



SUPREME COURT OF CANADA

CITATION: Alberta (Aboriginal Affairs and Northern Development) v. Cunningham, 2011 SCC 37 **DATE:** 20110721
DOCKET: 33340

BETWEEN:

Her Majesty The Queen in Right of Alberta (Minister of Aboriginal Affairs and Northern Development) and Registrar, Metis Settlements Land Registry

Appellants
and

Barbara Cunningham, John Kenneth Cunningham, Lawrent (Lawrence) Cunningham, Ralph Cunningham, Lynn Noskey, Gordon Cunningham, Roger Cunningham, Ray Stuart and Peavine Métis Settlement

Respondents
- and -

Attorney General of Ontario, Attorney General of Quebec, Attorney General for Saskatchewan, East Prairie Métis Settlement, Elizabeth Métis Settlement, Métis Nation of Alberta, Métis National Council, Métis Settlements General Council, Aboriginal Legal Services of Toronto Inc., Women's Legal Education and Action Fund, Canadian Association for Community Living, Gift Lake Métis Settlement and Native Women's Association of Canada

Interveners

CORAM: McLachlin C.J. and Binnie, LeBel, Deschamps, Fish, Abella, Charron, Rothstein and Cromwell JJ.

REASONS FOR JUDGMENT: McLachlin C.J. (Binnie, LeBel, Deschamps, Fish, Abella, Charron, Rothstein and Cromwell JJ. concurring)
(paras. 1 to 96)

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ALBERTA v. CUNNINGHAM

Her Majesty The Queen in Right of Alberta (Minister of Aboriginal Affairs and Northern Development) and Registrar, Metis Settlements Land Registry

Appellants

v.

Barbara Cunningham, John Kenneth Cunningham, Lawrent (Lawrence) Cunningham, Ralph Cunningham, Lynn Noskey, Gordon Cunningham, Roger Cunningham, Ray Stuart and Peavine Métis Settlement

Respondents

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Attorney General of Ontario, Attorney General of Quebec, Attorney General for Saskatchewan, East Prairie Métis Settlement, Elizabeth Métis Settlement, Métis Nation of Alberta, Métis National Council, Métis Settlements General Council, Aboriginal Legal Services of Toronto Inc., Women's Legal Education and Action Fund, Canadian Association for Community Living, Gift Lake Métis Settlement and Native Women's Association of Canada

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2011 SCC 37

File No.: 33340.

2010: December 16; 2011: July 21.

Present: McLachlin C.J. and Binnie, LeBel, Deschamps, Fish, Abella, Charron, Rothstein and Cromwell JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ALBERTA

Constitutional Law — Charter of Rights — Right to equality — Ameliorative programs — Alberta Metis Settlements Act providing that voluntary registration under the Indian Act precludes membership in a Métis settlement — Whether distinction drawn on enumerated or analogous grounds — Whether program genuinely ameliorative — Whether distinction serves or advances object of ameliorative program — Canadian Charter of Rights and Freedoms, s. 15(2) — Metis Settlements Act, R.S.A. 2000, c. M-14, ss. 75, 90.

Constitutional Law — Charter of Rights — Freedom of Association — Alberta Metis Settlements Act providing that voluntary registration under the Indian Act precludes membership in a Métis settlement — Whether legislation violates right to freedom of association — Canadian Charter of Rights and Freedoms, s. 2(d) — Metis Settlements Act, R.S.A. 2000, c. M-14, ss. 75, 90.

Constitutional Law — Charter of Rights — Right to Liberty — Alberta Metis Settlements Act providing that voluntary registration under the Indian Act precludes membership in a Métis settlement — Whether legislation violates right to

liberty — Canadian Charter of Rights and Freedoms, s. 7 — Metis Settlements Act, R.S.A. 2000, c. M-14, ss. 75, 90.

Section 35 of the *Constitution Act, 1982* recognizes three groups of Aboriginal peoples — Indians, Métis and Inuit. In Alberta, the relationship between the government and the Métis has evolved to a point where the Métis and the government entered into negotiations centered on establishing settlement lands for Métis communities, extending self-government to those communities, and ensuring the protection and enhancement of Métis culture and identity. The negotiations extended to provisions that would allow the Métis to maintain their separate identity as Métis, distinct from Indians. The *Métis Settlements Act* (“*MSA*”) was enacted as a result of these negotiations.

The claimants were formal members of a Métis community in Alberta which was established and administered under the terms of the *MSA*. They opted to register as status Indians in order to obtain medical benefits under the *Indian Act*. However, the *MSA* provides that voluntary registration under the *Indian Act* precludes membership in a Métis settlement. Their membership in the Métis settlement was revoked pursuant to s. 90 of the *MSA*. The claimants sought a declaration that the denial of membership pursuant to ss. 75 and 90 of the *MSA* was unconstitutional due to violations of the *Charter* guarantees of equality, freedom of association and liberty. The chambers judge dismissed these claims. The Court of Appeal allowed the

appeal, finding that these provisions were inconsistent with the equality guarantee under s. 15 of the *Charter*.

Held: The appeal should be allowed and the judgment of the chambers judge affirmed.

The s. 15 claim must be dismissed. The *MSA* is an ameliorative program protected by s. 15(2) of the *Charter*. Section 15(2) permits governments to assist one group without being paralyzed by the necessity to assist all, and to tailor programs in a way that will enhance the benefits they confer while ensuring that the protection that s. 15(2) provides against the charge of discrimination is not abused for purposes unrelated to an ameliorative program's object and the goal of substantive equality. Ameliorative programs, by their nature, confer benefits on one group that are not conferred on others. These distinctions are generally protected if they serve or advance the object of the program, thus promoting substantive equality, even where the included and excluded groups share a similar history of disadvantage and marginalization.

Where the government relies on s. 15(2), the first question is whether the law makes an adverse distinction against the claimant group on the basis of one of the grounds set out in s. 15(1) or an analogous ground. If so, the next question is whether the distinction is saved by s. 15(2). The government must show, on the evidence, that the program is a genuinely ameliorative program directed at improving the situation of a group that is in need of ameliorative assistance in order to enhance substantive

equality, that there is a correlation between the program and the disadvantage suffered by the target group, and that rational means are being used to pursue the ameliorative goal. If these conditions are met, s. 15(2) protects all distinctions drawn on enumerated or analogous grounds that serve and are necessary to the ameliorative purpose, to the extent justified by the object of the ameliorative program. If not, the analysis returns to s. 15(1) and, if substantive discrimination is established, to s. 1.

In this case, and assuming that the distinction between the Métis and status Indians in the *MSA* is a distinction on an enumerated or analogous ground, the *MSA* program is a genuinely ameliorative program. Unlike many ameliorative programs, its object is not the direct conferral of benefits on individuals within a particular group, but the enhancement and preservation of the identity, culture and self-governance of the Métis through the establishment of a Métis land base. The correlation between the program and the disadvantage suffered by the target group, one of the three aboriginal peoples of Canada recognized in s. 35 of the Constitution, is manifest.

As excluding Métis who are also status Indians from formal membership in Métis settlements serves or advances the object of the ameliorative program, s. 15(2) protects the *MSA* against the charge of discrimination. The Métis have a right to their own culture and drawing distinctions on this basis reflects the Constitution and serves the legitimate expectations of the Métis people. The exclusion corresponds to the historic and social distinction between the Métis and

Indians and respects the role of the Métis in defining themselves as a people. Moreover, achieving the object of the program would be more difficult without the distinction. The fact that some people may identify as both Métis and Indian does not negate the general correspondence underlying the distinction between the two groups.

The record does not provide an adequate basis to assess the claimants' s. 2(d) argument. The s. 7 claim also fails. There is no need to decide whether place of residence is protected by s. 7 because any impact on liberty was not shown before the chambers judge to be contrary to the principles of fundamental justice. Requiring Aboriginal adults who might otherwise meet the definition of both Indian and Métis to choose whether they wish to fall under the *Indian Act* or the *MSA* is not grossly disproportionate to the interest of Alberta in securing a land base for the Métis.

Cases Cited

Referred to: *Alberta (Minister of International and Intergovernmental Relations) v. Peavine Metis Settlement*, 2001 ABQB 165, [2001] 3 C.N.L.R. 1; *R. v. Kapp*, 2008 SCC 41, [2008] 2 S.C.R. 483; *Withler v. Canada (Attorney General)*, 2011 SCC 12, [2011] 1 S.C.R. 396; *Lovelace v. Ontario*, 2000 SCC 37, [2000] 1 S.C.R. 950, aff'g (1997), 33 O.R. (3d) 735; *R. v. Powley*, 2003 SCC 43, [2003] 2 S.C.R. 207; *Godbout v. Longueil (City)*, [1997] 3 S.C.R. 844.

Statutes and Regulations Cited

Act to Amend the Indian Act, S.C. 1985, c. 27.

Alberta-Metis Settlements Accord, 1989.

Canadian Charter of Rights and Freedoms, ss. 1, 2(d), 7, 15.

Constitution Act, 1982, ss. 35, 52.

Constitution of Alberta Amendment Act, 1990, R.S.A. 2000, c. C-24, preamble.

Indian Act, R.S.C. 1985, c. I-5.

Metis Betterment Act, R.S.A. 1955, c. 202.

Metis Population Betterment Act, S.A. 1938 (2d), c. 6, s. 2(a) “Metis”.

Metis Settlements Act, R.S.A. 2000, c. M-14, ss. 0.1, 1(j) “Metis”, 75, 90, 91, 92, 93.

Royal Proclamation (1763), R.S.C. 1985, App. II, No. 1.

Transitional Membership Regulation, Alta. Reg. 337/90.

Authors Cited

Alberta. *Report of the MacEwan Joint Committee to Review the Metis Betterment Act and Regulations: Foundations for the Future of Alberta’s Metis Settlements*. Edmonton: Alberta Municipal Affairs, 1984.

Alberta. *Report of the Royal Commission Appointed to Investigate the Conditions of the Half-Breed Population of Alberta*. Edmonton: Department of Lands and Mines, 1936.

APPEAL from a judgment of the Alberta Court of Appeal (McFadyen, Costigan and Ritter JJ.A.), 2009 ABCA 239, 8 Alta L.R. (5th) 16, 457 A.R. 297, 457 W.A.C. 297, 310 D.L.R. (4th) 519, 194 C.R.R. (2d) 205, [2009] 9 W.W.R. 584,

[2009] 3 C.N.L.R. 261, [2009] A.J. No. 678 (QL), 2009 CarswellAlta 952, reversing a decision of Shelley J., 2007 ABQB 517, 81 Alta. L.R. (4th) 28, 424 A.R. 271, 160 C.R.R. (2d) 185, [2008] 1 W.W.R. 507, [2007] 4 C.N.L.R. 179, [2007] A.J. No. 913 (QL), 2007 CarswellAlta 1103. Appeal allowed.

Robert J. Normey and David N. Kamal, for the appellants.

Kevin C. Feth, Q.C., and Jeremy L. Taylor, for the respondents.

Janet E. Minor and Mark Crow, for the intervener the Attorney General of Ontario.

Isabelle Harnois, for the intervener the Attorney General of Quebec.

Written submissions only by *P. Mitch McAdam* and *James Fyfe*, for the intervener the Attorney General for Saskatchewan.

Richard B. Hajduk, Rodger C. Gibbs and Jeffrey Beedell, for the intervener the East Prairie Métis Settlement.

Thomas R. Owen and Tara Rout, for the intervener the Elizabeth Métis Settlement.

Beverly J. M. Teillet, for the intervener the Métis Nation of Alberta.

Jason Madden, Clément Chartier, Q.C., and Kathy L. Hodgson-Smith, for the intervener the Métis National Council.

Garry Appelt and Keltie L. Lambert, for the intervener the Métis Settlements General Council.

Jonathan Rudin and Mandy Wesley, for the intervener the Aboriginal Legal Services of Toronto Inc.

Dianne Pothier and Joanna L. Birenbaum, for the intervener the Women's Legal Education and Action Fund.

Laurie Letheren and C. Tess Sheldon, for the intervener the Canadian Association for Community Living.

Sandeep K. Dhir and Lindsey E. Miller, for the intervener the Gift Lake Métis Settlement.

Mary Eberts, for the intervener the Native Women's Association of Canada.

The judgment of the Court was delivered by

I. Overview

[1] Section 35 of the *Constitution Act, 1982* recognizes three groups of Aboriginal peoples — Indians, Métis and Inuit. The claimants are members of the Métis settlement of Peavine, Alberta; they are also status Indians. The *Metis Settlements Act*, R.S.A. 2000, c. M-14 (“*MSA*”), does not permit status Indians to become formal members of any Métis settlement, including Peavine. The claimants now apply for a declaration that this denial of membership violates the *Canadian Charter of Rights and Freedoms* guarantees of equality, freedom of association and liberty, and is unconstitutional.

[2] I conclude that the claimants have failed to establish that the sections of the *MSA* that led to their exclusion from the Peavine settlement are unconstitutional.

[3] The claimants assert that the *MSA*’s exclusion of Métis who are also status Indians from membership in the Peavine Métis Settlement violates the guarantee of equality of s. 15 of the *Charter*. I conclude that s. 15(2) of the *Charter*, which permits inequalities associated with ameliorative programs aimed at helping a disadvantaged group, provides a complete answer to this claim. The purpose and effect of the *MSA* is to enhance Métis identity, culture, and self-governance by creating a land base for Métis. The exclusion of status Indians from membership in the new Métis land base serves and advances this object and hence is protected by s.

15(2). I also conclude that the claimants have failed to establish that the *MSA*'s exclusion from membership in the settlement violates freedom of association under s. 2(d) of the *Charter* or liberty under s. 7 of the *Charter*.

[4] I would therefore allow the appeal and affirm the judgment of the chambers judge.

II. The History and Framework of the Program

[5] The Métis were originally the descendants of eighteenth-century unions between European men — explorers, fur traders and pioneers — and Indian women, mainly on the Canadian plains, which now form part of Manitoba, Saskatchewan and Alberta. Within a few generations the descendants of these unions developed a culture distinct from their European and Indian forebears. In early times, the Métis were mostly nomadic. Later, they established permanent settlements centered on hunting, trading and agriculture. The descendants of Francophone families developed their own Métis language derived from French. The descendants of Anglophone families spoke English. In modern times the two groups are known collectively as Métis.

[6] Following *The Royal Proclamation* of 1763, R.S.C. 1985, App. II, No. 1, which organized the territories recently acquired by Great Britain and reserved certain lands for Indians, the Crown adopted a practice of making treaties with Indian bands. Thus most Indians on the prairies are Treaty Indians. In exchange for surrendering

their traditional lands to the Crown, they were granted reservations and other benefits, such as the right to hunt and trap on Crown land. Today, the welfare of Indians is dealt with under the *Indian Act*, R.S.C. 1985, c. I-5, which provides a variety of benefits to status Indians living on and off reserve.

[7] The Crown did not apply to the Métis its policy of treating with the Indians and establishing reservations and other benefits in exchange for lands. In some regions, it adopted a scrip system that accorded allotments of land to individual Métis. However, Métis communities were not given a collective reservation or land base; they did not enjoy the protections of the *Indian Act* or any equivalent. Although widely recognized as a culturally-distinct Aboriginal people living in culturally-distinct communities, the law remained blind to the unique history of the Métis and their unique needs.

[8] Governments slowly awoke to this legal lacuna. In 1934, the Alberta legislature established the Ewing Commission, a “Royal Commission Appointed to Investigate the Conditions of the Half-Breed Population of Alberta”. The mandate of the Commission was to inquire into “the problems of health, education, relief and general welfare of the half-breed population” and to make recommendations based on its investigation.

[9] The Ewing Commission *Report* (1936) defined the terms “Metis” or “half-breed” for its own purposes as “a person of mixed blood, white and Indian, who lives the life of the ordinary Indian, and includes a non-treaty Indian” but excluding

persons of mixed blood (Indian and white) who had settled down as farmers and who did not need or desire public assistance (at p. 4).

[10] *The Metis Population Betterment Act*, S.A. 1938, 2nd Sess., c. 6, was enacted as a result of the findings and recommendations of the Ewing Commission. The term “Metis” was defined in s. 2(a) of the Act as:

... a person of mixed white and Indian blood but does not include either an Indian or a non-treaty Indian as defined in *The Indian Act*, being chapter 98 of the Revised Statutes of Canada, 1927.

[11] Renamed, *The Metis Betterment Act*, R.S.A. 1955, c. 202, continued to exclude anyone registered as an Indian under the *Indian Act* from the definition of “Metis” and expanded the exclusion to encompass anyone with the ability to be registered as an Indian under the *Indian Act*: s. 2(a).

[12] *The Metis Betterment Act*, while according limited statutory recognition to Métis, did not compel the Province of Alberta to establish a land base for Métis communities; nor did it provide adequate support for preservation of the distinct Métis identity and culture. Like the predecessor legislation, it continued to deny the Métis any form of self-government.

[13] The landscape shifted dramatically in 1982, with the passage of the *Constitution Act, 1982*. In the period leading up to the amendment of the Constitution, Indian, Inuit and Métis groups fought for constitutional recognition of their status and

rights. Section 35 of the *Constitution Act, 1982* entrenched existing Aboriginal and treaty rights and recognized three Aboriginal groups — Indians, Inuit, and Métis. For the first time, the Métis were acknowledged as a distinct rights-holding group.

[14] In anticipation of the coming into force of the *Constitution Act, 1982*, the Province of Alberta struck a Joint Métis-Government Committee to review *The Metis Betterment Act* and Regulations. The Committee, comprised of the chair, the late Grant MacEwan, who was chosen by the Métis and government, along with two members from government and two from the Métis community, prepared a report, dated July 12, 1984, setting out its conclusions and recommendations (*Foundations for the Future of Alberta's Metis Settlement* (the “MacEwan Report”)).

[15] The MacEwan Report defined a “Métis” simply as “an individual of aboriginal ancestry who identifies with Métis history and culture” (at p. 12), and recommended legislation to secure a land base and self-government for Métis communities in the province. The Alberta legislature accepted these recommendations in principle by authorizing an amendment to the *Constitution of Alberta Amendment Act, 1990*, R.S.A. 2000, c. C-24.

[16] A period of negotiation between the Métis of Alberta and the government of Alberta followed. The negotiations centered on establishing settlement lands for Métis communities, extending self-government to those communities, and ensuring the protection and enhancement of Métis culture and identity. Importantly for this

case, the negotiations extended to provisions that would allow the Métis to maintain their separate identity as Métis, distinct from Indians.

[17] These negotiations culminated on July 1, 1989, with the *Alberta-Metis Settlements Accord*. The following year, pursuant to the Accord, Alberta granted the Métis Settlements General Council fee simple title to the lands of the eight Métis communities and passed a suite of legislation to protect Métis rights, including the *MSA* at issue here.

[18] The constitution of Alberta, which, in the British tradition, is unwritten, was amended to provide constitutional recognition for the changes. The preamble to the *Constitution of Alberta Amendment Act, 1990* offers crucial insight into the objects of the legislation:

WHEREAS the Metis were present when the Province of Alberta was established and they and the land set aside for their use form a unique part of the history and culture of the Province; and

WHEREAS it is desired that the Metis should continue to have a land base to provide for the preservation and enhancement of Metis culture and identity and to enable the Metis to attain self-governance under the laws of Alberta and, to that end, Her Majesty in right of Alberta is granting title to land to the Metis Settlements General Council; and

WHEREAS Her Majesty in right of Alberta has proposed the land so granted be protected by the Constitution of Canada, but until that happens it is proper that the land be protected by the constitution of the Province;

...

[19] The Recital to the *MSA*, added in 2004, contains the following expression of purpose:

0.1 This Act is enacted

- (a) recognizing the desire expressed in the *Constitution of Alberta Amendment Act, 1990* that the Metis should continue to have a land base to provide for the preservation and enhancement of Metis culture and identity and to enable the Metis to attain self-governance under the laws of Alberta,
- (b) realizing that the Crown in right of Alberta granted land to the Metis Settlements General Council by letters patent and that the patented land is protected by an amendment to the *Constitution of Alberta* and by the *Metis Settlements Land Protection Act*,
- (c) in recognition that this Act, the *Constitution of Alberta Amendment Act, 1990*, the *Metis Settlements Land Protection Act* and the *Metis Settlements Accord Implementation Act* were enacted in fulfilment of Resolution 18 of 1985 passed unanimously by the Legislative Assembly of Alberta, and
- (d) acknowledging that the Government of Alberta and the Alberta Federation of Metis Settlement Associations made The Alberta-Metis Settlements Accord on July 1, 1989.

[20] The *MSA* defined “Metis” for its purposes as “a person of aboriginal ancestry who identifies with Metis history and culture” (s. 1(j)). Consistent with the negotiations that preceded it and the desire to preserve Métis culture and identity, the *MSA* limited the scope for status Indians to be recognized as members of settlement communities. Section 75 provides that persons registered as Indians or Inuit may not apply for membership in a Métis settlement, unless certain conditions are met and membership is authorized by a settlement bylaw. Because its provisions are central to this case, I set out s. 75 in relevant part:

75(1) An Indian registered under the *Indian Act* (Canada) or a person who is registered as an Inuk for the purposes of a land claims settlement is not eligible to apply for membership or to be recorded as a settlement member unless subsection (2) or (3.1) applies.

(2) An Indian registered under the *Indian Act* (Canada) or a person who is registered as an Inuk for the purposes of a land claims settlement may be approved as a settlement member if

- (a) the person was registered as an Indian or an Inuk when less than 18 years old,
- (b) the person lived a substantial part of his or her childhood in the settlement area,
- (c) one or both parents of the person are, or at their death were, members of the settlement, and
- (d) the person has been approved for membership by a settlement bylaw specifically authorizing the admission of that individual as a member of the settlement.

(3) If a person who is registered as an Indian under the *Indian Act* (Canada) is able to apply to have his or her name removed from registration, subsection (2) ceases to be available as a way to apply for or to become a settlement member.

(3.1) In addition to the circumstances under subsection (2), an Indian registered under the *Indian Act* (Canada) or a person who is registered as an Inuk for the purposes of a land claims settlement may be approved as a settlement member if he or she meets the conditions for membership set out in a General Council Policy.

...

[21] Additionally, the *Transitional Membership Regulation*, Alta. Reg. 337/90, permitted those registered on a settlement membership list upon the entry into force of the *MSA* to maintain their membership even if they were already registered or were eligible to register as Indians under the *Indian Act*. Persons registering as Indians after the coming into force of the *MSA* on November 1, 1990, were not covered by these grandfathering provisions.

[22] Section 90 of the *MSA* confirms that voluntary registration under the *Indian Act* precludes membership in a Métis settlement unless a General Council Policy provides otherwise:

90(1) Unless a General Council Policy provides otherwise, a settlement member terminates membership in a settlement if

- (a) the person voluntarily becomes registered as an Indian under the *Indian Act* (Canada), or
- (b) the person becomes registered as an Inuk for the purpose of a land claims agreement.

(2) On receipt from the settlement council of notice of a termination of membership under subsection (1), and after any verification of the facts that is considered necessary, the Minister must remove the name of the person concerned from the Settlement Members List.

No General Council Policy addressing settlement membership for status Indians has been passed.

[23] A settlement member who loses membership under these provisions loses any interest in the settlement land, but may continue to reside on a Métis settlement unless expelled. Sections 91 and 93 provide:

91(1) When the membership of a settlement member terminates or is terminated, the member

- (a) loses any rights gained by his or her former membership to reside on or occupy patented land, but
- (b) does not lose any right to reside on patented land acquired by or under this or any other enactment, a General Council Policy or a settlement bylaw.

(2) The termination of settlement membership does not affect any right acquired by the spouse or adult interdependent partner or minor children of the member to continue to reside on patented land.

(3) A settlement council and a person whose membership has been terminated may agree on the compensation to be paid to the former settlement member for improvements made on land held by the member and if they cannot agree either of them may refer the matter to the Appeal Tribunal.

...

93(1) A person who is permitted to reside in a settlement area under section 92 is entitled to continue to reside in the area unless the settlement council, for just cause, orders the person expelled from the settlement area.

(1.1) A settlement council may order a person who is not permitted to reside in the settlement area expelled from the settlement area if the person refuses to leave the settlement area on the request of the settlement council.

(2) No order can be made under subsection (1) or (1.1) unless the person concerned has been given an opportunity to tell the settlement council why he or she should be able to remain in the settlement area.

[24] While the negotiations proceeded with the Alberta Métis to achieve a land base, self-governance and support for Métis culture and identity, an important change was made to broaden the definition of who could register as an Indian under the federal *Indian Act*. In *An Act to Amend the Indian Act*, S.C. 1985, c. 27 (Bill C-31), Parliament reinstated the right to Indian status for many Métis settlement members who had been previously denied status, including the claimants. Prior to this amendment, Indian women who married Métis men lost their Indian status and could not pass it to their descendants. The new act went some way towards correcting this

injustice, recognized the descendants of these unions, and gave them the option of registering as status Indians.

[25] The claimants, members of the Métis settlement of Peavine, opted to register as status Indians in order to obtain medical benefits under the *Indian Act*. They did so outside the limited window provided by the *Transitional Membership Regulation*. As a result, the Registrar of the Métis Settlements Land Registry revoked their membership in the settlement of Peavine, under s. 90 of *MSA*. They sued for a declaration that s. 90 and its companion provision, s. 75, are inconsistent with ss. 15, 2(d) and 7 of the *Charter* in a manner that cannot be justified under s. 1 and are thus null and void under s. 52 of the *Constitution Act, 1982*.

[26] Underlying this litigation is the suggestion that the manner in which the Cunninghams' registration was revoked was procedurally unfair. The list that the Peavine Council submitted to the Registrar of the Métis Settlements Land Registry for revocation of membership did not include all of the members who had obtained Indian status, but only the members of the Cunningham family. Following related proceedings (*Alberta (Minister of International and Intergovernmental Relations) v. Peavine Metis Settlement*, 2001 ABQB 165, [2001] 3 C.N.L.R. 1), the Registrar removed the claimants from the Peavine membership list on May 10, 2001. Though bad faith and improper motivations were alleged against the then Council, no judicial review or other action was commenced on that basis. Accordingly, the matter of how the revocation proceeded is not before this Court.

III. The Rulings in the Alberta Courts

A. *The Chambers Judge*

[27] The chambers judge, Shelley J., dismissed the claimants' application (2007 ABQB 517, 81 Alta. L.R. (4th) 28). She accepted the claimants' view that the exclusion from membership was based on the analogous ground of registration as a status Indian. She concluded, however, that the *MSA* did not violate the equality provision of s. 15(1) of the *Charter* because the relevant contextual factors did not establish that ss. 75 and 90 resulted in the stereotyping or disadvantage required to show discrimination. She accepted that the provisions might cause the claimants to lose their right to reside on the Peavine settlement without having obtained corresponding benefits under the *Indian Act*, and that even if they were able to continue to reside on the land under s. 92, as it appeared they currently did, they would have no say in settlement governance or the right to vote. However, they would have acquired benefits available to them under the *Indian Act* as status Indians.

[28] Although she did not conduct an analysis under s. 15(2) of the *Charter* (her decision was before *R. v. Kapp*, 2008 SCC 41, [2008] 2 S.C.R. 483, which clarified the steps of the s. 15(2) analysis), the chambers judge concluded that the ameliorative purpose and effect of the *MSA* supported the exclusion under ss. 75 and 90 of Métis who registered as status Indians. In her view, the purposes of enhancing Métis culture and identity, as well as the preservation of land rights and self-governance, were furthered by the exclusion of status Indians, subject to any General Council Policy. While the loss of the right to participate in the governance of the

Métis community with which they had been associated on a long-term basis was a severe consequence, this was offset by the fact that by registering as Indians under the *Indian Act*, the claimants had chosen to receive other rights and benefits.

[29] The chambers judge also dismissed the Cunninghams' s. 2(d) claim for breach of freedom of association. Section 2(d) of the *Charter*, she held, protects association only for the purpose of protecting fundamental freedoms, not access to a particular statutory regime. The privilege of membership does not exist independently of the legislative regime established by the *MSA*. Moreover, the claimants had not shown substantial interference with their associational right, in the sense that the *MSA* made it next to impossible for them to pursue common goals. It was their decision to register as Indians, not state action, that resulted in any inability to exercise fundamental freedoms.

[30] Finally, the chambers judge found no violation of s. 7 of the *Charter*. Even if the *MSA* limited the claimants' liberty by jeopardizing their right to reside on the Peavine settlement, the deprivation was not arbitrary or grossly disproportionate, and hence not contrary to the principles of fundamental justice, as required by s. 7. She found that "[r]equiring aboriginal adults who might otherwise meet the definition of both Indian and Métis to choose which legislative scheme they wish to fall under — the *Indian Act* or the *MSA* — is not a requirement which is grossly disproportionate to the interest of Alberta in securing a land base for the Métis" (para. 130).

B. *The Court of Appeal*

[31] The Court of Appeal concluded that ss. 75 and 90 were inconsistent with the equality guarantee in s. 15 of the *Charter* and thus invalid, and directed registration of the claimants as members of the Peavine settlement (2009 ABCA 239, [2009] 8 Alta. L.R. (5th) 16).

[32] As there was no dispute that registration as a status Indian was an analogous ground under s. 15(1) of the *Charter*, the court, proceeding post-*Kapp*, moved to s. 15(2), which provides that governments may adopt ameliorative programs that might otherwise be viewed as conferring benefits unequally without violating s. 15. It held that, for the exclusion of status Indians to be saved by s. 15(2) by virtue of having an ameliorative or remedial purpose, it must be rationally connected to the enhancement and preservation of Métis culture and self-governance and the securing of a Métis land base. This was not established, in the court's view. Noting that the exclusion from membership of people who had identified with and lived in the Métis culture for all or most of their lives was "relatively arbitrary", the court concluded that "[i]t is difficult to imagine that such exclusion is in furtherance of the enhancement and preservation of Métis culture, identity and self-governance" (para. 28). Moreover, since Métis membership is rooted in Aboriginal ancestry, removal of membership is at odds with the goal of enhancing Métis culture. There was no evidence that settlements were being overrun by status Indians or that the number of status Indians seeking settlement membership would impair the aims of the *MSA*. Finally, denying status Indians membership because of registration under the

Indian Act constituted a punishment for behaviour — registering as status Indians — which should not be protected by s. 15(2). The court concluded that exclusion was not rationally connected to advancing a legislative purpose, and was not saved by s. 15(2).

[33] Returning to s. 15(1), the Court of Appeal held that the law stereotyped people like the claimants as being “less Métis” because of their registration under the *Indian Act* in a way that did not correspond to their actual circumstances. The court concluded that they “are vulnerable to both a unique disadvantage and to stereotyping ... resulting in differential treatment and discrimination” (para. 45).

[34] The Court of Appeal declined to rule on whether freedom of association under s. 2(d) was violated, as there was insufficient evidence and argument on the issue. It also declined to rule on the s. 7 claim.

[35] Accepting the government’s claimed purpose — promoting the Métis culture, protecting and distinguishing it from Indian culture, furthering self-governance, and preserving a Métis land base — the court held that there was no pressing and substantial objective capable of justifying the infringement of s. 15(1) of the *Charter* caused by the exclusion of the claimants and other status Indians from settlement membership under ss. 75 and 90 of the *MSA*. The promotion of Métis culture could not serve as such an objective, since there was no evidence to support the view that the provisions were meant to help protect and distinguish Métis culture from Indian culture. Nor could the goal of furthering self-governance serve as an

objective because there was no evidence that the provisions provide Métis settlements with means of controlling their membership.

[36] The Court of Appeal added that, had a pressing and substantial objective been established, exclusion would still not be justified under s. 1 because ss. 75 and 90 were neither rationally connected to the objective nor minimally impairing. The absolute removal of membership went beyond what was necessary to achieve the goals of distinguishing Métis culture from Indian culture and self-governance, in the court's view. Consequently, the membership provisions could not be saved by s. 1, and the appeal was allowed.

IV. The Equality Claim Under Section 15 of the *Charter*

[37] Section 15 of the *Charter* states:

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.

(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.

A. *The Purpose of Section 15(2)*

[38] Section 15 of the *Charter* protects against discriminatory laws and government actions. Its goal is to enhance substantive equality. It does this in two ways.

[39] First, s. 15(1) is aimed at *preventing* discrimination on grounds such as race, age and sex. Laws and government acts that perpetuate disadvantage and prejudice, or that single out individuals or groups for adverse treatment on the basis of stereotypes, violate s. 15(1) and are invalid, subject to justification under s. 1 of the *Charter*: *Kapp; Withler v. Canada (Attorney General)*, 2011 SCC 12, [2011] 1 S.C.R. 396.

[40] Second, s. 15(2) is aimed at permitting governments to *improve* the situation of members of disadvantaged groups that have suffered discrimination in the past, in order to enhance substantive equality. It does this by affirming the validity of ameliorative programs that target particular disadvantaged groups, which might otherwise run afoul of s. 15(1) by excluding other groups. It is unavoidable that ameliorative programs, in seeking to help one group, necessarily exclude others.

[41] The purpose of s. 15(2) is to save ameliorative programs from the charge of “reverse discrimination”. Ameliorative programs function by targeting specific disadvantaged groups for benefits, while excluding others. At the time the *Charter* was being drafted, affirmative action programs were being challenged in the United States as discriminatory — a phenomenon sometimes called reverse discrimination. The underlying rationale of s. 15(2) is that governments should be permitted to target

subsets of disadvantaged people on the basis of personal characteristics, while excluding others. It recognizes that governments may have particular goals related to advancing or improving the situation of particular subsets of groups. Section 15(2) affirms that governments may not be able to help all members of a disadvantaged group at the same time, and should be permitted to set priorities. If governments are obliged to benefit all disadvantaged people (or all subsets of disadvantaged people) equally, they may be precluded from using targeted programs to achieve specific goals relating to specific groups. The cost of identical treatment for all would be loss of real opportunities to lessen disadvantage and prejudice.

B. *The Steps Under Section 15(2)*

[42] This Court in *Kapp* set out the basic framework for cases where the government relies on s. 15(2).

[43] As in all s. 15 cases, the first question is whether the law makes an adverse distinction against the claimant group on the basis of one of the grounds set out in s. 15(1) or an analogous ground.

[44] If so, and if the government relies on s. 15(2) to defend the distinction, the analysis proceeds immediately to whether the distinction is saved by s. 15(2). To establish this, the government must show that the program is a genuinely ameliorative program directed at improving the situation of a group that is in need of ameliorative assistance in order to enhance substantive equality: *Kapp*, at para. 41. There must be

a correlation between the program and the disadvantage suffered by the target group: *Kapp*, at para. 49. Courts must examine the program to determine whether, on the evidence, the declared purpose is genuine; a naked declaration of an ameliorative purpose will not attract s. 15(2) protection against a claim of discrimination: *Kapp*, at para. 49.

[45] If these conditions are met, s. 15(2) protects all distinctions drawn on enumerated or analogous grounds that “serve and are necessary to” the ameliorative purpose: *Kapp*, at para. 52. In this phrase, “necessary” should not be understood as requiring proof that the exclusion is essential to realizing the object of the ameliorative program. What is required is that the impugned distinction in a general sense serves or advances the object of the program, thus supporting the overall s. 15 goal of substantive equality. A purposive approach to s. 15(2) focussed on substantive equality suggests that distinctions that might otherwise be claimed to be discriminatory are permitted, to the extent that they go no further than is justified by the object of the ameliorative program. To be protected, the distinction must in a real sense serve or advance the ameliorative goal, consistent with s. 15’s purpose of promoting substantive equality.

[46] The fundamental question is this: up to what point does s. 15(2) protect against a claim of discrimination? The tentative answer suggested by *Kapp*, as discussed above, is that the distinction must serve or advance the ameliorative goal. This will not be the case, for instance, if the state chooses irrational means to pursue

its ameliorative goal. This criterion may be refined and developed as different cases emerge. But for our purposes, it suffices.

[47] If s. 15(2) does not protect the impugned distinction, the analysis returns to s. 15(1) to determine whether the distinction constitutes substantive discrimination by perpetuating disadvantage or prejudice or by inappropriately stereotyping the excluded group.

[48] If substantive discrimination is established under s. 15(1), the final question is whether the government has shown it to be justified under s. 1 of the *Charter*.

[49] Section 15(2), understood in this way, permits governments to assist one group without being paralyzed by the necessity to assist all, and to tailor programs in a way that will enhance the benefits they confer while ensuring that the protection that s. 15(2) provides against the charge of discrimination is not abused for purposes unrelated to an ameliorative program's object and the goal of substantive equality.

[50] This understanding of s. 15(2) is consistent with the approach to an ameliorative program taken in the earlier case of *Lovelace v. Ontario* (1997), 33 O.R. (3d) 735 (Ont. C.A.), aff'd 2000 SCC 37, [2000] 1 S.C.R. 950, which upheld a similar distinction from a benefit under an ameliorative program. The ameliorative program at issue in *Lovelace*, as here, involved different groups of Aboriginal people — registered Indian bands, who have reserves, and unregistered Indian bands and the

Métis, who do not have reserves. It sought to enhance the situation of one of these groups, on-reserve Indians, by permitting the establishment of a reserve-based casino. As here, the excluded group of off-reserve Ontario Aboriginals claimed that the distinction discriminated against them contrary to s. 15 of the *Charter*.

[51] While *Lovelace* pre-dated *Kapp*, the Ontario Court of Appeal's analysis followed a broadly similar template. The court first examined whether the program was a genuinely ameliorative program. Having confirmed that it was, it then asked whether restriction of the benefits of the casino program to on-reserve Indians (members of registered reserve bands) conformed to the object of the program. It concluded that it did. The object of the scheme was to benefit on-reserve Indians. The narrow focus of the program corresponded to historic, social and governance differences between the targeted groups and other Aboriginal groups. It also supported the program's object of enhancing the situation of on-reserve Indians; the Court observed that if the program were extended to all Ontario Aboriginals, it would not achieve its goal. Those factors, along with the magnitude of the project, its attendant social risks and its status as a pilot project, supported the claim that the true purpose of the program was to ameliorate the social and economic conditions of the targeted group — the registered bands. No further proof was needed to show that the program was authorized by s. 15(2) (at paras. 73-90).

[52] On further appeal, this Court (albeit proceeding under s. 15(1) and using s. 15(2) as an interpretive guide only) confirmed that conclusion, emphasizing that the

distinction made by the program between members of the registered reserve bands and off-reserve Aboriginals was consistent with the purpose of securing substantive equality that underlies s. 15 as a whole. Despite the shared disadvantage of the included and excluded groups, this Court in *Lovelace* concluded that social and historic differences between the two groups, as well as realization of the object of the program, supported the distinction between on-reserve and off-reserve Indians and Métis. The exclusion from the casino program of Aboriginal communities not benefitting from band status under the *Indian Act* was thus upheld.

[53] This brings us to the following propositions. Ameliorative programs, by their nature, confer benefits on one group that are not conferred on others. These distinctions are generally protected if they serve or advance the object of the program, thus promoting substantive equality. This is so even where the included and excluded groups are aboriginals who share a similar history of disadvantage and marginalization: *Lovelace*.

[54] These propositions, as discussed more fully below, suffice to resolve the issue that arises in this case. What is at issue here is a special type of ameliorative program — one designed to enhance and preserve the identity, culture and self-governance of a constitutionally-recognized group. The group targeted by the program precisely corresponds to a group that is identified as one of the groups that make up the “aboriginal peoples of Canada” in s. 35 of the *Constitution Act, 1982*. The object of enhancing the identity, culture and self-governance of the Métis as a s.

s. 35 group, of necessity, must permit the exclusion of other s. 35 groups since an essential part of their unique identity is that they are “not Indian” and “not Inuit”.

[55] It is therefore unnecessary to embark on a lengthy consideration of precisely what considerations may enter into the issue of how distinctions are made for ameliorative programs in different types of cases. The law is best left to develop on an incremental basis.

C. Application

1. Is the Distinction Based on an Enumerated or Analogous Ground of Discrimination?

[56] Following the analysis set out in *Kapp*, the first question is whether the distinction between Métis and status Indians in the *MSA* constitutes a distinction on an enumerated or analogous ground, thereby attracting s. 15 protection. Absent such a distinction, no claim lies under s. 15.

[57] The ground advanced and applied in the courts below is registration as a status Indian, as distinguished from non-status Indians or Métis. This ground was accepted as analogous without much discussion below.

[58] I refrain from making a determination as to whether registration as a status Indian constitutes an analogous ground of discrimination. The trial judge’s conclusion that it did constitute an analogous ground was not challenged by the

Crown in Right of Alberta before the Court of Appeal and the parties have not thoroughly canvassed the issue before this Court. Since the case has proceeded on the assumption that an analogous ground was made out, I will assume that it has been, and consider the remaining aspects of s. 15 as they apply in this case.

2. Is the Program a Genuinely Ameliorative Program?

[59] To qualify as a genuinely ameliorative program, the program must be directed at improving the situation of a group that is in need of ameliorative assistance: *Kapp*, at para. 41. There must be a correlation between the program and the disadvantage suffered by the target group: *Kapp*, at para. 49. The goal is to promote the substantive equality of the group: *Kapp*, at para. 16. To ascertain whether these conditions are met, one looks first to the object of the program, and then asks whether it correlates to actual disadvantage suffered by the target group.

[60] I begin with the object of the *MSA* program. The discussion that follows establishes that the object of the program is to enhance Métis identity, culture and self-government through the establishment of a Métis land base. This is a special type of ameliorative program. Unlike many ameliorative programs, the object of the program is not the direct conferral of benefits onto individuals within a particular group, but the strengthening of the identity of Métis as a group — one of three aboriginal groups recognized in the Constitution.

[61] The object of an ameliorative program must be determined as a matter of statutory interpretation, having regard to the words of the enactment, expressions of legislative intent, the legislative history, and the history and social situation of the affected groups. Defining the objective of the ameliorative program too broadly or too narrowly will skew the analysis.

[62] Applying this approach, I conclude that the object of the *MSA* program is not the broad goal of benefiting all Alberta Métis, as the claimants contend, but the narrower goal of establishing a Métis land base to preserve and enhance Métis identity, culture and self-governance, as distinct from surrounding Indian cultures and from other cultures in the province.

[63] I turn first to the words of the enactment. The preamble to the amendments to the *Constitution of Alberta Amendment Act* emphasizes the desire to preserve the “unique” Métis culture and identity. It refers to the land set aside for Métis use as forming “a unique part of the history and culture of the Province”. It states that it is desirable “that the Metis should continue to have a land base to provide for the preservation and enhancement of Metis culture and identity and to enable the Metis to attain self-governance”.

[64] The *MSA* echoes these objects in its Recital, which proclaims that “the Metis should continue to have a land base to provide for the preservation and enhancement of Metis culture and identity and to enable the Metis to attain self-governance under the laws of Alberta”.

[65] The wording of the *MSA*'s provisions supports the view that the object of the ameliorative program was to benefit Métis, as distinct from Indians, by setting up a land base that would strengthen an independent Métis identity, culture and desire for self-governance. The title of the statute, the "*Metis Settlements Act*", suggests that the focus is not on benefiting the Métis generally, but on establishing land-based settlements. The enactment sets out detailed provisions for the establishment of a Métis land base and governance of the land base by Métis members.

[66] The history of the struggle that culminated in the *MSA* supports this view of the object of the challenged legislation. The *MSA*, as discussed earlier, is the result of a negotiation process between the Métis of Alberta and the Province and the outcome of an ongoing struggle for self-preservation. The Métis considered themselves as one of three Aboriginal groups in Canada, but this was not recognized until the *Constitution Act, 1982*. Unlike Indians, however, they enjoyed no land base from which to strengthen their identity and culture or govern themselves. Nor did they enjoy the protection of an equivalent to the *Indian Act*. Their aboriginality, in a word, was not legally acknowledged or protected. Viewed in this perspective, the ameliorative program embodied in the *MSA* emerges as an attempt to provide to Alberta's Métis settlements similar protections to those which various Indian bands have enjoyed since early times.

[67] From the beginning, the quest that led to the *MSA* was premised on the view that the Métis, while Aboriginals, were unique — that they were different from

Indians. The first step was the Ewing Commission in 1934, which led to the recognition that the Métis were distinct from other Aboriginal groups, notably Indians, in *The Metis Population Betterment Act* of 1938. The *MSA*, which was the result of a review of *The Metis Betterment Act*, which was in turn prompted by the recognition of the Métis as a distinct Aboriginal group in the *Constitution Act, 1982*, maintains the historic insistence on the need to exclude Indians from membership in Métis settlements. The current membership provision is less exclusionary and arbitrary than the earlier statutes, which absolutely excluded all actual and potential status Indians, but the *MSA* maintains the requirement for a distinct Métis settlement which, subject to limited exceptions, excludes status Indians from living on settlement lands.

[68] The *Constitution Act, 1982*, gave constitutional recognition to the Métis as one of three distinct Aboriginal groups, provoking review of *The Metis Betterment Act* and Regulations. The MacEwan Committee was conceived as a partnership, composed of a jointly-chosen chair and an equal number of Métis and non-Métis Commissioners. The *MSA* was the ultimate result of the Committee's work and the negotiations that followed over the next five years.

[69] In summary, the preamble, wording, legislative history, and social context of the *MSA* combine to support the conclusion that the *MSA* is not a general benefit program, but a unique scheme that seeks to establish a Métis land base to preserve and enhance Métis identity, culture and self-government, as distinct from Indian

identity, culture and modes of governance. In seeking this objective, it reflects the constitutional scheme, which endorses Indians, Métis and Inuit as distinct Aboriginal groups with distinct identities, cultures and rights.

[70] Finally, as required by *Kapp*, there is a correlation between the program and the disadvantage suffered by the target group. In this case, the correlation is manifest. The history of the Métis is one of struggle for recognition of their unique identity as the mixed race descendants of Europeans and Indians. Caught between two larger identities and cultures, the Métis have struggled for more than two centuries for recognition of their own unique identity, culture and governance. The constitutional amendments of 1982 and, in their wake, the enactment of the *MSA*, signal that the time has finally come for recognition of the Métis as a unique and distinct people.

[71] I conclude that the *MSA*, while unique, is a genuinely ameliorative program. Provided that the means of implementation chosen by the legislature serves or advances this end, s. 15(2) protects the *MSA* against the charge of discrimination.

3. Does the Distinction Serve or Advance the Object of the Ameliorative Program?

[72] The object of the *MSA* is to benefit the members of a constitutionally identified and protected group by enhancing the identity, culture and self-governance of the group. In order to achieve this object, the legislature has excluded Métis who are also status Indians from membership in the settlement for purposes of establishing

a Métis land base. The question is whether this distinction serves or advances its object.

[73] In my view, the line drawn by the *MSA* between Métis and Métis who are also status Indians with respect to membership, serves and advances the object of the program. It is supported by historic distinctions between Métis and Indian culture; by the fact that, without the distinction, achieving the object of the program would be more difficult; and by the role of the Métis settlement in defining its membership.

[74] Before discussing these matters in more detail, I note that the chambers judge concluded that exclusion of status Indians from membership in the Peavine Métis Settlement furthered the object of enhancing Métis culture, identity and governance. The Court of Appeal, while accepting that the *MSA* was a genuinely ameliorative program, overturned this finding on the basis there was “no evidence” that the exclusion would enhance those goals. In my view, the Court of Appeal erred in demanding positive proof that an impugned distinction will in the future have a particular impact. As *Kapp* makes clear, all the government need show is that it was “rational for the state to conclude that the means chosen to reach its ameliorative goal would contribute to [its ameliorative] purpose”: *Kapp*, at para. 49.

(a) *The Program Recognizes the Historic Uniqueness of the Métis*

[75] The object of the *MSA*, as we have seen, is to promote Métis identity, culture and self-governance in recognition of their unique status — aboriginal, yet neither Indian nor Inuit. This object corresponds to historic differences between the Métis and Indians. Since their emergence as a distinct people on the Canadian prairies in the 1700s, the Métis have claimed an identity based on non-Indianness. They have persistently distinguished themselves as a people from the other dominant Aboriginal group in their territory — Indians. The obverse side of the struggle of the Métis to preserve their distinct identity and culture is the fear that overlap and confusion with the larger Indian cultures would put their identity and culture at risk. The right of the Métis to their own non-Indian culture is confirmed by the *Constitution Act, 1982*, s. 35. Line drawing on this basis, far from being irrational, simply reflects the Constitution and serves the legitimate expectations of the Métis.

[76] The distinction in the *MSA* between Métis and status Indians conforms, in general terms, to the different identities and protections enjoyed by each group and recognized in the Constitution. It thus serves to enhance Métis identity and to further the goal of the ameliorative program. The fact that some people may identify as both Métis and Indian does not negate the general correspondence underlying the distinction between the two groups.

(b) *Realizing the Object of the Program*

[77] To accord membership in the *MSA* communities to Métis who are also status Indians would undermine the object of the program of enhancing Métis identity, culture and governance, and would potentially hollow out the goal of the *MSA* of preserving and enhancing a distinct Métis culture, identity and governance.

[78] Extending membership to significant numbers of people with Indian status may undercut the goals of preserving and enhancing the distinctive Métis culture, identity and self-governance into the future. To the extent that status Indians are members of Métis settlements, the distinctive Métis identity, with its historic emphasis on being distinct from Indian identity, would be compromised. And to the extent that status Indians are members of Métis settlements, the goal of self-governance is hampered. For example, Indians who already enjoy the right to hunt off-reserve may have little interest in promoting the right of Métis to hunt outside settlement lands. The same may be ventured for other benefits and privileges. Because the *Indian Act* provides a scheme of benefits to status Indians, ranging from medical care to housing to tax-free status, status Indian members of Métis settlements may have less interest in fighting for similar benefits than Métis without Indian status.

[79] The exclusion of status Indians from membership in the new land-based Métis settlements was the product of a long period of consultation between the government and the Métis. According a measure of respect to this role serves and advances the object of the ameliorative program. It does not insulate the selection of beneficiaries from *Charter* review, to be sure, but it supports the connection between the object of the program and the means chosen to achieve it.

[80] In *R. v. Powley*, 2003 SCC 43, [2003] 2 S.C.R. 207, this Court was seized with the task of developing a test for identifying Métis aboriginal rights under s. 35 of the *Constitution Act, 1982*, and identifying the holders of such rights. We recognized that the term “Métis” used in s. 35 “refers to distinctive peoples who, in addition to their mixed ancestry, developed their own customs, way of life, and recognizable group identity separate from their Indian or Inuit and European forebears” (para. 10; see also para. 11). We further held that “[t]he inclusion of the Métis in s. 35 is based on a commitment to recognizing the Métis and enhancing their survival as distinctive communities” (para. 13).

[81] While this case is not about defining entitlement to s. 35 rights, it is about the identification of membership requirements for Métis settlements for the purpose of establishing a Métis land base. The Court’s reasons in *Powley* suggest that Métis communities themselves have a significant role to play in this exercise. We wrote, at para. 29:

As Métis communities continue to organize themselves more formally and to assert their constitutional rights, it is imperative that membership requirements become more standardized so that legitimate rights-holders can be identified.

[82] The self-organization and standardization of the Métis community in Alberta is precisely what the Alberta legislature and the Alberta Métis have together sought to achieve in developing, agreeing upon and enacting the membership requirements found in the *MSA* and challenged here. The significant role that the Métis must play in defining settlement membership requirements does not mean that this exercise is exempt from *Charter* scrutiny. Nevertheless, it does suggest that the courts must approach the task of reviewing membership requirements with prudence and due regard to the Métis's own conception of the distinct features of their community.

(d) *Conclusion: The Distinction Serves and Advances the Object of the Ameliorative Program*

[83] I conclude that the exclusion from membership in any Métis settlement, including the Peavine Settlement, of Métis who are also status Indians serves and advances the object of the ameliorative program. It corresponds to the historic and social distinction between the Métis and Indians, furthers realization of the object of enhancing Métis identity, culture and governance, and respects the role of the Métis in defining themselves as a people.

[84] It follows that the distinction between Métis and status Indians in the *MSA* does not fall outside the protective reach of s. 15(2). Rather, the distinction is the type of targeted ameliorative program s. 15 was intended to allow legislatures to adopt. Section 15(2) applies, and the exclusion of the claimants from membership in a Métis settlement does not constitute discrimination.

[85] The argument advanced by the claimants in favour of recognition of the multiple identities of many aboriginal individuals does not undermine this conclusion. The claimants argue that people — particularly Aboriginal people — may, for historical reasons, have multiple identities and that the law should respect those identities in all their complexity.

[86] That people, including many Métis, include mixed ethnic and cultural strands in their particular individual identity is clear. However, this does not mean that every program must recognize everyone who holds some claim to a group targeted by an ameliorative program. Mixed identity is a recurrent theme in Canada's ongoing exercise of achieving reconciliation between its Aboriginal peoples and the broader population. It figures, for example, in land claims negotiations between particular Indian groups and the government. Residents of one Indian group frequently also identify themselves with other Indian groups for historical and cultural reasons. Yet lines must be drawn if agreements are to be achieved. The situation of Métis settlements is similar. In order to preserve the unique Métis culture and identity and to assure effective self-governance through a dedicated Métis land

base, some line drawing will be required. It follows of necessity that not every person who is a Métis in the broad sense of having Indian-European ancestry and self-identifying with the Métis community, as discussed in *Powley*, may be entitled to the benefit of membership under the *MSA*.

[87] The conclusion of this Court in *Lovelace*, per Iacobucci J., is apposite:

There are important differences among First Nations bands, Métis communities and non-band First Nations, and as stated by L'Heureux-Dube J. in *Corbiere*, *supra*, at para. 94, “[t]aking into account, recognizing, and affirming differences between groups in a manner that respects and values their dignity and difference are not only legitimate, but necessary considerations in ensuring that substantive equality is present in Canadian society.” [para. 90]

[88] I conclude that the *MSA* is an ameliorative program protected by s. 15(2) of the *Charter*. It follows that the claimants’ s. 15 claim must be dismissed.

V. The Freedom of Association Claim under Section 2(d) of the *Charter*

[89] Freedom of association is guaranteed by s. 2(d) of the *Charter*, which holds:

2. Everyone has the following fundamental freedoms:

(d) freedom of association. . . .

[90] The claimants assert that ss. 75 and 90 of the *MSA*, which prevent the reinstatement of their membership in the Peavine Métis Settlement, interfere with their freedom of association under s. 2(d) of the *Charter*.

[91] The record does not provide an adequate basis to assess the claimants' s. 2(d) argument. As noted by the Alberta Court of Appeal, at para 57:

A substantial body of proof was not before the chambers judge on this issue and, more troubling, at the hearing before the chambers judge this issue was only argued in the most oblique terms.

I conclude that, on the record before us, no viable claim has been raised under s. 2(d) of the *Charter*.

VI. The Right to Liberty Claim Under Section 7 of the *Charter*

[92] The claimants' right to reside on the Peavine settlement, though not eliminated, has been circumscribed. They could, in future, find themselves excluded from residence on the settlement. The claimants allege that this violates their right to liberty under s. 7 of the *Charter*, which provides:

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.

[93] It is not clear that place of residence is a protected liberty interest under s. 7 of the *Charter*. In *Godbout v. Longueil (City)*, [1997] 3 S.C.R. 844, La Forest J., writing for himself and two other members of the Court, suggested that it was, but the issue remains unsettled.

[94] It is not necessary to decide whether place of residence is protected by s. 7 because, as found by the chambers judge, any impact on liberty has not been shown to be contrary to the principles of fundamental justice, as required for a s. 7 claim. The deprivation is neither arbitrary nor grossly disproportionate, for the reasons discussed in connection with the s. 15 claim. As the chambers judge put it, “[r]equiring aboriginal adults who might otherwise meet the definition of both Indian and Métis to choose which legislative scheme they wish to fall under — the *Indian Act* or the *MSA* — is not a requirement which is grossly disproportionate to the interest of Alberta in securing a land base for the Métis” (para. 130).

[95] The s. 7 claim therefore fails.

VII. Conclusion

[96] I would allow the appeal, set aside the decision of the Court of Appeal and affirm the decision of the chambers judge. The appellants have not sought their costs before this Court, so I would not award them. I would answer the constitutional questions as follows:

1. Do ss. 75 and/or 90 of the *Metis Settlements Act*, R.S.A. 2000, c. M-14, infringe s. 2(d) of the *Canadian Charter of Rights and Freedoms*?

The record does not provide an adequate basis to assess the claimants' s. 2(d) argument and the Court therefore declines to answer this question.

2. If so, is the infringement a reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society under s. 1 of the *Canadian Charter of Rights and Freedoms*?

It is not necessary to answer this question.

3. Do ss. 75 and/or 90 of the *Metis Settlements Act*, R.S.A. 2000, c. M-14, infringe s. 7 of the *Canadian Charter of Rights and Freedoms*?

No.

4. If so, is the infringement a reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society under s. 1 of the *Canadian Charter of Rights and Freedoms*?

It is not necessary to answer this question.

5. Do ss. 75 and/or 90 of the *Metis Settlements Act*, R.S.A. 2000, c. M-14, infringe s. 15 of the *Canadian Charter of Rights and Freedoms*?

No.

6. If so, is the infringement a reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society under s. 1 of the *Canadian Charter of Rights and Freedoms*?

It is not necessary to answer this question.

Appeal allowed.

Solicitor for the appellants: Attorney General of Alberta, Edmonton.

Solicitors for the respondents: Field, Edmonton.

Solicitor for the intervener the Attorney General of Ontario: Attorney General of Ontario, Toronto.

Solicitor for the intervener the Attorney General of Quebec: Attorney General of Quebec, Sainte-Foy.

Solicitor for the intervener the Attorney General for Saskatchewan: Attorney General for Saskatchewan, Regina.

Solicitors for the intervener the East Prairie Métis Settlement: Hajduk Gibbs, Edmonton.

Solicitors for the intervener the Elizabeth Métis Settlement: Owen Law, Edmonton.

Solicitors for the intervener the Métis Nation of Alberta: Pape Salter Teillet, Vancouver.

Solicitors for the intervener the Métis National Council: JTM Law, Toronto.

Solicitors for the intervener the Métis Settlements General Council: Witten, Edmonton.

Solicitor for the intervener the Aboriginal Legal Services of Toronto Inc.: Aboriginal Legal Services of Toronto Inc., Toronto.

Solicitor for the intervener the Women's Legal Education and Action Fund: Women's Legal Education and Action Fund, Toronto.

Solicitor for the intervener the Canadian Association for Community Living: ARCH Disability Law Centre, Toronto.

Solicitors for the intervener the Gift Lake Métis Settlement: Field, Edmonton.

Solicitors for the intervener the Native Women's Association of Canada: Law Office of Mary Eberts, Toronto.