treaty Three Police Service [T3PS], the Anishinabek Police Service [APS], and the UCCM Anishnaabe Police Service [UCCM] [together, the Three Police Services]. IPCO claims that PSC refused to enter in good faith negotiations before the expiry of funding agreements with a number of self-administered Indigenous police services, which resulted in T3PS, APS, and UCCM losing funding as of March 31, 2023. IPCO further maintains that the loss of funding for the Three Police Services will imminently lead to the cessation of policing services in 45 Indigenous communities, resulting in the need for interlocutory orders to prevent the irreparable

harm that such circumstances will inevitably cause to Indigenous people living in these communities.

[4] More specifically, IPCO asks the Court to issue a mandatory order requiring PSC to immediately reinstate funding for the Three Police Services whose funding under the FNIPP expired on March 31, 2023, as well as a prohibitive order requiring PSC to suspend the effects of section 6 of the Terms and Conditions — Funding for First Nations and Inuit Policing [Terms and Conditions], or relieve the T3PS, APS, and UCCM police services from compliance with this section.

[5] IPCO submits that the Court has jurisdiction to issue the requested injunctive relief pursuant to section 44 of the FC Act, and that it satisfies each prong of the conjunctive three-part test set forth by the Supreme Court of Canada [SCC] in *RJR-MacDonald Inc v Canada (Attorney General)*, [1994] 1 SCR 311 [*RJR-MacDonald*] for the issuance of interlocutory injunctions. IPCO claims that: 1) a serious issue to be tried has been raised in its underlying Complaint; 2) the Indigenous communities served by the Three Police Services will suffer irreparable harm if interlocutory injunctive relief is not granted; and 3) the balance of convenience, which compares the harm IPCO and the Three Police Services will suffer to the harm done to PSC, as well as the public interest, favours IPCO.

[6] On this motion, the Court is not tasked with deciding the merits of IPCO's Complaint under the CHRA or, more generally, the adequacy of funding of self-administered Indigenous police services in Canada. The Court's role is to determine whether IPCO satisfies the requirements to be granted the declaratory and injunctive relief sought.

[7] There are five issues to be determined in this matter: 1) whether section 44 of the FC Act can apply in the circumstances; 2) whether PSC is issue estopped from contradicting certain findings made in three recent judicial decisions relating to the FNIPP; 3) whether IPCO meets the requirements for a declaratory relief; 4) whether IPCO meets the well-established tripartite test to obtain injunctive relief; and 5) if so, what are the appropriate remedies.

[8] Further to my review of the parties' written and oral submissions and of the evidence, IPCO's motion will be granted in part. I am satisfied that IPCO meets the applicable conditions for the issuance of a mandatory interlocutory injunction reinstating, on a temporary basis and on certain conditions, the funding of the T3PS, APS, and UCCM police services. The Court has jurisdiction pursuant to section 44 of the FC Act, and IPCO has demonstrated that a serious issue to be tried exists, that the Indigenous communities served by the Three Police Services will suffer irreparable harm if an injunction is not granted, and that the balance of convenience tilts in IPCO's favour. I conclude that this is an exceptional situation where it is just and equitable for the Court to intervene. However, there are no grounds to issue any form of declaratory relief or to order the outright suspension of the prohibitions still contained in section 6 of the Terms and Conditions.

II. <u>Background</u>

A. *Factual context*

[9] It is undisputed that Indigenous communities have a long and difficult history with the criminal justice system in Canada and with non-Indigenous police services. First Nations communities across the country continue to suffer from serious public safety crises and

disproportionate levels of crime. It is in this context that Canada adopted the First Nations Policing Policy, first introduced in June 1991 and last updated in 1996 [Policy].

[10] The Policy aims at ensuring that Indigenous communities have "access to police services that are professional, effective, culturally appropriate, and accountable to the communities they serve" (Policy at p 1), and that they benefit from "policing services that are responsive to their particular needs and that meet acceptable standards with respect to the quality and level of service" (Policy at p 3). The Policy allows Indigenous communities to create self-administered Indigenous police services, providing culturally appropriate policing based on Indigenous approaches to justice and safety.

[11] The purpose of the Policy is to "contribute to the improvement of social order, public security and personal safety in First Nations communities, including that of women, children and other vulnerable groups" (Policy at p 2). The Policy also establishes that First Nations communities "should have access to policing services which are responsive to their particular policing needs and which are equal in quality and level of service to policing services found in communities with similar conditions in the region" (Policy at p 4). The Policy lists broad policing cost categories eligible for funding (Policy at p 8).

[12] The Policy governs the FNIPP, which PSC — a federal government ministry — has the responsibility to administer. Through the FNIPP, Canada and the provincial government of Ontario [Ontario] both fund self-administered Indigenous police services in Ontario by way of funding agreements with First Nations. Under the FNIPP, funding for self-administered Indigenous police services is provided through tripartite agreements signed between the First Nations, Canada, and the relevant provincial or territorial government.

[13] IPCO represents nine self-administered Indigenous police services in Ontario, including T3PS, APS, and UCCM.

(1) T3PS, APS, and UCCM police services agreements

[14] T3PS provides policing services to 23 Indigenous communities with a combined population of 23,000 people in the area of Grand Council Treaty #3 in Northern Ontario.

[15] APS serves 16 Indigenous communities located on a vast geographic area spanning hundreds of kilometers from Southern to Northern Ontario, and regrouping approximately 30,000 individuals.

[16] For its part, UCCM serves six Indigenous communities, with a combined population of 2,000 individuals, located in the District of Manitoulin Island in Northern Ontario. Furthermore, UCCM supports the Ontario Provincial Police and the Wikwemikong Tribal Police Service in their operations.

[17] On August 23, 2022, in light of the imminent expiry of their funding agreements, representatives of Ontario reached out to T3PS and Canada to set up a meeting and begin discussions for the renewal of their Indigenous police services funding agreement. Similar communications occurred with APS and UCCM on September 23, 2022.

[18] T3PS, Ontario, and Canada met on November 22 and 23, 2022. Following their meetings, the parties exchanged various correspondences. Among others, T3PS expressed its unwillingness to discuss operational needs until the parties signed terms of reference governing the negotiations. The parties both suggested subsequent meeting dates, but they did not meet again.

[19] Similarly, APS met with Canada and Ontario on October 19, 2022, and subsequently on December 8, 2022. Despite further correspondence, they did not reach an agreement.

[20] For its part, UCCM never attended a meeting, after it cancelled the first agreed-upon meeting date.

[21] On February 27, 2023, PSC communicated with T3PS and UCCM and indicated that Canada was prepared to offer increases to the current funding levels of their police services. A similar communication was sent to APS on March 14, 2023. Canada sent further additional increases to those funding amounts on March 23, 2023. T3PS was advised that roughly $25.5 million in funding for up to 105 officers was available for 2023-24, with another increase of four officers for 2024-25. According to PSC, this represented a 40% increase from T3PS's 2021 levels. APS was advised that over $24 million in funding for up to 92 officers was available for 2023-24, with another increase of an additional four officers for 2024-25. This represented a 48% increase from APS's 2021 levels. Finally, UCCM was advised that over $9.6 million in funding for up to 31 officers was available for 2023-24, with another increase of an additional officer for 2024-25. This represented a 78% increase from UCCM's 2021 levels.

[22] On March 17, 2023, T3PS, APS, and UCCM sent a joint letter to PSC. The letter contained three "preconditions" for negotiation before the three Indigenous police services would accept a one-year extension of the current funding agreements. Securing such a one-year extension would give T3PS, APS, and UCCM time to negotiate long-term agreements for the funding of their respective police services. The preconditions were that: 1) parties commit to the attendance of a decision maker with decision-making authority at each negotiation table; 2) a "Negotiations Terms of Reference" be finalized, recognizing the unique context of Indigenous

policing and shared commitments to encouraging self-determination, in line with the honour of the Crown, reconciliation, and the Policy; and 3) each table be funded by Canada, as is regularly done in other contexts [together, the Preconditions].

[23] At the time, PSC was not prepared to agree to the “Terms of Reference” proposed by IPCO, to consider setting aside certain prohibitions contained in the Terms and Conditions (such as the funding of legal services in the context of the FNIPP), or to commit to have precise decision makers present at all negotiation meetings.

[24] I pause to underline that, contrary to the impression left by some of the written and oral submissions made by IPCO, the three Preconditions are not to be confused with the three prohibitions set out in section 6 of the Terms and Conditions and which, on this motion, IPCO is asking the Court to suspend.

(2) Expiry of funding agreements and the Complaint

[25] On March 29, 2023, IPCO filed its Complaint with the Commission about Canada’s alleged discriminatory and systemic underfunding of Indigenous police services under the FNIPP. IPCO submitted the Complaint on behalf of the nine self-administered First Nations police services it represents. In the Complaint, IPCO claims that PSC ignores the recent findings of *Dominique (on behalf of the members of the Pekuakamiulnuatsh First Nation) v Public Safety Canada*, 2022 CHRT 4 [*Dominique*], of *Canada (Attorney General) v Pekuakamiulnuatsh First Nation*, 2023 FC 267 [*Pekuakamiulnuatsh*], and of *Takuhikan c Procureur général du Québec*, 2022 QCCA 1699 [*Takuhikan*], and instead forces Indigenous communities to accept the same discriminatory FNIPP Terms and Conditions, or else lose funding.

[26] On March 31, 2023, the funding agreements of T3PS, APS, and UCCM expired, despite the efforts of the parties to reach an agreement. The cessation affects approximately 30,000 to 40,000 individuals from the 45 Indigenous communities served by T3PS, APS, and UCCM.

[27] Since the expiry of their respective funding agreement, T3PS, APS, and UCCM have not received any funds from Canada and Ontario. T3PS, APS, and UCCM have been able to maintain their operations for a few more weeks, but T3PS expects to run out of funds by the end of June 2023, and APS and UCCM by July 2023.

[28] I point out that, on May 26, 2023, Canada sent further offers of 90-day funding extensions to T3PS, APS, and UCCM "for the express purpose of issuing a payment," with the aim to help alleviate the existing financial problems caused by the failure to renew the funding agreements. However, such extensions of funding would maintain "the parameters of the contribution agreement that expired in March 2023."

(3) The Complaint

[29] The Complaint, which is the underlying action at the source of IPCO's present motion for declaratory and interlocutory relief, can be summarized as follows. It arises out of what IPCO claims is the ongoing systemic discrimination perpetuated by Canada through its deliberate and wilful underfunding and under-resourcing of the safety of Indigenous communities through the FNIPP. IPCO maintains that Canada discriminates against First Nations in the provision of the FNIPP, resulting in a discriminatory denial of safety to Indigenous people. In sum, IPCO argues that, as a result of Canada's discriminatory conduct, the establishment of equitable policing for

Indigenous communities, comparable to the policing and safety that the rest of the country experiences, remains out of reach for Indigenous people.

[30] More specifically, IPCO submits in the Complaint that the perpetuation of inequitable policing for First Nations communities is engineered by: 1) the deliberate concealment of the Policy and the imposition of the discriminatory and restrictive Terms and Conditions designed to keep First Nations down; and 2) Canada's use of unconscionable bargaining tactics with First Nations with respect to the expiry and negotiation of tripartite funding agreements under the FNIPP.

[31] IPCO contends that the FNIPP Terms and Conditions — which, it says, were drafted by Canada with no consultation with Indigenous communities — impose restrictions and prohibitions designed to impede the ability of First Nations police services to deliver adequate, effective, and culturally responsive policing. In particular, IPCO takes issue with section 6 of the Terms and Conditions, which lists the following items as "ineligible expenditures" for the funding of self-administered Indigenous police services: "[c]osts 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."

[32] IPCO claims that the prohibitions on funding for access to legal advice, for mortgages and loans, and for specialized policing units contained in section 6 of the Terms and Conditions are discriminatory, as they impose lower standards of policing to First Nations, compared to those available to comparable non-Indigenous communities. This, says IPCO, amounts to a

denial of service contrary to section 5 of the CHRA, as it makes it impossible to provide basic policing services to the First Nations.

[33] In terms of relief, IPCO seeks the following remedies in its Complaint to the Commission: 1) a declaration that the Crown has breached the CHRA, and an order that it cease and desist from doing so; 2) an order that the Crown comply with the terms of its own Policy, including, but not limited to, the guarantees described in the Complaint; 3) damages of $40,000 per person based on the total population of communities served by IPCO, reflecting the wilful and reckless nature of the discriminatory conduct; and 4) appropriate public interest remedies. Even though the Complaint itself deals extensively with what IPCO describes as Canada's discriminatory FNIPP Terms and Conditions, no specific relief is sought with respect to the prohibited "ineligible expenditures" contained in section 6 of these Terms and Conditions.

[34] I pause to observe that, by letter dated June 27, 2023 — i.e., after the hearing before the Court which took place on June 14, 2023 —, counsel for PSC informed the Court that, on June 24, 2023, Canada modified, by way of a ministerial amendment, section 6 of the Terms and Conditions to remove "specialized police services, such as ERT, Canine Units and Forensic Services" from the list of expenditures ineligible for FNIPP funding. The other ineligible expenditures listed in section 6 of the Terms and Conditions, however, have not changed. On June 28, 2023, counsel for IPCO sent a letter to the Court to provide additional context and relevant documents (including a supplementary affidavit affirmed by T3PS's Chief Kai Liu) in relation to this late amendment made by PSC to the Terms and Conditions.

(4) Cases underlying the Complaint

[35] The Complaint heavily relies on the *Dominique*, *Pekuakamiulnuatsh*, and *Takuhikan* precedents issued in 2022 and 2023. In *Dominique*, issued on January 31, 2022, the Canadian Human Rights Tribunal [CHRT] found that Canada discriminated against the Pekuakamiulnuatsh First Nation in its implementation of the FNIPP. Particularly, the CHRT determined that discrimination occurred because of the short duration of the funding agreements, the lack of funding, and the poor level of policing services to this First Nation.

[36] On February 27, 2023, the CHRT decision was upheld by this Court in *Pekuakamiulnuatsh*, on an application for judicial review. According to IPCO, the Court then confirmed that Canada discriminates against Indigenous peoples through chronic underfunding of the FNIPP and through discriminatory terms directly contravening the underlying Policy. PSC has appealed the *Pekuakamiulnuatsh* decision at the Federal Court of Appeal [FCA], but has not sought a stay of the decision pending the outcome of that appeal.

[37] Finally, in a decision issued on December 15, 2022 in *Takuhikan*, the Quebec Court of Appeal [QCCA] held that, on the basis of the same factual context as in *Dominique*, Canada and the provincial government of Quebec breached their obligations under the honour of the Crown in applying the FNIPP in a manner that allows the underfunding of Indigenous police services to the Pekuakamiulnuatsh First Nation.

B. *Intervener*

[38] By an order of this Court issued on June 12, 2023, the Assembly of First Nations [AFN] was granted leave to intervene in the present matter. The AFN advocates and promotes

relationships between the Crown and diverse First Nations. It has a long history of intervening in judicial proceedings, providing courts with insight on the legal questions involving First Nations.

[39] PSC did not oppose the proposed intervention but asked that AFN's intervention be subject to the following terms:

- The AFN shall not be allowed to file any evidence or raise new issues;
- The AFN shall be entitled to file a memorandum of fact and law [MOFL] of no more than 10 pages;
- Canada shall be entitled to file a MOFL of no more than 5 pages in reply; and
- The AFN shall not be entitled to seek its costs against any other party.

[40] The Court accepted these terms, and the issues that the AFN could address in its written and oral submissions were limited as follows:

- Whether the discriminatory application and administration of the FNIPP by PSC has resulted in chronic and systematic underfunding for First Nations police services;
- The AFN's engagement with PSC in a process to co-develop legislation to recognize First Nations policing as an essential service; and
- Whether First Nations possess the right to self-determination with respect to determining their own community safety needs and the right to exercise their jurisdiction over policing.

[41] The AFN was also granted permission to make oral submissions at the hearing before the Court, not exceeding 15 minutes.

C. *Orders sought*

[42] In its MOFL, IPCO specified the orders it is requesting from the Court. These are as follows:

> 1. A declaratory relief reaffirming the CHRT decision in *Dominique*, the decision of this Court in *Pekuakamiulnuatsh*, and the decision of the QCCA in *Takuhikan*:
>
> > a. That the FNIPP is a service that is provided to Indigenous communities by Canada as defined in paragraph 5(b) of the CHRA;
> >
> > b. That the implementation of the FNIPP deprives Indigenous communities from being able to access basic policing services, which results in the perpetuation of existing discrimination faced by Indigenous people; and
> >
> > c. That the implementation of the FNIPP violates Canada's honour of the Crown obligations by failing to fund Indigenous police services at a level comparable to that of surrounding communities with similar conditions.
>
> 2. A prohibitive injunctive relief:
>
> > a. Enjoining Canada from enforcing specific identified clauses in section 6 of the Terms and Conditions (namely, clauses prohibiting essential police services, prohibiting financing of infrastructure, and prohibiting expenditures on legal representation); and/or
> >
> > b. In the alternative, an order relieving T3PS, APS, and UCCM from any obligation of compliance with the specific identified clauses in section 6 of the Terms and Conditions (namely, clauses prohibiting essential police services, prohibiting financing of infrastructure, and prohibiting expenditures on legal representation);
>
> 3. A mandatory injunctive relief, ordering Canada to flow funds to T3PS, APS, and UCCM for a 12-month period, consistent with the Policy and in at least the amounts flowed through the last tripartite funding agreement for the 2022-2023 fiscal period.

[43] At the hearing before the Court, counsel for IPCO confirmed that the reliefs detailed in IPCO's MOFL replace and supersede the reliefs initially described in IPCO's Notice of Motion. Counsel further confirmed that the three remedies sought were independent from one another.

D. *Relevant statutory framework*

[44] The relevant statutory provisions read as follows.

(1) FC Act

Mandamus, injunction, specific performance or appointment of receiver	**Mandamus, injonction, exécution intégrale ou nomination d'un séquestre**
44 In addition to any other relief that the Federal Court of Appeal or the Federal Court may grant or award, a mandamus, an injunction or an order for specific performance may be granted or a receiver appointed by that court in all cases in which it appears to the court to be just or convenient to do so. The order may be made either unconditionally or on any terms and conditions that the court considers just.	**44** Indépendamment de toute autre forme de réparation qu'elle peut accorder, la Cour d'appel fédérale ou la Cour fédérale peut, dans tous les cas où il lui paraît juste ou opportun de le faire, décerner un mandamus, une injonction ou une ordonnance d'exécution intégrale, ou nommer un séquestre, soit sans condition, soit selon les modalités qu'elle juge équitables.

(2) *Federal Courts Rules*, SOR/98-106 [FC Rules]

Motion before proceeding commenced	**Requête antérieure à l'instance**
372 (1) A motion under this Part may not be brought before the commencement of	**372 (1)** Une requête ne peut être présentée en vertu de la présente partie avant

a proceeding except in a case of urgency.

l'introduction de l'instance, sauf en cas d'urgence.

Undertaking to commence proceeding

(2) A party bringing a motion before the commencement of a proceeding shall undertake to commence the proceeding within the time fixed by the Court.

Engagement

(2) La personne qui présente une requête visée au paragraphe (1) s'engage à introduire l'instance dans le délai fixé par la Cour.

Availability

373 (1) On motion, a judge may grant an interlocutory injunction.

Injonction interlocutoire

373 (1) Un juge peut accorder une injonction interlocutoire sur requête.

Undertaking to abide by order

(2) Unless a judge orders otherwise, a party bringing a motion for an interlocutory injunction shall undertake to abide by any order concerning damages caused by the granting or extension of the injunction.

Engagement

(2) Sauf ordonnance contraire du juge, la partie qui présente une requête pour l'obtention d'une injonction interlocutoire s'engage à se conformer à toute ordonnance concernant les dommages-intérêts découlant de la délivrance ou de la prolongation de l'injonction.

Expedited hearing

(3) Where it appears to a judge that the issues in a motion for an interlocutory injunction should be decided by an expedited hearing of the proceeding, the judge may make an order under rule 385.

Instruction accélérée

(3) Si le juge est d'avis que les questions en litige dans la requête devraient être tranchées par une instruction accélérée de l'instance, il peut rendre une ordonnance aux termes de la règle 385.

Evidence at hearing

(4) A judge may order that any evidence submitted at the hearing of a motion for an interlocutory injunction shall be considered as evidence submitted at the hearing of the proceeding.

Preuve à l'audition

(4) Le juge peut ordonner que la preuve présentée à l'audition de la requête soit considérée comme une preuve présentée à l'instruction de l'instance.

III. Analysis

A. *Preliminary issues*

(1) Jurisdiction of the Court

[45] IPCO argues that, pursuant to section 44 of the FC Act, the Court has jurisdiction to hear its motion and to grant injunctive relief, pending the proceedings before the Commission. Relying on the SCC decision in *Canada (Human Rights Commission) v Canadian Liberty Net*, [1998] 1 SCR 626 [*Canadian Liberty Net*], IPCO argues that Parliament entrusted the Court with a general supervisory role over proceedings under the CHRA. IPCO claims that, in this context, the Court may grant an injunction "[i]n addition to any other relief," even in the event that the substance of the dispute remains to be determined by a different decision maker. As such, IPCO submits that, through section 44 of the FC Act, Parliament intended to grant to the Court a general administrative jurisdiction over all federal boards and tribunals, including the Commission.

[46] I agree. Section 44 of the FC Act provides this Court with jurisdiction to grant injunctive relief concerning administrative proceedings and decisions, even in circumstances where there is no proceeding before the Court.

[47] There is a line of authority standing for the proposition that the Court has jurisdiction to issue a freestanding interlocutory injunction pending a CHRA complaint. Indeed, section 44 of the FC Act can be and has been relied on to supervise and oversee the CHRA process (*Canadian Liberty Net* at paras 36–37; *Letnes v Canada (Attorney General)*, 2020 FC 636 [*Letnes*] at para 23; *Toutsaint v Canada (Attorney General)*, 2019 FC 817 [*Toutsaint*] at para 65; *Colasimone v*

Canada (Attorney General), 2017 FC 953 [*Colasimone*] at para 7; *Drennan v Canada (Attorney General)*, 2008 FC 10 [*Drennan*] at para 23). It applies to the CHRA process before both the Commission and the CHRT.

[48] In *Canadian Liberty Net*, the SCC established that section 44 of the FC Act empowers the Court to issue freestanding interim injunctive relief even in situations where the merits of the underlying case, action or application will be heard by another decision maker who cannot issue injunctions (*Pier 1 Imports (US), Inc v Canada (Public Safety and Emergency Preparedness)*, 2018 FC 963 at para 48). Pursuant to the language of section 44, the Court can do so "in all cases in which it appears to [it] to be just or convenient." In other words, the Court has residual jurisdiction to grant a freestanding injunction even if the final disposition of the dispute is left to an administrative decision maker and is not before the Court (*Canadian Liberty Net* at para 20).

[49] PSC has not challenged the Court's jurisdiction to hear this motion.

[50] I pause to underline, however, that section 44 of the FC Act does not invest the Court with any freestanding power to issue declaratory relief. Such declaratory power results from other provisions of the FC Act.

(2) Issue estoppel

[51] In its motion, IPCO relies on the doctrine of *res judicata* and submits that PSC is issue estopped from contesting several factual and legal findings made in *Dominique*, *Pekuakamiulnuatsh*, and *Takuhikan*. Particularly, IPCO claims that the following findings should not be at issue on this motion:

a. That the FNIPP is a "service," within the meaning of section 5 of the CHRA;

b. That Canada discriminates against Indigenous peoples through its implementation of the FNIPP;

c. That Canada's discriminatory practices stem from its failure to fulfil the guarantees of the underlying Policy that governs the FNIPP;

d. That the goal of substantive equality set out in the underlying Policy is not achieved and cannot be achieved by the FNIPP because of its very structure;

e. That the Canadian government is legally bound to guarantee a standard of policing in Indigenous communities that is adapted to their needs and that is equal in quality and quantity to services provided in similar non-Indigenous communities;

f. That this obligation extends to a legal guarantee that police service models in Indigenous communities should be at least equivalent to those offered in neighbouring communities with similar conditions, and that Indigenous communities should be involved in choosing a model that is adapted to their particular needs while also being as cost-effective as possible;

g. That the very structure of the FNIPP results in a denial of service, as the FNIPP makes it impossible for Indigenous communities to receive basic policing services, since basic services are effectively ruled out under the funding formula;

h. That funding under the FNIPP is both arbitrary and inadequate;

i. That Canada's discriminatory actions have violated the honour of the Crown;

j. That underfunding exacerbates existing discrimination against Indigenous communities by increasing their dependency on the federal Crown; and

k. That Canada cannot justify its discriminatory conduct based on its excuse that the FNIPP is a "contribution program."

[52] I am not convinced by IPCO's arguments on issue estoppel.

[53] The principle of issue estoppel applies when a person attempts to relitigate a particular matter (whether a question of law, of fact, or of mixed fact and law) that was determined in a prior proceeding to which that person — or that person's privy — was a party. Issue estoppel, or preclusion arising out of an issue already decided, is one of the two components of *res judicata*, the other being cause of action estoppel.

[54] The conditions to the operation of issue estoppel are well known. First, they require three elements: 1) that the same question has been decided; 2) that the judicial decision which is said to create the estoppel was final; and 3) that the parties to that judicial decision or their privies were the same persons as the parties to the proceedings in which the estoppel is raised or their privies (*Danyluk v Ainsworth Technologies Inc*, 2001 SCC 44 [*Danyluk*] at paras 25, 33; *Tuccaro v Canada*, 2014 FCA 184 at para 14). In *Danyluk*, the SCC noted that "estoppel extends to the material facts and the conclusions of law or of mixed fact and law […] that were necessarily (even if not explicitly) determined in the earlier proceedings" (*Danyluk* at para 24). The principle of estoppel thus prevents new litigation on the same issue between the same parties, even if the issue arises in the context of a different cause of action.

[55] There are two steps to the test for applying issue estoppel. First, the Court must be satisfied that the three conditions described above for triggering the application of the doctrine have been met. If so, the Court must then consider whether it should exercise its discretion to refuse to apply the doctrine of issue estoppel (*Timm v Canada*, 2014 FCA 8 [*Timm*] at paras 22–23). Thus, even if the Court concludes that the doctrine's three conditions have been met, it may nevertheless refuse to apply issue estoppel in order to ensure that principles of fairness are

adhered to. The Court's discretion at this second step of the analysis "must be exercised with regard to the particular circumstances of each case" (*Timm* at para 24, citing *Danyluk* at para 67).

[56] On this motion, IPCO does not meet any of the three elements of the test, and issue estoppel and the doctrine of *res judicata* therefore cannot apply.

[57] First, the decisions in *Dominique*, *Pekuakamiulnuatsh*, and *Takuhikan* addressed whether the amounts and duration of the FNIPP funding of the Pekuakamiulnuatsh First Nation in Quebec were discriminatory and contrary to the CHRA. Conversely, the issue in the underlying IPCO's Complaint will be whether the funding of the nine self-administered First Nations police services in Ontario is discriminatory under the FNIPP and contrary to the CHRA. I agree with PSC that these are different questions involving different evidence.

[58] Second, "[a] decision must be final before *res judicata* can apply. If an appeal is pending, the decision is not final" (*Novopharm Ltd v Eli Lilly and Co (TD)*, [1999] 1 FC 515 at para 29). As stated by the FCA in *Canada v MacDonald*, 2021 FCA 6 at paragraph 15, "an order or judgment under appeal is not final for the purposes of the doctrine of *res judicata*." Since there is an appeal pending before the FCA in *Pekuakamiulnuatsh*, the findings made in that case and in *Dominique* are not final. Moreover, *Dominique* is not final for the purpose of issue estoppel, since the CHRT still has to determine the issue of remedy. The remedy hearing has yet to occur, where the CHRT will consider whether to order Canada to "cease" from doing something pursuant to paragraph 53(2)(a) of the CHRA.

[59] Third, the findings made in *Dominique*, *Pekuakamiulnuatsh*, and *Takuhikan* cannot be issue estopped, as the parties in those cases and in the present proceeding are not the same (*Angle*

v MNR, [1975] 2 SCR 248; *Blocker v Canada (Citizenship and Immigration)*, 2022 FC 1101 at para 31). More specifically, the complainants are different.

[60] This is not to say that the Court should ignore the prior factual and legal findings made in *Dominique*, *Pekuakamiulnuatsh*, and *Takuhikan* with respect to the FNIPP and its discriminatory features. Those findings certainly have an important bearing on this motion and on the relief sought by IPCO, as they directly relate to the FNIPP and its implementation by PSC through the Terms and Conditions. They will therefore be considered below. But the similarity between different factual situations is not sufficient to trigger an issue estoppel.

B. *Declaratory relief*

[61] I now turn to the first remedy sought by IPCO on this motion, namely, declaratory relief reaffirming three conclusions allegedly stemming from the CHRT decision in *Dominique*, the decision of this Court in *Pekuakamiulnuatsh*, and the decision of the QCCA in *Takuhikan*.

[62] I decline to grant the requested declaratory relief for the following three reasons.

[63] First, as pointed out by PSC, this relief was not raised by IPCO in its Notice of Motion, and it cannot be added as a remedy for the first time through the insertion of a paragraph in IPCO’s MOFL. Absent unusual circumstances, a court may only grant the relief that is sought in the notice of motion (FC Rules at para 359(b); *Energizer Brands LLC v The Gillette Company*, 2020 FCA 49 at para 39). Here, IPCO has failed to demonstrate the existence of any unusual circumstances that would justify adding declaratory relief at the late stage of its MOFL.

[64] In a letter to the Court, counsel for IPCO claimed that discussions had taken place between the parties in the context of the cross-examinations on affidavits, pursuant to which IPCO could allegedly add to the injunctive relief singled out in its Notice of Motion. However, my review of the evidence leads me to conclude that such exchanges strictly related to additional details to be provided in relation to the prohibitive and mandatory injunctive relief initially laid out by IPCO in its Notice of Motion. Contrary to the suggestion made by counsel for IPCO, I can find no indication in the cross-examination of Ms. Debra Bouchie (one of IPCO's six affiants), or elsewhere in the record, that new declaratory relief was discussed between the parties or even contemplated after the filing of the Notice of Motion. The discussions referred to in the cross-examinations revolved solely around particularizing the injunctive relief, and were not about adding something not contemplated in the initial Notice of Motion, such as declaratory relief.

[65] Second, declaratory relief should not be made by the Court until after a full hearing on the merits and with complete evidence. In *Calwell Fishing Ltd v Canada*, 2016 FC 312 [*Calwell*] at paragraph 119, the Court described the declaratory relief as a "discretionary remedy whereby a court can issue a declaratory judgment, that is a judicial statement confirming or denying a legal right or existing legal situation. The Court lacks jurisdiction to make declarations of fact." The issuance of a declaration requires the Court to have jurisdiction to hear the issue, a real dispute, a genuine interest in the resolution of the issue by the moving party, and an interest by the respondents to oppose the declaration (*Ewert v Canada*, 2018 SCC 30 at para 81). The declaratory relief sought by IPCO is inappropriate in the circumstances, given that IPCO has only requested a motion for an interlocutory injunction pursuant to section 44 of the FC Act and that declaratory relief is not an appropriate remedy on an interlocutory motion (*Wasylynuk v*

Canada (Royal Mounted Police), 2020 FC 962 [*Wasylynuk*] at para 69, citing *Sawridge Band v Canada*, 2003 FCT 347 at para 6, aff'd 2004 FCA 16).

[66] Third, a moving party seeking declaratory relief is still required to establish the elements of the relief sought (*Calwell* at para 149). IPCO had the evidentiary burden to demonstrate that it is entitled to declaratory relief (*Calwell* at paras 170–171, 248–250). In my view, IPCO has failed to do so. The record and the affidavit evidence do not demonstrate that the three specific declarations sought are appropriate and of practical utility, especially in the context where the decisions on which IPCO relies are currently under appeal. I am not satisfied that, at this stage, IPCO has established that the *Dominique*, *Pekuakamiulnuatsh*, or *Takuhikan* decisions necessarily have the specific meaning and scope it asks the Court to declare they have.

[67] In light of the foregoing, IPCO's request for declaratory relief will be denied.

C. *Interlocutory injunctions*

[68] The essence of IPCO's motion relates to the prohibitive and mandatory injunctive reliefs it is seeking.

(1) The test for granting an interlocutory injunction

[69] It is trite law that, in order to succeed on a motion seeking an interlocutory injunction, the moving party must satisfy the well-known tripartite test set out by the SCC in *RJR-MacDonald*. The moving party must first establish, on a preliminary assessment of the merits of its case, that there is a serious issue to be tried in its underlying proceeding. This generally means that the underlying action or application is neither frivolous nor vexatious (*RJR-MacDonald* at pp 334–

335, 348). However, an elevated or heightened threshold may apply in certain particular circumstances. Second, the moving party must show that it will suffer irreparable harm if the interlocutory injunction is not granted. Third, the onus is on the moving party to establish that the balance of convenience, which contemplates an assessment of which of the parties would suffer greater harm from the granting or refusal of the remedy pending a decision on the merits, favours the granting of interlocutory relief (*R v Canadian Broadcasting Corp*, 2018 SCC 5 [*CBC*] at para 12; see also *Ahousaht First Nation v Canada (Fisheries and Oceans)*, 2019 FC 1116 [*Ahousaht*] at paras 48–53, *Robinson v Attorney General of Canada*, 2019 FC 876 at paras 56–82, *Okojie v Canada (Citizenship and Immigration)*, 2019 FC 880 at paras 61–93).

[70] At the outset, it is important to underline that an interlocutory injunction is an extraordinary and equitable relief. Moreover, a decision to grant or refuse an interlocutory injunction is a discretionary one (*CBC* at para 27). Given that an interlocutory injunction is an exceptional remedy, compelling circumstances are required to justify the intervention of the courts and the exercise of their discretion to grant relief. The burden is on the moving party to demonstrate that the conditions of this exceptional remedy are met.

[71] The *RJR-MacDonald* test is conjunctive and all three elements of the test must be satisfied in order to grant relief (*Air Passengers Rights v Canada (Transportation Agency)*, 2020 FCA 92 at para 15). None of the branches can be seen as an “optional extra” (*Janssen Inc v Abbvie Corporation*, 2014 FCA 112 [*Janssen*] at para 19), and a “failure of any of the three elements of the test is fatal” (*Canada (Citizenship and Immigration) v Ishaq*, 2015 FCA 212 at para 15; see also *Western Oilfield Equipment Rentals Ltd v M-I LLC*, 2020 FCA 3 [*Western Oilfield*] at para 7). That said, the three prongs of the test are not water-tight compartments, and

they should not be assessed in total isolation from one another (*The Regents of University of California v I-Med Pharma Inc*, 2016 FC 606 at para 27, aff'd 2017 FCA 8; *Merck & Co Inc v Nu-Pharm Inc* (2000), 4 CPR (4th) 464 (FC) at para 13). They are instead flexible and interrelated: "[e]ach one relates to the others and each focuses the court on factors that inform the overall exercise of the court's discretion in a particular case" (*Wasylynuk* at para 135). For example, demonstrated strength on the merits at stage one may affect the Court's consideration of irreparable harm and the balance of convenience at stages two and three (*British Columbia (Attorney General) v Alberta (Attorney General)*, 2019 FC 1195 at para 97, rev'd on other grounds 2021 FCA 84).

[72] In *Google Inc v Equustek Solutions Inc*, 2017 SCC 34 [*Google*], the SCC reminded that an overarching and fundamental objective animates the *RJR-MacDonald* test: the motions judge needs to be satisfied that, ultimately, granting the interlocutory injunctive relief is just and equitable, taking into consideration the particular circumstances of the case. The SCC in *Google* thus reinforces that, in exercising their discretion to grant an interlocutory injunction, the courts need to be mindful of overall considerations of justice and equity, and that the *RJR-MacDonald* test cannot be simply boiled down to a box-ticking exercise of the three components of the test.

[73] The Court must therefore assess whether, in the end, granting the interlocutory injunction sought by IPCO would ultimately be "just and equitable in all of the circumstances of the case," which will "necessarily be context-specific" (*Google* at para 25).

[74] A motion for interlocutory injunction like this one ultimately turns on its facts. When all the circumstances are considered, the motion materials and the evidence must convince the Court that, on a balance of probabilities, the three components of the test are met and that it is just and

equitable to issue an injunction. I underline that, as the SCC stated in *FH v McDougall*, 2008 SCC 53 [*McDougall*], there is only one standard of proof in civil cases in Canada, and that is proof on a balance of probabilities (*McDougall* at para 49). The only legal rule in all cases is that "evidence must be scrutinized with care by the trial judge" to determine whether it is more likely than not that an alleged event occurred or is likely to occur (*McDougall* at para 45). Evidence "must always be sufficiently clear, convincing and cogent to satisfy the balance of probabilities test" (*McDougall* at para 46).

[75] Each of the three prongs of the *RJR-MacDonald* test will be examined in turn below.

(2) Serious issue to be tried

[76] The first element of the tripartite test is whether the motion materials and the evidence before the Court are sufficient to satisfy the Court, on a balance of probabilities, that IPCO has raised a serious issue to be tried in its Complaint to the Commission. The demonstration of a single serious issue suffices to meet this part of the test (*Jamieson Laboratories Ltd v Reckitt Benckiser LLC*, 2015 FCA 104 at para 26).

[77] I underscore that, under the first prong of the *RJR-MacDonald* test, the question relates to a preliminary assessment of the strength of IPCO's case in the proceeding underlying its motion (*CBC* at para 25), namely, its Complaint to the Commission and the pending process under the CHRA (*Toutsaint* at para 71; *Colasimone* at para 10).

(a) *Legal test*

[78] The requirement of a serious issue to be tried can give rise to one of three different thresholds (*Letnes* at para 40; *Ahousaht* at para 78). First, the usual and general threshold is a low one, in which case the Court should not engage in an extensive review of the merits. There are no specific requirements to be met in order to satisfy this threshold and the judge must simply conclude that the issues raised in the underlying application are "neither frivolous nor vexatious" (*RJR-MacDonald* at pp 338–339). Second, an elevated threshold applies "when the result of the interlocutory motion will in effect amount to a final determination of the action" (*RJR-MacDonald* at p 338). These situations call for a more extensive review of the merits at the first stage of the analysis, and they have often been referred to as requiring a "likelihood of success" in the underlying application. Third, for mandatory interlocutory injunctions, the SCC established in *CBC* that a heightened threshold of a "strong *prima facie* case" applies, and it expressly stated that, in such cases, a "strong likelihood" of success needs to be demonstrated for assessing the strength of the applicant's case (*CBC* at paras 15, 17).

[79] In this case, IPCO's motion for injunctive relief has a dual dimension. First, a prohibitive injunction seeking an order refraining PSC from enforcing specific parts of section 6 of the Terms and Conditions. Second, a mandatory injunction seeking an order directing PSC to flow funds to T3PS, APS, and UCCM for a 12-month period, in a manner consistent with the Policy. Accordingly, for the prohibitive injunctive relief, IPCO only has to demonstrate that the underlying issues in its Complaint are neither vexatious nor frivolous. For the mandatory injunctive relief, however, the serious issue threshold is heightened to the standard of a "strong *prima facie* case," pursuant to which IPCO must demonstrate that it has a "high probability" or a

"great likelihood of success" in its CHRA process (*Ahousaht* at para 78, citing *CBC* at paras 15, 17).

[80] IPCO claims that it meets both thresholds, since its Complaint has a strong likelihood of success because it essentially relies on findings of discriminatory treatment under the FNIPP that have already been made by one tribunal — the CHRT — and two courts — this Court and the QCCA — in *Dominique*, *Pekuakamiulnuatsh*, and *Takuhikan*. In light of these three precedents, IPCO is of the opinion that the Commission and the CHRT are highly likely to make a finding of discrimination with regard to the funding of policing services provided under the FNIPP and the Terms and Conditions.

[81] In its submissions, PSC responded that both injunctive remedies sought by IPCO are in fact mandatory in nature. According to PSC, asking for restrictions of the terms of an agreement — which, it says, is what the prohibitive relief boils down to — is "in effect a mandatory order to make an agreement in a certain way, not a prohibitive one" (PSC's MOFL at para 49). I disagree. In my view, the prohibitive injunctive relief sought by IPCO would not force PSC to enter into a certain type of funding agreement. Rather, it would only prohibit PSC from relying on some specific provisions contained in one section — i.e., section 6 — of the Terms and Conditions developed by Canada to implement the FNIPP. I am not persuaded that such a relief is not prohibitive in nature.

(b) *Serious* prima facie *case*

[82] I am satisfied that IPCO meets the heightened "serious issue to be tried" threshold applicable to mandatory injunctions, and that it has a "strong likelihood of success" in its CHRA

process and its allegations regarding Canada's discriminatory and systemic underfunding of Indigenous police services under the FNIPP. It goes without saying that, in light of that conclusion, IPCO also meets the lower "neither frivolous nor vexatious" threshold as well.

[83] In *Dominique*, the CHRT dealt with a complaint that PSC discriminated against the Pekuakamiulnuatsh First Nation, located in the province of Quebec, in the provision of a service based on race, national, or ethnic origin. The complainant argued that the financial assistance provided to that First Nation under the FNIPP did not allow it to offer policing services equivalent to those otherwise provided to comparable municipalities. The complaint to the Commission related to the funding itself, the duration of the funding agreements, and the level of police services offered to the Pekuakamiulnuatsh First Nation.

[84] According to IPCO, the CHRT decision in *Dominique* holds, more generally, that Canada discriminates against First Nations through the systemic underfunding of policing services provided to First Nations communities via the FNIPP. Among its key findings, the CHRT held that Canada's implementation of the FNIPP violates the federal government's Policy, which commits Canada to ensuring policing in First Nations communities at a standard comparable to what is available in non-Indigenous communities.

[85] PSC responds that the *Dominique*, *Pekuakamiulnuatsh*, and *Takuhikan* decisions all turn on their respective factual context and on the specific terms of the agreement between the Pekuakamiulnuatsh First Nation, Canada, and Quebec. These decisions involve a policing regime from a different province than IPCO, under which the Pekuakamiulnuatsh First Nation received funds based on its own agreement with Canada and Quebec. According to PSC, *Dominique*, *Pekuakamiulnuatsh*, and *Takuhikan* do not invalidate the FNIPP *per se*. Rather, it is its

application through the funding agreement between Canada, Quebec, and the Pekuakamiulnuatsh First Nation that created discrimination:

> That being said, the Tribunal finds that while the foundations and broad principles of the [FNIPP], a program created by the federal government and implemented by the Respondent, and which, it should be recalled, was essentially a response to the 1990 Policing Report, are laudable and some of its elements are still favourable, the evidence reveals that the [FNIPP], in its application, does not fully correct the situation.
>
> (*Dominique* at para 348)

[86] In sum, PSC argues that the findings in the three precedents relied on by IPCO address the impact of the FNIPP and of the underfunding on a specific First Nations community. Such findings cannot be systematically transposed elsewhere, or applied to the particular circumstances raised in IPCO's Complaint or motion.

[87] More specifically, says PSC, the decisions in *Dominique*, *Pekuakamiulnuatsh*, and *Takuhikan* did not make any findings on the issue of whether section 6 of the Terms and Conditions is discriminatory. In other words, there is no clear and convincing evidence that *Dominique*, *Pekuakamiulnuatsh*, or *Takuhikan* dealt with any of the "ineligible expenditures" under section 6 of the Terms and Conditions, namely, the prohibition to use funds for financing police infrastructure, for legal costs, or for special police units. The three precedents simply found that the Pekuakamiulnuatsh First Nation had received insufficient funding over the years and that the application and implementation of the Policy were discriminatory. PSC submits that the decisions dealt with underfunding resulting from the FNIPP, not with any of the prohibitions laid out in section 6 of the Terms and Conditions.

[88] I am not persuaded by PSC's arguments.

[89] I accept that the decisions in *Dominique*, *Pekuakamiulnuatsh*, and *Takuhikan* are specific to the policing services structure under the Quebec provincial legislation, the particular tripartite funding agreements signed by the Pekuakamiulnuatsh First Nation, and the evidence that was adduced before the CHRT or the Quebec courts on the impact of the FNIPP on that specific community. I also do not dispute that these precedents are fact-based, and I agree with PSC that the specific facts and evidence on that complaint cannot be assumed to be present for all other First Nations in Canada. I also acknowledge that none of *Dominique*, *Pekuakamiulnuatsh*, or *Takuhikan* discussed the "ineligible expenditures" set out in the Terms and Conditions, which are a central point of grievance raised by IPCO in the Complaint and on this motion.

[90] However, I underscore that the three decisions also contain more general statements of principle made by the CHRT, the Court, and the QCCA on the FNIPP and its implementation (which includes the Terms and Conditions). For example, in *Dominique*, the CHRT held at paragraph 326 that it is the structure of the FNIPP itself that causes the discrimination experienced by the Pekuakamiulnuatsh First Nation:

> [326] […] The evidence shows that the implementation of the [FNIPP] is perpetuating existing discrimination, not eliminating it entirely. The goal of substantive equality is not achieved and cannot be achieved by the [FNIPP] because of its very structure. This is highlighted by the gap between the objectives of the policy to develop professional and responsive policing services for First Nations and the actual impact of the implementation of the program.

[91] This was echoed by this Court in *Pekuakamiulnuatsh*, where Associate Chief Justice Gagné observed that the CHRT had concluded that the implementation of the FNIPP perpetuated the existing discrimination against First Nations (*Pekuakamiulnuatsh* at para 33). Further, in *Takuhikan* at paragraph 103, the QCCA held that the governments should not dictate how a First

Nation uses its resources: “I therefore believe that the question of allocating a First Nation’s resources must be analyzed first and foremost in terms of the needs and priorities established by the First Nation, and not in terms of those that a government can impose on the First Nation” [my translation]. This statement supports IPCO’s position that the federal or provincial governments are likely discriminating against the First Nations when they force them to use funds a certain way.

[92] Similarly, and contrary to what PSC repeatedly stated in its submissions on this motion, the three precedents clearly affirmed that the FNIPP is not a discretionary or voluntary “contribution program.” In *Dominique*, the CHRT held as follows, at paragraph 310:

> [310] Contrary to the Respondent’s argument that the [FNIPP] is merely a funding or contribution program and that the Canadian government has no obligation to fully fund Indigenous police services, the Tribunal notes that “once the state does provide a benefit, it is obliged to do so in a non-discriminatory manner” (*Eldridge* at para. 73). In other words, when the Canadian government decides to provide the benefits that come from applying the Policy and [FNIPP], which includes not only funding but also other benefits associated with the implementation of the program, then it must do so in a non-discriminatory manner (*Children’s Aid Society 2016*, at para. 403).

[93] This was subsequently confirmed by this Court in *Pekuakamiulnuatsh*, where Associate Chief Justice Gagné stated the following, at paragraph 78:

> [78] The Tribunal was correct in rejecting the AGC’s position that the [FNIPP] is simply a contribution program to fund various Indigenous police forces or that its only purpose is to improve provincial policing services. That interpretation is fundamentally narrow and does not take into account the object and scope of the policy that aims to implement the inherent right of Indigenous Peoples to self-govern. The Policy and the [FNIPP] enable Indigenous communities that desire to do so to form their own police force, adapted to their particular needs and in line with acceptable quantitative and qualitative standards. The Policy itself

> provides that such services should be equal to those provided in communities with similar conditions in the region. […]

[94] Those statements are important as PSC's qualification of the FNIPP as a voluntary "contribution program" is what anchors and justifies its position on the Terms and Conditions and the prohibitions on the use of funding they contain. PSC and Canada claim that they are free to impose the terms that they see fit for self-administered Indigenous police services as they are merely providing discretionary funding through the FNIPP program. This argument was clearly dismissed and rejected by both the CHRT and this Court.

[95] Further, in *Dominique*, the CHRT determined that choices effectively offered to the Pekuakamiulnuatsh First Nation under the FNIPP structure were of a discriminatory nature. It is worth reproducing paragraphs 329 to 331 of the decision, which read as follows:

> [329] In the Tribunal's view, this is indeed where the subtle odours of discrimination manifest themselves; the Complainant and the Pekuakamiulnuatsh find themselves having to make a choice, to make a decision which, in the circumstances, is necessarily a lose-lose situation. According to the evidence presented, since they are Indigenous, they are the only ones who have to make this choice, which is not available to any other public.
>
> [330] What is discriminatory in the circumstances is the inherent disadvantage in this choice that the Complainant and the Pekuakamiulnuatsh must make. They are necessarily at a disadvantage and do not enjoy the same equality of opportunity as others (section 2 of the CHRA).
>
> [331] Simply put, the adverse treatment based on race and national or ethnic origin arises from the fact that the Complainant and the Pekuakamiulnuatsh must either
>
> > - accept a police service 100 percent funded by the province of Quebec, under which the services offered by the SQ will not necessarily be adapted to the needs, habits and customs of the First Nation; or

> - rely on applying the [FNIPP] to have their own Indigenous police force that provides a service adapted to the needs, customs and traditions of the community; however, they must then expect that their police services will not be funded to the extent that they need to be because of the structure of the [FNIPP], such that if they wish to provide the community with culturally appropriate basic police services, they will incur deficits.

[96] Similarly, in the present matter, IPCO claims that it is constrained to either accept discriminatory Terms and Conditions simply because PSC is not prepared to negotiate on those terms, or lose its funding and be forced to accept non-Indigenous police services.

[97] In my view, when they are read in context, those extracts from the *Dominique*, *Pekuakamiulnuatsh*, and *Takuhikan* decisions indicate that the findings made by the CHRT and the courts certainly went beyond the sole situation of the Pekuakamiulnuatsh First Nation and contained observations regarding inherent discriminatory features of the FNIPP itself, both in its structure and in the way Canada has applied it to the First Nations police services through the Terms and Conditions.

[98] I further observe that the *Dominique*, *Pekuakamiulnuatsh*, and *Takuhikan* decisions are populated with several factual findings regarding the discriminatory dimensions of the FNIPP program and its implementation by PSC. Those include the facts: 1) that Canada discriminates against Indigenous peoples through its implementation of the FNIPP; 2) that Canada's discriminatory practices stem from its failure to fulfil the guarantees of the underlying Policy that governs the FNIPP; 3) that there appears to be a certain disconnect between the Policy and the FNIPP Terms and Conditions, notably those dealing with prohibitions on the use of funding for ineligible expenditures; 4) that the goal of substantive equality set out in the Policy is not

achieved and cannot be achieved by the FNIPP because of its very structure (which includes the Terms and Conditions); 5) that Canada is legally bound to guarantee a standard of policing in Indigenous communities that is adapted to their needs and that is equal in quality and quantity to services provided in similar non-Indigenous communities; 6) that the very structure of the FNIPP results in a denial of service, as the FNIPP makes it impossible for Indigenous communities to receive certain basic policing services which are effectively ruled out under the funding formula; 7) that Canada's discriminatory actions have violated Canada's honour of the Crown obligations; and 8) that Canada cannot justify its discriminatory conduct based on its recurring statement that the FNIPP is a "contribution program."

[99] It is true that IPCO may be slightly stretching the findings and conclusions actually reached by the CHRT, this Court, and the QCCA in *Dominique*, *Pekuakamiulnuatsh*, and *Takuhikan*. However, these three precedents certainly planted the seeds of a finding of discriminatory treatment of First Nations police services under the FNIPP.

[100] In my view, and without deciding the merits of the issues to be determined by the Commission on IPCO's Complaint, the evidence on the record amply supports a conclusion that IPCO has a high likelihood that its underlying Complaint will ultimately succeed, given that it is predicated on numerous findings previously made by the CHRT and the courts on the FNIPP and its attributes. Furthermore, the *Dominique* and *Pekuakamiulnuatsh* decisions reject, in clear terms, PSC's sole justification for insisting on maintaining the funding prohibitions contained in section 6 of the Terms and Conditions, namely, its qualification of the FNIPP as a voluntary "contribution program." I pause to note that a strong *prima facie* case does not require a certainty

that IPCO will prevail on the merits. It still remains a "likelihood," albeit a "strong" one (*CBC* at para 17).

[101] In addition, the conclusion that IPCO's Complaint raises a serious issue to be tried is further supported by the recent public acknowledgement made by the minister in charge of PSC, Minister Marco Mendicino. The evidence on the record indicates that, on June 12, 2023, Minister Mendicino affirmed that IPCO's statements on the subject of Indigenous police services funding, discussed during the question period in the House of Commons, "have merit." These remarks made by the minister in charge of PSC and of the FNIPP provide additional support for the existence of a strong *prima facie* case for IPCO's Complaint. Indeed, by removing the prohibition on specialized police services from the Terms and Conditions by way of a post-hearing ministerial amendment made on June 24, 2023, Minister Mendicino provided further support to IPCO's position on the serious issue to be tried.

(c) *The prematurity issue*

[102] PSC argues that IPCO's request for injunctive relief is premature and should be dismissed on that basis.

[103] The question of the "prematurity" of the injunction recourse is typically addressed in the assessment of the "serious issue" branch of the tripartite test (*Letnes* at para 45). In *Newbould v Canada (Attorney General)*, 2017 FCA 106 [*Newbould*], the FCA observed that prematurity and extraordinary circumstances are "a feature of the law of judicial review, and not the law of injunction" (*Newbould* at para 22). As such, these issues are to be "considered under the heading of serious issue" where the question is whether their weight "is such that the underlying

application can be considered frivolous or vexatious" (*Newbould* at para 24). I further note that, in previous cases such as *Abdi v Canada (Public Safety and Emergency Preparedness)*, 2018 FC 202 [*Abdi*] or *Rogan v Canada (Citizenship and Immigration)*, 2010 FC 532 [*Rogan*], the Court indeed dealt with the issue of prematurity of injunctive relief at the "serious issue to be tried" stage of the *RJR-MacDonald* test (*Abdi* at para 22; *Rogan* at para 12).

[104] That said, the question of prematurity permeates the assessment of each component of the tripartite *RJR-MacDonald* test and essentially calls to mind the overarching exceptional and discretionary nature of interlocutory injunctive relief. Viewed under that lens, it could be considered under any of the three prongs of the *RJR-MacDonald* test, as it in fact goes to the essence of the remedy sought and calls into question the exercise of the Court's discretion (*Letnes* at paras 46, 89–95).

[105] On this motion, I conclude that PSC's argument on the prematurity of IPCO's motion must fail, as the Court has the ability to grant injunctions despite a complaint being only at the Commission stage. In *Drennan*, the Court found that it had jurisdiction to issue an injunction despite the fact that a complaint had not yet been transferred to the CHRT for determination. In that case, Justice Mactavish granted part of the injunctive relief sought by the applicant, pending the Commission's determination. At paragraph 23 of *Drennan*, Justice Mactavish clarified that there is no distinction to make between cases involving a proceeding before the Commission as opposed to those involving the CHRT, when it comes to the Court's jurisdiction on injunctive relief:

> [23] A review of the Supreme Court's analysis at paragraphs 23–37 of [*Canada (Human Rights Commission) v. Canadian Liberty Net*, [1998] 1 SCR 626] does not disclose any obvious impediment to this Court assuming jurisdiction [to issue an injunction] in this

> case. Virtually all of the Supreme Court's comments with respect to the supervisory relationship of the Federal Court to the Canadian Human Rights Tribunal apply with equal force to the nature of the relationship between the Federal Court and the Canadian Human Rights Commission.

[106] Similarly, the fact that the CHRT in *Dominique* has not yet ruled on the issue of remedy does not change the findings that were otherwise made by the tribunal on the discriminatory aspects of the FNIPP, and which lead me to conclude that IPCO has a high probability of being successful in its Complaint.

(d) *Conclusion on serious issue*

[107] In light of the foregoing, I am satisfied that IPCO has demonstrated a serious issue to be tried and a strong *prima facie* case in its Complaint about discrimination in the FNIPP and its funding Terms and Conditions, and that there is a strong likelihood, on the law and the evidence presented, that IPCO will ultimately be successful in proving the allegations set out in its Complaint (*CBC* at para 18).

(3) Irreparable harm

[108] Turning to the second element of the *RJR-MacDonald* test, the moving party is required to provide clear, compelling, and non-speculative evidence to demonstrate that it will suffer irreparable harm if the injunction is denied. Under this second prong of the test, the question is whether IPCO has provided sufficiently clear, convincing, and cogent evidence that, on a balance of probabilities, it will suffer irreparable harm between now and the time the Commission process is completed, should an interlocutory injunction be denied.

(a) *Legal test*

[109] Irreparable harm refers to the nature of the harm suffered rather than its magnitude. The irreparability of the harm is not measured by the pound. It is harm which “either cannot be quantified in monetary terms or which cannot be cured, usually because one party cannot collect damages from the other” (*RJR-MacDonald* at p 341).

[110] Irreparable harm is a strict test. The FCA has frequently insisted on the attributes and quality of the evidence needed to establish irreparable harm in the context of stays or injunctive reliefs (*Canada (Health) v Glaxosmithkline Biologicals SA*, 2020 FCA 135 at paras 15–16; *Western Oilfield* at para 11; *Janssen* at para 24).

[111] First, irreparable harm must flow from clear, compelling, and non-speculative evidence (*United States Steel Corporation v Canada (Attorney General)*, 2010 FCA 200 [*US Steel*] at para 7; *AstraZeneca Canada Inc v Apotex Inc*, 2011 FC 505 at para 56, aff’d 2011 FCA 211). In addition, simply claiming that irreparable harm is possible is not enough. The jurisprudence states that “[i]t is not sufficient to demonstrate that irreparable harm is ‘likely’ to be suffered” (*US Steel* at para 7). There must rather be a real probability that the moving party will suffer irreparable harm if the injunction or the stay is denied (*Arctic Cat, Inc v Bombardier Recreational Products Inc*, 2020 FCA 116 at paras 19–20; *Glooscap Heritage Society v Canada (National Revenue)*, 2012 FCA 255 [*Glooscap*] at para 31; *Ahousaht* at para 84). Further, irreparable harm is unavoidable harm that, by its quality, cannot be redressed by monetary compensation (*Canada (Attorney General) v Oshkosh Defense Canada Inc*, 2018 FCA 102 [*Oshkosh*] at para 24; *Janssen* at para 24).

[112] The evidence of harm must be more than a series of possibilities, speculations, or hypothetical or general assertions (*Gateway City Church v Canada (National Revenue)*, 2013 FCA 126 [*Gateway City Church*] at paras 15–16). Assumptions, hypotheticals, and arguable assertions unsupported by evidence carry no weight (*Glooscap* at para 31). There needs to "be evidence at a convincing level of particularity that demonstrates a real probability that unavoidable irreparable harm will result unless a stay is granted" (*Gateway City Church* at para 16, citing *Glooscap* at para 31). It is not enough "to enumerate problems, call them serious, and then, when describing the harm that might result, to use broad, expressive terms that essentially just assert – not demonstrate to the Court's satisfaction – that the harm is irreparable" (*Stoney First Nation v Shotclose*, 2011 FCA 232 [*Stoney First Nation*] at para 48). In other words, to prove irreparable harm, "the moving party must demonstrate in a detailed and concrete way that it will suffer real, definite, unavoidable harm – not hypothetical and speculative harm – that cannot be repaired later" (*Oshkosh* at para 25; *Janssen* at para 24).

[113] In *Janssen*, the FCA furthermore observed that "it would be strange if a litigant complaining of harm it caused itself, harm it could have avoided or repaired, or harm it still can avoid or repair could get such serious relief" (*Janssen* at para 24). Justice Stratas repeated the same phrase in *Oshkosh* at paragraph 25, and it was endorsed by Justice Nadon in *Western Oilfield* at paragraphs 11–12.

[114] The existence of one ground meeting the required attributes of irreparable harm is sufficient to meet the second prong of the *RJR-MacDonald* test.

[115] Again, the requirement of having evidence convincing and cogent enough to satisfy the balance of probabilities test, set out in *McDougall*, applies to the clear and non-speculative evidence needed for irreparable harm.

[116] I take a moment to reiterate a remark on the prospective nature of the relief sought by IPCO. All injunctions are future-looking in the sense that they all intend to prevent or avoid harm rather than compensate for injury already suffered (Robert J. Sharpe, *Injunctions and Specific Performance* (Toronto: Canada Law Book, 1992) (loose-leaf updated 2018, release 23) [*Sharpe*] at para 1.660). One type of injunction that is frequently considered and issued by the courts is the *quia timet* ("because he or she fears") injunction, where injunctive remedies are sought before any harm has actually been suffered and where the harm is only apprehended and expected to occur at some future point. As I discussed in *Letnes*, to assess prospective harm for *quia timet* injunctions, the courts have adopted a cautious approach requiring the conjunction of two evidentiary elements. First, the evidence must support a high degree of probability that the alleged harm will occur; second, the evidence must demonstrate that the situation expected to exist when the alleged harm eventually occurs is about to occur imminently or in the near future, and is already "crystallized" (*Letnes* at paras 55–58; *Merck & Co, Inc v Apotex Inc*, [2000] FCJ No 1033, 2000 CarswellNat 1291 (FCA) at para 8; *Gilead Sciences, Inc v Teva Canada Limited*, 2016 FC 336 [*Gilead*] at paras 5, 10; *Amnesty International Canada v Canadian Forces*, 2008 FC 162 [*Amnesty*] at para 70; see also *Sharpe* at para 1.690).

[117] In the context of interlocutory injunctions, the high probability that harm will occur has often been expressed by the Court in terms of clear and non-speculative evidence that irreparable harm will ensue if the interlocutory relief is not granted (*Amnesty* at paras 69, 123), thus

mirroring the general test for irreparable harm. On the imminence of harm, the case law developed by this Court offers no clear definition or timeline of what is "imminent," but rather suggests that it will depend on the facts of each case. For example, harm distant from as much as 18 months has been found to be imminent (*Gilead* at paras 5–6).

[118] The determinative element is the likelihood of harm, not its futurity (*Horii v Canada (CA)*, [1992] 1 FC 142 (FCA) at para 13). The fact that the harm sought to be avoided is in the future does not necessarily make it speculative. It all depends on the facts and the evidence. On this requirement to prove the imminence of harm, Justice Sharpe (writing extrajudicially) suggests that the courts should rather look at whether the factors relevant in the granting of injunctive relief have "crystallized" (*Sharpe* at para 1.750). According to this approach to the imminence criterion, a *quia timet* injunction should not be granted by the courts unless the situation that will exist when the alleged harm eventually occurs has already taken form, as opposed to situations where the nature or the extent of the harm may change between the time of the decision and the moment where the harm would occur.

[119] In light of the foregoing, the test applicable for apprehended harm is whether there is clear, convincing, and non-speculative evidence allowing the Court to find or infer that irreparable harm will result if the relief is not granted, using the cautious approach prescribed for *quia timet* injunctions. Stated differently, to meet its burden in an application where the harm is apprehended and more distant, the moving party must establish, on a balance of probabilities, that there is clear, convincing, and non-speculative evidence demonstrating that such harm has crystallized, so that any findings or inferences made about the harm can be found to reasonably and logically flow from the evidence.

[120] The question for the Court is therefore whether the harm identified by IPCO is clear, convincing, and not speculative, and reaches the level of irreparable harm defined by the FCA, as opposed to being a simple inconvenience.

(b) *Evidence of irreparable harm*

[121] IPCO argues that, without injunctive relief, there will be harm to the public security and personal safety of Indigenous people residing in the communities serviced by T3PS, APS, and UCCM, as the funding of their police services will stop. Once funding runs out, up to 45 Indigenous communities, with tens of thousands of residents, will immediately lose access to the programs and services provided by their designated and self-administered Indigenous police services. IPCO maintains that the interruption of Indigenous policing services will affect community safety, the relationship between police and Indigenous communities, and the access to guaranteed services. Further, it will trigger police-related trauma and will harm Indigenous sovereignty, self-government, and self-determination. Moreover, it also involves a real risk of non-Indigenous police services, lacking cultural competence, entering First Nations communities uninvited and attempting to replace the missing Indigenous police services.

[122] These allegations of harm are supported by six detailed affidavits submitted by IPCO in support of its motion. Three of those affidavits were affirmed by the police chiefs of each of the T3PS, APS, and UCCM police services, namely, Chief Kai Liu, Chief Jeffery Skye, and Chief James Killeen, respectively. Three other affidavits were provided by the presidents of the boards of each police service: Ms. Christine Jourdain, Ms. Debra Bouchie, and Mr. Derek Assiniwe. These affidavits conveyed the state of emergency in which the lack of renewed funding has now put their First Nations communities.

[123] Further to my review of these affidavits and their supporting materials, I am satisfied that the statements contained in those affidavits do not speak in general terms and instead provide evidence that goes beyond vague and general assertions of harm devoid of any level of particularity. This evidence does not reside in the landscape of "assumptions, speculations, hypotheticals and arguable assertions, unsupported by evidence," repeatedly found insufficient by the FCA to anchor a claim of irreparable harm and to justify an interlocutory injunctive relief (*Glooscap* at para 31; *Stoney First Nation* at paras 48–49). On the contrary, they explain, in a detailed and concrete way, how irreparable harm will be suffered by the affected Indigenous communities.

[124] I further agree with IPCO that the short- and long-term consequences of a cessation of policing services cannot be quantified in monetary terms and is not something that can be cured retroactively. There is hardly anything as irreparable as harm caused to social order, public security or one's personal safety, or the adverse physical and mental consequences for all individuals affected resulting from a lack of public safety.

[125] In addition, PSC's affiant, Mr. Daniel Malone, has acknowledged that a return to non-Indigenous policing would be against Canada's Policy. In light of Indigenous history and past relations with non-Indigenous police services, there is a real probability that the substitution of Indigenous police services by provincial police services will create harm that cannot be compensated with monetary damages. The risk to the First Nations' way of life, culture, and traditions can constitute compelling evidence of irreparable harm (*Namgis First Nation v Canada (Fisheries, Oceans and Coast Guard)*, 2018 FC 334 at para 94). Here, IPCO has provided undisputed evidence, coming from its affidavits and from the Policy itself, that the creation of

self-administered Indigenous police services is the preferred option — if not the only option — to provide culturally appropriate policing based on Indigenous approaches to justice and safety.

[126] In the circumstances of this case, I am satisfied that IPCO has demonstrated that the Indigenous communities it represents will suffer irreparable harm if the Court does not grant the mandatory injunctive relief sought. In my view, and on a balance of probabilities, IPCO has provided the required clear and non-speculative evidence to establish a real probability of irreparable harm to public safety caused by the termination of funding to the T3PS, APS, and UCCM police services. I am not persuaded that this alleged harm is speculative or insufficient. Furthermore, the evidence shows that such harm has already "crystallized."

(c) *The issue of avoidable harm*

[127] On the question of irreparable harm, PSC argues that the harm claimed by IPCO is avoidable, as IPCO could obtain the necessary funding for the T3PS, APS, and UCCM police services if it accepts to abide by the Terms and Conditions (including section 6 on prohibited ineligible expenditures), and if it retreated from its requests on the Preconditions. On this issue of "avoidable" harm, PSC essentially advances two arguments. First, it claims that the harm alleged by IPCO is not irreparable because the cessation of funding to T3PS, APS, and UCCM is due to their own insistence that PSC agrees to their Preconditions before renewing the funding agreements. Second, PSC also maintains that the harm alleged by IPCO is not irreparable because the loss of funding is attributable to IPCO's own refusal to accept the FNIPP Terms and Conditions (and more specifically the prohibitions on the use of of funding for the ineligible expenditures listed in section 6).

[128] With respect, I am not persuaded by PSC's arguments.

[129] I do not dispute that, in order to be irreparable, harm suffered by the moving party must be unavoidable and must not be self-inflicted or result from the moving party's own actions or inactions (*Janssen* at para 24; *Glooscap* at paras 31, 39; *Wasylynuk* at paras 152–164; *Szuchewycz v Canada (Attorney General)*, 2020 FC 954 at paras 56–57). In *Wasylynuk*, Justice Little held that the applicant in that case would not suffer unavoidable, irreparable harm since it was within his power to take steps in order to avoid such harm. Justice Little found that the harm would flow from the applicant's decision not to comply with his employer's requirements concerning his return to work, rather than from the requirements themselves (*Wasylynuk* at para 162). At paragraph 163, Justice Little held as follows:

> [163] I recognize that it may well feel very uncomfortable and unpleasant for [the applicant] to do these things. It may well feel very unjust to comply, based on how he believes he has been treated by the Force and on his interpretation of the s. 26 stay. Yet it is something he can do to avoid the harm and, given my interpretation of the scope of the stay in s. 26, I am not aware of any legal impediment to him doing so. To be clear, I am not suggesting what he should or must do. This analysis concerns whether unavoidable harm is present on the evidence.

[130] However, in my view, a further distinction needs to be made between harm that is entirely within a moving party's control and is self-inflicted (as appears to have been the case in *Wasylynuk*), and harm that is caused or induced by the actions of a third party or the party against whom the injunction is sought. In order for irreparable harm to be considered "avoidable" in the context of injunctive relief, it must be harm that is within the moving party's control or solely results from the moving party's own actions or inactions. Conversely, harm

cannot be considered “avoidable” when a party could only avert such harm by accepting certain conditions that are not within its control or that are imposed by a third party.

[131] On this motion, I am ready to accept PSC’s argument that IPCO’s harm would constitute avoidable harm if the cessation of the funding and police services of T3PS, APS, and UCCM was strictly due to their own insistence that PSC accepts the three Preconditions they set out in their March 17, 2023 letter for renewing the funding agreements.

[132] The evidence indicates that the parties’ failure to continue discussions about the renewal or negotiation of new funding agreements occurred because T3PS, APS, and UCCM insisted that PSC accepts the three Preconditions before they would even consider pursuing further discussions with PSC. At the hearing, counsel for IPCO did not spend much time addressing these Preconditions — which, as I indicated earlier, are distinct from the prohibitions listed in section 6 of the Terms and Conditions. Counsel for IPCO rather focused on the fact that T3PS, APS, and UCCM would be ready to sign an extension of their respective funding agreements if the identified prohibitions contained in section 6 of the Terms and Conditions were removed, without specific regard to the three Preconditions being accepted by PSC or not.

[133] Had the Preconditions requirement been the sole reason for the failure to renew the funding agreements, the irreparable harm to be suffered if the Three Police Services cannot continue their operations could arguably have been avoided if IPCO had not insisted on the Preconditions as it did.

[134] However, this is not the case, as PSC’s insistence to maintain the existing Terms and Conditions has become the determinative element leading to the cessation of the funding

agreements. On that front, the evidence establishes that the FNIPP Terms and Conditions attached to the renewal of the funding agreements are unilaterally determined and imposed by Canada. Indeed, the late amendment made by PSC on June 24, 2023 to section 6 of the Terms and Conditions — whereby Minister Mendicino removed the prohibition on the funding of specialized police units — confirms that PSC and Canada have total control on the contents of these Terms and Conditions. Ironically, PSC and the Minister repeatedly state that they continue to be "constrained" by the FNIPP Terms and Conditions whereas they themselves have the ability to amend them at will, and can unilaterally modify what those "constraints" effectively are.

[135] It is true that Canada is ready and willing to renew the funding agreements for the T3PS, APS, and UCCM police services, including with significant new, additional money. However, PSC is only ready and willing to do so on its own terms, and more specifically on the basis of the Terms and Conditions that it has itself determined, and that IPCO and the Three Police Services consider offending.

[136] In the circumstances, I do not agree that irreparable harm flowing from a cessation of funding of the Three Police Services can be qualified as "avoidable" if the renewed funding could only be obtained upon acceptance of Canada's own Terms and Conditions. Harm that can only be avoided with strings attached by the party against whom injunctive relief is sought does not amount to avoidable harm.

[137] It is true that IPCO could have accepted the terms suggested by PSC despite its disagreement with them and IPCO's conviction that they amount to discriminatory treatment under the FNIPP. This way, T3PS, APS, and UCCM could avoid the harm that the interruption

of funding will cause, without impeding their right to challenge the terms of their funding agreement and of the FNIPP at some future point. But this would mean that the Three Police Services would need to agree to conditions which, in their view, are at the very source of the Complaint filed by IPCO, of the discrimination they are alleging and of the harm they are complaining about. This, in my view, cannot constitute avoidable harm in the context of injunctive relief.

[138] Moreover, because the present case deals with relations between First Nations and Canada, the assessment of irreparable harm must also be considered with the principles of reconciliation and of the honour of the Crown in mind. This is another element that differentiates this case from *Wasylynuk* on the issue of avoidable harm.

[139] In *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73 [*Haida*], the SCC described the honour of the Crown as follows, at paragraph 17:

> [17] 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. In all its dealings with Aboriginal peoples, from the assertion of sovereignty to the resolution of claims and the implementation of treaties, the Crown must act honourably. Nothing less is required if we are to achieve “the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown”: *Delgamuukw*, *supra*, at para. 186, quoting *Van der Peet*, *supra*, at para. 31.

[140] The test for injunctive relief requires a contextual analysis. Therefore, the particular obligations to be borne by the Crown when dealing with First Nations are necessarily part of the circumstances the Court must consider. To echo what Associate Chief Justice Gagné held in *Pekuakamiulnuatsh* at paragraph 76, it is well known that judicial debates raising issues affecting First Nations must take into account the Indigenous perspective, as well as the historical, social,

and legal context. Therefore, when reconciliation and the honour of the Crown are involved, the injunction test has to be viewed through the lens of these guiding principles.

[141] As such, the choice offered to IPCO and to the Three Police Services, which consisted of accepting funding on PSC's own Terms and Conditions or lose funding, resulting in the interruption of self-administered Indigenous police services, is not a choice rendering the irreparable harm "avoidable."

[142] The readiness and willingness of PSC to determine IPCO's need for additional funding is one thing, but PSC's outright refusal to negotiate the Terms and Conditions of such funding is quite another. Where the honour of the Crown applies, there is a special duty on Canada to negotiate honourably: "[t]his fiduciary relationship must form part of the context of the Panel's analysis, along with the corollary principle that <u>in all its dealings with Aboriginal peoples, the honour of the Crown is always at stake</u>" [emphasis added] (*First Nations Child and Family Caring Society of Canada et al v Attorney General of Canada (for the Minister of Indian and Northern Affairs Canada)*, 2016 CHRT 2 at para 95).

[143] In *Takuhikan* at paragraph 124, the QCCA held that "[b]y remaining deaf to the grievances of the appellant who, in the end, rather than resort to the Sûreté du Québec, accepted to be served by a police force of lesser quality, the respondents breached their obligation to act honourably" [my translation]. Similarly, the unwillingness of PSC to negotiate or even discuss the Terms and Conditions with IPCO, besides the amount of funding, is arguably not an honourable conduct and encroaches on the principles of reconciliation and of the honour of the Crown. As such, I am not persuaded that IPCO's refusal of the funding under the Terms and Conditions imposed and enforced by PSC, and the irreparable harm resulting from it, can be

considered avoidable. In this matter, the unavoidable irreparable harm arising from the lack of real choice offered to IPCO and the Three Police Services is a result of the special context applicable to the relationships between First Nations and Canada.

(d) *Conclusion on irreparable harm*

[144] Accordingly, I am satisfied that IPCO has demonstrated that the Indigenous communities served by the Three Police Services will suffer irreparable harm if the Court refuses to grant a mandatory injunctive remedy. This irreparable harm takes the form of harm caused to social order, public security, and personal safety of Indigenous people residing in the communities serviced by T3PS, APS, and UCCM if the cessation of funding for the Three Police Services is maintained.

(4) Balance of convenience

[145] I finally turn to the last part of the *RJR-MacDonald* test, the balance of convenience (or inconvenience, as some prefer to state it). Under this third prong of the test, the courts must determine which of the parties will suffer the greater harm from the granting or refusal of the interlocutory injunction, pending a decision on the merits (*RJR-MacDonald* at p 342). At this stage, the interest of the public must also be taken into account (*RJR-MacDonald* at p 350).

[146] The factors to be considered in assessing the balance of convenience are numerous and vary with each individual case (*RJR-MacDonald* at pp 342, 349). Public interest is usually one of the important factors the Court considers. It “includes both the concerns of society generally and the particular interests of identifiable groups” (*RJR-MacDonald* at p 344). The harm found under

the second prong of the *RJR-MacDonald* test is considered again at this stage, but it is now assessed in comparison with other interests that will be affected by the Court's decision.

[147] On this motion, I find that several relevant factors heavily favour IPCO. They include: 1) the high level of harm to the public safety in the affected Indigenous communities due to the imminent interruption of three self-administered Indigenous police services because of lack of funding; 2) the limited harm demonstrated by PSC should an injunctive relief be granted; 3) the protection of the *status quo*; 4) PSC's financial ability to maintain the flow of funding to the T3PS, APS, and UCCM police services, its own recognition of the urgent need to flow funds, and its willingness to make the funding available; 5) PSC's inability to provide a compelling rationale for the prohibitions contained in the Terms and Conditions; 6) the strength of IPCO's case against the discriminatory features of the FNIPP and its funding Terms and Conditions in light of the precedents in *Dominique*, *Pekuakamiulnuatsh*, and *Takuhikan*; and 7) the overarching principles of reconciliation and of the honour of the Crown. The factors favouring PSC are much more limited. They essentially include PSC's role as a public authority and the principle of judicial non-interference in administrative processes. When I compare the two sets of inconvenience, I conclude that, on a balance of probabilities, the balance tips in favour of IPCO and the Three Police Services, and for the issuance of mandatory injunctive relief.

[148] These relevant factors are discussed below.

(a) *PSC as a public authority*

[149] Given that the injunction sought by IPCO is against a public authority, namely, PSC, there is a public interest dimension at stake in this motion. When a public authority is involved,

the onus of demonstrating that the balance of convenience lies against the public interest rests with the private parties. I acknowledge that, as a public authority, PSC is presumed to act in the public interest (*Ahousaht* at paras 124–126).

[150] PSC is a decision maker who is acting under provisions and processes that have not yet been determined to be invalid or inapplicable in the case at hand. PSC is presumed to act in the public interest, and weight should be given to these public interest considerations and to the statutory duties carried out by a federal government ministry. PSC benefits from a presumption that actions taken pursuant to its enabling legislation and regulations are *bona fide* and in the public interest. When it is established that a public authority is charged with the duty of protecting the public interest, and that a proceeding or activity is carried and undertaken pursuant to that responsibility, “the court should in most cases assume that irreparable harm to the public interest would result from the restraint of that action” (*RJR-MacDonald* at p 346). Put differently, when a public authority is prevented from exercising its statutory powers, it can be said that the public interest, of which the authority is the guardian, suffers irreparable harm.

[151] I also accept that the balance of convenience does not favour encroaching on PSC’s ability to manage and administer its budget regarding First Nations policing services.

[152] The status of PSC as a public authority in charge of administering the FNIPP is therefore an element that weighs in favour of PSC on this motion.

(b) *The process under the CHRA*

[153] Another factor pointing in PSC’s favour is the fact that mandatory injunctive relief would interfere with the ongoing administrative process under the CHRA.

[154] The principle of judicial non-interference with ongoing administrative proceedings in the absence of "exceptional circumstances" is well established. In essence, it provides that administrative processes must be completed before an applicant can seek relief from the courts and ask a motion judge to stop such process in its tracks (*Letnes* at para 90, citing *CB Powell Canada (Border Services Agency) v CB Powell Limited*, 2010 FCA 61) [*CB Powell*]).

[155] This principle of judicial restraint in the context of an ongoing or pending administrative proceeding has been regularly recognized by the courts. When legislation sets out an administrative process consisting of a series of decisions and remedies, it must be followed to the end, barring exceptional circumstances, before the courts may be asked to intervene. The parties must therefore exhaust all adequate remedial recourses when Parliament has given administrative decision makers the authority to make decisions rather than courts of law: "[…] absent exceptional circumstances, courts should not interfere with ongoing administrative processes until after they are completed, or until the available, effective remedies are exhausted" (*CB Powell* at para 31).

[156] The public has an interest in non-interference with the decision-making process of administrative decision makers, and the public interest favours the expeditious resolution of administrative proceedings. This is another factor weighing in favour of PSC.

[157] However, numerous other factors tilt the balance of convenience in the opposite direction.

(c) *Risk to public safety*

[158] There is no need to repeat what was said earlier about the irreparable harm to be suffered by the affected Indigenous communities further to a cessation of the funding of the T3PS, APS, and UCCM police services. The high level of risk to social order, public security, and the personal safety in the affected Indigenous communities due to the imminent interruption of Indigenous policing services is indisputable. Under the current trajectory, the First Nations communities served by the Three Police Services could very soon see a complete halt of their designated Indigenous policing services and their replacement by unwanted non-Indigenous police services.

[159] There is no doubt that the risk to Indigenous communities' public and personal safety is far higher than the risk to PSC's authority to grant funding, and tips the scales in favour of IPCO.

(d) Status quo

[160] The preservation of the *status quo* also favours IPCO in the particular circumstances of this case.

[161] A main objective of an interlocutory injunction is to preserve the *status quo*. Typically, interlocutory injunctions seek to ensure that the subject matter of the litigation will be preserved so that effective relief will be available when the case is ultimately heard on the merits. This is true whether the injunction sought is prohibitive or mandatory. Courts have proceeded cautiously where an injunction requires a respondent to take positive steps, to incur additional expenses, or to act in ways that would modify an existing state of affairs.

[162] Here, IPCO's request for a mandatory injunction essentially seeks to compel PSC to "put the situation back to what it should be," to revert back to a course of conduct pursued before the occurrence of the acts or omissions that provoked the litigation, albeit on slightly modified Terms and Conditions (*CBC* at para 15). In essence, the mandatory injunctive relief sought by IPCO would prevent the termination of access to funding for the T3PS, APS, and UCCM police services. If a mandatory injunction is granted, the net effect or practical outcome will be that PSC will be required to continue to fund the Three Police Services.

[163] In this case, even if mandatory, I am satisfied that the injunctive remedy sought by IPCO remains restorative, as it aims to preserve and reinstate the flow of funding to T3PS, APS, and UCCM that was in place until the end of March 2023.

[164] In *CBC*, the SCC identified two main rationales for drawing a distinction between mandatory and prohibitory injunctive orders (*CBC* at para 15). First, it was seen as potentially unfair to resolve an action at an interlocutory stage and grant relief tantamount to a final judgment on the merits when the plaintiff could get restorative relief later, after both parties had the opportunity to present their cases more fully at trial. Second, forcing a defendant to take positive action, such as restoring the *status quo*, may, for that reason or otherwise, be unduly burdensome for the defendant. None of these considerations is at play here. This is not a situation where the Three Police Services could get their funding later, as policing services offered by T3PS, APS, and UCCM would be halted without a mandatory injunctive remedy. Further, imposing a mandatory injunctive relief is not unduly burdensome on PSC, since the evidence demonstrates that PSC can easily provide the funding to T3PS, APS, and UCCM, and has already earmarked the necessary amounts to do so.

[165] In fact, the evidence shows that PSC would not be materially inconvenienced by mandatory injunctive relief of this Court, as it indicated that it already has the funds available for the Three Police Services, and is ready and prepared to send them — if the Terms and Conditions are respected. Canada has in fact offered a significant, multi-year increase in the amount of funding available to the Three Police Services, in order to support them in the provision of police services to the communities they serve.

(e) *The lack of rationale for the Terms and Conditions*

[166] Another factor that plays in IPCO's favour is the absence of any compelling rationale or justification supporting PSC's position on the requirement for the funding prohibitions contained in the Terms and Conditions.

[167] PSC's affiant, Mr. Malone, and counsel for PSC were unable to explain why the prohibitions listed in section 6 are essential or necessary to the renewal of the funding agreements with self-administered Indigenous police services, nor even why they are reasonable. Mr. Malone was unable to explain why Canada needs them in the face of the three decisions in *Dominique*, *Pekuakamiulnuatsh*, and *Takuhikan* which, at the very least, raise a serious concern about the discriminatory dimension of the FNIPP and its funding Terms and Conditions. PSC has failed to articulate any cogent reasoning for requiring the prohibitions, including the prohibition on using the funds for legal representation and legal advice in the negotiation of the funding agreements.

[168] I do not dispute that PSC may have a right to request prohibitions on the use of funding for certain expenditures in the Terms and Conditions. But, in a context where its insistence on

maintaining these prohibitions is a determinative element leading to the cessation of funding for the T3PS, APS, and UCCM police services, the lack of a rationale for doing so suggests that a mandatory injunction forcing PSC to resume funding is of little inconvenience to PSC and Canada.

[169] The only justification advanced by PSC for insisting on maintaining the funding prohibitions found in section 6 is the simple fact that they actually form part of the Terms and Conditions and that they are put in place in the context of a discretionary "contribution program." As mentioned before, PSC and Canada's claim that the FNIPP is only a "discretionary contribution program" — which would allow PSC to impose any terms and conditions it deems appropriate — has been clearly rejected by the CHRT and this Court. PSC cannot convincingly rely on this argument to support its position on the prohibitions contained in the Terms and Conditions.

[170] PSC, Canada and Minister Mendicino repeatedly state that they are "constrained" by the Terms and Conditions, but the reality is that they can unilaterally modify them, at the stroke of a pen, as they see fit. This is precisely what happened on June 24, 2023, when Minister Mendicino decided to remove the prohibition on specialized police services in section 6 of the Terms and Conditions.

[171] I further observe that the Policy itself contains no terms and conditions prohibiting certain expenditures or ineligible expenses. In fact, the Policy only refers to policing costs eligible for funding, including program administration and expenditures to operate the policing services.

[172] Again, the absence of any rationale for maintaining the funding prohibitions as part of the FNIPP Terms and Conditions is a factor weighing in favour of the mandatory injunctive relief sought by IPCO.

(f) *The precedents in* Dominique*,* Pekuakamiulnuatsh*, and* Takuhikan

[173] As IPCO repeatedly pointed out, this motion arises in the unusual context where one administrative tribunal and two courts, including this Court, have already found that the FNIPP and its funding Terms and Conditions contain discriminatory features against First Nations communities. Nevertheless, PSC and Canada persist in their attempts to renew the funding agreements with T3PS, APS, and UCCM on the same terms as before, as if these precedents were non-existent.

[174] As discussed above, the precedents in *Dominique*, *Pekuakamiulnuatsh*, and *Takuhikan* are an important element which contributes to the strength of IPCO's case against the discriminatory features of the FNIPP Terms and Conditions. The demonstrated strength on the merits at stage one of the *RJR-MacDonald* test may affect the Court's consideration of irreparable harm and the balance of convenience at stages two and three. This is the case here, and the presence of the three judicial precedents contributes to push the balance of convenience in IPCO's favour.

(g) *Reconciliation and the honour of the Crown*

[175] Finally, IPCO raised the issue of the public interest in reconciliation. I agree that the reconciliation of the rights and culture of Indigenous peoples with the interests of and sovereignty of Canada is of fundamental importance to all Canadians. There is significant public

interest in reconciliation and in giving recognition to the SCC's emphasis on the overarching principles governing the relations between First Nations and the federal government (*Southwind v Canada*, 2021 SCC 28 at para 55). It is very much in the public interest that Canada upholds its duty to accommodate the First Nations' right to self-government and self-determination, and this certainly needs to be taken into account in assessing the balance of convenience in this case.

[176] Indeed, the Policy expressly recognizes the First Nations' right to self-government and self-determination, and contains a commitment to such self-determination and self-governance with respect to Indigenous police services.

[177] I however observe that IPCO's claim of bad faith negotiation on behalf of PSC and Canada finds little support in the evidence. There is no clear and cogent evidence showing that PSC simply refused to negotiate any renewal of funding to the T3PS, APS, and UCCM police services, nor that its objective was to cut off funding. On the contrary, the evidence contains numerous letters from PSC where it reaffirms its intent to keep discussions alive with the First Nations and reiterates its willingness to provide funding.

[178] Nonetheless, IPCO has provided evidence, through its six affidavits and the materials filed in their support, where the representatives raised concerns about the conduct of PSC in its dealings with the Three Police Services, and its failure to be guided by the overarching principles of reconciliation and the honour of the Crown. These principles required more diligence and attention from PSC in dealing with funding agreements with the Three Police Services. As already explained above, PSC did not consistently follow its duty to act honourably and in the spirit of reconciliation as it kept insisting on the impossibility to negotiate the Terms and Conditions and the prohibitions they contain. The controlling question in all situations involving

First Nations is “what is required to maintain the honour of the Crown and to effect reconciliation between the Crown and the Aboriginal peoples with respect to the interests at stake” (*Haida* at para 45). Canada always has an obligation to act in ways that maintain the honour of the Crown vis-à-vis Indigenous peoples and that are in line with the objective of reconcilation. PSC’s omissions in that respect in the context of the renewal of the funding agreements of the Three Police Services is another element weighing in favour of IPCO on the balance of convenience.

(h) *Conclusion on balance of convenience*

[179] In the end, the various factors listed above clearly tilt the balance of convenience in favour of IPCO, not PSC. This is especially true in a context where IPCO’s alleged irreparable harm is supported by sufficiently convincing evidence. In the current circumstances, the harm that IPCO and the affected Indigenous communities will suffer in the absence of injunctive relief is far greater than the harm caused to PSC and to the public interest by a mandatory injunction. In my view, there is no doubt that the balance of convenience lies with IPCO and favours granting the mandatory interlocutory injunction sought. The third element of the *RJR-MacDonald* test is therefore satisfied.

(5) The just and equitable requirement

[180] On a request for an interlocutory injunction, the ultimate focus of the Court must always be on the justice and equity of the result in light of the particular context of each case (*Google* at para 25). Therefore, the just and equitable requirement is the last element that I need to cover.

[181] In the circumstances of this case, I have no hesitation to conclude that the only just and equitable option to issue the mandatory injunctive relief sought by IPCO, and that this is an appropriate case to exercise my discretion in IPCO's favour. The compelling elements that support this conclusion are: 1) the seriousness of the alleged discrimination raised with respect to the FNIPP, the funding Terms and Conditions, and their implementation; 2) the repeated findings by other tribunal and courts on the discriminatory aspects of the FNIPP; 3) the apparent disconnect between the Policy and certain provisions of the Terms and Conditions, notably section 6; 4) the absence of evidence and rationale supporting Canada's position on the funding prohibitions contained in the Terms and Conditions; 5) the demonstrated irreparable harm to the Indigenous communities that will result from the absence of funding for the Three Police Services; and 6) the various factors, including the public interest in safeguarding the public security and personal safety in the affected Indigenous communities, that tilt the balance of convenience in IPCO's favour.

[182] On an interlocutory application, a court has neither a full record of the evidence to be heard in the underlying process nor sufficient time to properly weigh that evidence. The legal and factual issues raised by IPCO in its Complaint are complex, but there is enough legal merit to its mandatory injunction application to justify the extraordinary intervention of this Court in making the order sought at the interlocutory stage.

[183] What is just and equitable in the circumstances of this case is to ensure that the self-administered Indigenous policing services remain in place in the short term. To do so, PSC must continue to flow funds to T3PS, APS, and UCCM pending the resolution of IPCO's Complaint.

D. *Remedy*

[184] In light of the foregoing, the appropriate remedy to be granted is the mandatory injunctive relief sought by IPCO, namely, the reinstatement, on a temporary basis, of funding for the Three Police Services. There is a link between the irreparable harm alleged (i.e., the detrimental impact on public security and personal safety in the affected Indigenous communities further to the ceasing of the T3PS, APS, and UCCM police services) and the remedy ordered on this motion (reinstating the funding of the Three Police Services).

[185] Despite the recent amendment to the Terms and Conditions announced by Minister Mendicino on June 24, 2023, IPCO maintains that two offending and discriminatory prohibitions remain in section 6 of the Terms and Conditions: 1) the prohibition against expenditures in relation to debt-financing arrangements such as mortgages, and 2) the prohibition against expenditures on legal representation relating to the funding agreements.

[186] PSC has provided some evidence that a separate program, the First Nations and Inuit Policing Facilities Program, exists for police infrastructure, and that T3PS, APS, and UCCM have benefited from funding under that program. However, it is unclear whether such program allows for funding of the costs of debt-financing arrangements prohibited under section 6 of the Terms and Conditions.

[187] The evidence indicates that, if these prohibitions on financing of infrastructure and on costs of non-operational legal representation are maintained, the funds will not necessarily flow back to the Three Police Services, even with the mandatory injunctive remedy in place, as the Three Police Services will not agree to conclude renewed funding agreements under the FNIPP.

And PSC has affirmed that the FNIPP and funding agreements concluded pursuant to the Terms and Conditions are the only mechanism to flow funding to self-administered Indigenous police services.

[188] In *Richardson v Seventh-day Adventist Church*, 2021 FC 609 [*Richardson*], Justice Pentney held that “[a]t the end of the day, it is important to remember that an interlocutory injunction is equitable relief, and a degree of flexibility must be preserved in order to ensure that the remedy can be effective when it is needed to prevent a risk of imminent harm pending a ruling on the merits of the dispute” (*Richardson* at para 30).

[189] In this case, the remedy to be granted needs to include conditions that will ensure that the funds effectively flows back to the Three Police Services under the FNIPP.

[190] I am not persuaded, at this stage, that the prohibitions still contained in section 6 of the Terms and Conditions need to be entirely suspended nor that the Court should generally enjoin PSC from enforcing them. I understand that these Terms and Conditions have been accepted in certain funding agreements negotiated between First Nations and Canada.

[191] However, I am satisfied that I should relieve the Three Police Services from compliance with these provisions in order to allow the flow of funding to resume on an emergency basis. In my view, without such ancillary relief, the mandatory injunctive remedy could end up being toothless and ineffective.

[192] Hopefully, the limited and temporary timeframe of the injunctive relief will allow the parties to arrive at a negotiated resolution for acceptable long-term agreements on the funding of

the three self-administered Indigenous police services, pending the resolution of the Complaint before the Commission.

[193] I observe that Mr. Malone has acknowledged that the restrictions contained in the Terms and Conditions can be severed from the FNIPP without affecting the funding agreements. I further underscore that, according to the evidence, PSC has repeatedly stated that its insistence on keeping the prohibition on using funds for the costs of legal representation was a direct consequence of the FNIPP being a "contribution program." However, as mentioned above, both the CHRT and this Court have expressly affirmed that such a qualification of the FNIPP was erroneous. I am therefore left with no explanation or rationale anchoring PSC's position that the prohibitions in section 6 of the Terms and Conditions need to stay in place.

[194] With respect, it is fundamentally incorrect — and somewhat troubling — for Canada, PSC, and Minister Mendicino to keep labelling the prohibitions listed in the Terms and Conditions as "constraints," when the evidence clearly demonstrates that PSC can unilaterally decide to modify any provision of the Terms and Conditions at its own leisure and how it sees fit. The last-minute removal of the prohibition on using funds for specialized policing services is a most eloquent reflection of that. A self-imposed limitation or restriction over which a person has total control is not a constraint. It is a choice. And here, it appears that, for the time being, PSC and Canada have made the deliberate choice to maintain the prohibitions on using the funding of self-administered Indigenous police services for the financing of infrastructure or for the costs of legal representation, even though there is no evidence of any rationale supporting it.

[195] In the circumstances, I conclude that the appropriate remedy to be ordered by the Court therefore needs to include the alternative prohibitive measure described by IPCO in its MOFL.

IV. Conclusion

[196] For all the above-mentioned reasons, I find that IPCO has met the conjunctive tripartite test articulated in *RJR-MacDonald* to justify the granting of a mandatory interlocutory injunction reinstating, on a temporary basis and on certain conditions, the funding of the T3PS, APS, and UCCM police services. On the basis of the evidence before me, I find that IPCO has demonstrated the existence of a serious issue to be tried in its underlying Complaint, that it has provided clear, compelling, and non-speculative evidence demonstrating that the Indigenous communities served by the Three Police Services will suffer irreparable harm if mandatory injunctive relief is not granted, and that the balance of convenience favours granting the relief sought.

[197] I further conclude that this is an exceptional situation where it is just and equitable for the Court to intervene and to exercise its discretion in IPCO's favour, in order to prevent the harm that will be caused to the public security and personal safety of Indigenous people residing in the communities serviced by T3PS, APS, and UCCM if the cessation of funding for the Three Police Services is maintained.

[198] PSC will therefore be ordered to immediately flow funds to each of T3PS, APS, and UCCM for a 12-month period, in a manner consistent with the Policy and in at least the amounts flowed through the last tripartite funding agreements for the 2022-2023 fiscal period. For such 12-month period, T3PS, APS, and UCCM will also be relieved from any obligation of compliance with the provisions contained in section 6 of the Terms and Conditions prohibiting the use of funds for "costs related to amortization, depreciation, and interest on loans" and for

“legal costs related to the negotiation of the agreement and any dispute related to the agreement or the funding received under the agreement.”

[199] However, there are no grounds to issue any form of declaratory relief or to order the outright suspension of the prohibitions contained in section 6 of the Terms and Conditions. These reliefs sought by IPCO on this motion will be denied.

[200] Given that success is divided on this motion, no costs will be awarded.

ORDER in T-961-23

THIS COURT ORDERS that:

1. The motion is granted in part.

2. Public Service Canada, on behalf of the government of Canada, shall immediately flow funds to each of the Treaty Three Police Service [T3PS], the Anishinabek Police Service [APS], and the UCCM Anishnaabe Police Service [UCCM] for a 12-month period, in a manner consistent with the First Nations Policing Policy and in at least the amounts flowed through the last tripartite funding agreements for the 2022-2023 fiscal period.

3. During such 12-month period, T3PS, APS, and UCCM are relieved from any obligation of compliance with the provisions contained in section 6 of the Terms and Conditions — Funding for First Nations and Inuit Policing prohibiting the use of funds for "costs related to amortization, depreciation, and interest on loans" and for "legal costs related to the negotiation of the agreement and any dispute related to the agreement or the funding received under the agreement."

4. The other reliefs sought by IPCO on this motion are denied.

5. No costs are awarded.

"Denis Gascon"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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