S.C.C. File No.:

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL OF BRITISH COLUMBIA)

BETWEEN:

DANIEL CHRISTOPHER SCOTT, MARK DOUGLAS CAMPBELL, GAVIN MICHAEL DAVID FLETT, KEVIN ALBERT MATTHEW BERRY, BRADLEY DARREN QUAST, AARON MICHAEL BEDARD

APPLICANT
(Respondent)

-and-

ATTORNEY GENERAL OF CANADA

RESPONDENT
(Appellant)

APPLICATION FOR LEAVE TO APPEAL
(DANIEL CHRISTOPHER SCOTT et al., APPLICANTS)
(Pursuant to s.40 of the *Supreme Court Act,* R.S.C. 1985, c.S-26

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PART I - OVERVIEW AND STATEMENTS OF FACTS

Overview

1. This case raises fundamental questions about the unique and special relationship between Canada and members of the Armed Forces. Specifically, it asks this Honourable Court to address the obligations that flow from this important relationship: does the enactment of the inadequate compensation scheme under the *Canadian Forces Members and Veterans Re-establishment and Compensation Act*,[1] breach Canada's solemn obligation ("Social Covenant") to those who have served the country?

2. In answering this question, this Honourable Court has an important opportunity to address the nature and scope of the doctrine of the Honour of the Crown. The Court of Appeal disagreed with the Case Management Judge's acceptance of the existence of the Social Covenant and its legal effect, on the basis that the Honour of the Crown cannot apply outside the aboriginal context. Should that be the case?

3. There are no authorities that address the Crown's *sui generis* relationship with its Armed Forces members and veterans, and the obligations owing to those injured in service to Canada. This case provides this Honourable Court an invaluable opportunity to address these questions.

4. If not reversed, the Court of Appeal's decision will define the legal relationship between Canada and its Armed Forces members and veterans as one in which no special relationship or duty is owed when injury results from service to Canada. Such a legal conclusion, absent a hearing on the facts, could have profound implications for future military service in Canada and the very operation of Veterans Affairs Canada.

5. It is necessary, as a matter of utmost public importance and safety, that the Social Covenant be recognized as having legal effect. The Social Covenant was and is constitutionally necessary for military recruitment to raise a voluntary citizens' army, as evidenced in its inclusion as a term of condition of service. Those who enlist in military service do so at great personal risk and sacrifice, but do so based on the premise which underlies the Social Covenant:

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[1] *Canadian Forces Members and Veterans Re-establishment and Compensation Act*, S. C. 2005, c. 21. ("New Veterans Charter").

should they fall or be injured, the nation and people of Canada will ensure they will be looked after. The implication of the Court of Appeal's decision is that this solemn obligation does not exist.

Statement of Facts

6. The Applicants are members or veterans of the Canadian Armed Forces who were injured in the course of their military duties.[2]

7. Until 2006, the governing legislation for compensation for disability and injuries resulting from service was the *Pension Act.*[3] On April 1, 2006, during the Afghanistan conflict, the *Canadian Forces Members and Veterans Re-establishment and Compensation Act*[4] was enacted, replacing the *Pension Act*.

8. When the New Veterans Charter came into force, as many as 3,000 members of the Canadian Armed Forces were actively conducting combat operations in Kandahar, Afghanistan as part of Operation ATHENA. Canadian Forces combat deployments continued in Afghanistan until March 14, 2014.[5]

9. The Applicants have each made a claim for and received disability compensation under the New Veterans Charter.

10. On October 30, 2012, the Applicants filed a Notice of Civil Claim under the *Class Proceedings Act*,[6] alleging compensation provided under the New Veterans Charter is inadequate – representing a substantial reduction from the compensation formerly granted under the provisions of the *Pension Act*.

11. On May 31, 2013, the Respondent filed an application to strike the claim pursuant to Rule 9-5 of the British Columbia *Supreme Court Civil Rules*. The application was heard by Mr.

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[2] *Scott v. Canada*, 2017 BCCA 422 at para. 18. ("*Scott 2017*").**[Tab 2C]**
[3] *Pension Act*, R.S.C. 1985, C. P-6.
[4] *Canadian Forces Members and Veterans Re-establishment and Compensation Act*, S. C. 2005, c. 21. ("New Veterans Charter").
[5] Amended Notice of Civil Claim. **[Tab 4A]**
[6] *Class Proceedings Act*, R.S.B.C. 1996, c. 50.

Justice Weatherill, who had been assigned as the Case Management Judge for the proposed class action.

Case Management Judge Decision

12. The Case Management Judge issued his reasons for judgment on the Respondent's application, striking out some portions of the claim related to the *Universal Declaration of Human Rights*, s. 26 of the *Charter*, *the Statutory Instruments Act* and public law duties of care but allowing the majority of the causes of action to proceed.

13. The Case Management Judge held it was not plain and obvious that the following causes of action had no reasonable prospect of success:

(a) Breach of the Social Covenant;
(b) Breach of fiduciary duty;
(c) Breaches of sections 7, 15 and 24 of the *Charter*; and
(d) the *Bill of Rights*.

14. Furthermore the Case Management Judge held that the Applicant's claim was not statute barred by s. 9 of the *Crown Liability and Proceedings Act*[7].

15. The Case Management Judge reviewed the relevant portions of the pleadings and the case law that has to date dealt with the concept of the Honour of the Crown and concluded that it was not plain and obvious that the principles of the Honour of the Crown could not bind the Crown in respect to historical promises made to the members of the Armed Forces.[8]

16. After reviewing the test established by this Court in *Québec (Attorney General) v. A*,[9] the Case Management Judge considered whether the New Veterans Charter creates a distinction based on an analogous ground for the purpose of s. 15 of the *Charter*. In doing so, the Court considered the previous jurisprudence with respect to military personnel in *R. v. Généreux*,[10] highlighting the following passage:

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[7] *Crown Liability and Proceedings Act*, RSC 1985, c C-50.
[8] *Scott v. Canada*, 2013 BCSC 1651at paras. 23, 24, and 32 to 35. ("*Scott 2013"*).**[Tab 2A]**
[9] *Québec (Attorney General) v. A.*, 2013 SCC 5.
[10] *R. v. Généreux*, [1992] 1 S.C.R. 259.

> *I emphasize, however, that my conclusion here is confined to the context of this appeal. I do not wish to suggest that military personnel can never be the objects of disadvantage or discrimination in a manner that could bring them within the meaning of s. 15 of the Charter. Certainly it is the case, for instance, that after a period of massive demobilization at the end of hostilities, returning military personnel may well suffer from disadvantages and discrimination peculiar to their status, and I do not preclude that members of the Armed Forces might constitute a class of persons analogous to those enumerated in s. 15(1) under those circumstances*. However, no circumstances of this sort arise in the context of this appeal, and the appellant gains nothing by pleading s. 15 of the *Charter*.[11]

17. With respect to whether the distinction perpetuates disadvantage or stereotype, the Case Management Judge held that, in light of the Supreme Court of Canada's more expansive approach adopted in *Québec (Attorney General) v. A*, it was not plain and obvious that the New Veterans Charter could not be found to violate the norm of substantive equality through its treatment of injured Canadian Forces members and veterans.[12]

18. With respect to s. 7 of the *Charter*, the Case Management Judge noted that, while previous case authorities had limited its application, the Applicants' circumstances put them in a unique relationship with the government.[13] The Case Management Judge took note of the fact that the legislative changes took place during the Afghanistan war when the Applicants had no choice but to continue serving their country and concluded it was not plain and obvious the Applicants' s. 7 *Charter* claim in respect of serious state imposed psychological distress would fail.[14]

19. The Respondent appealed the decision to the British Columbia Court of Appeal. The Applicants did not appeal the Case Management Judge's ruling on the portions of the claim that were struck.

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[11] *Scott 2013*, at paras. 85 to 90.**[Tab 2A]**
[12] *Scott 2013*, at para. 95. **[Tab 2A]**
[13] *Scott 2013*, at paras. 104-108. **[Tab 2A]**
[14] *Scott 2013*, at paras. 109-112. **[Tab 2A]**

Intervening Events Prior to the Court of Appeal's Judgment

20. On March 30, 2015, Bill C-58 was introduced in Parliament.[15] The Bill included a "Purpose Clause" to be added to the New Veterans Charter which read:

> The purpose of this Act is to recognize and fulfill the obligation of the people and Government of Canada to show just and due appreciation to members and veterans for their service to Canada. This obligation includes providing services, assistance and compensation to members and veterans who have been injured or have died as a result of military service and extends to their spouses or common-law partners or survivors and orphans. This Act shall be liberally interpreted so that the recognized obligation may be fulfilled.[16]

21. On May 11, 2015, Mr. Fin Donnelly, MP introduced an Opposition Day Motion (the "Donnelly Motion") which read:

> That, in the opinion of the House, a standalone covenant of moral, social, legal, and fiduciary obligation exists between the Canadian people and the government to provide equitable financial compensation and support services to past and active members of the Canadian Armed Forces who have been injured, disabled or have died as a result of military service, and to their dependants, which the government is obligated to fulfil.[17]

22. The House of Commons was unanimous in its support of the motion.[18]

23. Furthermore, prior to the release of the Court of Appeal's decision, the parties entered into an "Abeyance Agreement" which was signed by the Minister of Veteran's Affairs and contained an acknowledgment of the Social Covenant by the Respondents.[19]

Court of Appeal Decision

24. The Court of Appeal framed the question before it as being "…whether an arguable case can be advanced that the Canadian Parliament lacks authority to enact legislation fixing and limiting compensation."[20]

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[15] Scott Affidavit at para. 16. **[Tab 4B]**
[16] Exhibit "H" to the Scott Affidavit at para. 25. [Emphasis Added]. **[Tab 4B]**
[17] Exhibit "F" to the Scott Affidavit at para. 22. [Emphasis Added]. **[Tab 4B]**
[18] Exhibit "G" to the Scott Affidavit at para. 24. **[Tab 4B]**
[19] Exhibit "A" to the Scott Affidavit at para. 5. **[Tab 4B]**
[20] Scott 2017, at para. 16. **[Tab 2C]**

25. After reviewing the procedural history of the case and the reasons of the Case Management Judge, the Court of Appeal turned to what it viewed as the material facts plead by the Applicants as grounding their non-*Charter* constitutional arguments, which facts were limited to the statements made by Prime Minister Borden as well as references made in two subsequent pieces of veterans legislation to the "recognized obligation of the people and Government of Canada."[21]

26. The Court of Appeal disagreed with the Case Management Judge's acceptance of the existence of the Social Covenant and concluded that "the idea that inspirational statements by a prime minister containing vague assurances could bind the Government of Canada to a specific legislative regime in perpetuity does not, in any way, conform with the country's constitutional norms".[22]

27. The Court of Appeal disagreed with the Case Management Judge's assessment of the scope of the doctrine of the Honour of the Crown. For the Court, the doctrine, as it applies in Aboriginal law, is a distinct concept which recognizes that the Crown, in asserting sovereignty over lands already occupied by First Nations, undertook obligations of honour.[23]

28. The Court concluded that:

> [68] The concept of "honour of the Crown" as a constitutional doctrine in Aboriginal law, then, arises from unique circumstances. It is important to recognize that it is not a concept that serves to override the Constitution of Canada. Rather, it predates the *Constitution Act, 1867* and exists as part of Canada's unwritten constitution, now read in to s. 35 of the *Constitution Act, 1982*. It applies to First Nations in order to reconcile their status as original (and unconquered) occupants of the land with the assertion of Crown sovereignty.
>
> [69] The situation of the plaintiffs bears no resemblance to that of First Nations. The Canadian Forces were created by the Crown, and are under the Queen's command. The *Constitution Act, 1867* gives Parliament plenary power over Canada's armed forces, without imposing any special constitutional limitations deriving from the honour of the Crown.
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> [70] I would, therefore, reject the judge's suggestion that the doctrine of "honour of the Crown" could expand to act as a foundation for the plaintiffs'

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[21] *Scott 2017*, at para. 53. **[Tab 2C]**
[22] *Scott 2017*, at para. 55. **[Tab 2C]**
[23] *Scott 2017*, at para. 63 to 67. **[Tab 2C]**

> contentions. Such an expansion would be completely contrary to the scheme of the *Constitution Act, 1867,* which forms part of the fundamental law of Canada.[24]

29. With respect to the Applicants' claim for breach of fiduciary duties, the Court of Appeal held the claim was premised on the existence of the Social Covenant and having rejected the assertion of a Social Covenant, the Court of Appeal held that it follows that the claim for breach of fiduciary duty must fail. In addition, the Court of Appeal concluded that the Applicants had failed to meet the undertaking requirement set out by the Court in *Alberta v. Elder Advocates Society*.[25]

30. With respect to the applicability of s. 7 and s. 15 of the *Charter*, the Court of Appeal concluded there was no reasonable claim.[26] Having rejected the idea that the Social Covenant exists, the Court found there was no other property right asserted and, as such, concluded that the pleadings under the *Canadian Bill of Rights* do not state a reasonable claim. As the balance of the claims were found to be ancillary to the constitutional claims, the Court concluded that those claims fail as well.[27]

PART II – STATEMENT OF ISSUES

31. Should this Court grant leave on the grounds that the appeal will raise the following issues of national importance:

> **Issue One:** What is the nature of the relationship between Canada and its Armed Forces members and veterans who are injured in their service? Specifically:
>
> (i) is there a sacred obligation or "social covenant" between the people and government of Canada and the members of its Armed Forces to provide equitable compensation and support to those who have been injured in service?; and
> (ii) if so, what legal effect can be given to a "social covenant" broadly or specifically in the application of government compensation?;
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> **Issue Two:** What is the scope of the "honour of the Crown" doctrine, and specifically:

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[24] *Scott 2017*, at paras. 68 to 70. **[Tab 2C]**
[25] *Scott 2017*, at paras. 71 to 73 citing *Alberta v. Elder Advocates of Alberta Society*, [2011] 2 SCR 261, 2011 SCC 24. **[Tab 2C]**
[26] *Scott 2017*, at paras. 77 to 80. **[Tab 2C]**
[27] *Scott 2017*, at paras. 92 to 94. **[Tab 2C]**

(i) does it apply outside the context of Aboriginal law and s. 35 of the *Constitution Act, 1982*?; and

(ii) if so, is membership in the Canadian Armed Forces capable of recognition as a "special relationship" with the Crown for the purposes of the "Honour of the Crown" doctrine?

Issue Three: Is membership in the Canadian Armed Forces capable of recognition as an analogous ground for the purpose of s. 15 of the *Charter*?

Issue Four: Can s. 7 of the *Charter* create positive obligations on the Government in unique circumstances, or is its application is limited to situations where a deprivation is imposed by the government?

PART III - STATEMENT OF ARGUMENT

Issue One: What is the nature of the relationship between Canada and its Armed Forces members and veterans who are injured in their service?

32. The Court of Appeal correctly held that the "essence" of the claim is the Social Covenant: that in exchange for the personal sacrifices made by Armed Forces members, the government of Canada has bound itself to provide adequate compensation for disabilities resulting from service to the country.[28] The existence of a disability pension is an essential condition of the relationship between Canada and Canadian Forces members following enlistment, as evidenced by its inclusion as a term in the Conditions of Service. These Conditions of Service were unilaterally changed by Parliament with the enactment of the New Veterans Charter during a period at which Canada was at war sustaining heavy casualties and injuries.[29]

33. The Court of Appeal has rejected this position and the very existence of the Social Covenant. The Applicants' position is that the foundation for the Social Covenant arose out of constitutional necessity to raise a citizens' voluntary army.[30] Statements made by Prime Minister Borden provide one example, among others, of the expression of the Social Covenant. Other

[28] *Scott 2017* at para. 6. **[Tab 2C]**
[29] Amended Notice of Civil Claim at paras. 234, 237 and 238. **[Tab 4A]**
[30] Amended Notice of Civil Claim at paras. 221 to 224. **[Tab 4A]**

examples are cited in the pleadings, including in Canadian veteran legislation, government reports, representations by military recruiters, and as a term in the Conditions of Service.[31]

34. The Applicants' claim with respect to the Social Covenant was correctly articulated by the Case Management Judge where, after quoting the relevant paragraphs of the Amended Notice of Civil Claim noted above, he stated:

> [23] The foregoing assumed facts disclose a long standing and legislated recognition in Canada of the unique service and sacrifices of those who serve and have served in its armed forces. The Government of Canada represented to its armed forces its commitment to fairly and adequately compensate those members who were injured as well as their dependants. Indeed, the existence of a disability pension was an "essential condition of the relationship" following enlistment (amended notice of civil claim at para. 237).[32]

35. However, the Court of Appeal ignored these and other examples from the pleadings expressly in para. 53 of the Judgment, where the Court limited the "material facts" to those statements of Robert Borden and subsequent veterans legislation and concluded that "[t]he idea that inspirational statements by a prime minister containing vague assurances could bind the Government of Canada to a specific legislative regime in perpetuity does not, in any way, conform with the country's constitutional norms."[33]

36. In the circumstances, is there *really* no obligation to fulfill assurances reasonably relied upon by Canada's Armed Forces? Does the force of these words depend on whether Canada is enduring a time of war? Should veterans and service members continue to rely on the word of their Government? These statements were not vague, they reflect a solemn obligation and they were intended to both assure and encourage participation in armed conflict.

37. The Constitution of Canada includes not only organic statutes, but also a large body of constitutional customs and conventions, some of which are unwritten but understood, and often equally important to the provisions of positive enactments. As such, can there be a constitutionally recognized Social Covenant between Canada and members of the Canadian Forces?

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[31] Amended Notice of Civil Claim at paras. 225 to 238. **[Tab 4A]**
[32] *Scott 2013*, at para. 23. **[Tab 2A]**
[33] *Scott 2017*, at paras. 53 to 55; see also paras. 58 and 5. **[Tab 2C]**

38. There is a strong basis for concluding, as the Case Management Judge did, that the Social Covenant exists. The historic legal foundation for the Social Covenant dates back to the events of the Glorious Revolution in 1688 and 1689, which transformed the foundations of government in England as reflected in the *Bill of Rights of 1689*, (Eng.) 1 Will. & Mar. sess.2, c.2. The *Bill of Rights of 1689* established a constitutional monarchy in Great Britain and, *inter alia*, provided that keeping a standing army in time of peace, unless it be with the consent of Parliament, is against the law. The *Bill of Rights of 1689* is part of the Constitutional Law of Canada through the Preamble of the *British North America Act* of 1867 and has been recognized to be so.[34][35]

39. The Social Covenant issue is one of great national importance as it goes to the very nature of the relationship between Canada and those who serve and the promises made to them upon recruitment and therefore the Court of Appeal's Judgment denying its existence has serious national implications.

40. There is no foundation for the conclusion of the Court of Appeal that the Social Covenant does not exist.[36] This conclusion is contrary to historical fact, of which the Court could take judicial notice, and contrary to the material before the Court, which included:

(i) the unanimous resolution of the House of Commons in the Donnelly Motion;

(ii) the speeches of the veterans affairs leadership of all political parties in the House of Commons supporting the unanimous resolution;

(iii) the reintroduction of the Purpose Clause; and

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[34] *Resolution to amend the Constitution*, [1981] 1 SCR 753, at p. 785 holding that Reference may appropriately be made to art. 9 of the *Bill of Rights* of 1689, undoubtedly in force as part of the law of Canada, which provides that "Proceedings in Parliament ought not to be impeached or questioned in any Court or Place out of Parliament".

[35] *O'Donohue v. Canada*, 2003 CanLII 41404 (ON SC), paras. 17-23 and 35, noting that the *Bill of Rights* of 1689 is listed in Chapter 2 of the Constitutional Acts listed in *Revised Statutes of Ontario, 1897*, vol. III, appendix Part 1.

[36] See, for example, the legislation and reports referred to in the Amended Notice of Civil Claim and para. 6 of the Reasons for Judgment of the Court of Appeal.

(iv) the Abeyance Agreement.

41. In addition to the unanimous resolution on the standalone covenant to veterans, resolutions of the House of Commons have been passed to make important political statements. Shortly after the 1995 referendum on the succession of Québec, the House of Commons passed a resolution acknowledging that Québec is a distinct society because of its main language, unique culture, and civil law tradition. Similarly, in 2006 the House of Commons passed a resolution acknowledging that the Québécois form a nation within a united Canada. It was stated by the proponents that passing the motions established a constitutional convention. Is legislative recognition of the Social Covenant not an analogous situation?

42. The issue of the legal effect of the Social Covenant is one that reasonably requires determination by this Court. Both present and future Canadian Armed Forces members and veterans need to know the status of their relationship with the Government, its contours and limitations.

Issue Two: What is the Scope of the Application of the Honour of the Crown?

43. The decision of the Court of Appeal raises an issue as to the applicability in Canadian law of the Honour of the Crown doctrine. The Social Covenant is given effect by the principle of the Honour of the Crown. The Case Management Judge articulated the Applicants' position correctly, as follows:

> [23] The foregoing assumed facts disclose a long standing and legislated recognition in Canada of the unique service and sacrifices of those who serve and have served in its armed forces. The Government of Canada represented to its armed forces its commitment to fairly and adequately compensate those members who were injured as well as their dependants. Indeed, the existence of a disability pension was an "essential condition of the relationship" following enlistment (amended notice of civil claim at para. 237).
>
> [24] The plaintiffs argue that this long standing and legislated recognition amounts to a "Social Covenant" that, by virtue of the evolving legal doctrine known as the "Honour of the Crown", the defendant is honour bound to carry out.[37]

[37] *Scott 2013,* at paras. 23 and 24. **[Tab 2A]**

44. After reviewing the various examples of the jurisprudence dealing with the application of the Honour of the Crown, the Case Management Judge concluded that it was not plain and obvious that the Honour of the Crown could not be found to bind the Crown in respect of the historical promises it made to the members of the Armed Forces:

> [33] Members of the Canadian Forces bear a unique relationship with the Crown insofar as they are required by law to face injury or death to carry out the orders of their military commanders in furtherance of the policies determined by the Government of Canada. Casualties are anticipated and planned for by superior officers. Canadian Forces members are given no choice. They must obey the orders of their superiors to go into battle or face severe military sanctions. Indeed, until 1998 when the *National Defence Act* was amended, the death penalty existed for several military offences such as showing cowardice before the enemy.
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> [34] In return for undertaking these onerous and often dangerous obligations, armed forces members were promised that they and their dependants would be fairly and adequately compensated.
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> [35] In *Manitoba Métis Federation*, the Supreme Court of Canada fashioned a new constitutional obligation derived from the Honour of the Crown albeit within the Aboriginal context. It appears to me that this doctrine may well be an evolving one. On the facts as pleaded, I cannot find it is plain and obvious that the Honour of the Crown doctrine could never be extended to impose an obligation on the Crown to fulfill the Social Covenant it made to its armed forces despite changes in government policy. It is conceivable that the promise to provide suitable and adequate care for the armed forces and their families meets the threshold of an overarching reconciliation of interests that engages the Honour of the Crown. The issue is an important one that is deserving of full inquiry and should appropriately be left for determination after a trial on the merits.[38]

45. The Court of Appeal disagreed with the Case Management Judge's assessment of the scope of the doctrine of the Honour of the Crown. Instead, the Court of Appeal held that the doctrine as it applies in Aboriginal law is a distinct concept which recognizes that the Crown, in asserting sovereignty over lands already occupied by First Nations, undertook obligations of honour.[39]

46. The Applicants agree with the Court of Appeal as to the origins of the doctrine in the Aboriginal law context. It was necessary to invoke the Honour of the Crown because the promises made to First Nations people were of fundamental constitutional importance to the

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[38] *Scott 2013*, at paras. 33 to 35. **[Tab 2A]**
[39] *Scott 2017*, at paras. 63to 73. **[Tab 2C]**

creation of Canada and Canada's relationship with First Nations, but those promises were not embodied in any statute. The same principles apply here. The Social Covenant was, and continues to be needed to mobilize an army to protect Canada and its values, but the solemn promises it contains remain unwritten.

47. In rejecting the expansion of the doctrine, the Court of Appeal specifically noted that the Honour of the Crown predates the *Constitution Act, 1867* and exists as part of Canada's unwritten constitution, now read in to section 35 of the *Constitution Act, 1982*.[40]

48. The fact that the Honour of the Crown is a part of the unwritten constitution is exactly why it is open to the Court to consider its application beyond the First Nations context. Had it been embodied in the text of the Constitutional provisions that address First Nations, there would be no question that it is so limited in scope.

49. Despite the fact that the Honour of the Crown predates the *Constitution Act, 1867*, the drafters of the Constitution did not see fit to include the doctrine in the text of the *Constitution Act, 1867*. Instead, it continued as an unwritten principle which applies to the Crown's dealings with First Nations and was given effect to in the jurisprudence.[41] When Aboriginal rights were acknowledged and included in s. 35 of the *Constitution Act, 1982*, the principle of the Honour of the Crown was again not included in the text of that section, but continues to be applied in the jurisprudence as an unwritten principle to interpret of the obligations contained in s. 35.[42]

50. Since the Honour of the Crown remains an unwritten principle, developed solely by jurisprudence, why should its application be limited to Aboriginal law? Can this concept be applied to interpret the Crown's obligations to members of its Armed Forces?

51. The Court of Appeal suggests that the expansion of the Honour of the Crown to the Applicants' claims would be contrary to the scheme of the *Constitution Act, 1867*, but the Applicants' claim does not deny the power of Parliament to legislate in the area of Canada's Armed Forces – including the power to enact a compensation scheme for injured veterans.

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[40] *Scott 2017*, at paras. 68. **[Tab 2C]**
[41] See, for example, *Calder et al. v. Attorney-General of British Columbia*, [1973] SCR 313.
[42] See, for example, *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SC 73, [2004] 3 S.C.R. 511.

52. Rather, the question is whether the Honour of the Crown, as an unwritten principle of Canada's constitution, requires Parliament to act honourably and carry out its powers in a manner consistent with the promise to those who enlisted in service to Canada and sacrificed for this nation.

53. The Court of Appeal's judgment has closed the door to the Honour of the Crown doctrine's application outside of Aboriginal law, an unfortunate conclusion which has implications far beyond the scope of this case. The issue warrants consideration by this Honourable Court.

Issue Three: Can being a member of the Canadian Armed Forces be recognized as an analogous ground for the purpose of s. 15 of the *Charter*?

54. With respect to the applicability of s. 15 of the *Charter*, under the relevant inquiry as set out in *Québec (Attorney General) v. A.*[43], the Applicants' position is that while being a member of the Canadian Forces was neither an enumerated or analogous ground, the existing case law does not preclude new grounds, and it is arguable that it *could* be recognized as such.

55. In *Ontario (Attorney General) v. Fraser*[44], this Honourable Court left open the possibility that occupational status could be an analogous ground. Moreover, this Court's decision in *R. v. Généreux* was confined to its context and did not suggest that military personnel can *never* demonstrate discrimination to bring themselves within the meaning of s. 15.

56. In concluding that status as a Canadian Forces member or veteran injured while serving could constitute an analogous ground, the Case Management Judge below identified some of the unique aspects of employment in the Armed Forces as follows:

> [88] When a person becomes a member of the Canadian Forces, he or she is bound to serve until lawfully released: National Defence Act, s. 23. This imposes a legal obligation upon Canadian Forces members that is unlike that upon members of civilian society. Civilians who decide to quit their job may face the prospect of loss of employment or threat of legal action for breach of contract. In contrast, Canadian Forces members who abandon or fail to report for duty face far

[43] *Québec (Attorney General) v. A*, 2013 SCC 5, [2013] 1 SCR 61

[44] *Ontario (Attorney General) v. Fraser*, 2011 SCC 20, [2011] 2 SCR 3 at para. 116.

more serious repercussions including imprisonment, potentially for life: National Defence Act, ss. 88 and 90.[45]

57. It is critical to note the decision of this Court in *R. v. Généreux* was rendered in 1992 at a time when Canada's veteran population was aging and Canada's military role was largely limited to NATO and UN peacekeeping operations. By way of contrast, this case arises at the end of the Afghanistan war – a conflict which has rapidly changed the role of the Canadian military and Canada's veteran population. Veterans Affairs Canada was not prepared to deal with this new generation of veterans.[46] At present, there has been demobilization of the Canadian Forces from Afghanistan, which was the longest war the Canadian Military has ever been engaged in. The Applicants and class members returned from the war to find a government unprepared to deal with the changing demographic of veterans and to a system of compensation that is unfair and inadequate.

58. This case provides an opportunity for the Court to revisit *R. v. Généreux* in light of the *very* different nature of the Canadian military today and in light of its decision in *Ontario v Fraser*, which suggests that occupational status could be an analogous ground. Should the door forever be closed to this potential category?

Issue Four: Can s. 7 of the *Charter* create positive obligations on the Government in unique circumstances?

59. Canada has benefited from the Canadian Forces participation in the Afghanistan conflict – whereas, the Applicants have, by their participation, endangered their lives under the direction and control of the Canadian government. Does this special relationship carry <u>any</u> positive obligation on the side of Government, or do Canadian Forces members bear all the risks and all the responsibilities upon their return home?

60. With respect to the claim that the New Veterans Charter violated the Applicants' right to life, liberty and security of the person, the Case Management Judge noted that, while previous case authorities had limited the application of s. 7 and specifically not included economic interests, the Applicants in the present case had been injured and were in need of economic assistance as a result of their service to Canada, and therefore he held it was not plain and

[45] *Scott 2013*, at para. 88. **[Tab 2A]**
[46] Amended Notice of Civil Claim at paras. 272 to 286. **[Tab 4A]**

obvious that the principles relating to s. 7 could not apply in their unique circumstances, and that the Applicants should be entitled to develop their case on a full record.[47]

61. The Court of Appeal held that s. 7 is targeted at action that *deprives* an individual and which has not been interpreted as placing an affirmative obligation on governments to take measures that enhance an individual's life, liberty or security of the person. In support of this decision, the Court of Appeal referred to *Gosselin v. Québec (Attorney General)*, that this was not a case where "special circumstances" required an interpretation of s. 7 favouring the imposition of positive obligations for the Government. This conclusion was based, in part, on its rejection of the existence of the Social Covenant.[48]

62. In the circumstances of this case, does the special relationship between Canada's Armed Forces and the Government impose any obligation? The Court of Appeal ignored the Applicants' position that there are two circumstances which make this case unique and distinct from *Gosselin v. Québec*.

63. While one ground of distinction is the Social Covenant, the second is the need for a positive obligation and protection of economic interests arising specifically from the Applicants' injuries resulting from their service to the country:

> [105]… The Plaintiffs have been injured, disabled and are in need of adequate economic assistance as a result of their military service. They are in a unique relationship with the government.[49]

64. In considering *Gosselin v. Québec*, the Court stated:

> [88] As I understand the Charter jurisprudence in general, and *Gosselin* in particular, s. 7 of the *Charter* only deals with deprivations that result from government action. In saying, in *Gosselin*, that it is conceivable that, in the future, s. 7 of the *Charter* could be held to found positive obligations on the part of governments, I do not read the Court as suggesting that resort may be had to s. 7 in the absence of a deprivation imposed by government. Rather, what the court is concerned with is complex situations where deprivations contributed to by

[47] *Scott 2013*, at paras. 104 to 108. **[Tab 2A]**
[48] *Scott 2017* at paras. 83 to 90, citing *Gosselin v. Québec (Attorney General)*, 2002 SCC 84, [2002] 4 SCR 429. **[Tab 2C]**
[49] Respondents' Factum at para. 81 citing the Amended Notice of Civil Claim at para. 105. **[Tab 4C]**

> government might give rise to countervailing obligations of a positive nature. [Emphasis added].[50]

65. The fact that the Applicants suffered deprivations as a result of their service is a "complex situation where deprivation contributed to by government might give rise to countervailing obligations of a positive nature".

66. By foreclosing the application of s. 7 in these circumstances, the Court of Appeal's judgment ignores the caution of this Court in *Gosselin v. Québec* which stressed the importance of not limiting the application of s. 7 and is inconsistent with the incremental approach in applying s. 7 of the Charter espoused by the Supreme Court of Canada in *Chaoulli v. Québec (Attorney General).*[51]

67. The unique circumstances of the Applicants justify the intervention and consideration of this Honourable Court and provides an opportunity to clarify the application of s. 7.

68. In addition, the Court of Appeal did not address an important aspect of the s. 7 claim: that the passing of the New Veterans Charter occurred while the Applicants were serving overseas and caused serious state imposed psychological distress. The Case Management Judge correctly articulated the Applicants' position as follows:

> [110] The plaintiffs allege that, despite the promises made to them in the form of the Social Covenant, the government acted unilaterally to diminish the benefits they would have otherwise received after April 1, 2006. This legislative change occurred during the Afghanistan war when the armed forces had no choice but to continue serving their country and believed they would continue to receive benefits under the Pension Act. They say that they legitimately believed the government would honour its Social Covenant. The economic strain that has now been placed upon them as a consequence of the NVC creates enormous stress and feelings of betrayal and abandonment.
>
> [111] The plaintiff, Major Mark Campbell is one example. After 32 years of military service, Mr. Campbell suffered the loss of both legs as well as other injuries. He also experienced severe mental health injuries initially caused by his physical injuries and later perpetuated by his feelings of betrayal and abandonment

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[50] *Scott 2017* at para. 88. **[Tab 2C]**

[51] *Chaoulli v. Québec (Attorney General)*, 2005 SCC 35, [2005] 1 SCR 791.

by the Canadian Forces, Veterans Affairs Canada and the government: amended notice of civil claim para. 104.[52]

69. The question of under what circumstances s. 7 protects against state imposed psychological distress is an important one that will have implications beyond the Applicants and class members that justifies the intervention of this Court.

Conclusion:

70. The men and women who voluntarily sign up for Canada's military do so at great personal risk and sacrifice. In exchange for that sacrifice there is a sacred obligation on the Government and people of Canada to ensure those who are injured or fall receive adequate recognition and compensation for their injuries or losses.

71. The Court of Appeal was correct when it stated "[a]ll right thinking Canadians would agree that they should be provided with adequate disability benefits. If that is not occurring, it is a national embarrassment."[53] In making this statement, the Court of Appeal acknowledges the national importance of the case.

72. This case raises fundamental questions about the unique and special relationship between Canada and members of the Armed Forces, including:

(a) does the enactment of the inadequate compensation scheme under the *Canadian Forces Members and Veterans Re-establishment and Compensation Act*,[54] breach Canada's solemn obligation ("Social Covenant") to those who have served the country; and

(b) what is the nature and scope of the doctrine of the Honour of the Crown?

73. At present, there are no authorities that address the Crown's *sui generis* relationship with its Armed Forces members and veterans. Further guidance is required to assist Courts tasked with examining the nature and extent of obligations owing to those injured in service to Canada.

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[52] *Scott 2013* at paras. 110 and 111. **[Tab 2A]**

[53] *Scott 2017*, at para. 16. **[Tab 2C]**

[54] *Canadian Forces Members and Veterans Re-establishment and Compensation Act*, S. C. 2005, c. 21. ("New Veterans Charter").

PART IV - SUBMISSIONS CONCERNING COSTS

74. As this is public interest litigation, the Applicants do not seek an award of cost for the Leave Application.

PART V - ORDER SOUGHT

75. The Applicants seek an order granting leave to appeal from the Judgment of the Court of Appeal of British Columbia dated December 4, 2017.

ALL OF WHICH IS RESPECTFULLY SUBMITTED, this 30th day of January 2018.

Donald J. Sorochan QC, Kelsey K. Sherriff, Aimee Schalles

Counsel for the Applicants

PART VI TABLE OF AUTHORITIES

Cases ***Paragraph(s)***

PART VII - LEGISLATION

Bill of Rights of 1689, (Eng.) 1 Will. & Mar. sess.2, c.2

Canadian Forces Members and Veterans Re-establishment and Compensation Act, S. C. 2005, c. 21

Class proceedings Act, R.S.B.C. 1996, c.50

Constitution Act, 1867, 30 & 31 Vict, c 3.

Constitution Act, 1982, Schedule B to the Canada Act 1982 (UK), 1982, c 11, ss. 7, 15 and 35

Legal Rights

Life, liberty and security of person

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

Equality Rights

Equality before and under law and equal protection and benefit of law

15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

Affirmative action programs

(2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

RIGHTS OF THE ABORIGINAL PEOPLES OF CANADA

Recognition of existing aboriginal and treaty rights

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

Garanties juridiques

Vie, liberté et sécurité

7. Chacun a droit à la vie, à la liberté et à la sécurité de sa personne; il ne peut être porté atteinte à ce droit qu'en conformité avec les principes de justice fondamentale.

Droits à l'égalité

Égalité devant la loi, égalité de bénéfice et protection égale de la loi

15. (1) La loi ne fait acception de personne et s'applique également à tous, et tous ont droit à la même protection et au même bénéfice de la loi, indépendamment de toute discrimination, notamment des discriminations fondées sur la race, l'origine nationale ou ethnique, la couleur, la religion, le sexe, l'âge ou les déficiences mentales ou physiques.

Programmes de promotion sociale

(2) Le paragraphe (1) n'a pas pour effet d'interdire les lois, programmes ou activités destinés à améliorer la situation d'individus ou de groupes défavorisés, notamment du fait de leur race, de leur origine nationale ou ethnique, de leur couleur, de leur religion, de leur sexe, de leur âge ou de leurs déficiences mentales ou physiques.

DROITS DES PEUPLES AUTOCHTONES DU CANADA

Confirmation des droits existants des peuples autochtones

Definition of "aboriginal peoples of Canada"

(2) In this Act, "aboriginal peoples of Canada" includes the Indian, Inuit and Métis peoples of Canada.

Land claims agreements

(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.

Aboriginal and treaty rights are guaranteed equally to both sexes

(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.

Commitment to participation in constitutional conference

35.1 The government of Canada and the provincial governments are committed to the principle that, before any amendment is made to Class 24 of section 91 of the "Constitution Act, 1867", to section 25 of this Act or to this Part,

(a) a constitutional conference that includes in its agenda an item relating to the proposed amendment, composed of the Prime Minister of Canada and the first ministers of the provinces, will be convened by the Prime Minister of Canada; and

(b) the Prime Minister of Canada will invite representatives of the aboriginal peoples of Canada to participate in the discussions on that item.

35. (1) Les droits existants — ancestraux ou issus de traités — des peuples autochtones du Canada sont reconnus et confirmés.

Définition de « peuples autochtones du Canada »

(2) Dans la présente loi, « peuples autochtones du Canada » s'entend notamment des Indiens, des Inuit et des Métis du Canada.

Accords sur des revendications territoriales

(3) Il est entendu que sont compris parmi les droits issus de traités, dont il est fait mention au paragraphe (1), les droits existants issus d'accords sur des revendications territoriales ou ceux susceptibles d'être ainsi acquis.

Égalité de garantie des droits pour les deux sexes

(4) Indépendamment de toute autre disposition de la présente loi, les droits — ancestraux ou issus de traités — visés au paragraphe (1) sont garantis également aux personnes des deux sexes.

Engagement relatif à la participation à une conférence constitutionnelle

35.1 Les gouvernements fédéral et provinciaux sont liés par l'engagement de principe selon lequel le premier ministre du Canada, avant toute modification de la catégorie 24 de l'article 91 de la « Loi constitutionnelle de 1867 », de l'article 25 de la présente loi ou de la présente partie :

a) convoquera une conférence constitutionnelle réunissant les premiers ministres provinciaux et lui-même et comportant à son ordre du jour la question du projet de modification;

b) invitera les représentants des peuples autochtones du Canada à participer aux travaux relatifs à cette question.

Crown Liability and Proceedings Act, RSC 1985, c C-50

Pension Act, R.S.C. 1985, C. P-6