UNIVERSITY OF TORONTO FACULTY OF LAW

A. Summary of the Case

1. In 1979, the Government of Flavelle adopted a non-binding Federal Indian Health Policy intended to address the health care and well-being of Aboriginal peoples. Though the policy did not have the force of law, it embodied a triple mandate of developing aboriginal communities, supporting the traditional trust relationship between the federal government and Aboriginal peoples, and accommodating the interrelated Canadian health care system. Broadly speaking, it established a framework for the relationship between Health Canada and Aboriginal communities vis-à-vis funding and social needs.

2. In 2005, a series of public protests drew attention to the concerns of Flavelle's Aboriginal communities. In response to public concern and growing political pressure, the Government of Flavelle commissioned a task-force of federal and provincial leaders to assess the problem and brainstorm potential solutions. Prior to the first meeting of the task-force, each of the Flavellian provinces publicly reaffirmed its longstanding disavowal of any obligation to fund or otherwise furnish health care on Aboriginal reserves.

3. After many weeks of negotiations in the province of Falconer, a rough framework agreement (the "Falconer Accords") was drafted in late 2005, which provided guidelines and standards for federal and provincial funding to Aboriginal communities. The agreement was widely considered a success and received accolades from experts, politicians and Aboriginal leaders.

4. The Falconer Accords were seen to be a replacement for the Federal Indian Health Policy. To demonstrate the seriousness of the underlying Aboriginal rights issues, the federal government proposed legislation in early 2006 to honour its commitments. The *Falconer Accords Act* ("the Act", or the "*FAA*") passed and came into force in late 2006.

5. In recognition of the history of the Federal Indian Health Policy, the goal of the Accords, and the purpose of the legislation, the Act contained the following preamble:

   "*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."*

6. Notably, the Act did not require the federal government to meet the guidelines of the Accords. Rather, it recognized the importance of the standards set out in the agreement and vested in the Governor-in-Council (specifically, the Minister of Aboriginal Affairs, Minister of Finance, and Minister of Health) the discretion to collaboratively develop and fund programs to meet the Accord guidelines to the best of their ability and judgment. However, for greater certainty and in recognition of the substantive importance of the Accords, Schedule A of the Act included non-binding "Implementation Guidelines" which acted to codify the standards in the Accords (see below at para 22).

7. The Prime Minister issued a statement indicating that the federal government anticipated the development and funding of such programs to commence in 2008.

8. In mid-2008, the global economy began to contract due to large-scale financial crisis, substantially impacting the fiscal situation of Flavelle. Declining government revenues and increased political pressures caused the federal government to devise an action plan for the reduction of public spending in a number of key areas, including to welfare and social assistance programs.

9. Another area affected by these budget constraints were the anticipated investments into Aboriginal communities under the *Falconer Accords Act*. On September 1, 2008, the Prime Minister and Minister of Aboriginal Affairs jointly declared implementation of the agreements to be "postponed indefinitely".

10. In addition, a large number of budget cuts included limiting funding to certain "non-essential services" on reserves. In the 2008 *Budget Implementation Act*, funding for several programs, such as mental health and addiction treatment programs were cut by almost 30 per cent. According to an estimate by an independent taxpayer-focused think tank, the aggregate savings resulting from the cuts amounted to less than 0.01 per cent of total federal government expenditure.

11. The *Budget Implementation Act* also provided for a 10 per cent average reduction in the funding of welfare and social assistance programs from the previous fiscal year, amounting to 0.05 per cent of the budget. Provincial health care payments were cut by 7 per cent, approximately 0.02 per cent of the budget.

12. A White Paper published in 2013 by the Ministry of Aboriginal Affairs and Northern Development called public attention to widespread deficiencies in the basic living standards of Aboriginal peoples. The report, which focused on areas such as the quality of health care and public services, was based on five years of census data.

13. Of particular note, the report held that aboriginal reserves generally exhibited:

    a. A deficiency in supplementary health care programs, such as programs supporting mental and psychological well-being. This was linked with higher rates of depression and other mental illnesses, drug and alcohol abuse, as well as higher rates of suicide and attempted suicide. Suicide rates for youth on reserves are 5-6 times higher than their off-reserve counterparts. Life expectancy is 6 years lower for individuals living on reserves than off them. One non-governmental study found that depression rates were ten per cent higher on reserves. The same study found that twenty five per cent of survey participants self-identified as having a problem with alcohol abuse, a third of participants indicated that it was a problem in their household, and seventy-five per cent overall thought that it was a problem in their community as a whole.

b. The absence of a legislative regime to ensure that the water on reserves met the Guidelines for Flavellian Drinking Water Quality, despite the existence of such a regime in other provinces of Flavelle.

14. Some of the worst on-reserve living conditions in the province of Falconer are found in the Treaty 3 (1873) reserve community of Birge-Carnegie. Specifically, public education and health care are materially worse than in urban and off-reserve areas, and there have been numerous reports of near third-world conditions within the community. Experts have further linked the poor reserve conditions to severe consequences for its residents, including drastically poorer professional prospects, elevated incidences of communicable disease, and reduced life expectancy. There have been multiple reported cases of Birge-Carnegie members, including children, having to permanently leave the reserve to access long-term care for chronic conditions. The reserve itself, located in the Birge-Carnegie First Nation's traditional territory, is over 500 km from the nearest urban center, and is accessible only by air for the majority of the year.

15. The government does not dispute the factual accuracy of these findings.

16. During the 2011 federal election, the Member of Parliament for the riding of Birge-Carnegie, a member of the party that introduced the budget cuts, was re-elected by a margin that was ten per cent greater than in the previous election.

17. The community of Birge-Carnegie brought an action on behalf of the Assembly of First Nations of Flavelle against the Minister of Aboriginal Affairs and Northern Development. The claim stated that the federal government's failure to provide decent living standards, both by cutting funding to so-called to "non-essential services" and by failing to implement the Accords, brings about living conditions that violate the principles of fundamental justice protected by section 7 of the Charter.

18. Birge-Carnegie First Nation further submits that the government owes a fiduciary duty to the First Nations of Flavelle, and the government's actions regarding health care on reserves – specifically, the reduction of funding to important programs and the failure to implement the *FAA* and adequately fund programs that would ameliorate reserve conditions – breaches this fiduciary duty.

19. Birge-Carnegie First Nation requests an order in the nature of mandamus to cause the government of Flavelle to implement the *FAA* in the manner contemplated by the implementation guidelines forming Schedule A to that Act. It further requests that the Court retain supervisory jurisdiction for the length of the implementation schedule.

20. The government of Flavelle has responded that positive rights are not protected by section 7. It also argues that it does not owe a fiduciary duty in this context, as it is a general principle that fiduciary duty is not engaged simply by eliminating funding for a program that has benefited Aboriginal groups.

21. Finally, the government of Flavelle submits that should the Court find a breach of section 7 or of fiduciary duty, it should make an order that the federal government use its best efforts to implement the *FAA*. It further argues that the Court should not retain supervisory jurisdiction over an order after it is made in this case.

Implementation Guidelines – Schedule A to the *Falconer Accords Act, 2006*

1. Subject to any other provisions of this Act, the Minister shall develop health and social welfare programs for Aboriginal persons pursuant to the following guidelines:

    a. The Minister shall establish an *Aboriginal Welfare Index* (the "Index") that measures health and well-being of Aboriginal persons relative to the outcomes for Flavellians as a whole. The index shall include, but is not limited to, measures for life expectancy, suicide rates, secondary school completion rates, and hospital admissions.

    b. Within five years of this Act coming into force, the Government of Flavelle shall implement programs that:

        i. Constitute a 2.5% compound annual increase in government expenditure towards on-reserve aboriginal health and social welfare programming, or:

        ii. Increase Index values by 10%.

    c. Within ten years of this Act coming into force, the Government of Flavelle shall implement programs that:

        i. Constitute a 2.5% compound annual increase in government expenditure towards on-reserve aboriginal health and social welfare programming, or:

        ii. Increase Index values by 25%.

B. Judicial History

Falconer Superior Court of Justice

22. At trial, Hertzman J granted several preliminary motions in favour of the plaintiffs. Notably, she granted them standing to bring the claim, deemed the court competent to adjudicate the issue, and ruled that the Minister's discretion was subject to judicial review.

23. On the substantive matters of the case, Hertzman J held that section 7 of the *Charter* was intended, in spirit and in purpose, to protect society against intrusions upon their liberty in all forms. Accordingly, Hertzman J further held that section 7 imposed positive obligations on the government, insofar as the government is required to sustain life, liberty and security of the person. Referencing the *Charter*'s provision of positive rights in a number

of separate contexts, she contended that a legally accurate reading of section 7 must contemplate the general lens of equality which frames the *Charter* as well as Canada's international treaty commitments. She held that life, liberty and security of the person were interests protected only in a society which protected the basic needs of its most vulnerable, such as those living on aboriginal reserves. The Court ruled further that even if section 7 did not encompass positive rights, deprivations of certain positive rights could give rise to intrusions on personal liberty fully analogous to misuse of state power. Such deprivations were perceived to arise not only through active state legislation, but also by inaction or legislative omission.

24. Justice Hertzman went on to assess the actual living conditions of the Aboriginal peoples of Falconer and affirmed the undisputed evidence regarding the low quality of basic human services in the country's aboriginal reserves. She made a finding that these consequences bore a direct causal link to the government's discretionary cuts and deemed them to fall beneath the basic positive rights standards underlying section 7. Positive rights notwithstanding, Hertzman J further held that the budgetary decision not to implement programs to remedy the "reprehensible" health standards on the reserves in question constituted an unconstitutional deprivation of life, liberty and security of the person that was not in accordance with the principles of fundamental justice. She further observed that Aboriginal persons living on reserves should be entitled to the same level of health care as all other Flavellians and found it "deplorable" that individuals had been forced to permanently leave reserves in order to access medical treatment. In light of her other findings, Hertzman J determined that the severe effects on aboriginal health were disproportionate to any general benefit accruing to the government or Flavellian society as a whole.

25. On the matter of fiduciary duty, Hertzman J held that the government of Flavelle did owe a fiduciary duty to the Aboriginal peoples of Falconer living on reserves regarding the discretionary provision of health services. She noted that provincial governments of Flavelle, including that of Falconer, had expressly disavowed any obligation to fund or provide on-reserve health care. Hertzman J found that living together as a community or people was a practical interest for Aboriginal people, characterizing it as a cognizable aboriginal interest. She then found that the provision of health care on reserves was necessary to protect the aboriginal interest in living together. Justice Hertzman also held that was not necessary that an aboriginal interest meet the "distinctly Aboriginal" standard required of an aboriginal rights claim under s. 35. Fiduciary duty is grounded in the honour of the Crown, and means that a special, *sui generis* relationship exists between the Crown and Aboriginal peoples of Falconer based on the pre-existence of the sovereignty of Falconer's Aboriginal peoples. Hertzman J held that the contexts that can give rise to a fiduciary duty have not been exhaustively enumerated by the courts, and that this was a novel situation which gave rise to a novel duty.

26. Justice Hertzman concluded that postponing the implementation of funding for the *FAA* and cutting funding to other on-reserve health care programs breached this fiduciary duty insofar as the government failed to protect the aboriginal interest in living as a community on reserve.

27. In deciding on the remedy, Hertzman J considered the interests of Aboriginal peoples and Flavellians at large. As one goal of Aboriginal law, the honour of the Crown, and fiduciary duty is reconciliation, Hertzman J issued a declaration that section 7 and the Crown's fiduciary duty had been breached. She provided *obiter* to the effect that she considered the appropriate government response to her declaration to be making the best efforts possible to tackle health care problems on aboriginal reserves.

Falconer Court of Appeal

28. The Falconer Court of Appeal reconsidered and affirmed Hertzman J's findings with respect to standing, justiciability, and the appropriateness of judicial review. However, on the merits, Grossman J (also writing for Lewandowski J of the Falconer Court of Appeal) rendered fundamentally different verdicts, even going so far as to term the trial judgment an exercise in "flawed judicial activism".

29. Pointing to a lack of precedent for the use of section 7 in a positive rights context, and indeed the stated reluctance of the courts of other countries to recognize such uses (specifically, the Supreme Court of Canada), Grossman JA decidedly ruled against the Birge-Carnegie First Nation's interpretation of section 7. She held further that a refusal to improve health care services did not constitute a deprivation within the meaning of section 7, and further that such positive rights did not engage "life, liberty and security of the person" to begin with. Even if the Minister's decision was to be considered under the principles of fundamental justice, the decision was not arbitrary or disproportionate insofar as it aligned with the purpose the legislature conferred upon the statute: to symbolically demonstrate support for the Falconer Accords while empowering Cabinet to choose whether and to what extent to fund related programs.

30. Justices Lewandoski and Grossman found that while a general fiduciary relationship exists between Aboriginal peoples and the Crown, there was no specific fiduciary duty in this case. Such a duty would expand the concept of fiduciary duty too far. Insufficient guidance has been given from higher courts and the jurisprudence regarding how to identify a cognizable aboriginal interest outside of a land or s. 35-based interest. Finding an aboriginal interest in living as a community on reserve land to constitute a cognizable legal interest would be inconsistent with the development of the jurisprudence; other court decisions have rejected similar claims regarding community loss of culture. The trial judge's decision amounted to a finding that any interest is a "cognizable aboriginal interest" simply if it is an interest that happens to be held by an Aboriginal individual. This opened the fiduciary duty much too far.

Dissent

31. Justice Schiff, writing in dissent, held that Hertzman J of the Superior Court was correct in law when she found both a *Charter* violation and a breach of fiduciary duty. On the *Charter* issue, Schiff JA lauded the courage of the trial court in extrapolating section 7 jurisprudence to accommodate a "new generation" of rights claims for historically disadvantaged groups. While Schiff JA did not agree that section 7 conferred free-standing positive rights imposing burdens on the government, he held that the conferral of benefits related to life, liberty and security of the person did engage constitutional obligations that would be breached if the programs were withdrawn.

32. On the fiduciary duty claim, Schiff JA was in agreement with the reasons of Hertzman J. However, regarding the appropriate remedy, Justice Schiff did not find that a declaration was the correct remedy regarding the fiduciary duty issue, finding that such a breach calls for a different kind of remedy than a *Charter* violation.

33. Justice Schiff emphasized that remedies for breaches of fiduciary duties are equitable in nature, and designed to address the harm that is suffered from the breach. From the White Paper and other statistics provided, Schiff JA found that it was clear that Aboriginal communities were suffering harm, and that this harm was magnified due to the breach of fiduciary duty – the postponement of funding and the cutting of funding to health care programs that are desperately needed. As such, Schiff JA would have issued a mandatory injunction ordering the Governor-in-Council to resume funding for the de-funded programs and the implementation of the *Falconer Accords Act*.

C. Issues on Appeal

The Birge-Carnegie First Nation has been granted leave to appeal the Court of Appeal's decision to the Supreme Court of Flavelle. The Crown concedes that if a violation of section 7 of the *Charter* is found, it cannot be upheld under section 1.

The Court is asked to decide the following issues:

1. Do the actions of the Crown breach section 7 of the *Charter*?
    a. Does section 7 encompass substantive guarantees ("positive rights")?
    b. Were the Birge-Carnegie First Nation's rights to life, liberty and security of the person infringed in a manner not consistent with the principles of fundamental justice?
2. Did the Crown owe a fiduciary duty to the Birge-Carnegie First Nation and if so, did the Crown breach that duty?

3. If the Crown breached the Appellant's section 7 rights or its fiduciary obligation to the Birge-Carnegie First Nation, what is the appropriate remedy?