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 a minimum level of social services to the Birge-Carnegie First Nation; whether the government owed or breached a fiduciary duty to the Birge-Carnegie First Nation by not adequately funding certain programs; and the appropriate remedy if a breach is found.

FACTUM OF THE RESPONDENT

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Part I – Facts and Overview

Overview

1. Not every moral quandary the federal government faces is also a constitutional one. This is true with respect to the relationship between the federal government of Flavelle and Aboriginal peoples, despite its history and complexity.
2. The federal government of Flavelle was entitled to exercise its discretion in postponing the implementation of the *Falconer Accords Act* and changing the level of funding for on-reserve health care services. These actions do not give rise to the breaches the Appellant alleges.
3. Section 7 of the *Charter of Rights and Freedoms* does not provide a freestanding, positive right to health care. There are compelling reasons for this: it acknowledges the intended scope of *Charter* protections, and allows the government to make policy decisions in the best interests of all Flavellians, reflecting the current economic climate. Using section 7 to create positive obligations on the government does not cohere with the division of powers in the Flavellian political system.
4. The exercise of a public law duty does not engage the Crown's fiduciary relationship towards Aboriginal peoples. Furthermore, there is no cognizable Aboriginal interest in health care. Health care is a distinctly Flavellian interest and common to all citizens; it is not uniquely aboriginal.
5. The judiciary is not in a position to determine the appropriate level of funding for health care services on a reserve. This question is a policy issue, not a constitutional one. It is an issue for the executive and the legislature—the democratically elected bodies of the Flavellian government—to decide.

Factual Background

6. In response to public protests and growing concern over the living conditions of on-reserve Aboriginal communities in 2005, the federal government of Flavelle commissioned a task force of federal and provincial leaders to brainstorm solutions. The task force devised a rough framework agreement to address health care problems on reserves entitled the Falconer Accords.

   Problem at paras 2-3.

7. The Accords contained no specific government commitment to implement or fund health care services, but federal and provincial leaders were lauded for their efforts. They received accolades from aboriginal experts, politicians, and aboriginal leaders alike.

   Problem, *supra* para 6 at para 3.

8. The federal government demonstrated its commitment to fulfilling the Falconer Accords by proposing the *Falconer Accords Act* ("the ***FAA***") in 2006. The *FAA* recognized the importance of the guidelines set out in the Accords, and vested in the Governor-in-Council discretion to develop and fund programs on reserves in accordance with those guidelines.

   Problem, *supra* para 6 at paras 4-6.

9. The *FAA* recognized the history of good faith efforts by the Flavellian government to improve health care on reserves through the Federal Indian Health Policy, adopted in 1979, and the Falconer Accords. The preamble to the *FAA* reads:

> The Government of Flavelle is committed to developing the health and social welfare of Aboriginal persons in Flavelle, as part of its responsibilities to promote and preserve the interests of all Flavellians in a progressive and balanced manner.

   Problem, supra para 6 at para 5.

10. The federal government aimed to initiate the implementation of the *FAA* in 2008. Halfway through that year, a worldwide financial crisis caused the global economy to contract and impacted the fiscal situation of nations across the globe. In the 2008 federal budget, welfare and social assistance programs across Flavelle were cut by an average of 10 per cent. Non-essential health care programs on reserves were cut by 30 per cent.

    Problem, *supra* para 6 at paras 7-11.

11. In accordance with the *FAA*'s objective of preserving Flavellian interests in a "progressive and balanced manner", the Governor-in-Council exercised his discretion and decided not to begin implementation of the *FAA* in 2008. Without a clear time horizon for global or Flavellian economic recovery, implementation of the programs was postponed indefinitely.

    Problem, *supra* para 6 at para 9.

12. The programs that suffered from budget cuts have not yet been reinstated in light of fiscal challenges and competing priorities facing elected public officials. In 2011, the Member of Parliament for the riding of Birge-Carnegie, a member of the governing party that instituted the budget cuts, was re-elected by a margin ten per cent greater than in the previous election.

    Problem, *supra* para 6 at para 16.

Judicial History

1. Trial Judgment

13. Using the reserve community of Birge-Carnegie as a representative plaintiff, the Assembly of First Nations of Flavelle (the "**Appellant"**) brought an action against the Minister of Aboriginal Affairs and Northern Development (the "**Respondent"**), challenging the government's failure to provide "decent living standards". They alleged that the

government's actions constituted a breach of section 7 of the *Charter of Rights and Freedoms* (the **"*Charter*"**) and a breach of the Crown's fiduciary duty to Aboriginal peoples.

Problem, *supra* para 6 at paras 17-18.

14. At trial, Justice Hertzman found that although section 7 of the *Charter* was meant to protect against "intrusions" upon liberty, a positive obligation to provide social services still existed. She found that the government's actions resulted in a violation of the plaintiff's interests in life, liberty, and security of the person. She then engaged in an analysis of the benefits that accrued to Flavellian society as a whole as a result of the budget cuts. She determined that these benefits were disproportionately small compared to the effects on Aboriginal health.

Problem, *supra* para 6 at paras 24-25.

15. Justice Hertzman concluded that the discretionary decision to postpone funding pursuant to the *FAA* breached the Crown's fiduciary obligation to Aboriginal communities, even if health care was not a distinctly aboriginal interest. She recognized that she was imposing a "novel duty" on the Crown.

Problem, supra para 6 at paras 26-27.

16. As a remedy, Justice Hertzman issued a declaration that section 7 and the Crown's fiduciary duty had been breached.

Problem, *supra* para 6 at para 28.

2. Court of Appeal Judgment

17. A majority of the Court of Appeal of Falconer reversed the trial judgment, concerned with the trial judge's exercise in "flawed judicial activism".

Problem, supra para 6 at para 29.

18. Justice Grossman, writing for the majority, refused to overturn earlier section 7 jurisprudence, and held that the government's refusal to implement the *FAA* and fund health

services at a certain level did not constitute a deprivation under section 7. She declined to engage in the trial judge's cost-benefit analysis of the government's budget, and found no breach of the principles of fundamental justice.

Problem, *supra* para 6 at para 30.

19. On the matter of fiduciary obligations, Justice Grossman held that the mere fact that the plaintiff was Aboriginal did not mean that all of its interests were cognizable aboriginal interests. Noting that similar claims for social assistance have been rejected, she refused to expand the scope of fiduciary obligations beyond their existing boundaries.

Problem, *supra* para 6 at para 31.

20. In dissent, Justice Schiff encouraged the Court to usher in a "new generation" of *Charter* jurisprudence. He affirmed the trial judge's ruling on section 7 and fiduciary obligation grounds, but held that she should have gone further by implementing a remedy in the form of a mandatory injunction.

Problem, supra para 6 at para 32.

Part II – Issues on Appeal

21. 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 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 government's decisions do not give rise to a breach of section 7

22. Section 7 of the *Charter* is not engaged in this context, as the alleged violations do not relate to the state's administration of justice. The state did not actively deprive the Appellant of life or security of the person. The rights sought by the Appellant are positive in nature and fall outside the scope of section 7.

23. Even if there was a deprivation, the government's exercise of authority did not violate the principles of fundamental justice. Judicial intervention in this case would fundamentally alter the meaning and scope of *Charter* rights, with negative collateral consequences.

24. Section 7 describes the parameters of acceptable government conduct. It reads:

> 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.

Canadian Charter of Rights and Freedoms as found in *Constitution Act, 1982*, being Schedule B to the Canada Act 1982 (UK), 1982, c11, s7 [*Charter*].

25. The Appellant bears the burden of proving: (i) a deprivation of life, liberty or security of the person, and (ii) that the deprivation is not in accordance with the principles of fundamental justice.

Gosselin v Quebec (Attorney General), 2002 SCC 84 at para 205, [2002] 4 SCR 429 [*Gosselin*].

A. The Minister's position is not captured by the scope of section 7

26. The budgetary and policy decisions made pursuant to the *FAA* are unrelated to the administration of justice. Section 7 of the *Charter* captures government actions "that occur as a result of an individual's interaction with the justice system and its administration". Even if not in an adjudicative context, the state must be enforcing or securing compliance with the

law for section 7 to apply. In this case, the government has not implemented a law or policy that in any way engages an individual's interaction with the justice system in this case.

New Brunswick (Minister of Health and Community Services) v G (J), [1999] 3 SCR 46 at para 65, 177 DLR (4^{th}) 124 [*G (J)*].

27. No member of the Birge-Carnegie First Nation is facing a penal consequence or otherwise interacting with a state representative as a result of the *FAA*. This stands in stark contrast to cases where section 7 was held to apply, where one could have faced a consequence for performing an abortion, seeking private health insurance, or erecting a shelter in public overnight. The rare judicial decisions that have compelled government action, such as providing counsel in a child custody hearing, involved a state-initiated proceeding in which the administration of justice played a fundamental role.

R v Morgentaler, [1988] 1 SCR 30, 44 DLR (4th) 385 [*Morgentaler*].
Chaoulli v Quebec (Attorney General), 2005 SCC 35, [2005] 1 SCR 791 [*Chaoulli*].
Victoria (City) v Adams, 2009 BCCA 563, 313 DLR (4th) 29.
G (J) supra para 26.

B. Section 7 does not give rise to a positive obligation

28. There is no right to health care under section 7. Indeed, the Supreme Court has clearly stated: "The *Charter* does not confer a freestanding constitutional right to health care". The fact that funding is needed in this case to optimize health care delivery, and has not been provided, is insufficient to support a *Charter* claim.

Chaoulli, supra para 27 at para 104.

29. The *Charter* is meant to protect citizens of Flavelle from government conduct, rather than to confer positive rights. Dickson J (as he then was) clearly articulated the purpose of the *Charter* in *Hunter v Southam*: it is "intended to constrain governmental action inconsistent with [*Charter*] rights and freedoms …".

Canada (Combines Investigation Acts, Director of Investigation and Research) v Southam Inc, [1984] 2 SCR 145 at para 19, 11 DLR (4th) 641 [emphasis added].

30. Proposed amendments to the *Charter* included language that would have guaranteed "adequate social services and benefits to ensure that all individuals resident in Canada have reasonable access to housing, food and other basic necessities". It would be redundant for such a change to be proposed, and put to Canadian people in a vote, if these guarantees were already captured within the ambit of section 7.

Consensus Report on the Constitution: Charlottetown, August 28, 1992, Final Text Part I, s. B(4).

31. The federal government is not under an obligation to ensure each citizen of Flavelle enjoys a certain standard of living when receiving social welfare payments. The Supreme Court of Canada determined as much in *Gosselin*. It would be logically inconsistent with the holding in *Gosselin* to suggest that the government is constitutionally compelled to provide an essential service, like health care, which is closely linked with a certain standard of living.

Gosselin, supra para 25.

C. The Minister's position does not constitute a deprivation

i. The Appellant must prove a deprivation

32. The right to life, liberty, and security of the person is not freestanding. *Charter* jurisprudence has consistently held that the only *Charter* entitlement arising from section 7 is the right not to be deprived of life, liberty and security of the person.

Operation Dismantle Inc v the Queen, [1985] 1 SCR 441 paras 98-100, 18 DLR (4th) 481.

33. The trial judge erred in holding that the Appellant suffered from state-imposed deprivation or hardship. While the provision of social programs by the government may be viewed as suboptimal, the government is voluntarily providing these services as a matter of policy. In contrast, the Supreme Court of Canada has found section 7 violations only where the state

has "intervene[d]", and claimants' rights to be "free from state interference" are violated. Here, there is no governmental intervention.

Morgentaler, supra para 27 at para 121.

Rodriguez v British Columbia (Attorney General), [1993] 3 SCR 519 at para 136, 107 DLR (4th) 342 [*Rodriguez*].

ii. The availability of alternatives precludes the finding of a deprivation

34. The Minister is not standing in the way of the Appellant and any self-initiated activity that would improve living conditions or health standards. In *Chaoulli*, the only successful section 7 case directly pertaining to the provision of health care services, McLachlin CJ noted: "[t]he appellants do not seek an order that the government spend more money on health care […]. They only seek a ruling that … they should be allowed to take out insurance to permit them to access private services". In other words, the government is not entitled to enact prohibitions that increase the risk of death.

Chaoulli, supra para 27 at para 103.

35. There is no legislative scheme or statutory provision preventing the Birge-Carnegie First Nation from implementing the programs to which funding has been cut. Section 73 of the *Indian Act* states that the Governor-in-Council may make regulations "to provide medical treatment and health services for Indians". This provision does not correspond to a prohibition on any interested party to create mental health, addiction, or other supplementary social programs. All other Flavellian jurisdictions' health care systems are managed by provincial governments, yet the implementation of youth suicide prevention initiatives, for example, can be undertaken by anyone.

Indian Act, RSC 1985, c I-5, s 73(1).

36. The fact that the Birge-Carnegie First Nation may not practically have access to resources to seek service alternatives is not relevant as a matter of law. In *Wynberg v. Ontario*, the

Ontario Court of Appeal held that the financial limitations faced by parents seeking to provide for their autistic children did not play a role in the section 7 analysis, even though funds were needed to provide "any hope" to the children becoming "fully realized individuals".

Wynberg v Ontario (2006), 269 DLR (4th) 435 at para 212, 82 OR (3d) 561 (CA).

iii. The Crown's relationship with Aboriginals does not create a *de facto* deprivation

37. The deprivation must result directly from the state in order to engage section 7. There must be a "sufficient causal connection" between the state conduct and the prejudice suffered. It cannot be said that the consequences faced by the Birge-Carnegie First Nation would not have occurred "but for" the Minister's decisions. Indeed, if the *FAA* had never been enacted, the Appellant would be in the same position, if not a worse one, than it is now.

Blencoe v British Columbia (Human Rights Commission), 2000 SCC 44 at para 60, [2000] 2 SCR 307.

38. The Crown's historic responsibility for systemic negative conditions on aboriginal reserves is not enough to constitute a deprivation under section 7. The government is not blameless for the struggles of aboriginal communities, but this cannot mean that its actions have violated section 7 by default. Otherwise, a *Charter* breach would occur every time an aboriginal community experienced lower life expectancy or higher rates of psychological harm than the rest of Flavelle; there would always be partial blame attributed to the Crown's historic relationship with Aboriginal peoples.

39. Rather than resort to a judicial enactment of a new section 7 right that applies only to Aboriginal peoples, these matters are best left to Parliament, which has legislated specific constitutional and Criminal Code provisions that consider the unique circumstances of Aboriginal peoples.

Charter, *supra* para 24 at s 25.

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

Criminal Code, RSC 1985, c C-46, s. 718.2(e).

40. Courts have not accepted historical suppression of aboriginal communities as establishing a causal connection between the harm alleged in this case and a deprivation under section 7. In *Grant v. Canada (Attorney General)*, a First Nations community was relocated to housing allegedly containing toxic mould. In striking the plaintiff's section 7 claim, which relied in part on the Crown's *sui generis* relationship with on-reserve Indians, the motions judge held: "The claim that s. 7 imposes a duty on the Crown to provide housing, to protect the health of on-reserve individuals, and to respond adequately to situations where this is threatened, is obviously far-reaching".

Grant v Canada (Attorney General) (2010), 77 OR (3d) 481 at para 55, 258 DLR (4th) 128 (ONSC) [emphasis added].

41. Even when the government sets in motion a series of events that eventually leads to a risk to health, a causal connection is not established. For example, deportation to a country where an individual was unlikely to receive cancer treatment did not constitute a breach of section 7. Many, if not all, of the government's policy decisions can impact the health and wellbeing of one or more groups of individuals in Flavelle. But this does not represent a sufficient causal nexus to constitute a deprivation.

Laidlow v Canada (Minister of Citizenship and Immigration), 2012 FC 144, 404 FTR 304.

iv. Postponing implementation of legislation is not a deprivation

42. There is neither a statutory nor a constitutional obligation on the federal government to continue measures it has undertaken voluntarily, even where those measures would enhance or improve values enshrined in the *Charter*.

Lalonde v Ontario (Commission de restructuration des services de santé) (2001), 56 OR (3d) 505 at para 94 (CA), 2001 OJ no 4767 (QL) [*Lalonde*].

43. The language of the *FAA* is explicit: its implementation is discretionary. A legal obligation on the federal government to fulfill its standards does not arise merely because the Falconer Accords became law through the enactment of the *FAA*. Failure to implement discretionary measures in a certain period of time cannot constitute a deprivation under section 7.

44. Where there is no constitutional right requiring the government to act, there is no constitutional right to force the government to continue measures it has voluntarily undertaken. This is true even where those measures enhance the values enshrined in the *Charter*.

Lalonde, supra para 42 at para 94.

v. Cutting funding to programs is not a deprivation

45. Creating government services that assist certain segments of society does not confer upon those segments a constitutional right not to be deprived of those services. If the reverse were true, any reduction in government funding from an initially authorized level or change in government policy could ground a section 7 claim. Yet this is precisely the position of the Appellant: it claims that once supplementary health programs were put in place, any cut in funding constitutes a breach of section 7.

46. A finding in favour of the Appellant on this issue would effectively create a group of statutes that are constitutionally entrenched. The Supreme Court of Canada has previously rejected this result. As recognized by Bastarache J in *Dunmore v. Ontario (Attorney General)*, by undertaking a policy initiative the government does not deprive itself of the right to change policies or repeal protective schemes. To hold otherwise would be to create a broad class of statutes that would enjoy the status of a constitutional guarantee and be immune to repeal.

Dunmore v Ontario (Attorney General), 2001 SCC 94 at para 9, [2001] 3 SCR 1026.

47. Moral obligations to provide aid, if they exist, do not rise to legal or constitutional ones. In *Masse v. Ontario*, for example, a 21.6 per cent cut in social assistance benefits was legally acceptable: "[s]. 7 does not provide the applicants with any legal right to minimum social assistance … s. 7 does not confer any affirmative right to governmental aid". While the cuts in this case were greater, the principle remains intact.

Masse v Ontario (Ministry of Community & Social Services) (1996), 134 DLR (4th) 20 at para 350-351, 35 CRR (2d) 44, (Div Ct).

48. The claim that the current state of affairs violates Aboriginal peoples' liberty interests by compelling them to seek certain services elsewhere does not withstand scrutiny. Choosing to seek health care elsewhere is a personal, not a *Charter*-protected, choice. When an Ontario resident was refused a transplant that was medically necessary to save his life and subsequently sought the treatment in England for $450,000, the government's refusal to reimburse health care costs was held not to violate section 7, even though the treatment saved his life.

Flora v General Manager, Ontario Health Insurance Plan, 2008 ONCA 538, 91 OR (3d) 12.

vi. The Appellant's definition of a deprivation is unworkable

49. The Appellant's submission that the government is compelled to provide "decent living standards" fails to delineate a workable or discernible standard. It is not clear that the mental health and addiction programs in question fall within the scope of basic health care services. In fact, it is not clear in a broad sense what kinds of health care services are required for "decent living standards".

50. The Appellant also fails to provide a meaningful definition of an acceptable minimum level for "decent living standards". An increased risk to health, without more, is insufficient to

violate section 7. It cannot be that, if the government does not behave in a manner to minimize health risks to the lowest scientifically possible level, a *Charter* violation occurs. Thus, the Appellant does not answer the question of Binnie and Lebel JJ in *Chaoulli*: "What are the benchmarks … how many MRIs does the Constitution require"?

Chaoulli, supra para 27 at para 163.

D. The Minister's actions do not violate principles of fundamental justice

51. The onus is on the Appellant to demonstrate that the deprivation, if any, violates a principle of fundamental justice.

Gosselin, *supra* para 25 at para 205.

i. State objectives play an amplified role in the analysis

52. Where there is a low threshold for section 7 to be engaged, a correspondingly greater deference to the analysis of principles of fundamental justice should arise.

53. Courts and commentators agree that the analysis of whether a state deprivation is in accordance with the principles of fundamental justice under section 7 in many ways mirrors the relevant considerations under section 1. The government's legislative methods and objectives are scrutinized through principles such as gross disproportionality and over-breadth rather than through the *Oakes* test. The symmetry between the principles of fundamental justice and section 1 has resulted in section 1 playing a limited role in section 7 jurisprudence.

Aileen Kavanagh, "Special Issue – The Role of the Courts in Constitutional Law: Judicial Restraint in the Pursuit of Justice" (2010) 60 Univ. of Toronto L.J. 23.

R v Oakes, [1986] 1 SCR 103, 26 DLR (4th) 200.

54. Where there is a low threshold for engaging section 7, there should be correspondingly greater deference to the government in the analysis of the principles of fundamental justice.

The state of public finances is relevant to this analysis. While budgetary constraints cannot justify a *Charter* breach, "the proper distribution of scarce resources must be weighed in a s. 1 analysis". The same is true of the analysis of principles of fundamental justice.

McKinney v University of Guelph, [1990] 3 SCR 229 at para 71, 76 DLR (4th) 545 [*McKinney*].

Irwin Toy Ltd v Québec (Attorney General), [1989] 1 SCR 927 at para 80, 58 DLR (4th) 477 [*Irwin Toy*].

55. The Supreme Court of Canada has consistently held that the government should be afforded a wide margin of discretion when determining the optimal allocation of resources. In *NAPE*, Binnie J. indicated that "the scope of the margin will be influenced, amongst other things, by the scale of the financial challenge confronting the government and the size of expenditure in relation to the financial challenge." The same consideration is relevant here.

Newfoundland (Treasury Board) v NAPE, 2004 SCC 66 at para 84, [2004] 3 SCR 381.

ii. The deprivation, if any, is not grossly disproportionate

56. The Minister's decisions are not grossly disproportionate to the compelling governmental objectives those decisions fulfill. Gross disproportionality arises when a law or state action is "so extreme" that it is "*per se* disproportionate to any legitimate government interest." The standard is not one of mere disproportionality, but rather gross disproportionality, which in the words of the Supreme Court of Canada, gives "broad latitude" to legislators.

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

R v Malmo-Levine, 2003 SCC 74 at para 175, [2003] 2 SCR 571.

57. The purpose of the *FAA* requires an analysis of the impact of government decisions on all Flavellians. In evaluating a government action, this Court must consider the "purposes of the Act as a whole" and the "broader scheme of the legislation". The preamble to the *FAA* explicitly discusses its objective to "promote and preserve the interests of all Flavellians in a progressive and balanced manner".

Vriend v Alberta, [1998] 1 SCR 493 at para 111, 156 DLR (4th) 385.

58. Facing a fiscal emergency of considerable magnitude, the government of Flavelle's actions were proportionate with the state objective. The rich and distinctive culture of aboriginal communities necessarily means that there are a large number of geographically dispersed reserves, many of which have a very small number of residents. Rather than implement supplementary health programs in every single reserve, at a significant fixed cost, the government has decided to temporarily allocate these resources elsewhere. The government did so in a balanced manner, and thus acted in accordance with its legislative objective.

iii. The deprivation, if any, is not arbitrary

59. The Minister's actions, in the midst of the greatest financial crisis since the advent of the *Charter*, were not arbitrary. A law, policy or program is arbitrary where "it bears no relation to, or is inconsistent with, the objective that lies behind [it]". Even if the sole purpose of the *FAA* were to promote aboriginal health, the postponement and scaling back of services deemed as non-essential are not inconsistent with this objective, despite the fact that such actions may not further the objective.

Rodriguez, *supra* para 33 at para 203.

60. It is well established that "rules that endanger health arbitrarily do not comply with the principles of fundamental justice". In this case, there is no rule in place that is creating added risk to health. Governments worldwide have, in the midst of the unprecedented contraction in the global economy, taken steps to reduce public spending in areas that are important to its citizens' livelihood.

Chaoulli, *supra* para 27 at para 133.

61. The Minister's actions are consistent with the conduct of other countries in comparable circumstances. A survey of OECD countries, an appropriate comparator group, indicates that

member countries have reduced government deficits by 48 per cent on average, in large part as a result of austerity measures. Cutting funding to services deemed non-essential by 30 per cent is, at the very least, reasonable. This Court is permitted to look to the conduct of other liberalized democracies in determining whether or not an action is arbitrary, as the Supreme Court of Canada did when examining the arbitrariness of assisted suicide provisions.

OECD, *Economics: Key Tables from OECD - Government surplus/deficit as a percentage of GDP*, online: http://www.oecd-ilibrary.org/.

Rodriguez, supra para 33 at paras 163-167.

62. The fact that the Minister's decisions entailed complex considerations involving long-term strategic choices militates against a finding of arbitrariness. The Supreme Court of Canada has indicated that deference must be shown to the executive branch of government, namely in situations in which the government is required to "mediate between competing interests and to choose between a number of legislative priorities" in light of "new social, economic, or political conditions".

Irwin Toy, supra para 54 at para 74.

63. The Minister, acting on behalf a government administering a sizable budget deficit, is in the best position to evaluate the trade-offs to be made and the consequences of not cutting the social programs in question. Such an evaluation may entail reducing spending in other critical areas. This holistic decision-making process cannot be viewed as arbitrary.

E. The Appellant's interpretation of section 7 undermines legislative intent

64. A finding that the Minister's decisions represented constitutional violations would allow economic rights, explicitly excluded from the *Charter*, to enter through the backdoor. The decision to exclude the protection of property from the *Charter*, despite its inclusion in other worldwide constitutions, was an explicit departure from the framework under the Canadian

Bill of Rights, which included the protection of "life, liberty, security of the person and the enjoyment of property". Silence on the matter of property is indicative of legislative intent to exclude economic liberty and security from the ambit of *Charter* protection.

US Const amend V, XIV.
Canadian Bill of Rights, RSC 1985, App III, s 1(a).

65. Previous section 7 decisions have protected rights that money cannot buy: for example, the right to be permitted to purchase insurance, the right to silence, and the right not to be subject to overbroad and disproportionate laws. Indeed, no legal right in the *Charter*, ranging from the right not to be arbitrarily detained to the right against self-incrimination, can be purchased.

Chaoulli, supra para 27.
R v Hebert, [1990] 2 SCR 151, 47 BCLR (2d).
R v Heywood, [1994] 3 SCR 761, 120 DLR (4th) 348.

66. The Appellant seeks to change this by demanding that the government pay for services. Accepting the Appellant's interpretation of section 7 forces courts to act as a super-legislature, creating a constitutional Trojan horse that allows litigants to re-frame their unsuccessful economic arguments in the language of "liberty" and "security of person" violations.

67. The legislature is entitled to the last say where, in the context of limited resources, some programs must be excluded or cut back. For example, the Court of Appeal of Nova Scotia has held that exclusion of treatment for disability, while unfortunate, is legally permissible when it is necessary to provide the best possible *overall* health care coverage in the context of limited resources. The Supreme Court of Canada has recognized that it is legitimate for the government to expect flexibility when making decisions between various groups in need of funding if its view is towards the overall wellbeing of its mandate in the public service.

As any added investment in programs pursuant to the *FAA* would require trade-offs elsewhere in government spending, the Minister's decision is entitled to deference.

Cameron v Nova Scotia (Attorney General) (1999), 177 DLR (4th) 611, 204 NSR (2d) 1 (NSSC).
McKinney, supra para 54 at para 131.

68. Finding a violation based on the government's failure to implement the *FAA* would have a chilling impact on future social benefit schemes. Although discussing an alleged section 15 violation, Sopinka J's holding in *Egan v. Canada* rings true in this context:

> It is not realistic for the Court to assume that there are unlimited funds to address the needs of all. A judicial approach on this basis would tend to make a government reluctant to create any new social benefit schemes because their limits would depend on an accurate prediction of the outcome of court proceedings …

If announcing a change in policy, and enacting legislation to give effect to that policy, always gave rise to a legal obligation, the government would exhibit reluctance to engage in dialogue with communities or enact social policies to begin with.

Egan v Canada, [1995] 2 SCR 513 at para 104, 124 DLR (4th) 609.

69. The Appellant's case rests not on a constitutional issue, but on a disagreement with government policy. Interference with this policy is best exercised through democratic institutions, rather than through the judiciary.

Issue 2: The government's actions do not give rise to fiduciary obligations to Aboriginal peoples

70. The federal government was entitled to use its discretion to cut non-essential services and not to implement the *FAA*. The exercise of this discretion did not give rise to fiduciary obligations to Aboriginal peoples in Flavelle.

71. The Crown stands in a fiduciary relationship with Aboriginal communities; however, the Supreme Court of Canada has clearly indicated that not every aspect of a fiduciary

relationship will give rise to a fiduciary obligation. The content of the fiduciary relationship depends on its context.

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

Quebec (Attorney General) v Canada (National Energy Board), [1994] 1 SCR 159 at para 34, [1994] SCJ no 13 (QL).

72. A fiduciary duty on the Crown to Aboriginal peoples may arise in two contexts. First, it may arise as a result of the Crown assuming discretionary control over specific aboriginal interests. In these cases, the focus of the inquiry is on the particular aboriginal interest that is the subject matter of the dispute. The content of the fiduciary duty will vary with the nature and importance of the interest. Second, a fiduciary duty may arise from an undertaking. It is undisputed that there was no undertaking in this case.

Manitoba Metis Federation Inc v Canada (Attorney General), 2013 SCC 14, 291 ManR (2d) 1 at para 49 [*Manitoba Metis*].

Haida Nation v British Columbia (Minister of Finance), 2004 SCC 73, [2004] 3 SCR 511 at para 18.

Wewaykum Indian Band v Canada, 2002 SCC 79, [2002] 4 SCR 245 at paras 83, 86 [*Wewaykum*].

A. The Crown's exercise of discretion in the course of its public law duties should not give rise to a fiduciary obligation to Aboriginal peoples

73. The federal government's exercise of discretion in the course of its public law duties does not give rise to a fiduciary obligation on the part of the Crown to Aboriginal peoples. The decisions not to implement the *FAA* and to cut funding to non-essential health care services were exercises of discretion in the course of the federal government's public law duty to create a budget for all federal programs. It was obliged to do so with economic realities in mind.

74. Fiduciary duties rarely arise in the context of the Crown exercising its public law duties. As Dickson J., as he then was, stated in *Guerin*:

> It should be noted that fiduciary duties generally arise only with regard to obligations originating in a private law context. Public law duties, the performance of which requires the exercise of discretion, do not typically give rise to a fiduciary relationship. As the "political trust" cases indicate, the Crown is not normally viewed as a fiduciary in the exercise of its legislative or administrative function.

The Supreme Court of Canada unanimously approved of this paragraph of *Guerin* in *Alberta v Elder Advocates of Alberta Society*.

Guerin, supra para 71 at para 104 [emphasis added].

Alberta v Elder Advocates of Alberta Society, 2011 SCC 24 at para 37, [2011] 2 SCR 261 [*Elder Advocates*].

75. Cases where fiduciary obligations on the Crown to Aboriginal peoples were recognized are grounded in analogy to private law. The Supreme Court of Canada in *Guerin* explicitly analogized the aboriginal interest in land, and the Crown's assumption of control over it, to a private law duty. The analogy cannot be extended to the provision of health care services. There is no private law duty on behalf of the government to fund health care services.

Guerin, *supra* para 71.

76. Imposing a fiduciary duty on the Crown in this case would force it to forego its public law duties any time those duties conflicted with an aboriginal group's interest in health care. The law of fiduciary duties in the aboriginal context cannot be interpreted to force the Crown to forego its public law duties when those duties conflict with aboriginal interests, unless there are legislative or constitutional provisions to the contrary. There are no such provisions in this case.

Fairford First Nation v Canada (Attorney General), [1999] 2 FC 48 at para 67 (FCTD), [1998] FCJ no 1632 (QL).

Tuplin v Canada (Indian and Northern Affairs), 2001 PESCTD 89 at para 56, 207 Nfld & PEIR 292 (PEI Sup Ct., Trial Div.).

77. If the Crown's fiduciary duty to a specific group is said to flow from a statute, the language of that statute must clearly support it. It is not sufficient that a public authority is granted

discretionary power to affect a group's interests. The *FAA* does not compel the Crown to forego its public law duties when such duties conflict with the interests of aboriginal groups: its implementation is discretionary in order to prevent this outcome.

KLB v British Columbia, 2003 SCC 51 at para 40, [2003] 2 SCR 403.

Authorson v Canada (Attorney General) (2000), 53 OR (3d) 221 at para 28 (Ont. SCJ), [2000] OJ no 376 (QL), aff'd (2002), 58 OR (3d) 417 at para 73, 215 DLR (4th) 496 (CA), rev'd on other grounds, 2003 SCC 39, [2003] 2 SCR 40.

Elder Advocates, *supra* para 74 at para 45.

78. There are no constitutional provisions compelling the Crown to forego its public law duties in favour of the interests of aboriginal groups. Section 7 of the *Charter* does not impose positive obligations on the federal government to provide certain levels of funding for aboriginal health care.

79. Imposing a duty on the Crown to enact legislation that was intended to be discretionary, and to fund non-essential programs at a certain level, fundamentally conflicts with the Crown's responsibility to act in the broader public interest. The nature of a fiduciary obligation—a duty of utmost loyalty to the beneficiary—is incompatible with the exercise of public law duties in the context of policy implementation and funding decisions.

Sagharian (Litigation Guardian of) v Ontario (Minister of Education), 2008 ONCA 411 at paras 47-49, [2008] OJ No 2009 (QL).

Elder Advocates, *supra* para 74 at para 44.

B. There is no specific, cognizable aboriginal interest capable of giving rise to a fiduciary duty

80. Even if the Crown's exercise of discretion in the course of its public law duties is capable of giving rise to a fiduciary obligation to Aboriginal peoples, there was no such obligation on the facts of this case. The elements of the test from *Wewaykum* are not met. First, there is no specific, cognizable aboriginal interest. Second, the Crown did not assume discretionary

control over the aboriginal interest in a way that created responsibility in the nature of a private law duty.

Wewaykum, *supra* para 72 at para 85.

i. The aboriginal interest in living on reserves does not meet the test for an aboriginal right under section 35

81. The Appellant frames the interest that gives rise to a fiduciary duty in this case as the Aboriginal peoples' interest in living together, as a community, on reserve lands. This interest imposes on the federal government a fiduciary obligation to fund health care services, as without health care, Aboriginal peoples' ability to live together on remote reserves is compromised.

Factum of the Appellant at para 59.

82. Living together is neither an aboriginal right under section 35 nor a cognizable aboriginal interest. The nature of the interest the Appellant claims is too wide to fit within the test for aboriginal rights from *Van der Peet*: "in order to be an aboriginal right an activity must be an element of a practice, custom or tradition integral to the distinctive culture of the aboriginal group claiming the right." Living together as a community certainly helps, and has helped, make an Aboriginal society what it is today—but this is also true of any cultural community. It is not distinctively aboriginal.

R v Van der Peet, [1996] 2 SCR 507 at para 46, [1996] SCJ No 77 (QL) [*Van Der Peet*].
R v Sappier; R v Gray, 2006 SCC 54 at para 45, [2006] 2 SCR 686 [*Sappier*].

83. Allowing the Appellant's claim would empty the test from *Van der Peet* and its elaboration in *Sappier* of content. The aboriginal rights that the Supreme Court of Canada has recognized in the past are not common to non-aboriginal cultural communities throughout Canada. Rather, they are specific practices, customs, or traditions that have a distinctive aboriginal element. Living together as a people is not an interest specific to the Aboriginal

peoples of Flavelle. It is common to cultural communities throughout Flavelle, and indeed, throughout the world.

84. The effects of recognizing this right are far-reaching and overbroad. The right, as opposed to the interest, being litigated in this case would only apply to the representative plaintiff, the Birge-Carnegie First Nation—Aboriginal rights must be adjudicated on a community-by-community basis. But the wide scope of the right being claimed would effectively allow any aboriginal community in Flavelle living in a rural and difficult-to-access part of the country to argue it also applies to them.

Van der Peet, *supra* para 82 at para 69.

85. Should the Appellant's claimed right be recognized, the federal government would effectively be forced to fund any and all services on reserves without which members of the community might choose to leave. In accounting for the aboriginal community's perspective on its rights, the Court must also remember that the rights will have force and effect within the mainstream Flavellian legal system. Compelling the federal government to fund specific services at a specific level is incompatible with the Crown's public law duties to consider the interests of all Flavellians when creating a budget and making policy decisions.

ii. The aboriginal interest in living as a community on reserves is not cognizable or specific enough to give rise to a fiduciary duty

86. The Appellant does not succeed in establishing that the aboriginal interest in living as a community on reserves gives rise to a fiduciary duty. Two elements must be established: there must be a cognizable, uniquely aboriginal interest, and there must be discretionary control by the Crown that creates responsibility in the nature of a private law duty.

Wewaykum, *supra* para 72 at para 85.

87. Aboriginal peoples' interest in living as a community on reserves is not distinctly aboriginal. The Supreme Court of Canada recently confirmed in *Manitoba Metis Federation* that "the interest (title or some other interest) must be distinctly Aboriginal." In *Wewaykum*, the Supreme Court cautioned that "the fiduciary duty of the Crown does not exist at large but in relation to specific Indian interests." The fact that it is Aboriginal peoples living on reserves, and not non-Aboriginal peoples, is not enough to make the nature of the interest distinctly aboriginal.

Manitoba Metis, *supra* para 72 at para 53.
Wewaykum, *supra* para 72 at para 81.

88. The same argument that is fatal to the Appellant's claim under section 35 is fatal to the claim for a fiduciary duty. The interest claimed is overbroad. Living together as a community is neither distinctly aboriginal, nor a specific Indian interest. It is a deeply rooted part of human nature, and common to all people.

89. Were this Court to recognize the Appellant's claimed interest as distinctly aboriginal and cognizable, the fiduciary relationship between the Crown and Aboriginal peoples in Flavelle would exist at large. There would be no limit on the scope of the Crown's fiduciary duty, as any action that even mildly threatened the ability of the community to remain together would breach its obligations. This result was precisely what Binnie J. sought to prevent in *Wewaykum* by limiting the fiduciary duty to specific Indian interests.

Wewaykum, *supra* para 72 at para 81.

iii. There is no cognizable aboriginal interest in funding or setting standards for health care services on reserves

90. There is no cognizable, uniquely aboriginal interest in the funding and implementation of health care programs on reserves. Aboriginal peoples certainly do have a practical interest in

health care; however, the nature of that practical interest is not distinctly aboriginal. Rather, Aboriginal peoples have the same interest in health care as other Flavellians.

91. The need for health care services on reserves does not make the Aboriginal peoples' interest in health care into one that is specifically aboriginal. The nature of the human interest in health care does not change depending on where it is located.

92. The act of setting standards and guidelines for federal and provincial funding of health care through the *FAA* also is not a cognizable Aboriginal interest. The federal and provincial governments work together to set standards and guidelines for multiple policy issues affecting all Flavelians on a regular basis. The mere implication of Aboriginal peoples in the effects of legislative standards and guidelines cannot impose a fiduciary duty on the federal government. Such a result would open the floodgates to litigation claiming that every instance in which Aboriginal peoples were implicated in legislation gave rise to a fiduciary duty on the Crown.

93. Canadian and Flavellian Courts have never recognized a fiduciary obligation on the Crown to Aboriginal peoples outside of the context of land claims or the context of non-land claims under section 35. Provincial Courts have declined to find that the content of the fiduciary duty between the Crown and Aboriginal Peoples obligates the federal government to pay any specific amount of funding for any specific purpose.

> *Southeast Child and Family Services v Canada (Attorney General)* (1997), 120 ManR (2d) 114 at oara 22, [1997] 9 WWR 236 (Man Ct QB), aff'd (1998), 126 ManR (2d) 239, [1998] 9 WWR 583 (MBCA).

94. The Appellant carries the scope of a cognizable Aboriginal interest too far. On the Appellant's logic, any federally funded service on reserves would become a cognizable aboriginal interest capable of giving rise to a fiduciary duty. The mere existence of a federal service on a reserve would engage the interests of Aboriginal peoples in living together as a

community, as its absence might endanger the ability of the people to continue living on the reserve.

C. The Crown did not undertake discretionary control over the Appellant's interests in a way that created responsibility in the nature of a private law duty

95. For a fiduciary obligation to exist between the Crown and Aboriginal peoples, the Crown must have undertaken discretionary control over the distinctly aboriginal interest in a way that creates responsibility in the nature of a private law duty. This occurs when the Crown interposes itself between an Indian band and non-Indians with respect to an existing Indian interest, such as that in land or a band asset.

Wewaykum, *supra* para 72 at paras 85, 91.

96. The Respondent recognizes that the Crown did take discretionary control over the creation of reserves, which gave rise to certain responsibilities in the nature of a private law duty. But those responsibilities do not include the provision of health care services on reserves. The Crown's duty cannot be extended beyond the scope of the original duty, which was related to the management of land, and into the realm of social welfare and public services. The two are not related.

97. Furthermore, the federal government's control over and discretion during the creation of Reserve 3, or any other reserves in Flavelle, does not make its control and discretion over health care akin to a private law duty. The processes and policies associated with each are distinct. The assumption of discretionary control over reserve creation has never given rise to a public law duty in relation to services provided on those reserves, for good reason: it would effectively turn the fiduciary duty between the Crown and Aboriginal peoples into one that exists at large.

98. The federal government's funding of health care services in and of itself likewise does not create a duty akin to one in private law over which the Crown has discretionary control. Aboriginal peoples did not have a right to the funding which the Crown chose to withdraw in order to help close the fiscal gap in the 2008 budget. This is in contrast to cases where the Crown failed to carry out a mandate conferred by an Indian band with respect to disposition of band assets, and was thus found to have assumed discretionary control over those assets in a way that created a duty akin to private law.

Wewaykum, *supra* para 72 at para 91.

99. Assuming control over health care spending on reserves cannot give rise to responsibility in the nature of a private law duty as required by *Wewaykum*. The provision of government services to all Flavellians is not grounded in tort, contract, or property; it is grounded in public policy. If an analogy to a private law duty were found here, government spending would *always* give rise to responsibility in the nature of a private law duty. This result is contrary to the public law notion that the government must be afforded discretion to legislate in the way it deems appropriate.

100. The provinces' express disavowal of any obligations to fund health care services on reserves does not change this analysis. The *Wewaykum* test does not hinge on whether provincial funding could be forthcoming.

D. Even if a fiduciary duty did arise, the Crown fulfilled its obligations to Aboriginal peoples

101. Even if this Court finds that the Crown did have a fiduciary duty towards the Aboriginal peoples, represented by the Birge-Carnegie First Nation, in the exercise of its discretion over the implementation of the *FAA*, this Court should nevertheless find that the Crown fulfilled that duty.

102. The Supreme Court of Canada has recognized that, despite the special relationship between Aboriginal peoples and the Crown, the Crown is not an ordinary fiduciary. It necessarily "wears many hats and represents many interests, some of which cannot help but be conflicting." The content of the Crown's fiduciary obligations to Aboriginal peoples in this case must be determined with this in mind.

Wewaykum, *supra* para 72 at para 96.

i. The content of the duty was to act with loyalty and good care

103. Whether the fiduciary duty was breached calls for an inquiry into the specific obligations of the federal government in the specific context of discretionary funding of non-essential health care services. Fiduciary relationships and obligations are "shaped by the demands of the situation".

Ermineskin Indian Band and Nation v Canada, 2009 SCC 9 at para 72, [2009] 1 SCR 222.

104. The Appellant argues that the content of the Crown's fiduciary duty is stronger after legislation has been enacted that affects an Aboriginal interest. This argument erroneously relies on the distinction made in *Wewaykum* between the Crown's fiduciary obligations prior to reserve creation and after reserve creation. The process of reserve creation is not at all similar to the process of passing legislation. Reserves are specifically for the use of Aboriginal peoples. Legislation affects all Flavellians.

Wewaykum, *supra* para 72 at paras 94, 98.

105. Importing the content of the duty during reserve creation into the context of health care services on reserves ignores the fact-specific nature of fiduciary obligations. Not all aspects of a fiduciary relationship give rise to obligations. The content of the obligations that do

arise from the fiduciary relationship must reflect the specific facts and circumstances of the parties.

106. In this regard, it is more appropriate to consider the three factors that the Supreme Court of Canada enunciated in *Wewaykum* as shaping the content of a fiduciary obligation in any case. Courts should consider (1) the nature and importance of the Aboriginal interest to be protected; (2) whether public interests are involved and the importance of those interests; and (3) the degree of Crown intervention with respect to the Aboriginal interest involved.

Wewaykum, *supra* para 72 at para 86.

107. The Respondent acknowledges that the Aboriginal interest in health care, if such an interest exists, is important and worthy of protection. The Respondent also concedes that the Crown has exclusive authority to legislate in respect of Aboriginal health care services under section 73 of the *Indian Act*. The degree of Crown intervention is high.

Indian Act, *supra* para 35 at s 73.

108. However, the public interest in a balanced budget and in affording the federal government discretion in creating that budget is significant. Both Aboriginal peoples and the general public have an important interest in allowing the government to legislate for the benefit of all Flavellians in good and bad economic times.

109. In this context, the Crown had a fiduciary obligation to Aboriginal peoples to act with loyalty and good faith in the exercise of its ordinary government powers to create a budget. This duty of loyalty and good faith is not one of exclusive loyalty to Aboriginal peoples, though: the Crown is obliged to have regard to the interests of all affected parties in the exercise of its ordinary government powers. It is especially important that the interests of all Flavellians are considered when funding to important services are cut across Flavelle in

times of economic downturn. As such, it is better to conceptualize this duty as that of "a man of ordinary prudence in managing his own affairs."

Samson Indian Nation and Band v Canada, [1995] 2 FC 762 at para 21 (CA), [1995] FCJ no 734 (QL) [*Samson*].

Wewaykum, *supra* para 72 at para 96.

Blueberry River Indian Band v Canada (Department of Indian Affairs and Northern Development), [1995] 4 SCR 344 at para 104, [1995] SCJ no 99 (QL).

110. The Appellant's position that the Crown's duty was to provide adequate health services on reserves, and hence carry out the provisions of the FAA, is incompatible with the federal government's unique position as fiduciary. Because of its public law duties, the Crown can never be obligated to act only in the best interests of Aboriginal peoples. Deciding upon and passing a budget is a public law function that requires consideration of the interests of all Flavellians. The budget passed in 2008 rightfully accounted for a diverse range of interests.

Samson, *supra* para 109 at para 21.

ii. The duty to act with loyalty and good care was not breached

111. The Crown acted with loyalty and good faith toward Aboriginal peoples from the time of the 1979 Federal Indian Health Policy to the passing of the *FAA* in 2006. The Policy established a framework for the relationship between Health Canada and aboriginal communities, promoting collaboration and cooperation between the two. The precursor to the *FAA*, the Falconer Accords, was drafted in conjunction with aboriginal leaders. The Accord was considered a success by politicians and aboriginal leaders alike.

112. The federal government's discretionary postponement of the *FAA* was within the contemplation of all parties involved in its drafting. The same aboriginal leaders who considered the *FAA* a success when its full funding was reasonably assured now criticize it for the discretion it afforded the federal government.

113. The federal government acted with ordinary prudence when cutting funding to aboriginal programs and other important Flavellian social welfare programs. Provincial health care payments were also cut significantly. Spending on welfare and social assistance programs decreased. Cutting the funding to aboriginal programs was not ideal, but it was done fairly and with ordinary prudence in consideration of the interests of Aboriginal peoples and the general Flavellian public.

Issue 3: The proper remedy, if a breach is found, is a best efforts order

A. If this Court finds that section 7 was breached, the proper remedy is an order for the government to use its best efforts to implement the *FAA*

i. A best efforts order promotes the purposes of the section 7 right and the section 24(1) remedy provision

114. The Respondent agrees that the appropriate remedy in this case lies under section 24(1) of the *Charter*.

115. The *Charter* requires a broad and purposive interpretation in order to realize its objects. The broad and purposive interpretation principle applies to *Charter* remedies as well as rights. The purposive approach ensures rights holders enjoy the full protection of the *Charter*.

> *Doucet-Boudreau v Nova Scotia (Minister of Education)*, 2003 SCC 62 at para 23, [2003] 3 SCR 3 [*Doucet-Boudreau*].

116. In crafting constitutional remedies, courts must be careful not to craft remedies that usurp the role of other branches of government. The role of the court is to act as a judicial arbiter. Remedies that step beyond this function and into the realm of another branch of government are inappropriate.

> *Doucet-Boudreau*, *supra* para 115 at para 34.

117. Under the purposive approach to crafting remedies, two considerations must be taken into account. First, the purpose of the right being protected must be promoted. Second, the purpose of the remedies provision itself must be promoted. In essence, the remedy must be both responsive and effective.

Doucet-Boudreau, *supra* para 115 at para 25.

118. An order for the government to use its best efforts to implement the *FAA* promotes the purpose of the section 7 right to life, liberty and security of person. The standards and benchmarks set by the *FAA* contribute to the security of the person of Aboriginal peoples living on reserves by improving their access to health care. This remedy is responsive to the reliance of the Aboriginal peoples on the Prime Minister's commitment to implement the *FAA* in 2006.

119. A best efforts order also promotes the purpose of section 24(1), the remedy provision. That section gives courts wide latitude to craft remedies that are appropriate and just under the circumstances. The order that the Respondent requests is an appropriate one for courts to make. It was made at the trial level in *Doucet-Boudreau* to compel the provincial government to make policy choices that protected the language rights of the appellants in that case. It is likewise the proper remedy here, where the federal government is in a position to make policy choices that will protect the section 7 rights of the Appellant in this case.

ii. A "best efforts" order properly acknowledges and reflects historical and contextual factors affecting aboriginal communities' access to health care

120. An order for the federal government to use its best efforts to implement the *FAA* recognizes the unique history of Aboriginal peoples in Flavelle and their special relationship with the Crown. It recognizes that indefinitely postponing the implementation of the *FAA* is

not reconcilable with the federal government's exclusive control over health care on reserves under the *Indian Act*.

121. A "best efforts" order strikes the best balance between the different contexts in which the federal government is operating. It must not breach its fiduciary obligations to Aboriginal peoples, should those exist in the context of health care. But the government must also fulfill its public law duty of passing a budget that reflects the interests of all Flavellians. The "best efforts" order compels the government to act by preventing indefinite postponement of the *FAA*, and gives the government the freedom to legislate appropriately in a time of economic recession.

B. If this Court finds that the Crown breached its fiduciary duty to Aboriginal peoples, the proper remedy is a best efforts order

122. An order for the government to use its best efforts to implement the *FAA* puts the Appellant back in the exact position it would have occupied had the government not indefinitely postponed the enactment of the legislation. The implementation of the *FAA* was intentionally made discretionary. While it was a policy objective to implement the *FAA* as soon as possible, the federal government recognized while drafting it that circumstances might arise where immediate implementation would be unrealistic or even impossible. Such circumstances arose during the financial crisis in 2008.

123. The best efforts order prevents the federal government from indefinitely postponing the implementation of the *FAA*. Beyond this, it does not impose a timeline for the implementation of the statute—exactly as Parliament intended. Parliament will be able to work with Aboriginal groups to implement the statute over time in a way that will have substantive, positive impact on reserves.

C. An injunction and an order for mandamus are not appropriate remedies in this case

124. The Appellant's request for an injunction would effectively impose a minimum level of government spending on Aboriginal communities for health care services. This result is not consistent with the principle of separation of powers, which must be respected at the remedy formation stage.

125. Forcing the government to spend a certain amount on aboriginal health care by way of an injunction and an order for mandamus means this Court would abdicate its function as the judiciary and step into the realm of the legislature and the executive. The Supreme Court of Canada has historically been reluctant to order remedies with mandatory levels of spending for this precise reason. The division of powers, and rule of law, must be respected.

126. Budgetary constraints are relevant to the determination of an appropriate remedy once a *Charter* violation that does not survive section 1 has been established. While the case at bar is not about section 15 of the *Charter* or about reading in as a remedy, as was the case in *Schachter*, Chief Justice Lamer's remarks are instructive:

> In determining whether reading in is appropriate then, the question is not whether courts can make decisions that impact on budgetary policy; it is to what degree they can appropriately do so. A remedy which entails intrusion into this sphere so substantial as to change the nature of the legislative scheme in question is clearly inappropriate.

Schachter v Canada, [1992] 2 SCR 679 at para 63, [1992] SCJ no 68 (QL).

127. An order in the nature of mandamus would change the discretionary nature of the legislative scheme in question. The legislature clearly intended that the implementation of the *FAA* begin when the Governor-in-Council determined it was appropriate, having regard to other budgetary constraints facing the government in any given year. Forcing the government to begin implementation immediately, and supervising its efforts to ensure they

are exactly in line with the guidelines in Schedule A of the *FAA*, effectively precludes the government from taking any steps other than those laid out in Schedule A. Yet there may be measures outside of Schedule A that are smaller than initially contemplated, but nonetheless helpful.

D. Supervisory jurisdiction is not required in this case

128. The Appellant's request for supervisory jurisdiction ignores the very recent commitments of the federal government to ameliorate living conditions on reserves, including health care services. It disregards the fact that the implementation of the *FAA* was postponed not for petty reasons, but because a global financial crisis required re-alignment of immediate fiscal priorities. The federal government has given no indication that it will "forget" the public pressure and outrage that led to the creation of the Falconer Accords following an improvement in the economic outlook.

129. The best efforts order in this case does not require supervisory jurisdiction. It is not like *Doucet-Boudreau*, where it was clear that the government was dragging its feet, and had been for many years. Supervisory jurisdiction was required because if the government had continued to postpone implementation of legislation that would ameliorate the breach, the violation of the right might not have even existed in the future. The breach of section 7 or a fiduciary duty in this case is not contingent on government inaction in the same way.

> *Doucet-Boudreau*, *supra* para 115.

130. Supervisory jurisdiction would be counter-productive to the recent gains made in the relationship between the federal government and Aboriginal peoples. The current government has demonstrated willingness to take seriously the issues facing Aboriginal peoples on reserves and to respond to public outrage about those issues. There is no need to

supervise its continued efforts in these respects, particularly while it is also focused on coping with a global financial crisis.

Part IV – Order Sought

131. The Respondent seeks an order that the appeal be dismissed.

All of which is respectfully submitted.

Signed this 20th day of September, 2013.

Meghan Bridges	Hani Migally
	Counsel for the Respondent

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.	**74, 77, 79**
Authorson v Canada (Attorney General) (2000), 53 OR (3d) 221 (SCJ), [2000] OJ no 376 (QL), aff'd (2002), 58 OR (3d) 417, 215 DLR (4th) 496 (CA), rev'd on other grounds, 2003 SCC 39, [2003] 2 SCR 40.	**77**
Blencoe v British Columbia (Human Rights Commission), 2000 SCC 44, [2000] 2 SCR 307.	**37**
Blueberry River Indian Band v Canada (Department of Indian Affairs and Northern Development), [1995] 4 SCR 344, [1995] SCJ no 99 (QL).	**109**
Cameron v Nova Scotia (Attorney General) (1999), 177 DLR (4th) 611, 204 NSR (2d) 1 (NSSC).	**67**
Canada (Combines Investigation Acts, Director of Investigation and Research) v Southam Inc, [1984] 2 SCR 145, 11 DLR (4th) 641.	**29**
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Ermineskin Indian Band and Nation v Canada, 2009 SCC 9, [2009] 1 SCR 222.	**103**
Fairford First Nation v Canada (Attorney General), [1999] 2 FC 48 (FCTD), [1998] FCJ no 1632 (QL).	**76**

Case Law	Paragraph
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Gosselin v Quebec (Attorney General), 2002 SCC 84, [2002] 4 SCR 429.	**25, 31, 51**
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Guerin v Canada, [1984] 2 SCR 335, [1984] SCJ no 45 (QL).	**71, 74, 75**
Haida Nation v British Columbia (Minister of Finance), 2004 SCC 73, [2004] 3 SCR 511.	**72**
Irwin Toy Ltd v Québec (Attorney General), [1989] 1 SCR 927, 58 DLR (4th) 477.	**54, 62**
KLB v British Columbia, 2003 SCC 51, [2003] 2 SCR 403.	**77**
Laidlow v Canada (Minister of Citizenship and Immigration), 2012 FC 144, 404 FTR 304.	**41**
Lalonde v Ontario (Commission de restructuration des services de santé) (2001), 56 OR (3d) 505 (CA), 2001 OJ no 4767 (QL).	**42, 44**
Manitoba Metis Federation Inc v Canada (Attorney General), 2013 SCC 14, 291 ManR (2d) 1.	**72, 87**
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R v Sappier; R v Gray, 2006 SCC 54, [2006] 2 SCR 686.	**82**
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Rodriguez v British Columbia (Attorney General), [1993] 3 SCR 519, 107 DLR (4th) 342.	**33, 59, 61**
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Samson Indian Nation and Band v Canada, [1995] 2 FC 762, [1995] FCJ no 734 (CA).	**109, 110**

Case Law	Paragraph
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Southeast Child and Family Services v Canada (Attorney General) (1997), 120 ManR (2d) 114, [1997] 9 WWR 236 (Man Ct QB), aff'd (1998), 126 ManR (2d) 239, [1998] 9 WWR 583 (MBCA).	**93**
Suresh v Canada (Minister of Citizenship and Immigration), 2002 SCC 1, [2002] 1 SCR 3.	**56**
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Victoria (City) v Adams, 2009 BCCA 563, 313 DLR (4th) 29.	**27**
Vriend v Alberta, [1998] 1 SCR 493, 156 DLR (4th) 385.	**57**
Wewaykum Indian Band v Canada, 2002 SCC 79, [2002] 4 SCR 245.	**72, 80, 86, 87, 89, 95, 98, 102, 104, 106, 109**
Wynberg v Ontario (2006), 269 DLR (4th) 435, 82 OR (3d) 561 (CA).	**36**

ii. Secondary Sources

Secondary Sources	Paragraph
Aileen Kavanagh, "Special Issue – The Role of the Courts in Constitutional Law: Judicial Restraint in the Pursuit of Justice" (2010) 60 Univ of Toronto LJ 23.	**53**
Consensus Report on the Constitution: Charlottetown, August 28, 1992, Final Text part I, s. B(4)	**30**

Schedule B: Relevant Statutes

Canadian Bill of Rights, RSC 1985, App III. s. 1(a)

1. It is hereby recognized and declared that in Canada there have existed and shall continue to exist without discrimination by reason of race, national origin, colour, religion or sex, the following human rights and fundamental freedoms, namely,

(a) the right of the individual to life, liberty, security of the person and enjoyment of property, and the right not to be deprived thereof except by due process of law;

Canadian Charter of Rights and Freedoms **as found in** ***Constitution Act, 1982,*** **being Schedule B to the** ***Canada Act 1982 (UK), 1982, c11, s. 7***

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.

Canadian Charter of Rights and Freedoms **as found in** ***Constitution Act, 1982,*** **being Schedule B to the** ***Canada Act 1982 (UK), 1982, c11, s. 25***

25. The guarantee in this Charter of certain rights and freedoms shall not be construed so as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada including

(a) any rights or freedoms that have been recognized by the Royal Proclamation of October 7, 1763; and
(b) any rights or freedoms that now exist by way of land claims agreements or may be so acquired.

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

35. Rights of the Aboriginal Peoples of Canada

(1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.
(2) In this Act, "aboriginal peoples of Canada" includes the Indian, Inuit and Métis peoples of Canada.
(3) For greater certainty, in subsection (1) "treaty rights" includes rights that now exist by way of land claims agreements or may be so acquired.
(4) Notwithstanding any other provision of this Act, the aboriginal and treaty rights referred to in subsection (1) are guaranteed equally to male and female persons.

Criminal Code, RSC 1985, c C-46, s. 718.2(e)

718.2. A court that imposes a sentence shall also take into consideration the following principles:

(e) all available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders, with particular attention to the circumstances of aboriginal offenders.

Indian Act, RSC 1985, c I-5, s 73(1)

73. Regulations

(1) The governor in Council may make regulations
(g) to provide medical treatment and health services for Indians;

The United States Constitution – Amendment 5

5. No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The United States Constitution – Amendment 14

14. Citizenship Rights

(1) All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.