SUPREME COURT OF FLAVELLE

ON APPEAL FROM
THE FALCONER COURT OF APPEAL

BETWEEN:

BIRGE-CARNEGIE FIRST NATION

Appellant

– and –

FLAVELLE (MINISTER OF ABORIGINAL AFFAIRS AND NORTHERN DEVELOPMENT)

Respondent

Appeal concerning whether the Government of Flavelle breached section 7 of the *Charter* by failing to provide the Birge-Carnegie First Nation with access to health care; whether the Government owed, and breached, a fiduciary duty to the Birge-Carnegie First Nation by failing to provide adequate health care; and the appropriate remedy if breaches are found.

FACTUM OF THE APPELLANT

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Part I – Overview and Facts

A. Overview

1. When the government retreats from its moral, historical and constitutional obligations to its most vulnerable citizens, the law must respond to give effect to their rights.

2. This appeal addresses two fundamental matters at the intersection of constitutional and aboriginal law: the content of section 7 rights in the aboriginal context and the Crown's fiduciary duty to Aboriginal peoples. Neither was respected when the Minister of Aboriginal Affairs and Northern Development (the "Respondent") decided to indefinitely delay implementation of the *Falconer Accords Act* ("*FAA*") and to slash funding of on-reserve health-care programs by 30 percent.

3. The Respondent's actions deprive the Birge-Carnegie First Nation (the "Appellant") and its members of their rights to life, liberty, and security of the person in a manner contrary to the principles of fundamental justice. In addition, by suspending implementation of the *FAA* and failing to meet its own guidelines, the Respondent further breached the fiduciary duty it owes the Appellant.

4. The two wrongs that form the subject of this appeal both stem from the Respondent's expedient retreat from its own guidelines and commitments. In this context an order in the nature of mandamus with ongoing supervision, which compels the Respondent to keep its promises, is the most appropriate remedy.

B. Factual Background

5. There are, as it stands, two Flavelles. One is the prosperous, socially progressive country lauded for its health care system and quality of life. Hidden within it, however, is a parallel country where basic health, mental health, and addiction services are woefully inadequate, individuals die six years earlier, and young people are five to six times more likely to take their own lives. Such is the reserve system for First Nations.

   Problem at para 13.

6. The drafting of the Falconer Accords ("the Accords") in 2005 marked a significant step toward closing this gap. The Accords were seen as a replacement for the 1979 Federal Indian Health Policy, which had acknowledged the fiduciary relationship between the Crown and Aboriginal peoples and sought to develop health care programs to remedy the longstanding grave health disadvantages faced by Aboriginal peoples living on reserves.

   Problem, *supra* para 5 at paras 1, 3.

7. To honour the commitments it had made, Flavelle passed the *Falconer Accords Act*. The *FAA* included a preamble stating the newfound commitment of the Government of Flavelle to "developing the health and social welfare of Aboriginal persons." Schedule A to the Act set out implementation guidelines and timelines. The Prime Minister then issued a statement announcing that the funding and development of health care programs for Aboriginal communities pursuant to the *FAA* was expected to begin in 2008.

   Problem, *supra* para 5 at paras 4-7.

8. However, the Government of Flavelle did not follow through with these commitments. Faced in 2008 with a global economic downturn, it embarked on a politically expedient

course of action. On September 1st of that year, the Prime Minister and the Respondent jointly declared the implementation the *FAA* to be "postponed indefinitely."

Problem, *supra* para 5 at paras 8-9.

9. The government also made broad funding cuts to health and social assistance programs in its *Budget Implementation Act*. Funding for mental health and addictions programs serving on-reserve aboriginal communities was cut by thirty percent, amounting to a less than 0.01 percent decrease in federal government spending. In contrast, other programs suffered to a much lesser degree: general welfare and social assistance spending was cut by ten percent, health transfer payments to provinces by only seven.

Problem, *supra* para 5 at paras 10-11.

10. In the intervening five years, conditions on reserves have deteriorated even further. The Respondent Ministry's own research confirms that reserves have sub-par levels of mental health care programming, exacerbating the disproportionately high rates of substance abuse, mental illness, suicide and attempted suicide experienced by Aboriginal peoples living on-reserve. Moreover, many reserves lack basic access to safe drinking water.

Problem, *supra* para 5 at paras 12-13.

11. Beyond their immediate harm, these poor health conditions comprise an assault on the dignity and status of the Aboriginal peoples of Flavelle. The members of the Birge-Carnegie First Nation endure particularly dire living conditions, described by some experts as "third-world." Their reserve is a remote one, accessible only by air for the majority of the year, and located five hundred kilometres from the nearest urban centre. A number of individuals, including children, have had to permanently leave the reserve to access long-term care for

chronic conditions. Those who stay suffer from reduced life expectancy, even as compared to other reserves, and sharply elevated rates of illness.

Problem, *supra* para 5 at para 14.

12. With the Birge-Carnegie First Nation as a representative plaintiff, the Assembly of First Nations of Flavelle brought an action against the Respondent under section 7 of the *Charter of Rights and Freedoms* (the "*Charter*").

Problem, *supra* para 5 at para 17.

13. The Appellant claims that, both by cutting funding to important health programs and by failing to ensure that on-reserve Aboriginal peoples have adequate access to health care, the Respondent has violated its rights to life, liberty and security of the person, and that those actions do not accord with the principles of fundamental justice.

Problem, *supra* para 5 at para 17.

14. Moreover, the Appellant claims that the Respondent's actions constitute a breach of the fiduciary duty owed by the Crown to the Birge-Carnegie First Nation.

Problem, supra para 5 at para 17.

C. Judicial History

1. Trial Judgment

15. At the Falconer Superior Court of Justice, Hertzman J held that a purposive and "legally accurate" interpretation of section 7 imposed positive obligations on the government to protect life, liberty and security of the person. She found that deprivations of these interests could arise not only from the cuts imposed by the Respondent in this case, but also from state inaction or legislative omission.

Problem, *supra* para 5 at para 24.

16. Recognizing the "reprehensible" health conditions on reserves, Hertzman J rightly found that the Appellant should be entitled to the same level of health care as all Flavellians. She also noted that the government's failure to remedy these circumstances put members of the Appellant in the "deplorable" circumstance of having to leave the reserve to seek self-help. Accordingly, she found the government's actions bore a "direct causal link" to these outcomes, and amounted to an unconstitutional deprivation of life, liberty and security of the person, the effects of which were disproportionate to any legitimate government interest.

Problem, *supra* para 5 at para 25.

17. Justice Hertzman further held that a fiduciary duty rested on the government of Flavelle to protect the cognizable aboriginal interest of living together as a people or community. As health service provision was found necessary to protect this interest, she found that the government of Flavelle breached its fiduciary duty by postponing implementation of the *FAA* and withdrawing funding for on-reserve health care programs.

Problem, *supra* para 5 at para 26.

18. As a remedy, Hertzman J issued a declaration that both section 7 and the Crown's fiduciary duty were breached, recognizing the importance of reconciliation.

Problem, *supra* para 5 at para 28.

2. Court of Appeal Judgment

19. Two of the three justices at the Falconer Court of Appeal reversed the trial decision, neglecting to recognize the Appellant's positive rights interpretation of section 7 owing to the lack of precedent for such claims. In neglecting to find the government's actions arbitrary or disproportionate, Grossman JA, writing for the majority, characterized the stated purpose of the *FAA* as 'symbolic'.

Problem, *supra* para 5 at para 30.

20. Justice Grossman also declined to recognize a specific fiduciary duty or cognizable Aboriginal interest in this instance owing to the lack of explicitly supportive jurisprudence.

    Problem, *supra* para 5 at para 31.

21. Writing in dissent, Schiff JA affirmed the trial decision, lauding Hertzman J for accommodating the interests of historically disadvantaged groups under the scope of section 7. He also agreed with the trial judge's finding on fiduciary duty, but found that the nature of the harm and the equitable interests at stake required a more robust remedy. Accordingly, he issued a mandatory order requiring the resumption of funding and implementation of the *FAA*.

    Problem, supra para 5 at para 31.

Part II – Issues

22. There are three issues on appeal:

Issue 1: Did the federal government breach section 7 of the *Charter*?

Issue 2: Did the federal government's actions give rise to, and subsequently breach, a fiduciary obligation to the Birge-Carnegie First Nation?

Issue 3: What is the appropriate remedy for a breach of either section 7 of the *Charter* or the Crown's fiduciary duty?

Part III – Argument

Issue 1: The Respondent's Actions and Decisions Breach Section 7 of the Charter.

23. The Respondent's decisions to cut funding to aboriginal health services and indefinitely postpone programs to ensure the welfare of Aboriginal peoples violate section 7 of the *Charter.* The Appellant's rights to life, liberty and security of the person cannot be fulfilled when it cannot access health services and clean water. To be given substantive meaning and purpose, section 7 must be interpreted to protect interests fundamental to the preservation of human life.

> *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act*, *1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*].

A. Section 7 provides substantive guarantees

24. Section 7 of the *Charter* provides that "everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice." Limiting these guarantees to circumstances where the state seeks to impose penal or punitive consequences bespeaks an impoverished and outmoded view of the *Charter*. Whether section 7 is engaged relates to the interests at stake, not "the legal label attached to the impugned legislation." It is clearly triggered when government action creates a risk to health by preventing access to health care.

> *Charter*, *supra* para 23, s 7.
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> *Gosselin v Quebec (Attorney General),* 2002 SCC 84 at paras 82-83, [2002] 4 SCR 429, McLachlin CJ [*Gosselin*].
>
> *New Brunswick (Minister of Health) v G(J),* [1999] 3 SCR 46 at para 55, 177 DLR (4th) 124.
>
> *Charkaoui v Canada,* 2007 SCC 9 at para 18, [2007] 1 SCR 350.
>
> *Canada (Attorney General) v PHS Community Services Society,* 2011 SCC 44 at para 93, [2011] 3 SCR 134 [*PHS*].

25. A continued evolution in section 7's scope is both appropriate and necessary. In her majority judgment in *Gosselin,* McLachlin CJ recognized that "[while] an adjudicative context might be sufficient […] we have not yet determined that one is *necessary* in order for section 7 to be implicated." Moreover, as the Supreme Court of Canada stated in *Blencoe*:

> [Section 7's] importance is such for the definition of substantive and procedural guarantees in Canadian law that it would be dangerous to freeze the development of this part of the law. […] Our Court should be alive to the need to safeguard a degree of flexibility in the interpretation and evolution of s. 7 of the Charter.

Gosselin, supra para 24 at para 78 [emphasis in original].

Blencoe v British Columbia (Human Rights Commission), 2000 SCC 44 at para 188, [2000] 2 SCR 307 [*Blencoe*].

26. The notion that substantive rights are deserving of recognition and protection under section 7 is an inevitable consequence of the *Charter's* substantive guarantees. The Supreme Court has repeatedly affirmed that *Charter* interpretations should be "generous rather than […] legalistic […] [and] aimed at fulfilling the purpose of the guarantee and securing for individuals the full benefit of *Charter* protection." Under the vision of the Constitution as a "living tree," section 7 should apply where budgetary and policy decisions such as the *FAA* directly impinge upon rights to life, liberty and security of the person.

Gosselin, supra para 24 at paras 82, 317.

R v Big M Drug Mart, [1985] 1 SCR 295 at para 117, 18 DLR (4th) 321.

Reference re Provincial Electoral Boundaries (Sask), [1991] 2 SCR 158 at para 42, [1991] SCJ no 46 (QL), McLachlin J.

B. The rights to life, liberty and security of the person require access to health care

27. The Supreme Court of Canada has consistently and deliberately left open the possibility that section 7 can import a positive obligation to sustain life, liberty and security of the person in certain circumstances. In the circumstances such as these, where state inaction deprives

Aboriginal peoples of the ability to access services that directly implicate their health and survival, section 7 should continue to evolve in requiring the state to take positive steps.

Gosselin, supra para 24 at para 82.

Problem, *supra* para 5 at paras 13-14.

28. Adequate access to health care is necessary for the full enjoyment of life, liberty and security of the person under the *Charter*. As stated by Sopinka J in *Rodriguez*, these interests are "intrinsically concerned with the well-being of the living person [...] based upon respect for the intrinsic value of human life and on the inherent dignity of every human being."

Gosselin, supra para 24 at para 346, Arbour J, dissenting.

Rodriguez v British Columbia (Attorney General), [1993] 3 SCR 519 at para 129, 107 DLR (4th) 342 [*Rodriguez*].

29. Preventive and acute medical care for mental illness and substance abuse has been shown to preserve health and life. As Beetz J stated in *Morgentaler*, "[section 7] must include a right of access to medical treatment for a condition representing a *danger to life or health.*" The Respondent has failed to ensure that health services are accessible to on-reserve Aboriginal persons. As a result, the Appellant members experience markedly higher rates of depression, substance abuse and suicide, not only relative to the larger Flavellian population, but also to the already deficient standards prior to the Respondent's program cutbacks.

R v Morgentaler, [1988] 1 SCR 30 at para 70, 44 DLR (4th) 385, Beetz J, concurring [*Morgentaler*] [emphasis added].

Problem, *supra* para 5 at para 14.

1. Section 7 must be interpreted through an equality lens

30. Applying an equality perspective to the interpretation of section 7 further confirms that the government has breached the Appellant's *Charter* rights to liberty and security of the

person. The Supreme Court of Canada has held that equality and dignity underlie all *Charter* rights, and are embodied within section 7's guarantees.

R v Andrews, [1990] 3 SCR 870 at para 32, [1990] SCJ no 130 (QL), McLachlin J, dissenting.
Morgentaler, supra para 29 at paras 225-228, Wilson J, concurring.

31. Aboriginal peoples are dependent upon the federal government for the provision and funding of comprehensive health services. The Federal Indian Health Policy and the *FAA*, the products of years of negotiation, themselves recognize the Crown's necessary role in funding and managing health services for Aboriginal peoples. Furthermore, as Wilson J stated over twenty years ago in *Stoffman:*

> [G]overnment has recognized for some time that access to basic health care is something that no sophisticated society can legitimately deny to any of its members. Less philosophically, government has also recognized that the promotion and protection of health is crucial to the maintenance of a viable and productive society.

Problem, *supra* para 5 at paras 1, 4-5.
Stoffman v Vancouver General Hospital, [1990] 3 SCR 483 at para 98, [1990] SCJ no 125 (QL), Wilson J, dissenting.

32. Basic rights principles, and the specific guarantees provided by section 7, are offended where a law or legislative scheme that applies equally on its face deprives a disadvantaged group of meaningful and equal access. At trial, Hertzman J found that the Appellant was deprived of the ability to access the same levels of health care as all Flavellians. In *Eldridge,* the Supreme Court held:

> The principle that discrimination can accrue from a failure to take positive steps to ensure that disadvantaged groups benefit equally from services offered to the general public is widely accepted in the human rights field.

Moore v British Columbia (Education), 2012 SCC 61 at paras 34-36, 50-53, [2012] 3 SCR 360.
Dunmore v Ontario (Attorney General), 2001 SCC 94 at paras 167-70, [2001] 3 SCR 1016.
Problem, *supra* para 5 at para 25.

Eldridge v British Columbia (Attorney General), [1997] 3 SCR 624 at para 78, [1997] SCJ no 86 (QL) [*Eldridge*].

33. The Appellant's claim of a section 7 right to access health care fits squarely within this approach; it seeks substantive equality in the provision of a government service. The Respondent argues, from *Chaoulli*, that the *Charter* does not confer a freestanding right to health care, but neglects to emphasize the subsequent statement that equality in access to health care *is* required: "where the government puts in place a scheme to provide health care, that scheme must comply with the *Charter*."

Chaoulli v Quebec (Attorney General), 2005 SCC 35 at para 104, [2005] 1 SCR 791 [*Chaoulli*].

34. The Respondent's cuts to "non-essential services" threaten the health of Aboriginal persons whose protection is at the heart of both section 7 and section 15. Even the structure of the cuts themselves is unduly discriminatory; some on-reserve services were cut up to thirty percent, where as general health and welfare cuts affecting the larger Flavellian population ranged from seven to ten percent.

Problem, *supra* para 5 at paras 10-11.

2. Section 7 must be interpreted to give effect to Flavelle's international obligations

35. It is a well-recognized principle of *Charter* interpretation that the content of rights should be informed by international human rights law, particularly agreements that have been ratified in Flavelle. While not binding law in Flavelle, Dickson CJ has stated that these sources must be "relevant and persuasive […] for interpretation of the *Charter*'s provisions," and that the *Charter* should provide at least the same degree of rights protection as that found in ratified international agreements. The Supreme Court has held that international human rights are

particularly important in interpreting section 7, which embodies notions of dignity and integrity.

Slaight Communications v Davidson, [1989] 1 SCR 1038 at paras 23-24, [1989] SCJ no 45 (QL).

Reference re Public Service Employee Relations Act (Alta), [1987] 1 SCR 313 at paras 57-60, [1987] SCJ no 10 (QL), Dickson CJ, dissenting [*PSERA Reference*], affirmed in *Health Services and Support – Facilities Subsector Bargaining Assn v British Columbia,* 2007 SCC 27 at para 70, [2007] 2 SCR 391.

R v Ewanchuk, [1999] 1 SCR 330 at para 28, [1999] SCJ no 10 (QL).

36. A positive right to access health care and safe water is protected in a wide range of human rights instruments ratified by Flavelle. The *Universal Declaration of Human Rights* affirms that "[e]veryone has the right to a standard of living adequate for the health of himself and his family, including […] medical care and necessary social services."

Universal Declaration of Human Rights, GA Res 217 (III), UNGAOR, 3d Sess, Supp No 13, UN Doc A/810 (1948) 71, art 25.1.

37. These obligations are particularly relevant when the rights of Aboriginal persons are impugned. In its *General Comment* on Article 12 of the *ICESCR,* which provides "the right of everyone to the enjoyment of the highest attainable standard of physical and mental health" the UN CESCR states that health facilities "must be within safe physical reach for all sections of the population, *especially vulnerable or marginalized groups, such as* […] *indigenous populations* […] [and] also implies that […] safe and potable water [are accessible]." Furthermore, it specifically recognizes that:

> [I]ndigenous peoples have the right to specific measures to improve their access to health services and care. […] [S]tates should provide resources for indigenous people to design, deliver and control such services so that they may enjoy the highest attainable standard of physical and mental health.

International Covenant on Economic, Social and Cultural Rights, GA Res 2200A (XXI), UNGAOR, 21st Sess, Supp No. 16, UN Doc A/6316 (1966) 49, at 12(1) [*ICESCR*].

Substantive Issues Arising in the Implementation of the ICESCR, General Comment 14 (2000), CESCR, 22nd Sess, UN Doc E/C.12/2000/4 1 at para 27 [emphasis added].

38. Although many of these international instruments are necessarily aspirational, they import an obligation on Flavellian governments to, at the very least, take concrete steps *towards* ensuring that Aboriginal peoples living on reserves can access services necessary for their physical and mental health. The Respondent's acts of cutting and deliberately withholding access to these services directly contravene those obligations.

3. Section 7 rights can impose positive obligations on the government

39. The fact that the Appellant's interpretation of section 7 rights has an economic component does not prevent its adoption. What is significant in analyzing the scope of the rights claimed by the Appellant in this case is not whether they have economic consequences, but whether they fall within the rights to life, liberty and security of the person enumerated in section 7.

40. The *Charter* is*, prima facie*, a rights-*granting* instrument that has "positive" dimensions in many circumstances. A number of rights in the *Charter* compel the government to establish schemes requiring legislation and expenditure, including the right to vote (s 3), rights to a speedy trial (s 11) and to interpretation (s 14) in the penal context, and the right to minority language education (s 23).

> *Gosselin, supra* para 24 at para 320, Arbour J, dissenting.
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> *R v Askov,* [1990] 2 SCR 1199 at paras 43-47, 59-60, [1990] SCJ no 106 (QL).
>
> *Doucet-Boudreau v Nova Scotia,* 2003 SCC 62 at paras 27-29, 63, [2003] 3 SCR 3 [*Doucet-Boudreau*].

41. Canadian courts have also recognized that section 7 rights can require the government to take positive action. In *Adams,* the British Columbia Court of Appeal ruled that prohibitions interfering with the rights of homeless persons to shelter themselves violated their section 7 rights. Despite not granting an explicit positive right, the Court noted that the decision

would likely require some responsive government action in the form of regulation or creation of homelessness programs, rightly stating that "governments generally have to take some action to comply with the requirements of the *Charter*, [involving] some expenditures of public funds, or legislative action, or both."

Victoria (City) v Adams, 2009 BCCA 563 at para 96, [2009] BCJ 2451 [*Adams*].

42. Moreover, in order for the government to act in accordance with the principles of fundamental justice under section 7, it may be required to take positive action. As Lamer CJ held in *Schachter*, "the requirement that the government respect the 'principles of fundamental justice' may provide a basis for characterizing section 7 as a positive right in some circumstances."

Schachter v Canada, [1992] 2 SCR 679 at para 91, [1992] SCJ no 68 (QL) [*Schachter*].

43. In the ways listed above and more, the jurisprudential lines drawn between positive and negative rights amount to distinctions without a difference. Professor Jamie Cameron, a frequent commentator on these issues, notes that "the imposition of positive obligations is not an isolated phenomenon, and […] the momentum in their favour builds with every decision."

Jamie Cameron, "Positive Obligations Under Sections 15 and 7," (2003) 20 SCLR (2d) 65 at 73.

44. Fears that the recognition of a "positive" aspect to section 7 will open the floodgates to social rights litigation are unfounded. The unique circumstances of this case, in which the government has neglected to fulfil a responsibility to Aboriginal persons in a way that threatens their health and survival, place an inherent limit on the positive scope of the *Charter.* In the early *Charter* case of *Irwin Toy*, Dickson CJ held that only where economic rights were "*fundamental to human life or survival*" could they potentially find protection

under the *Charter*. The Appellant is claiming a right to access necessary health services, which has never been foreign to *Charter* jurisprudence.

> *Irwin Toy Ltd v Quebec (Attorney General),* [1989] 1 SCR 927 at para 95, 58 DLR (4th) 577 [*Irwin Toy*] [emphasis added].

C. The Birge-Carnegie First Nation's rights to life, liberty and security of the person were infringed

45. The nature of the infringement alleged in this case is novel. However, the conditions giving rise to that infringement are not. While the Appellant does not seek to re-litigate historical injustices, neither can it neglect to recognize the shameful legacies that underlie its present circumstances. Government interventions that intended to "suppress Aboriginal nations," "undermine Aboriginal cultures," and "stifle Aboriginal identity" are an unfortunate yet necessary backdrop to the social and physical ill health of Aboriginal peoples today.

> Royal Commission on Aboriginal Peoples*, People to People, Nation to Nation: Highlights for the Report of the Royal Commission on Aboriginal Peoples* (Ottawa: Supply and Services Canada, 1996) at 1-2 [*RCAP Highlights*].

1. The Respondent's actions constitute a deprivation of section 7 rights

46. If an interest in access to health care is protected under the rights to life, liberty and security of the person, as the Appellant submits it must be, it also needs to be shown that the government deprived the Appellant of those rights. Such deprivation does not arise only in cases where the government actively infringes upon *Charter*-protected rights, as the Respondent did by cutting essential health funding to on-reserve Aboriginal persons. A deprivation can also occur from a chronic failure to take positive steps to ensure protection of rights or the ability to exercise freedoms.

> *Charter, supra* para 27, s 7.

47. A purposive interpretation of the word "deprivation" as used in the *Charter* must include the withholding of a provision or absence of an action that individuals require in order to exercise their rights. This principle has been accepted in *Charter* jurisprudence. The Supreme Court has repeatedly indicated that legislative omissions can violate *Charter*-protected rights and interests, and can have consequences "as grave as [those] resulting from explicit exclusion."

Eldridge, supra para 32 at paras 77-78.

Vriend v Alberta, [1998] 1 SCR 493 at paras 56, 83, 98, 156 DLR (4th) 385.

48. Similarly, even when a piece of legislation like the *FAA* is otherwise constitutional, a discretionary decision to refuse to extend its benefits can be unconstitutional. In the recent case of *PHS*, McLachlin CJ held that where the extension of a statutory exemption would minimize risk of death and disease with no clear negative impact, such an exemption should be granted. According to one commentator, this holding can be interpreted to indicate that a failure to exercise discretion in a manner that furthers protected rights can breach the *Charter*, especially in sectors where the government has already taken a legislative or executive role.

PHS, supra para 24 at para 152.

Matthew Rottier Voell, "PHS Community Services Society v Canada (Attorney General): Positive Health Rights, Health Care Policy, and Section 7 of the Charter", (2012) 31 WRLSI 41 at 62-63.

49. Independent of any positive rights the Appellant claims, the Respondent had provided and funded a range of health programs, and then made cuts to them in the 2008 *Budget Implementation Act*. This action *clearly* deprived the Appellant's members of the ability to access care necessary to their physical, mental and psychological integrity, and therein *violated* their constitutional rights under section 7. It is no bar to the adjudication of this

claim that the proper recognition of the Appellant's constitutional rights may raise political or fiscal issues.

Problem, *supra* para 5 at para 10.

Chaoulli, supra para 33 at para 185.

Adams, supra para 41 at paras 65-67.

2. A lack of access to health care infringes the Appellant's right to security of the person

50. If the Appellant's members are unable to access potentially life-saving health services, whether through a withdrawal or a withholding of government funding and programs, their rights to security of the person are infringed. In *Rodriguez,* Sopinka J described the right to security of the person as "encompass[sing] a notion of personal autonomy involving, at the very least […] freedom from state-imposed psychological and emotional stress." The mental and emotional ill-health of Aboriginal peoples cannot be divorced from the Respondent's actions in this case, or the historical legacies of government intervention in Aboriginal communities.

Rodriguez, supra para 28 at para 136.

Report of the Royal Commission on Aboriginal Peoples: Gathering Strength, vol 3 (Ottawa: Supply and Services Canada, 1996) at 137-140 [*RCAP Report*].

51. When a law, policy or government decision establishes a clear risk of harm to health by limiting timely access to medical treatment, security of the person under section 7 is engaged. As McLachlin CJ held in *Chaoulli*, referencing *Morgentaler* and other cases, "the jurisprudence of this Court holds that delays in obtaining medical treatment which affect patients physically and psychologically trigger the protection of s. 7 of the Charter."

Chaoulli, supra para 33 at para 118.

52. Security of the person can also be implicated – and deprived – by a failure to ensure conditions that maximize access to health care. In *Singh,* noting that the phrase "security of the person" was capable of a "broad range of meaning," Wilson J approvingly cited the Law Reform Commission of Canada's assertion that "the right to security of the person means not only protection of one's physical integrity, but *the provision of necessaries for its support*." In addition, Wilson J recognized that an administrative decision that merely made it *more likely* that one's health would be impaired could "be sufficient to constitute a deprivation of the security of [the] person."

> *Singh v Minister of Employment and Immigration,* [1985] 1 SCR 177 at paras 46, 48, [1985] SCJ no 11 (QL), Wilson J [*Singh*][emphasis added], citing *Collin v Lussier,* [1983] 1 FC 218 at 239 and Canada, Law Reform Commission, *Medical Treatment and Criminal Law* (Working Paper 26) (Ottawa: Minister of Supply and Services Canada, 1980) at 6.

53. The Respondent's actions put an impermissible barrier between Aboriginal peoples, many of whom face serious and chronic long-term health concerns, and safe and timely access to health care, particularly in the treatment of addiction, communicable disease, and mental illness. These services reduce the risk of illness and even death. Both government and independent research prove that the risk to the claimants' health has been exacerbated by the limitations imposed on their access to these services, with life-threatening consequences. Indeed, aboriginal on-reserve populations are effectively deprived of access to these health care services if those services are not directly provided or funded by the Crown.

> *Problem*, *supra* para 5 at paras 13-14.
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> *Adams, supra* para 41 at paras 86-89.

3. A lack of access to health care infringes the Appellant's right to liberty

54. The right to choose where to live, in conjunction with the ability to access adequate health care in that place, engages the claimant's liberty interests. It has been recognized in

Canadian jurisprudence that the right to liberty includes the ability to make a choice about "matters that are fundamentally or inherently personal." Without access to supplementary health care programs, members of the Birge-Carnegie band have been compelled, in some cases, to leave the reserve in order to ensure that their basic necessities of life are adequately provided for.

Godbout v Longueuil (City), [1997] 3 SCR 844 at para 66, [1997] SCJ no 95 (QL) [*Godbout*].

55. While it may be overbroad to suggest that all persons have a right to access all health services wherever in Canada they may choose to live, the liberty interest with respect to this nexus of choices *is* engaged in respect of Aboriginal persons. The Supreme Court has affirmed in *Corbiere* that for Aboriginal and First Nations persons, the decision to live on or off reserve is fundamental to their identity and protected under section 15 of the *Charter*.

Corbiere v Canada (Minister of Indian and Northern Affairs), [1999] 2 SCR 203 at paras 10, 14-15, [1999] SCJ no 24 (QL) [*Corbiere*].

56. Furthermore, if compelled to leave the reserve, Aboriginal persons may also be deprived of other elements of their civic, political and economic identity that would have the effect of further marginalizing a historically disadvantaged population. Among Aboriginal peoples, health and well-being must be culturally appropriate and informed by community and history; this is lost when local access to treatment and care is deprived.

RCAP Report, vol 3, *supra* note 50 at 186.

57. When Aboriginal peoples on reserves cannot access critical health services, such that they are effectively compelled to move to other communities in order to protect their own health, their liberty interest is infringed. This is an inevitable and demonstrated outcome of the government's decisions in this case.

David R Boyd, "No Taps, No Toilets: First Nations and the Constitutional Right to Water in Canada" (2011) 57(1) McGill LJ 81 at 106.

58. The door remains open to a state obligation to provide access to health care services, where a failure to do so has had demonstrated impacts on the life, liberty and security of the person interests of an aboriginal population in relation to which the government has a recognized, long-standing obligation of support. As Professor Lorne Sossin has noted, in considering positive obligations in the wake of *Chaoulli*, "it is hard to imagine more compelling settings for elaborating such obligations than in the basic need for health care and sustenance of those dependent on state support." The rights here are so basic, and the claimants so dependent, that it is necessary to find that the Respondent breached section 7 and has a concomitant obligation to provide health care services in a rational way.

Lorne Sossin, "Towards a Two-Tier Constitution? The Poverty of Health Rights" in Colleen Flood, Kent Roach & Lorne Sossin, eds, *Access to Care, Access to Justice: The Legal Debate Over Private Health Insurance in Canada* (Toronto: University of Toronto Press, 2005) 161 at 178.

D. The Respondent's actions do not accord with the principles of fundamental justice

59. The deprivation of the Birge-Carnegie First Nation's rights to liberty and security of the person is arbitrary, disproportionate, and is not otherwise in accordance with the principles of fundamental justice. The decisions to cut back and withhold services not only violate the Crown's general duties to act honourably in respect of Flavelle's First Nations, but also its specific commitments under the *FAA* to develop the health and welfare of aboriginal persons.

1. The principles of fundamental justice should not defer to policy considerations

60. The Respondent's decision to indefinitely postpone the implementation of the *FAA* is not proper solely because the Act conferred the ability to make that decision. As McLachlin CJ stated for a unanimous court in *PHS*, a Minister cannot make such a decision "on the basis of policy *simpliciter*; insofar as it affects *Charter* rights, [the] decision must accord with the principles of fundamental justice." The effect of the Minister's decision limit's the Appellant's section 7 interests in a way that does not accord with those principles.

PHS, supra para 24 at paras 117, 128.

61. Whether the Respondent's decision accords with the principles of fundamental justice necessitates an inquiry into its purposes, whether in the form of a piece of legislation or an executive order. As McLachlin CJ stated in *Chaoulli*, "[t]he fact that the matter is complex, contentious or laden with social values does not mean the courts can abdicate their constitutional responsibility to review [it] for *Charter* compliance when citizens challenge it." Moreover, Professor Hogg has noted that the doctrines of arbitrariness and disproportionality are "authority for the Court to undertake a review of the wisdom of legislative policy."

Chaoulli, supra para 33 at para 107.

Peter W Hogg, Constitutional Law of Canada, loose-leaf (consulted on 18 September 2013), 5th ed (Toronto: Carswell, 2007) at 47-58.

62. The resource constraints the government faces do not suspend the requirement that its actions conform to constitutional standards. It is also clear from equality jurisprudence that in the absence of a clear evidentiary basis, a government claim that a violation of *Charter* rights is justified merely because it furthers pressing public interests in containing costs is unlikely to succeed. The government has responsibilities beyond controlling the public

purse; indeed, economic crisis should amplify the government's duty to safeguard the *Charter* rights of its most vulnerable citizens, not give licence to further deprive them.

Schachter, *supra* para 42 at paras 62-63.

2. The Respondent's actions were grossly disproportionate

63. The Respondent's actions are grossly disproportionate to the objective sought. The Supreme Court has held that the principle of proportionality is "fundamental to our constitutional system," and will be offended when the government's actions are "fundamentally unacceptable to [society's] notions of fair practice and justice." In this case, the outcomes of the Respondent's actions have led to decreased life expectancy, and higher rates of suicide, attempted suicide, drug abuse and mental illness among on-reserve Aboriginal persons.

R v Malmo-Levine, 2003 SCC 74 at para 113, [2003] 3 SCR 571.

Suresh v Canada (Minister of Citizenship and Immigration), 2002 SCC 1 at paras 47, 49, [2002] 1 SCR 3 [*Suresh*].

Problem, *supra* para 5 at paras 12-13.

64. Requiring members of the Birge-Carnegie First Nation to persist in near "third-world" conditions, subject to the false choice of leaving the reserve to ameliorate their situation, is abhorrent. Preserving a measure of fiscal balance is surely desirable, but when the means chosen to achieve that purpose have such intolerable outcomes, they must be seen as grossly disproportionate. As Sopinka J rightly stated in *Rodriguez,* "[w]here the deprivation of the right in question does little or nothing to enhance the state's interest (whatever it may be) […] a breach of fundamental justice will be made out, as the individual's rights will have been deprived for no valid purpose."

Problem, *supra* para 5 at para 14.

Rodriguez, *supra* para 28 at para 147.

65. The total amount of money saved by these reductions in funding to on-reserve "non-essential services" represents only 0.01 percent of the overall federal budget, doing little if anything to enhance a state interest in fiscal balancing. Chief Justice McLachlin stated in *PHS* that "the potential denial of health services and the correlative increase in the risk of death and disease […] outweigh any benefit that might be derived from maintaining [the government's purpose]." Similarly, the cuts and delays to necessary social services are grossly disproportionate to the kinds of cost savings the government recognizes through taking these actions.

Problem, *supra* para 5 at para 10.
PHS, supra para 24 at paras 133, 136.

3. The Respondent's actions were arbitrary

66. A government action will be arbitrary if it limits rights to life, liberty and security of the person without a discernible benefit or valid purpose. In *Chaoulli,* McLachlin CJ explicitly stated that: "rules that endanger health arbitrarily do not comply with the principles of fundamental justice." The government conduct in this case is no less limiting on Aboriginal access to health care than a binding rule, and is no less arbitrary than a penal provision merely because of its policy elements.

Rodriguez, supra para 28 at para 147, Beetz J, concurring.
Chaoulli, *supra* para 33 at para 133.

67. The onus of establishing all elements of a breach of section 7 lies on the claimant, but the more serious a deprivation of section 7 interests, the less onerous that burden should be. As McLachlin CJ stated, "where the individual's very life may be at stake, the reasonable person would expect a clear connection, in theory and in fact, between the measure that puts life at risk and the legislative goals." The Respondent has, at best, been inert while the

livelihoods of on-reserve Aboriginal peoples are imperilled by lack of access to health care and clean water.

Chaoulli, *supra* para 33 at para 131.

68. It cannot be said that a decision having the effect of entrenching persistent disadvantage and risking Aboriginal health corresponds to any valid legislative purpose. As stated in *Chaoulli*, "to determine whether [a law is arbitrary], it is necessary to consider the *state interest and societal concerns* that the provision is meant to reflect." The objective of the *FAA*, while cognizant of the interests of all Flavellians, was specifically intended to foster the health and social welfare of Aboriginal peoples in Flavelle. The Respondent's decision made pursuant to the *FAA* causes a *decline* in welfare, and directly contradicts this purpose. Even if the Act's purposes recognize a need for fiscal balancing, the decision made must be arbitrary.

Chaoulli, *supra* para 33 at para 130 [emphasis added].

69. The Appellant's claim goes beyond a mere challenge to a policy decision. It is a claim rooted in well-accepted constitutional principles that seeks the preservation and fulfillment of their basic rights. The Respondent's actions have violated these rights and principles in a way that demands legal recognition and remedy from this Court.

Issue 2: By indefinitely postponing the implementation of the FAA*, the Crown failed to fulfil its fiduciary duty to the Birge-Carnegie First Nation.*

70. Aboriginal peoples living on reserves can expect to live six fewer years than other Flavellians. In one of the wealthiest nations in the world, they endure living conditions and levels of ill-health reminiscent of the "third world." This state of affairs is the bitter fruit of "historical policies of displacement and assimilation" on the part of the Crown. In effect,

Aboriginal persons living on reserves in Flavelle today are presented with an unacceptable choice: their people and identity, or their lives.

Problem, *supra* para 5 at paras 13-14.
RCAP Report, vol 3*, supra* para 50 at 10.
R v Ipeelee, 2012 SCC 13 at para 60, [2012] 1 SCR 433.

71. Having obliged the Birge-Carnegie First Nation to live on-reserve subject to the dictates of the *Indian Act*, the Crown brought upon itself the obligation to ensure that the First Nation had the health care necessary to do so. It breached this duty by postponing indefinitely its implementation of the *FAA* and cutting funding by thirty percent to mental health and addiction programs on reserves.

Wewaykum Indian Band v Canada, 2002 SCC 79 at para 85, [2002] 4 SCR 245 [*Wewaykum*].
Problem, *supra* para 5 at paras 9-10.

A. The Crown had a fiduciary duty to the Appellant in respect of its provision of health care services

72. For the Crown to owe a fiduciary duty in the Aboriginal law context, two conditions must be met. First, a cognizable aboriginal interest, namely an aboriginal interest known to law, must be at stake. Second, the Crown must have taken discretionary control over that cognizable aboriginal interest. The mere fact that the Crown may also have a public duty in regard to the same interest does not preclude the existence of a fiduciary duty.

Wewaykum, supra para 71 at para 85.

1. Living together as a people is a cognizable Aboriginal interest

a. Living together as a people is a cognizable interest

73. Both legal and practical interests of a beneficiary receive protection in the fiduciary context. Legal interests generally comprise interests in property. A wide variety of practical, or vital

non-legal, interests are protected in a fiduciary relationship. The courts have found these to include such matters as the interest in a uniform being used for proper purposes, in authority not being used to collect bribes, in the financial well-being of a corporation, and in a corporation's good name.

Frame v Smith, [1987] 2 SCR 99 at para 60, 42 DLR (4th) 81.

Reading v Attorney-General, [1951] AC 507 (HL).

74. The Appellant's interest in living together as a people is a vital non-legal, or practical, interest. It is essential to the sustainability and very existence of the Birge-Carnegie First Nation. As such, it is not only a cognizable interest under Flavellian law, but precisely the kind of interest that attracts a fiduciary duty.

Frame v Smith, supra para 73 at para 60.

b. Living together as a people is an Aboriginal interest

i. *Living together as a people is an Aboriginal interest as it meets the* Van der Peet *criteria for an Aboriginal right*

75. Aboriginal rights, protected by s 35(1) of the *Constitution*, have their source in the fact that "aboriginal peoples were here when the Europeans came" and that "distinctive aboriginal societies lived on the land prior to the arrival of Europeans." They exist to preserve the interests of aboriginal communities. The claimant of an aboriginal right must show that the modern practice in question has sufficient continuity with pre-contact practices of the community and is one integral to its distinctive culture.

Constitution Act, 1982, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11, s 35(1).

Haida Nation v British Columbia (Minister of Forests), 2004 SCC 73 at para 25, [2004] 3 SCR 511 [*Haida Nation*].

R v Van der Peet, [1996] 2 SCR 507 at paras 60, 63 [1996] SCJ no 77 (QL) [*Van der Peet*].

76. Aboriginal rights are not general, and must relate "to the specific history of the community claiming that right." Living together as a people, however, will likely qualify as an aboriginal right for the majority of aboriginal communities, insofar as the modern practice of living together as a people on the traditional territories of that people stems from the pre-contact fact of being a particular people. Furthermore, living together as a people in one's traditional territory is the very thing that makes a particular community what it is, making the practice one that is integral to its distinctive culture.

Van der Peet, *supra* para 75 at paras 55-56, 69, 70.

77. The bare Aboriginal right to live together as a people is one that is likely held by all or nearly aboriginal communities in Flavelle. This alone, however, does not prevent the right from relating to the specific history and traditional territories of the particular community asserting it, as required by the *Van der Peet* test. The Birge-Carnegie First Nation, having lived as a society in traditional territories on the lands now forming part of Flavelle prior to the assumption of Crown sovereignty, and having lived together on its reserve lands since its accession to Treaty 3, is no exception. Furthermore, 'living together as a people' meets the requirement of "aboriginal specificity" set out in *Sappier*. That requirement is intended to capture an understanding of the importance of the requirement to the "pre-contact way of life" of the particular aboriginal group, including such elements as "socialization methods." There can be no doubt of the importance of living together as a people to the pre-contact way of life of the Birge-Carnegie First Nation.

Van der Peet, *supra* para 75 at para 69.

Problem, *supra* para 5 at para 14.

R v Sappier; R v Gray, 2006 SCC 54 at para 45, [2006] 2 SCR 686 [*Sappier*].

78. Aboriginal rights, once established, generally encompass any other rights necessary for their meaningful exercise. The provision of adequate on-reserve health care is necessary for the Appellant to exercise its right to live as a people. While individuals may, in certain cases, be able to receive medical treatment by leaving the reserve, every such forced departure erodes both the individual's and the community's stability, culture, and sense of self. Living on reserve as part of one's people holds deep meaning for Aboriginal peoples and cannot be analogized to ordinary choices of residence.

Mitchell v Canada, 2001 SCC 33 at para 22, [2001] 1 SCR 911.
Corbiere, *supra* para 55 at para 15, 71.

ii. Living together as a people is an aboriginal interest even if it does not qualify as an aboriginal right

79. Living together as a people need not meet the test for an aboriginal right in order to qualify as an aboriginal interest. The Supreme Court of Canada has held that the class of aboriginal interests capable of attracting fiduciary protection is not limited to aboriginal interests in land or section 35 aboriginal and treaty rights. Thus, aboriginal interests are distinct from, and more wide-ranging than, aboriginal rights.

Ross River Dena Council Band v Canada, 2002 SCC 54 at para 62, [2002] 2 SCR 816.
Wewaykum, *supra* para 71 at para 79.

80. The Supreme Court of Canada has also established that aboriginal interests in land must be "distinctly aboriginal" and integral to the nature of the particular community asserting the interest, as outlined by the *Van der Peet* test. This is not true of other Aboriginal interests. Indeed, requiring all aboriginal interests to meet such requirements would collapse them into the aboriginal rights protected under section 35, a move to which the Court has repeatedly demonstrated its opposition.

Manitoba Métis Federation Inc v Canada (Attorney General), 2013 SCC 14 at para 53, 291 ManR (2d) 1 [*Manitoba Métis*].

Van der Peet, *supra* para 75 at para 63.

81. Aboriginal peoples have an obvious interest in living together *as peoples*. This interest is an independent one, as required by *Guerin*, not one created by either legislative or executive action. Since the assertion of Crown sovereignty, the Appellant and the other aboriginal communities of Flavelle have fought a long and hard battle to preserve their culture and identity in the face of government efforts to have them disappear and assimilate. The very existence of Aboriginal peoples, now and even more so in the future, relies on their ability to live together as a self-same community.

Guerin v Canada, [1984] 2 SCR 335 at para 104, [1984] SCJ no 45 (QL) [*Guerin*].

2. The Crown has assumed discretionary control over the Appellant's interest

82. In order to exist as a people after the assumption of Crown sovereignty, the Birge-Carnegie First Nation was forced to live on reserve land set aside for it under Treaty 3 and governed by the reserve provisions of the *Indian Act.* Confined to this remnant of its traditional territories, which territories are now held by the Crown, the Appellant is also forced to govern itself with the limited powers it was allowed to retain under the *Indian Act*. There can be no clearer case of the assumption of discretionary control of an Aboriginal interest by the Crown.

Indian Act, RSC 1985, c I-5.

Guerin, *supra* para 81 at paras 104-05

Wewaykum, *supra* para 71 at paras 83, 85.

83. The Crown has also assumed discretionary control, by both word and deed, over the provision of the on-reserve health care necessary for the realization of the Appellant's aboriginal interest. The power to create a comprehensive health care regime is reserved to

the Crown under the *Indian Act*, which allows the Governor-in-Council to make regulations to "provide medical treatment and health services for Indians." The *Indian Act* also grants the Governor-in-Council the ability to impose penal sanction for the contravention of any regulation. In addition, the Minister of Aboriginal Affairs and Northern Development may take command of any lands in a reserve for the purposes of "Indian health projects" without consultation or consent of the band council nominally overseeing the reserve.

Indian Act, *supra* para 82, ss 18, 73(1)(f)-(h), 73(2).

84. In sharp contrast, a band council may only make by-laws to prevent the spread of contagious and infectious disease on the reserve and otherwise provide for the health of residents. Its powers are further limited by the requirement that these by-laws not conflict with any regulations made by the Respondent, or any provision of the *Indian Act.* These by-laws may also be disallowed by the Respondent within 40 days of being passed.

Indian Act, *supra* para 82, ss 81(1)(a), 82(2).

85. Not only does the Crown have the power to enact regulations in regards to Aboriginal health programs, it explicitly engaged to do so. The *Falconer Accords Act* vested in the Governor-in-Council the discretion to develop and fund Aboriginal health programs, and the Prime Minister pledged that the implementation of that Act would begin in 2008 pursuant to specific guidelines detailed therein.

Problem, *supra* para 5 at paras 6-7.

B. The Respondent's particular fiduciary obligation to the Appellant was the provision of adequate health services on the reserve

86. Having assumed discretionary control over the Appellant's aboriginal interest, the Crown is required to act in the Appellant's best interest when exercising that control. This discrete

fiduciary duty is *sui generis* but in the nature of a private duty rather than a public law duty or political trust. It finds its source in the Crown's more general duty to Aboriginal peoples of honourable conduct and dealing, which in turn flows from "the Crown's assertion of sovereignty over an Aboriginal people and de facto control of land and resources that were formerly in the control of that people."

Wewaykum, supra para 71 at para 79.
Haida Nation, *supra* para 75 at paras 18, 32.

87. The particular content of the Crown's fiduciary duty to act in the Appellant's best interest varies according to the circumstance. The nature of the affected interest must be considered in conjunction with the character and stage of the governmental intervention as well as the relevance of public interests at that that particular stage of intervention. In this case, the Crown was required to provide the Appellant with on-reserve health care services adequate to the true needs of the community.

Wewaykum, *supra* para 71 at para 86.

1. The Crown's obligation is in the nature of a private law duty rather than a political trust

88. The Appellant's practical Aboriginal interest in living together as a people is an independent interest, not one created by legislative or executive action. Accordingly, although *sui generis*, the Crown's fiduciary duty is in the nature of a private law duty rather than a political trust or public law duty. As in *Guerin*, the Appellant is statutorily unable to deal with third parties in relation to its interest, owing to provisions of the *Indian Act*. The only place the Birge-Carnegie First Nation is able to live together as a people is its reserve land, over which it has only those powers granted it by the Crown in the *Indian Act*. It is thus

legally incapable of establishing the adequate health care regime that would allow it to meaningfully safeguard its communal life on reserve.

Guerin, *supra* para 81 at paras 84-85, 101-02, 105-06.

89. The Crown is, in both cases, in a position of sole authority with respect to that interest and the Appellant, at the mercy of the Crown's statutory discretion. Thus, this authority "is the source of a distinct fiduciary obligation owed by the Crown" to the Appellant, as it was in *Guerin*.

Guerin, *supra* para 81 at para 85.

90. In fiduciary duty cases concerning reserve creation rather than *Indian Act* provisions, the Supreme Court has invoked *Guerin* on the basis that that case also concerned an Aboriginal interest in land. It does not follow, however, that *Guerin* is not also applicable to other *Indian Act* cases where the Appellant is prevented from dealing directly with third parties in relation to its interest. Interests in land and in living together as a people serve the same end: the overall preservation and sustainability of the particular Aboriginal community.

2. The Appellant's Aboriginal interest is a critical one

91. It is impossible to overstate the importance of the Appellant's interest in living together as a people as it goes to the very nature and existence of the Birge-Carnegie First Nation. The Appellant abides, notwithstanding the depredations inflicted upon it by colonialism and the historic assimilative policies of the Flavellian government. Its healing process, however, is not yet complete. The Birge-Carnegie First Nation seeks to re-establish its traditions, mores, and culture and needs to live together as a people in order to do so.

3. Provision of on-reserve health care is required for the preservation and realization of the Appellant's aboriginal interest

92. It is a simple fact that the members of the Birge-Carnegie First Nation cannot live together as a people on their reserve without a health care system adequate to the real needs of the community. Health is a collective rather than an individual outcome. The effects of growing up in a community with high rates of infection by communicable disease, depression, mental illness, and substance abuse are revealed in the tragic fact that aboriginal youth living on reserves are five to six times more likely to take their lives than their peers elsewhere. The reality of this lost generation of aboriginal youth fractures aboriginal communities, including that of the Appellant, undermining their cultural life and very existence. The same occurs when individuals are forced to venture off the reserve and away from their people to obtain needed medical treatment.

RCAP Report, vol 3*, supra* para 50 at 186.

4. The Crown's exercise of discretion expands its fiduciary obligation to the protection of the Appellant's interest

93. The content of the Crown's fiduciary duty in relation to an Aboriginal interest depends on the context of the Crown action: different obligations adhere at different stages. Prior to the exercise of Crown discretion, the Crown must consider the interests of all affected parties, aboriginal and non-aboriginal alike, and be even-handed towards its beneficiaries. Its only duty in regard to the aboriginal interest at issue is to act with "loyalty, good faith, [and] full disclosure appropriate to the subject matter." Following the exercise of Crown discretion, the Crown acquires the particular fiduciary duty of the protection of the aboriginal interest subject to its intervention. This two-stage framework was developed in *Wewaykum* in the

context of reserve creation, but no language in that case precludes its application to other facts, and it has been so applied.

Wewaykum, *supra* para 71 at paras 86, 96-100, 104.

Bonaparte v Canada (Attorney General), [2003] 64 OR (3d) 1 at paras 32-35, [2003] OJ no 1046 (QL) (Ont CA).

94. Having taken the discretionary action of enacting the *FAA*, including the Schedule setting out implementation guidelines and timelines, the Crown is subject to the fiduciary obligation to fulfill that commitment. This fiduciary obligation is further strengthened by the Prime Minister's voluntary public affirmation that implementation of the *FAA* was expected to begin in 2008.

5. Public interests are not relevant once the Crown has exercised its discretion

95. At the first stage of the *Wewaykum* framework, prior to the exercise of Crown discretion, the Crown "cannot ignore the conflicting demands confronting the government" and must represent the interests of both the Aboriginal and non-Aboriginal peoples of Flavelle. However, once the Crown has exercised its discretion in adopting a policy or enacting legislation, it acquires a particular fiduciary duty in relation to the aboriginal interest its intervention has affected and may no longer consider the general public interest. This is precisely the situation that obtains following the enactment of the *FAA*.

Wewaykum, *supra* para 71 at paras 86, 96-100, 104.

6. No valid legislation constrains or eliminates the Crown's fiduciary duty

96. Parliament may legislate in such a way as to limit the Crown's fiduciary duty. It has not done so in this case. The government of Flavelle chose to indefinitely postpone the

implementation of the *FAA* in response to declining revenue and increasing political pressure. There was no statutory or constitutional requirement that it do so.

Ermineskin Indian Band and Nation v Canada, 2009 SCC 9 at para 79, [2009] 1 SCR 222.

C. The Crown breached its fiduciary obligation to the Appellant by failing to implement the *FAA* and by cutting funding to on-reserve health programs

97. Litigation has high costs in both economic and human terms. It also often detrimental to the on-going project of reconciling the interests of the Aboriginal and non-Aboriginal peoples of Flavelle. As noted in *Delgamuukw*, we are all here to stay. Accordingly, the Appellant confines its argument to the present and ongoing breach of fiduciary duty caused by the Respondent's failure to implement the *FAA* and its 2008 cuts to on-reserve funding of mental health and addiction programs.

Delgamuukw v British Columbia, [1997] 3 SCR 1010 at para 186, [1997] SCJ no 108 (QL).

98. As found by the trial judge, Hertzman J, the health standards in the Birge-Carnegie First Nation community are "reprehensible." Conditions are so dire as to force a number of individuals, including children, to permanently leave the reserve for treatment, indicating that the group's Aboriginal interest in living together as a people has not been protected. Indeed, the very sustainability of the community is in jeopardy. The fiduciary duty of the Crown to Aboriginal peoples is derived from its representation to those peoples "that their rights would be better protected by reliance on the Crown than by self-help." It is clear that the aboriginal right has not been better protected in this case.

Problem, *supra* para 5 at para 25.

Wewaykum, *supra* para 71 at para 79.

Alberta v Elder Advocates of Alberta Society, 2011 SCC 24 at para 40, [2011] 2 SCR 261.

Issue 3: The proper remedy for both the breach of the Appellant's section 7 rights and the fiduciary obligation owed to it by the Crown is a mandatory injunction.

A. The proper remedy for the breach of the Birge-Carnegie First Nation's section 7 rights is a mandatory injunction under section 24(1)

99. When *Charter* rights are breached by government inaction, rather than action, the appropriate remedy lies under section 24(1), which gives courts wide latitude to craft such remedies as they find appropriate and just under the circumstances. Responsive and effective remedies are required to ensure that both the purposes of the infringed upon right and the remedies provision are protected. As the Supreme Court held in *Dunedin*,

> Section 24(1)'s interpretation necessarily resonates across all *Charter* rights, since a right, no matter how expansive in theory, is only as meaningful as the remedy provided for its breach. From the outset, this Court has characterized the purpose of s. 24(1) as the provision of a "direct remedy." As Lamer J. stated in *Mills,* "[a] remedy must be easily available and constitutional rights should not be 'smothered in procedural delays and difficulties.'" Anything less would undermine the role of s. 24(1) as a corner-stone upon which the rights and freedoms guaranteed by the *Charter* are founded, and a critical means by which they are realized and preserved.

Doucet-Boudreau, *supra* para 40 at paras 25, 43.

Charter, *supra* para 23, s 24(1).

R v 974649 Ontario Inc, 2001 SCC 81 at para 20, [2001] 3 SCR 575 [*Dunedin*] [citations omitted].

100. The infringement of the Birge-Carnegie First Nation's section 7 rights is ongoing. The implementation of the *Falconer Accords Act*, originally set to begin in 2008, has been postponed indefinitely by the government of Flavelle. Not only have remedial measures not been implemented, but funding to on-reserve mental health and addiction programs has been cut by 30 percent.

Problem, *supra* para 5 at paras 7, 9-10.

101. The infringement is also serious. It poses a severe and imminent threat to the health the members of the Birge-Carnegie First Nation. The appellants suffer from reduced life expectancy, higher rates of mental illness, and higher rates of suicide and attempted suicide than residents in urban and rural off-reserve areas. They can expect to live six fewer years than Flavellians who do not live on reserves. Their health care and general living conditions are materially worse than even those of other Aboriginal peoples living on reserves.

Problem, *supra* para 5 at paras 13-14.

102. As the remedy is one for state inaction, an order in the nature of mandamus is warranted. In enacting the *FAA* along with a Schedule setting out implementation guidelines and timelines, the government of Flavelle "committed to developing the health and social welfare of Aboriginal persons in Flavelle." Similarly, mental health and addiction programs on reserves had evidence-based funding levels recently cut. In both cases, the Respondent was vested with the discretion to develop, fund, and alter the health care programs in question. He was, however, required to do so in accordance with the *Charter*, and as the breach of the section 7 rights of the members of the Birge-Carnegie First Nation demonstrates, he did not.

Suresh, *supra* para 63 at para 106.
PHS, *supra* para *24* at para 117.
Problem, supra para 5 at paras 5, 10.

103. Only one constitutional response is possible in this case, given the nature and severity of the breach. The Governor-in-Council must be ordered to re-start the funding and development of the on-reserve health care programs envisioned in the *FAA* and to restore funding of the mental health and addiction programs to their former level.

104. There is "nothing to be gained (and much to be risked)" in simply allowing the Governor-in-Council to reconsider his previous decision. Any lesser remedy would fail to redress the breach of the section 7 rights of the members of the Birge-Carnegie First Nation, therefore undermining section 24(1) as a source of responsive and effective remedies that truly rectify and therefore preserve the rights guaranteed in the *Charter*.

PHS, *supra* para 24 at para 150.

B. The proper remedy for the Crown's breach of fiduciary duty is a mandatory injunction

105. A wide range of remedies is available for breach of fiduciary duty. Traditional remedies operate according to trust principles and aim to put the beneficiary in the position it would have occupied had the breach not occurred. Equitable remedies address the particular harm suffered, as long as there is a nexus between the wrong suffered and the fiduciary relationship.

Guerin, *supra* para 81 at paras 113, 117-18.
Wewaykum, *supra* para 71 at para 94.
Frame v Smith, *supra* para 73 at paras 79-80.

106. There is a strong nexus between the wrong suffered by the Birge-Carnegie First Nation and its fiduciary relationship with the Crown. The Crown had scope for the exercise of its discretion in regard to the funding and development of aboriginal health care on reserve, which discretion was exercised unilaterally so as to affect the Birge-Carnegie First Nation's practical aboriginal interest in living as a community on its reserve. The Birge-Carnegie First Nation, for its part, had a peculiar vulnerability to the exercise of this discretion, being unable to remedy its situation by self-help as it lacked the legal power to craft its own health care regime.

Frame v Smith, *supra* para 73 at para 60.

Lac Minerals Ltd v International Corona Resources Ltd, [1989] 2 SCR 574 at para 145, 61 DLR (4th) 14.

107. Both the traditional and equitable approaches to remedies lead to the same choice in this case. Putting the Birge-Carnegie First Nation in the same position it would have occupied had the breach not occurred requires remedying the breach by ordering the Respondent to resume the implementation of the *FAA* according to the guidelines set out in Schedule A. Similarly, in order to address the harm suffered by the members of the Birge-Carnegie First Nation through the lack of proper health care services on their reserve, it will be necessary to have the funding and development of on-reserve health care programs restarted and restored.

108. Thus, an order in the nature of mandamus, directing the Respondent to restart the implementation process of the *FAA* is warranted.

C. Supervisory jurisdiction is required for the length of the implementation schedule

109. The Aboriginal peoples of Flavelle, including the Birge-Carnegie First Nation, have been waiting a very long time for honourable conduct on the part of the Crown and adequate provision of on-reserve health care services. If history provides any guide, leaving the implementation of the *FAA* to the Respondent's best efforts means that they will be waiting a while yet.

110. Supervisory jurisdiction would relieve the Appellant of the burden of bringing a fresh application each time it appeared that the government of Flavelle was not taking sufficient or appropriate action to implement the *FAA* in accordance with the guidelines set out in

Schedule A of that Act. Such jurisdiction would be particularly appropriate in this case, as the Appellant lacks the resources for ongoing litigation and, more importantly, such litigation is deleterious to the difficult process of reconciliation ongoing between the Aboriginal peoples of Flavelle, including the Appellant, and the Crown.

111. As Justices Iacobucci and Arbour explained in *Doucet-Boudreau*, such an order is not inconsistent with the judicial function; did not represent a "radical break with the past practices of the courts"; and did nothing to "undermine […] a stable basis for launching an appeal." Instead, it is a "creative blending of remedies and processes already known to the courts in order to give life to [rights]".

Doucet-Boudreau, *supra* para 40 at paras 61, 73, 80.

112. It is precisely this kind of purposive and creative approach to remedies that is appropriate in the ongoing process of reconciliation and renewal of the relationship between the Aboriginal and non-Aboriginal peoples of Flavelle. As recently reaffirmed by the Supreme Court of Canada, "an honourable interpretation of an obligation cannot be a legalistic one that divorces the words from their purpose. Thus, the honour of the Crown demands that constitutional obligations to Aboriginal peoples be given a broad, purposive interpretation." In the language of the Six Nations of the Iroquois Confederacy, the relationship between Aboriginal and non-Aboriginal peoples is akin to a silver chain that does not easily break, but becomes tarnished when not cared for. It is time to renew the polish and lustre of that bond.

Manitoba Métis, supra para 80 at para 77.
RCAP Highlights, *supra* para 45 at 21.

Part IV – Order Sought

113. The Appellant requests an order that the appeal be allowed, and an order in the nature of mandamus, directing the Respondent to resume funding on-reserve health programs and restart the implementation process of the *FAA*. The Appellant further requests that this Court retain supervisory jurisdiction for the length of the implementation schedule.

All of which is respectfully submitted.

Signed this 20th day of September, 2013

Jordan Katz	Ljiljana Stanić

Counsel for the Appellant

Schedule A: Table of Authorities

i. Case Law

Case Law	Paragraph
Alberta v Elder Advocates of Alberta Society, 2011 SCC 24, [2011] 2 SCR 261.	**98**
Blencoe v British Columbia (Human Rights Commission), 2000 SCC 44, [2000] 2 SCR 307.	**25**
Bonaparte v Canada (Attorney General), [2003] 64 OR (3d) 1, [2003] OJ no 1046 (QL) (Ont CA).	**93**
Canada (Attorney General) v PHS Community Services Society, 2011 SCC 44, [2011] 3 SCR 134.	**24, 48, 60, 65, 102, 104**
Chaoulli v Quebec (Attorney General), 2005 SCC 35, [2005] 1 SCR 791.	**33, 49, 51, 61, 66, 67, 68**
*Charkaoui v Canada, 2*007 SCC 9, [2007] 1 SCR 350.	**24**
Corbiere v Canada (Minister of Indian and Northern Affairs), [1999] 2 SCR 203, [1999] SCJ no 24 (QL).	**55, 78**
Delgamuukw v British Columbia, [1997] 3 SCR 1010, [1997] SCJ no 108 (QL).	**97**
Doucet-Boudreau v Nova Scotia (Minister of Education), 2003 SCC 62, [2003] 3 SCR 3.	**40, 99, 111**
Dunmore v Ontario (Attorney General), 2001 SCC 94, [2001] 3 SCR 1016.	**32**
Eldridge v British Columbia (Attorney General), [1997] 3 SCR 624, [1997] SCJ no 86 (QL).	**32, 47**

Case Law	Paragraph
Rodriguez v British Columbia (Attorney General), [1993] 3 SCR 519, 107 DLR (4th) 342.	**28, 50, 64, 66**
Ross River Dena Council Band v Canada, 2002 SCC 54, [2002] 2 SCR 816.	**79**
Schachter v Canada, [1992] 2 SCR 679, [1992] SCJ No 68 (QL).	**42, 62**
Singh v Minister of Employment and Immigration, [1985] 1 SCR 177, [1985] SCJ no 11 (QL).	**52**
Slaight Communications v Davidson, [1989] 1 SCR 1038, [1989] SCJ no 45 (QL).	**35**
Stoffman v Vancouver General Hospital, [1990] 3 SCR 483, [1990] SCJ no 125 (QL).	**31**
Suresh v Canada (Minister of Citizenship and Immigration), 2002 SCC 1, [2002] 1 SCR 3.	**63, 102**
United States v Burns, 2001 SCC 7, [2001] 1 SCR 283.	**35**
Victoria (City) v Adams, 2009 BCCA 563, 313 DLR (4th) 29.	**41, 49, 53**
Vriend v Alberta, [1998] 1 SCR 493, 156 DLR (4th) 385.	**47**
Wewaykum Indian Band v Canada, 2002 SCC 79, [2002] 4 SCR 245.	**71, 72, 79, 82, 87, 93, 95, 98, 105**

ii. Secondary Sources

Secondary Sources	Paragraph
David R Boyd, "No Taps, No Toilets: First Nations and the Constitutional Right to Water in Canada" (2011) 57(1) McGill LJ 81	**57**
Jamie Cameron, "Positive Obligations Under Sections 15 and 7," (2003) 20 SCLR (2d) 65	**43**
Lorne Sossin, "Towards a Two-Tier Constitution? The Poverty of Health Rights" in Colleen Flood, Kent Roach & Lorne Sossin, eds, *Access to Care, Access to Justice: The Legal Debate Over Private Health Insurance in Canada* (Toronto: University of Toronto Press, 2005) 161	**58**
Peter W Hogg, Constitutional Law of Canada, loose-leaf (consulted on 18 September 2013), 5th ed (Toronto: Carswell, 2007)	**61**
Matthew Rottier Voell, "PHS Community Services Society v Canada (Attorney General): Positive Health Rights, Health Care Policy, and Section 7 of the Charter", (2012) 31 WRLSI 41	**48**
Report of the Royal Commission on Aboriginal Peoples: Gathering Strength, vol 3 (Ottawa: Supply and Services Canada, 1996)	**50, 56, 70**
Royal Commission on Aboriginal Peoples, *People to People, Nation to Nation: Highlights for the Report of the Royal Commission on Aboriginal Peoples* (Ottawa: Supply and Services Canada, 1996)	**45, 112**
Substantive Issues Arising in the Implementation of the ICESCR, General Comment 14 (2000), CESCR, 22nd Sess, UN Doc E/C.12/2000/4 1	**37**

Schedule B: Legislation and International Instruments

***Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.**

Life, liberty and security of person

7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

***Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11**

Recognition of existing aboriginal and treaty rights

35. (1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.

***Indian Act*, RSC 1985, c I-5**

Reserves to be held for use and benefit of Indians

18. (1) Subject to this Act, reserves are held by Her Majesty for the use and benefit of the respective bands for which they were set apart, and subject to this Act and to the terms of any treaty or surrender, the Governor in Council may determine whether any purpose for which lands in a reserve are used or are to be used is for the use and benefit of the band.

Use of reserves for schools, etc.

18. (2) The Minister may authorize the use of lands in a reserve for the purpose of Indian schools, the administration of Indian affairs, Indian burial grounds, Indian health projects or, with the consent of the council of the band, for any other purpose for the general welfare of the band, and may take any lands in a reserve required for those purposes, but where an individual Indian, immediately prior to the taking, was entitled to the possession of those lands, compensation for that use shall be paid to the Indian, in such amount as may be agreed between the Indian and the Minister, or, failing agreement, as may be determined in such manner as the Minister may direct.

Regulations

73. (1) The Governor in Council may make regulations […]

(f) to prevent, mitigate and control the spread of diseases on reserves, whether or not the diseases are infectious or communicable;

(g) to provide medical treatment and health services for Indians;

(h) to provide compulsory hospitalization and treatment for infectious diseases among Indians; […]

Punishment

73. (2) The Governor in Council may prescribe the punishment, not exceeding a fine of one hundred dollars or imprisonment for a term not exceeding three months or both, that may be imposed on summary conviction for contravention of a regulation made under subsection (1)

By-laws

81. (1) The council of a band may make by-laws not inconsistent with this Act or with any regulation made by the Governor in Council or the Minister, for any or all of the following purposes, namely,

(a) to provide for the health of residents on the reserve and to prevent the spreading of contagious and infectious diseases; […]

Effective date of by-law

82. (2) A by-law made under section 81 comes into force forty days after a copy thereof is forwarded to the Minister pursuant to subsection (1), unless it is disallowed by the Minister within that period, but the Minister may declare the by-law to be in force at any time before the expiration of that period.

***Universal Declaration of Human Rights*, GA Res 217 (III), UNGAOR, 3d Sess, Supp No 13, UN Doc A/810 (1948) 71.**

Article 25

1. Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.

***International Covenant on Economic, Social and Cultural Rights,* GA Res 2200A (XXI), UNGAOR, 21st Sess, Supp No. 16, UN Doc A/6316 (1966) 49.**

Article 12

1. The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.