File No. 33340

SUPREME COURT OF CANADA

(ON APPEAL FROM A JUDGMENT OF THE COURT OF APPEAL OF ALBERTA)

BETWEEN:

HER MAJESTY THE QUEEN IN RIGHT OF ALBERTA (MINISTER OF ABORIGINAL AFFAIRS AND NORTHERN DEVELOPMENT)

and

REGISTRAR, MÉTIS SETTLEMENTS LAND REGISTRY

APPELLANTS
(Respondents)

- and -

BARBARA CUNNINGHAM

and

JOHN KENNETH CUNNINGHAM, LAWRENT (LAWRENCE) CUNNINGHAM, RALPH CUNNINGHAM, LYNN NOSKEY, GORDON CUNNINGHAM, ROGER CUNNINGHAM AND RAY STUART

RESPONDENTS
(Appellants)

- and -

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PART I – OVERVIEW AND STATEMENT OF FACTS

OVERVIEW

1. The first part of s. 75 of the *Metis Settlement Act*, R.S.A. 2000, c. M-14 *(MSA)* states:

> 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.

Section 90 states:

> 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.

2. The Originating Notice of the Respondents seeks a declaration that s. 90(1)(a) is contrary to the *Charter*. There would seem to be no reason to strike s. 90(1)(b) dealing with an Inuk who registers for the purposes of a land claims agreement, given the Originating Notice and the facts of this case. The Originating Notice seeks a declaration that s. 75 or a portion thereof is contrary to the *Charter*. If it is necessary to strike all or part of s. 75 on the facts of this case, then it is submitted that only s. 75(2)(a) should be declared to be of no force and effect. This is the portion said by counsel for the Respondents to apparently be of primary concern and it is anticipated that this point will be addressed in the Respondents' factum.

3. Under the membership provisions of the *MSA* an individual adult member of a Métis settlement who voluntarily registers as an Indian after November 1, 1990 (the grandfathering provision)[1] has acted to terminate his or her membership, leaving the individual in the precarious position of awaiting a request by a settlement council for removal from the membership list.. The Metis Settlements General Council has the ability, in consultation with the Minister, to pass a policy respecting membership which would operate to override or otherwise modify ss. 75 and 90 [see s. 222(1)(y), s. 75(3.1) and s. 90(1)].

4. The Court of Appeal in its assessment of constitutional validity of the provisions focussed to an inordinate degree on the actions of the Former Peavine Settlement Council. Questionable as

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[1] See summary of this grandfathering by the chambers judge in Reasons for Judgment at para. 20, Appellants' Record (A.R.) Vol. I at 6 and for a summary of the situation of minors see her Reasons for Judgment at para. 203, A.R. Vol. I at 49.

they were, those actions are a separate issue from the question of validity. The Court of Appeal itself noted that it may be that the Respondents' underlying problem could have been dealt with by reliance on traditional judicial proceedings, such as judicial review or an action grounded on the tort of abuse of public office.[2] It is not the statute which authorizes councils to engage in the questionable conduct or abuse of process that was engaged in by the Former Council. Under the statute, all individuals who register as Indians terminate their membership and should face the same consequence of ultimately having their name struck from the membership list.

5. In conducting an analysis under s 15(1) and s. 15(2) of the *Charter*, it is essential to give full recognition to the unique nature of the *MSA* and companion legislation[3] enacted by Alberta to ameliorate the condition of Métis settlement members. This is the only legislation in Canada to provide a range of benefits and a land base to a group of Métis, being one of the aboriginal groups in Canada and a people who have been historically disadvantaged. It was and is a partnered initiative, involving consultation with the Metis Settlements of Alberta prior to enactment and on an ongoing basis. The importance of this historic ameliorative scheme comprising various statutes is underscored by the preamble and provisions of the *Constitution of Alberta Amendment Act.*[4]

6. The membership provisions are vital to the preservation and enhancement of Métis culture and identity and enable the Métis to attain self-governance under the laws of Alberta and as such they are part of a scheme or program falling within s. 15(2) or alternatively do not violate s. 15(1).

7. The *MSA* is not legislation intended to fulfill any rights under s. 35 of the *Constitution Act, 1982* nor to derogate from any such rights and it is noted that no party has invoked s. 35 rights in this matter. Nonetheless, the Métis settlements community consists of a group of Métis, being one of the three distinct aboriginal groups listed in s. 35. Regard will be had to this Court's comments in *R.* v. *Powley*[5] on the proper criteria in determining who is a Métis and for the requirement of community acceptance for membership purposes.

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[2] Reasons for Judgment at paras. 53, 29, A.R. Vol. I at 71, 66.
[3] These are the *Metis Settlements Accord Implementation Act*, R.S.A. 2000, c. M-15, the *Metis Settlements Land Protection Act*, R.S.A. 2000, c. M-16 and the *Constitution of Alberta Amendment Act*, 1990, R.S.A. 2000, c. C-24.
[4] *Constitution of Alberta Amendment Act*, R.S.A. 2000, c. -25.
[5] *R. v. Powley*, [2003] 2 S.C.R. 207.

8. This is not a case about whether, in a sociological sense, one can be both Métis and Indian. It is a case about the consequences of acquiring a separate legal status under federal law when one possesses a legal status under provincial law entitling one to a range of statutory benefits, in the context of a clear statement in the legislation as to those consequences.

9. There is no merit to the freedom of association (2(d) *Charter* claim. As noted by the Court of Appeal, this claim "was only argued in the most oblique terms" before the chambers judge[6] and there is an insufficient evidentiary foundation to conduct a proper s. 2(d) analysis in this case.

10. The s. 7 claim is also without merit. The circumstances of this case do not meet the very high tests required to establish a deprivation of life, liberty or security of the person.

11. Any breach is a reasonable limit pursuant to s. 1. The impugned provisions, considered in the context of the *Act* as a whole, fulfill pressing and substantial objectives. These are (1) providing Mètis settlements with a means of controlling their membership, being an objective relating to the broader purpose underlying the legislation of enabling Mètis settlements to attain self-governance and (2) to aid in protecting and distinguishing Mètis culture and identity from First Nation culture and identity.

12. The two objectives operate in tandem. The evidence shows that the legislation, including its membership provisions, were worked out in partnership between the provincial government and the Mètis leadership and through consultation. It shows that the agreement and resulting legislation are an expresson of self-governance. Enabling the Mètis to attain self-governance considered in combination with the second objective, to aid in protecting and distinguishing Mètis culture and identity, is pressing and substantial. The second objective is clear from a consideration of the history of the consultations leading up to the legislation and the clear language of the impugned provisions.

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[6] Reasons for Judgment at para. 57, A.R. Vol. I at 72.

STATEMENT OF FACTS

13. The Appellants accept the facts of this matter as summarized by the learned chambers judge.[7]

14. The eight Respondents are long time members of the Peavine Metis Settlement ("Peavine"), located near High Prairie, Alberta.[8] The Respondents remained members of Peavine until they were removed from the Peavine Settlement Members List by the Registrar of the Metis Settlements Land Registry (the "Registrar") in approximately March, 2001 (the "Removals").

15. Each Respondent voluntarily registered as an Indian under the *Indian Act* (Canada) (subsequent to November 1, 1990), while more than 18 years old in order to receive benefits under that *Act*.. Thereafter, none of the Respondents ever resided on an Indian reserve or ceased to reside at the Peavine settlement. They sought reinstatement of their settlement memberships.

16. The legislative basis for the Removals was s. 90 of the *MSA*, which provides for removal of a settlement member who voluntarily registers as an Indian upon a Notice of Termination being delivered to the Registrar.

17. The Removals were made following a request by the Peavine Council of the day (the "Former Council") to the Registrar to effect the Removals, and involving a subsequent order in the nature of *mandamus*, granted in favour of the Former Council by Nash, J., compelling the Registrar to effect the Removals.[9]

18. The request for the Removals arose from a political power struggle within the Settlement by which members of one family selectively sought to disenfranchise members of another. Although members other than the Respondents are registered as Indians, the Former Council did

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[7] Reasons of Judgment of the chambers judge, A.R. Vol. I at 3.
[8] Affidavits of the Respondents, see, for example Affidavit of Ralph David Cunningham, A.R. Vol. II at 1. Note that the Peavine Metis Settlement withdrew as an Appellant on November 8, 2007, following the October, 2007 settlement election.
[9] Affidavit of Dennis Cunningham, A.R. Vol. II at 107, 111-112.

not request the removal of such individuals from the Peavine Settlement Members List, and the Registrar was not in a position to effect such removals.[10]

19. In April, 2004, a differently constituted Peavine Council (the "2004 Council") sought to reverse the Removals, passed resolutions to reinstate the Respondent's membership, and requested that the Registrar restore the Respondents to the Peavine Settlement Members List.[11] The Registrar indicated he did not have the ability to do so.[12] The Respondents are currently ineligible to re-apply for settlement membership, since s. 75(2)(a) of the *MSA* renders individuals who become registered as Indians after attaining 18 years of age ineligible for settlement membership: *MSA*, s. 75. The Registrar, probably considering that the *Vicklund* decision of the Metis Settlements Appeal Tribunal[13] had the effect of rendering s. 75(2)(a) of no force and effect, suggested that the Respondents re-apply for membership. The decision could not have had such an effect. In any event, the Respondents did not re-apply for membership.

20. As a result of either registering as Indians or the Notice of Terminations, the Appellants have lost entitlement to a wide range of rights including: the right to vote in Peavine Council elections; the right to serve on Council; the right to reside at Peavine; the right to land allocation; fishing rights; and other rights accorded by the *MSA*, and Peavine resolutions and bylaws. *MSA*, ss. 14, 25, 91, 92, 95, 131, and 132.

21. Archie Collins, Chairman of the Elizabeth Métis Settlement Council ("Elizabeth") in his affidavit of January 7, 2007 stated that if the impugned provisions were declared to be of no force and effect, it will have an adverse effect on Elizabeth and on all settlement membership in two ways.[14] First, Elizabeth has determined that there are a number of individuals over the age of 18 with either Treaty or Bill C-31 status who would now be eligible to apply for, and to obtain,

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[10] Affidavit of Sherry Cunningham at paras. 8, 10, A.R. Vol. III at 128.
[11] Affidavit of Dennis Cunningham, Ex. "K", A.R. Vol. III, at 22 and Ex. "L", A.R. Vol. III at 36.
[12] Affidavit of Dennis Cunningham, Ex. "M", A.R. Vol. III, at 38.
[13] *Vicklund* v. *Peavine Metis Settlement*, [2004] AMSATP No. 5 (Q.L.). Note: this decision was appealed and the appeal then discontinued. It was a decision of the Metis Settlement Appeal Tribunal indicating that s. 75(2)(a) discriminated and was of no force as against a party before it and as such could not operate as a general declaration of invalidity.
[14] A.R. Vol. II at 72-4, see cross-examination at 79, 87, 95.

membership with Elizabeth. These individuals are not eligible for membership, and when such individuals applied for membership in the past, Elizabeth did not grant them membership. Second, he states that there are a number of existing Elizabeth members who could now apply for, and obtain, Bill C-31 status i.e. Registered Indian status, in addition to their membership with Elizabeth. Elizabeth estimates that approximately one-third of it's current members could also obtain Bill C-31 status. On cross-examination Mr. Collins acknowledged that the estimate was based on a general impression.

22. The chambers judge found that the impugned provisions did not violate ss. 15, 7 or 2(d) of the *Charter*. The decision was rendered before this Court's decision in *R.* v. *Kapp.*[15] Within the s. 15(1) analysis, she found that the legislation served an ameliorative purpose.

23. The Court of Appeal found that the impugned provisions did violate s. 15(1) of the *Charter*, having first conducted an inquiry under s. 15(2). It found that the impugned provisions did not constitute reasonable limits under s. 1. It did not render a decision on s. 2(d) or s. 7 of the *Charter*.

24. Leave to appeal was granted by this Court on March 11, 2010.

PART II – QUESTIONS AT ISSUE IN THIS APPEAL

25. The constitutional questions set by this Court are 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*?

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*?

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*?

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[15] [2008] 2 S.C.R. 483.

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*?

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*?

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*?

The Appellants state that questions 1, 3 and 5 should be answered in the negative. Alternatively, if an infringement has occurred, the infringement is a reasonable limit pursuant to s. 1.

PART III ARGUMENT

Standard of Review

26. The standard is correctness.

Section 15

27. This case raises vital issues pertaining to the proper interpretation and application of the test for an ameliorative program. This Court in *R.* v. *Kapp* has conceived a new role for s. 15(2) of the *Charter* and sets forth the test as follows::

> ...once the s. 15 claimant has shown a distinction made on an enumerated or analogous ground, it is open to the government to show that the impugned law, program or activity is ameliorative and, thus, constitutional. This approach has the advantage of avoiding the symbolic problem of finding a program discriminatory before "saving" it as ameliorative, while also giving independent force to a provision that has been written as distinct and separate from s. 15(1). Should the government fail to demonstrate that its program falls under s. 15(2), the program must then receive full scrutiny under s. 15(1) to determine whether its impact is discriminatory.
>
> We should therefore formulate the test under s. 15(2) as follows: A program does not violate the s. 15 equality

> guarantee if the government can demonstrate that: (1) the program has an ameliorative or remedial purpose; and (2) the program targets a disadvantaged group identified by the enumerated or analogous grounds.[16]

Alberta certainly does not and did not at the Court of Appeal mean to suggest that having met these requirements the inquiry is at an end and any challenged provision cannot be said to violate s. 15. It is our position that there must be a connection between the impugned provisions and the ameliorative scheme as a whole such that the provisions are supportive of or rationally connected to the ameliorative scheme. Alberta submits that the membership provisions are supportive of or rationally connected to the ameliorative scheme.

A. Ameliorative Purpose of *MSA* and Companion Legislation

28. It is for the Respondents to establish that a distinction is drawn by the impugned provisions on the basis of an enumerated or analogous ground. If they can do so, then it is open to government to attempt to establish that a program is ameliorative under s. 15(2).

29. The Alberta Court of Appeal acknowledged that *MSA* does have an ameliorative purpose and that it was appropriate for Alberta to proceed under s. 15(2) to endeavour to meet the criteria established in *Kapp*, concluding ultimately not that there was no ameliorative scheme but rather that the impugned provisions either did not themselves fulfill an ameliorative purpose or that they were not rationally connected to that purpose. Alberta will return to a consideration of the impugned provisions below.

30. The chambers judge held that the *MSA* was designed to have an ameliorative effect in redressing historical disadvantage and contributing to enhancement of the dignity and recognition of Métis in Alberta.[17]

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[16] *R.* v. *Kapp*, [2008] 2 S.C.R. 483 at para. 41.
[17] Reasons for Judgment at para. 185 A.R. Vol. I at 185.

31. As the chambers judge held:

> Like the First Nations Fund in *Lovelace*, the *MSA* represents a partnered initiative between the Government of Alberta and Alberta Métis designed, as stated in the recital to the Act, to recognize that the "Métis should continue to have a land base to provide for the preservation and enhancement of Métis culture and identity and to enable the Métis to attain self-governance under the laws of Alberta,." The Act recognizes that the Government of Alberta and the Alberta Federation of Metis Settlement Associations entered into The Alberta-Metis Settlements Accord on July 1, 1989, which was intended to allow the Métis "to secure a land base for future generations, to gain local autonomy in their own affairs, and to achieve economic self-sufficiency."[18]

32. The components of the ameliorative scheme established under the *MSA* are set out in the affidavit of Cameron Henry.[19] At para. 2 Mr. Henry outlines the statutory rights preserved in the *MSA* as follows:

- to apply to reside on land in Settlement areas;
- to receive surface rights compensation arising from the development of oil and gas resources;
- to harvest wildlife for subsistence purposes within the boundaries of their individual Settlements;
- to vote in general elections or by-elections;
- to run as a councillor;
- to vote on a resolution at a general or special meeting;
- to vote on bylaws including budget bylaws;
- to petition the settlement council.

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[18] Reasons for Judgment at para. 183, A.R. Vol. I at 36; see also paras 182 and 184. The components of the Accord are referred to in the Affidavit of Dennis Cunningham at paras. 4, 5 A.R. Vol. II at 108.
[19] A.R. Vol. V at 116-120.

33. Mr. Henry also states that as part of the development of new legislation providing for settlement governance, a financial package was developed and included in the *Metis Settlements Accord Implementation Act, R.*S.A. 2000, c. M-15. He indicates that the funding program was intended to enable settlement councils to provide local programs and services to settlement members. Attached to his affidavit is the Peavine Metis Settlement Budget By-Law for 2007/2008 which was voted on and passed by the members of the Peavine Settlement.

34. As Mr. Henry states, the Peavine budget shows that certain additional programs and services are available to settlement members.[20] Mr. Henry also outlines other programs and services under a variety of federal and provincial grant programs accessed by settlement councils, including those pertaining to post-secondary training opportunities and access to loans.

35. The *MSA* is a partnered initiative and, together with companion legislation, constitutes an ameliorative scheme or program just as the First Nations Fund in *Lovelace v. Ontario* did and as the Aboriginal Fisheries Strategy, including the Pilot Sales Program, did in *Kapp* and the Aboriginal Fisheries Strategy did in *Chippewas of Nawash First Nation.*[21]

36. The Respondents have argued that this case is different from *R.* v. *Kapp, supra,* insofar as somehow the challenge there was to the program as a whole, whereas here it is the impugned provisions alone which are challenged. In fact, the concern the *Charter* applicants had in *Kapp* was with eligibility for the program. They sought equal benefits, not a negation of benefits. Their concern was comparable to the concern here with membership provisions.

37. The ameliorative purpose of the *MSA* must be understood in the context of the ongoing efforts of the Province of Alberta to ameliorate the conditions of the members of the Métis settlements since enactment of the *Metis Population Betterment Act* in 1938[22] It must particularly be understood in light of the negotiations and consultation prior to and after the signing of the

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[20] Affidavit of Cameron Henry at para. 5, A.R. Vol. V at 118-119.
[21] *Lovelace v. Ontario*, [2000] 1 S.C.R. 950; *R. v. Kapp, supra,* at para. 7; *Chippewas of Nawash First Nation* v. *Canada (Minister of Fisheries and Oceans* 2003 CarswellNat. 3552 (Ont. C.A.) at paras. 45-50, 57-59.
[22] S.A. 1938 (2d) c. 6; see also: *Metis Population Betterment Act*, S.A. 1940, c. 6 and *Metis Betterment Act*, R.S.A. 1955, c. 202.

Accord which led to the *MSA*. The ameliorative purpose involves far more than providing Métis settlements with a land base and financial benefits, hunting and fishing rights and eligibility for programs. It also involves the development of local government structures and systems and the protection and preservation of Métis identity. These latter aspects of the ameliorative purpose of the scheme will be dealt with below, when considering the impugned provisions.

38. In noting the importance of self-government and the protection of Métis identity, points of comparison can be made with *Lovelace* where this Court speaks of a network between gaming and self-government efforts at para. 74. The Court refers to a partnered initiative designed to address several issues at once, including supporting the development of a government to government relationship. Similarly, it would be inappropriate to limit consideration of the ameliorative purpose of the *MSA* to land and specific financial benefits. A major aspect of the initiative is to give the Métis settlements control over their lives on the settlements.

B. Disadvantaged Group

39. The *MSA* ameliorates the condition of Métis settlement members in Alberta, who are a disadvantaged group.[23] Alberta is entitled to establish an ameliorative scheme which targets those who are considered to require assistance, being Mètis settlement members and its scheme or program need not encompass others, even if those others are also disadvantaged but outside the objects of the program.[24]

40. It is important to keep in mind that the targeted group of the scheme set forth in the *MSA* and companion legislation is not all Métis in Alberta but rather those who meet the membership criteria in the Act including the following:

- is a person of Canadian aboriginal ancestry who identifies with Métis history and culture,
- has or will have suitable living accommodation in the settlement area, and

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[23] *R. v. Powley*, 2001 CarswellOnt. 480 (Ont. C.A.) at para. 136.
[24] See in this regard *Ardoch Algonquin First Nation & Allies v. Ontario*, 1997 CarswellOnt. 1897 (Ont. C.A.), at paras. 66-75, 94 and *Lovelace v.* Ontario, *supra,* at paras. 46-48, 82-83, 85-87.

- is committed to living in the settlement area and preserving a peaceful community.[25]

C. The *Kapp* Test And The Relationship Between the Impugned Provisions and an Ameliorative Law or Program

41. Having satisfied the requirements explicitly set out in *Kapp* demonstrating an ameliorative program and a disadvantaged group the inquiry under s. 15(2) is not ended. It is our position that government must also show that the impugned provisions are supportive of or are rationally connected to the ameliorative purpose. We note that the chambers judge held they were supportive of the scheme. [26] The Court of Appeal considered amongst other possible tests whether the impugned provisions were a rational means of achieving the overall ameliorative purpose of the statute, concluding that they were not.

42. *Nova Scotia (Workers Compensation Board)* v. *Martin*[27] can also usefully be considered in determining the relationship between impugned provisions an ameliorative purpose. The case was of course dealt with under s. 15(1) but nonetheless the Court reached a conclusion on its approach under "amelioration" similar to our suggested approach for s. 15(2). If the impugned provisions are inconsistent with the purpose of the *Act* or program, then government's case under s. 15(2) is not made out.

43. Some additional guidance on the *Kapp* test from this Court would be useful. First, it is clear that the inquiry under s. 15(2) is a different inquiry than that under s. 15(1). If it was not, then s. 15(2) would be redundant. As this Court stated in *Kapp*: "Through s. 15(2), the *Charter* preserves the right of governments to implement such programs, without fear of challenge under s. 15(1)."[28]

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[25] *Metis Settlements Act*, R.S.A. 2000 C. M-14, s. 78(1)(p), (q), and (r). The *Act* is also found at A.R. Vol. IV, Exhibit A at 10.
[26] Reasons for Judgment at para. 203, A.R. Vol. I at 40.
[27] [2003] 2 S.C.R. 504 at para. 102.
[28] *R. v. Kapp, supra*, at para. 16.

44. While the Court of Appeal does not state that one is to inquire directly into the question of whether the impugned provisions discriminate, it does raise the issue of considering the discriminatory effects of specific provisions. Alberta agrees that one should not ignore such potential effects, so long as it is understood that it would be inappropriate to examine the issue in the manner one is to do in the event it becomes necessary to move to s. 15(1). Secondly, the Court of Appeal states the following:

> It is more logical that the state's onus is to demonstrate that the impugned provisions themselves have as their object, "the amelioration of conditions of disadvantaged individuals or groups." If the overall ameliorative purpose of the statute is considered, the impugned program or provision must still be a rational means of achieving that purpose: *Kapp* at para. 49.[29]

Surely that statement respecting the state's onus imposes too high a threshold and was not a requirement established in *Kapp* or *Lovelace*. Rather, the onus a government must meet should be to demonstrate that the impugned provisions are supportive of or rationally connected to the purpose.

D. Impugned Provisions Are Supportive of or Rationally Connected to the Ameliorative Purpose in this Case

45. The impugned provisions are supportive of or rationally connected to the ameliorative purposes of the *MSA*. Those purposes include the establishment of self-governance under the laws of Alberta and the preservation and enhancement of Métis identity. The chambers judge found the following:

> The ameliorative purpose or effect of the legislation is supported rather than undermined by the impugned provisions given the legislated entitlement of the General Council to adopt policy respecting eligibility for membership in settlements for the purpose of s. 75(3.1) and termination of membership for the purpose of s. 90(1).[30]

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[29] Reasons for Judgment of the Court of Appeal of Alberta at para. 23, A.R. Vol. I at 56.
[30] Reasons for Judgment of the chambers judge at para. 204, A.R. Vol. I at 40, see also: paras. 184-185 ; A.R. Vol. I at 36-37.

46. In considering whether the impugned provisions are supportive of or rationally connected to the ameliorative purpose, it is essential to recognize that the legislative package which was eventually to become the *MSA* was the result of a partnership and was the result of cooperation and consultation involving Alberta and the Métis leadership.

47. The sequence of events leading to the enactment of the *MSA* is outlined by the chambers judge at paras. 9-17. Following the MacEwan Report, being the Report of the MacEwan Joint Metis – Government Committee to Review the Metis Betterment Act and Regulations,[31] the Alberta Legislature passed Resolution 18, authorizing an amendment to the *Alberta Act* to secure a land base and self-government for the Mètis settlements. On July 1, 1989, the Alberta Federation of Metis Settlement Association and the Province of Alberta entered into the Alberta-Metis Settlements Accord[32] and prior to and after that date the process of developing the ameliorative program that would encompass the *MSA* involved consultation in partnership. All eight Métis settlements held referenda approving the Accord.[33] To fulfill the objectives of the Accord, Alberta passed the *MSA*.[34]

48. The McEwan Report in its conclusion sets out the basic principles that should apply to the drafting of the legislation that would become the MSA, including:

> (1) the Métis represent a unique cultural group in Canada, an aboriginal people recognized in the Canadian Constitution, and a group that played a major role in the development of Western Canada;
>
> (2) because the culture and lifestyle of the Métis settlements is inextricably linked to the land, a Métis settlement land base is the cornerstone on which to build and maintain the social, cultural and economic strength of the Métis settlers;

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[31] See Exhibit B to Affidavit of Dennis Cunningham, A.R. Vol. II at 135-211.
[32] A.R. Vol. At 50-72.
[33] Reasons for Judgment of the chambers judge at para. 15, A.R. Vol. I at 5.
[34] For background to the history of this process, see: Exhibit B to the Affidavit of Dennis Cunningham, being the conclusion of the McEwan Report, A.R. Vol. II at 143, 198; Exhibit D-1 from the Cross-Examination of Dennis Cunningham, being copy of Document Entitled Accord and including Transition Commission, A.R. Vol. III, at 59-62; Fred Martin, "Federal and Provincial Responsibility in the Metis Settlements of Alberta in *Aboriginal People and Government Responsibility*, edited by D. Hawkes at 243-44, 271, 273-75, 277-81; Catherine Bell, *Contemporary Metis Justice: The Settlement Way*, at 15, 36-37, 40-44.

(3) given a unique culture and the land base of the Metis Settlement Areas, the Métis can best achieve the mutual goal of self-reliant integration, without homogenization, by a legislative framework enabling the maximum practicable local self-government of the land base.

49. Fred Martin, in "Federal and Provincial Responsibility in the Metis Settlements of Alberta," an article published as part of a 1989 text, assesses the question of membership provisions in a context making clear that in his view they were developed by way of a process of cooperation and consultation with the Métis settlements and also providing his sense of the rationale for them, as follows:

> Fortunately the province and the settlements have adopted a pragmatic rather than legalistic view of the problems created by the *Indian Act* changes. To date no one has lost membership in a settlement because of becoming an "involuntary Indian." There is a different attitude, however, toward members who apply for Indian status. The general feeling is that under the Constitution of Canada there are three mutually exclusive class of aboriginal peoples, Indians Inuit and Metis, and people have to decide which class they belong to. This approach has been adopted in the membership provisions of the new Mètis settlements legislation. In addition, an effort has been made to enable individual settlements to resolve hardship cases where the eligibility of an individual could be affected by actions outside that person's control. [35]

50. The chambers judge correctly reached the conclusion, based on a consideration of the Affidavit of the Applicant Dennis Cunningham, of January 24, 2007[36] that the parties to the Accord clearly understood what the effect of ss. 75(1) and 90(1) would be and agreed that only those who registered as Indians after November 1, 1990, would be subject to the effect of those provisions.[37] As part of the Accord, Bill 64 was introduced, which does not include the specific language of s. 75 and s. 90. Nonetheless on the basis of Dennis Cunningham's Affidavit it is clearly implied that the parties to the Accord were aware of the Indian prohibition for the new legislative regime to come. Bill 64, s. 77, does indicate that membership provisions were to be set

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[35] *Aboriginal Peoples and Government Responsibility, supra,* at 281: see also: C. Bell, *Contemporary Metis Justice: The Settlement Way* at 21-22.
[36] Affidavit of Dennis Cunningham at para. 6, A.R. Vol. II at 109.
[37] Reasons for Judgment of chambers judge at paras. 196-198, A.R. Vol. I at 39.

out through the transition process.[38] An examination of the Metis Settlements Transition Commission document reveals clearly that the membership "regulations" (which were to become statutory provisions in fact) were to be worked out by way of proposal from the Metis General Council involving consultation with government representatives. [39] So clearly the membership provisions, along with other aspects of the package, were the product of cooperation and consultation with the Métis settlements leadership engaged in on a partnership basis.[40]

51. Alberta has continued to work closely with the Metis Settlements General Council as part of the process of extending self-governance and to that end in 2004 enacted s. 222(1)(y), allowing the General Council to enact a policy dealing with the Indian prohibition issue, which could override s. 75 and s. 90 in that regard or could establish some alternative approach to the issue. No policy has been passed to date.[41]

52. The legislation analyzed in context reveals a concern that Métis identity could be compromised in the event settlement members were to acquire Indian status. The evidence of Archie Collins also reveals such a concern.[42] The considerations respecting membership that might apply to a large nation state like Canada are evidently different than those which apply to small, vulnerable, historically marginalized communities like the Métis settlements in this regard.

53. Just as Bill C-31 created issues surrounding membership for the settlements, so too the *McIvor* v. *Canada* (*Registrar of Indian & Northern Affairs*)[43] decision will create similar issues. The declaration that ss. 6(1)(a) and 6(1)(c) of the *Indian Act*, R.S.C. 1985, c. I-5 are to be of no force and effect will mean that greater potential exists for settlement members to seek out Indian status.

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[38] A.R. Vol. III at 102, 107.
[39] Metis Settlements Transition Commission, being part of Exhibit D-1 of the cross-examination of Dennis Cunningham, A.R. Vol. II at 59-62.
[40] See also: C. Bell, *Contemporary Metis Justice* at 96-97; Fred Martin, "Federal and Provincial Responsibility in the Metis Settlements of Alberta in Aboriginal Peoples and Government Responsibility" edited by D. Hawkes at 243, 275-281.
[41] A draft policy was introduced before the General Council and not voted on, see: Affidavit of Archie Collins of February 27, 2007 at paras. 2-3, A.R. Vol. V at 75-77.
[42] See Affidavit of Archie Collins of January 9, 2007 at paras. 5-9, A.R. Vol. I at 73-74..
[43] (2009) CarswellBC 843 (B.C.C.A.) at paras. 165-166.

54. It is submitted that it is also legitimate for Alberta and the Métis settlements to have regard for the fact that widespread availability to those who register as Indians would dilute the benefits available for those who are Métis members and who do not voluntarily acquire Indian status or are unable to do so. The chambers judge accepted the evidence of Archie Collins in this regard.[44] This evidence must be examined critically. Given that there are currently individuals who are refused membership at present due to their Indian status, it is apparent that if the impugned provisions are declared of no force, such individuals will be able to successfully apply for membership. Given that resources are fixed, the increase in membership would indeed dilute the benefits available.

55. The exclusion of those who have acquired Indian status will have unfortunate consequences but it is clear that this is a result of a conscious choice to obtain benefits under an alternative regime, the federal *Indian Act* and related law and policy, made in the context of the clear language of s. 90. It is submitted that the government and the Métis settlements are entitled to take into account the fact that the Respondents and others who voluntarily acquire Indian status are obtaining benefits under federal laws due to this legal status.[45] These benefits are both tangible and intangible.[46] The exclusion is rationally connected to an ameliorative purpose of the legislation.

56. A further factor relevant to assessing the impugned provisions in light of the ameliorative purpose is that they are supportive of the concept of Métis distinctiveness. Métis are one of the three distinct aboriginal groups referred to in s. 35. In *R.* v. *Powley*[47] this Court goes to considerable lengths to distinguish Métis from Indians.

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[44] See Reasons for Judgment of chambers judge, at para. 199, A.R. Vol. I at 39.
[45] See Affidavit of Cameron Henry at para. 8, A.R. Vol. V at 119, 161-175.
[46] See: *McIvor* v. *Canada (Registrar of Indian & Northern Affairs)* 2009 CarswellBC 843 (B.C.C.A.) at para. 70; *McIvor v. Canada (Registrar of Indian & Northern Affairs)* 2007 CarswellBC 1327 (B.C.S.C.) at 132-4, 138, 141-142.
[47] *R. v. Powley, supra,* at paras. 10, 11, 13. See also: *R. v. Powley* 2001 CarswellOnt. 480 (Ont. C.A.) at para. 136.

57. The authors of the *Report of the Royal Commission on Aboriginal Peoples* recognize the fact that Métis are a distinct people within Canadian society. They state:

> It is primarily culture that sets the Métis apart from other Aboriginal peoples. Many Canadians have mixed Aboriginal/non-Aboriginal ancestry, but that does not make them Métis or even Aboriginal. Some of them identify themselves as First Nations persons or Inuit, some as Métis and some as non-Aboriginal. What distinguishes Métis people from everyone else is that they associate themselves with a culture that is distinctly Métis.[48]

58. Further, as part of a partnered initiative with the Métis settlements, the impugned provisions reflect current Métis settlements standards for community acceptance. Although this case is clearly not concerned with the existence or lack of existence of s. 35 rights, nonetheless how courts have analyzed the issue of determining membership in a Métis community is of assistance by way of analogy. This Court determined in *Powley* that establishing Métis identity requires proof of community acceptance.[49] In the context of this matter, community acceptance is denied to those who voluntarily register as Indians

59. It is noted that those who acquired dual status prior to November 1, 1990 have been grandfathered under the legislative package and an issue arises as to the different treatment of those individuals compared with those who register after that date. Individuals may have acquired Indian status prior to that date on an involuntary basis or without realizing the consequences of obtaining status.[50] This places them in a different situation from that of the Respondents, and as the chambers judge noted, the parties to the Accord were aware that the new legislation would operate so as to terminate those who voluntarily acquired status.[51]

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[48] Report of the Royal Commission on Aboriginal Peoples, Vol. 4, Perspectives and Realities, 1996 at 202; see generally 199-202.
[49] *R. v. Powley, supra,* at para. 33; see also: *R. v Lizotte* 2009 CarswellAtla 1759 (Alta. Prov. Ct.).
[50] Fred Martin, "Federal and Provincial Responsibility in the Metis Settlements of Alberta," *supra,* at 279-281.
[51].Reasons for Judgment of chambers judge at paras. 196-198, A.R. Vol. I at 39; see also: Transitional Membership Regulation Alta. Reg. 337/907.

60. Given that we acknowledge that one can examine impugned provisions in relation to the ameliorative scheme, concerns expressed by the Court of Appeal about our position resulting in a reconsideration of cases like *Vriend*[52] are fully addressed. The under-inclusive provision in *Vriend*, unlike the provisions in our case, did not support and was not rationally connected to the overall scheme. Of course we would not suggest that the *Individual Rights Protection Act* was an ameliorative scheme for s. 15(2) purposes in any event.

61. It is submitted that the Court of Appeal erred in finding that the impugned provisions are designed to restrict or punish behaviour and thus do not qualify for s. 15(2) protection. That is not a fair assessment of the membership provisions, which are designed to protect Métis identity and distinctiveness and take account of the fact that individuals electing to obtain Indian status are accessing benefits under federal law.

62. In this regard, merely because the Respondents have not accessed the full range of benefits available under federal law and with respect to certain benefits may not be eligible, does not alter our position. Alberta and the Métis settlements are not required to scrutinize every individual who voluntarily acquires Indian status to determine which benefits are being received on an ongoing basis and to make membership distinctions based on the degree to which benefits are obtained.

63. For all of the above reasons, the impugned provisions are supportive of and rationally connected to the ameliorative purposes of the *MSA*.

E. Section 15(1)

64. In the alternative, if it is necessary to proceed to a consideration of s. 15(1), Alberta submits that the impugned provisions do not create a disadvantage by perpetuating prejudice or stereotyping.[53] These provisions must be considered in the context of the *MSA*, the companion legislation and the history of negotiations and partnership leading up to enactment of the

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[52] *Vriend v. Alberta*, [1998] 1 S.C.R. 493.
[53] *Ermineskin Indian Band and Nation v. Canada* [2009] 1 S.C.R. 222 at para. 188.

legislation. If for some reason the *MSA* does not meet the criteria for a proper ameliorative scheme under s. 15(2), nonetheless its important ameliorative purpose should be the first and foremost consideration for a s. 15(1) analysis. Membership criteria under an Act of this nature must be considered in light of the overall purpose of the Act and not in isolation. Therefore many of the submissions made in the context of s. 15(2) continue to be of relevance for the s. 15(1) inquiry and are relied upon again.

65. Differential treatment of different groups is not in and of itself a violation of s. 15(1). The Respondents must show that the legislative impact of the law is discriminatory.[54]

66. The Respondents must first demonstrate that the impugned provisions draw a distinction on an enumerated or analogous ground. The comparator group for this inquiry was seen in the courts below as Métis who have not registered as Indians under the *Indian Act* and who meet the other criteria for settlement membership. They found that the impugned provisions result in differential treatment between the Respondents and the comparator group and that this treatment is based on an analogous ground. The analogous ground was said to be registration as an Indian under the *Indian Act*. Assuming that these are correct conclusions, the inquiry moves to the next stage. We submit in any event that the differential treatment is not discriminatory.

67. The proper approach to s. 15(1) is summarized in *R.* v. *Kapp*, *supra*, and in *Ermineskin Indian Band*, *supra.* In particular the Court comments on the limitations of various statements in *Law*, particularly pertaining to human dignity as a concept but also the continuing validity of aspects of *Law*, including the use of the four contextual factors to determine if discrimination exists. This Court emphasized that the factors should not be read literally as if they were legislative dispositions, but as a way of focussing on the central concern of s. 15 identified in *Andrews*[55] – combating discrimination, defined in terms of perpetuating disadvantage and stereotyping.[56]

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[54] *Ermineskin Indian Band and Nation, supra,* at para. 188.
[55] *Andrews v. Law Society of B.C.*, [1989] 1 S.C.R. 143.
[56] *R. v. Kapp*, *supra*, at para. 24.

68. The four factors, 1) pre-existing disadvantage; 2) degree of correspondence between the differential treatment and the claimant group's reality; 3) ameliorative purpose of effect of the law or program; and 4) nature of the interest affected, can be looked to individually. The key, however, is certainly to make an overall assessment of whether the claimants can establish discrimination.

69. The membership criteria, including the impugned provisions, evidently exclude some Métis other than those who voluntarily acquire status. This underscores that membership is intended for those with ties to the community, and who must have a residence or prove they will have residence on a settlement. This does not necessarily mean that the impugned provisions do not discriminate but exclusion of some who are Métis is unavoidable.

70. It is acknowledged that the claimants suffer pre-existing disadvantage.

71. With respect to the issue of correspondence between the differential treatment and the claimants' reality, regard should be had for the fact that the Respondents voluntarily acquired status, entitling them to benefits under federal laws. We do not suggest that those benefits replace the range of benefits available under the *MSA*, but they do not need to do so. Further, as this Court concluded in *Lovelace*,[57] the mere fact of common need is insufficient to find discrimination. If only a common need were the norm, governments would be placed in an untenable position for the reasons discussed. In the context of the factor of a correspondence to needs and circumstances, this Court also pointed out the fact that First Nations are on a different path to self-government than other aboriginal groups and the casino project is a single stepping stone on that path. Similarly, in the context of the self-governance purpose of the *MSA*, the impugned provisions reflect the different situation of the claimants vis-à-vis others on the settlements who are unable to or do not choose to acquire Indian status. The Métis settlements consider the two groups of individuals to be in different circumstances in a manner directly relevant to the need to preserve Métis identity.

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[57] *Lovelace, supra,* at para. 75.

72. With respect to whether the law or program has an ameliorative purpose, the extent to which this factor will apply here will depend on the reason the argument under s. 15(2) has been rejected, in the event that it has – see *Kapp*, *supra*, at para 23. If, for instance, this Court rejects our argument that the impugned provisions have a rational connection to the overall ameliorative purpose then there may be little to add on this point for s. 15(1) purposes.

73. The situation in this case can be likened to that of *Lovelace*, *supra,* where this Court relied heavily on the ameliorative purpose of the program as a whole in concluding there was a lack of discrimination.

74. The points of comparison between the casino project at issue in *Lovelace* and our situation are that both involve a partnered initiative and reflect goals beyond mere financial benefits, including promoting self-government. As well, both are targeted ameliorative programs rather than a more comprehensive ameliorative programs, and are said to be underinclusive. As this Court states, exclusion from a targeted or partnership program is less likely to be associated with stereotyping or stigmatization.[58] That should be viewed as the case here. There is no reason to conclude that exclusion on the basis of acquiring a separate legal status involves stigmatizing the Respondents. It is acknowledged that there is a difference between how the two ameliorative programs were scrutinized insofar as the exclusion in *Lovelace* did not deal with membership criteria of a given First Nation while the exclusion here relates to membership criteria for the Métis settlements. That being said, it is evident that targeted groups like the First Nations in *Lovelace* will have membership criteria that exclude others.[59]

75. In considering the nature of the interest affected, one is instructed to evaluate the economic, constitutional and societal significance of the interest adversely affected.[60] Here the Respondents complain of a severe and localized interest, economic and otherwise, which is affected by the legislation. As in *Lovelace*, *supra,* the severe and localized interest here is

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[58] *Lovelace, supra,* at para. 86.

[59] For further consideration of points of comparison between the two situations and the importance of ameliorative purpose for the s. 15 inquiry, see Reasons of Judgment of chambers judge at paras. 182-185, A.R. Vol. I at 36. See also: *Chippewas of Nawash First Nation, supra.*

[60] *Lovelace, supra,* at paras. 88-89.

interwoven with the compelling interest in a fundamental social institution, namely recognition as aboriginal communities who in this case possess the right of self-governance under the laws of Alberta.

76. The Respondents have sought to draw comparisons between this case and *Corbiere* v. *Canada*[61] to establish a similar finding of discrimination. One notable difference is that the claimants in *Corbiere* were off-reserve First Nations members, some of whom clearly do not reside off-reserve by choice.[62] The claimants here have chosen to acquire Indian status. The majority in *Corbiere* stated that even if all band members living off-reserve had voluntarily chosen this way of life, they would still have the same cause of action.[63] The situation of off-reserve First Nations members nonetheless remains different for additional reasons. This Court speaks of the off-reserve members being denied full participation in the affairs of the bands to which they would continue to belong. The effect of the legislation would clearly have an impact on the exercise of their political rights. Making the decision to live off-reserve or being forced to do so is surely not comparable to seeking out a separate legal status, being the status of a distinctly different "aboriginal peoples" (s. 35) in light of the clear language of the membership provisions. This Court in *Corbiere* did not analyze membership provisions of the First Nation that might have consequences for those seeking out a separate legal status. In this regard, note s. 13 of the *Indian Act*, R.S.C. 1985, c. 1-5 which specifies that no person is entitled to have his name entered at the same time in more than one Band List maintained by the Department of Indians Affairs and Northern Development. In the context of concerns about protection of Métis identity, the act of obtaining Indian status is far more problematic for the Métis settlements than is the act of living off-reserve for First Nations.

77. This Court in *Ermineskin Indian Band*[64] placed the impugned provisions in a broader context, looking beyond simply the legislation in question and taking into account many considerations including aboriginal self-determination and autonomy. In this case, the Court must place the membership provisions in the broader context of the ameliorative purposes of the *MSA*.

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[61] *Corbiere v Canada (Minister of Indian and Northern Affairs)*, [1999] 2 S.C.R. 203.
[62] *Ibid.* per L'Heureux-Dubé J. at para. 62.
[63] *Ibid.* at para. 19.
[64] *Ermineskin Indian Band and Nation, supra*, at paras. 193-195.

F. Conclusion on Discrimination

78. The impugned provision considered in the context of the *MSA* as a whole and in light of the important objectives of extending self-governance and protection Métis identity, do not create a disadvantage by perpetuating prejudice or stereotyping and do not discriminate.

Section 2(d)

79. It is submitted that the Alberta Court of Appeal was correct in finding that that the Respondents' s. 2(d) *Charter* claim "was only argued in the most oblique terms" before the chambers judge,[65] and that there is an insufficient evidentiary foundation to conduct a proper s. 2(d) analysis in this case.[66]

80. The general s. 2(d) analysis established by this Honourable Court in *Dunmore v. Ontario (Attorney General)*[67] requires the Court to make two inquiries:

> 1. Do the activities sought to be protected fall within the range of activities protected by s. 2(d) of the *Charter*?
>
> 2. Has the impugned legislation, either in purpose or effect, interfered with those activities?[68]

81. In cases where underinclusion is alleged – as in the present case- *Dunmore* carves out an exception to the general rule that s. 2(d) does not require positive governmental action. The factors to be considered in such an analysis are as follows:[69]

> (1) Claims of underinclusion should be grounded in fundamental Charter freedoms rather than in access to a particular statutory regime.

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[65] *Ibid.*, at para. 57, A.R. Vol. I at 63.
[66] *Ibid.*, at para. 57.
[67] [2001] 3 S.C.R. 1016 at para. 13.
[68] Ibid., at para. 13.
[69] Summarized in *Baier v. Alberta* [2007] 2 S.C.R. 673 at para 27.

> (2) The claimant must meet an evidentiary burden of demonstrating that exclusion from a statutory regime permits a substantial interference with activity protected under s. 2, or that the purpose of the exclusion was to infringe such activity. The exercise of a fundamental freedom need not be impossible, but the claimant must seek more than a particular channel for exercising his or her fundamental freedoms.
>
> (3) The state must be accountable for the inability to exercise the fundamental freedom: "[U]nderinclusive state action falls into suspicion not simply to the extent it discriminates against an unprotected class, but to the extent it substantially orchestrates, encourages or sustains the violation of fundamental freedoms."

A. Settlement Membership as a Fundamental Freedom

82. In the Courts below, the Respondents argued that membership in the statutory entity known as the Peavine Métis Settlement is a fundamental freedom because it is grounded in the existence a Métis community prior to the enactment of the *MSA*.

83. The Attorney General of Alberta says that membership in the Peavine Métis Settlement cannot be construed as a fundamental freedom. As such, the Respondents are merely seeking access to a particular statutory regime; the claim cannot pass the first stage of the *Dunmore* analysis; and there is no obligation upon Alberta to ensure that registered Indians can become Métis settlement members.

84. In *Dunmore* and *Health Services and Support- Facilities Subsector Bargainin Assn. v. British Columbia*[70] ("*BC Health Services*") there was an ample evidentiary record before the Court establishing trade union formation and collective bargaining as fundamental freedoms preceding any statutory framework. Such evidence enabled a further determination as to whether governmental action (or inaction) was substantially interfering with those activities.

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[70] [2007] 2 S.C.R. 391.

85. In the present case, there is no evidence with respect to a community or specific cultural practices (religious, social, political, etc.) preceding enactment of the *MSA* or Métis legislation generally. As such, there is no evidence that membership in the Peavine Settlement can be considered as a freedom that precedes the *MSA* and no evidence that the provisions of the *MSA* are actually interfering with any pre-existing rights, freedoms, or cultural practices.

86. We do know that registered Indians were absolutely excluded from the Métis statutory framework from 1938 to November 1, 1990 pursuant to s. 2(a) of the *Metis Betterment Act*. Thus, the Peavine community existed with a statutory Indian prohibition for some 50 years prior to the *MSA*.

87. Membership in the Peavine Settlement cannot be characterized as a fundamental freedom in a broad sense because then presumably any person (including non-aboriginal persons) could claim a right to settlement membership and available statutory benefits at any time and the imposition of membership criteria could be construed as a substantial interference with that right.

88. Settlement membership cannot be characterized in a narrow sense as a fundamental freedom belonging only to those persons associated with the Peavine community in some manner. By definition, such a narrow construal is simply not a "fundamental freedom".

89. While this is not a s. 35 case, the analytical framework established by this Court in *Powley* assists in determining the question of whether settlement membership can be construed as any sort of right or freedom in itself.

90. In *Powley*, this Court found that aboriginal rights are communal rights that are exercised by virtue of an individual's membership in an historic community.

91. Thus, it is submitted that while community membership enables the exercise of communal rights and receipt of benefits there is no primordial right to membership itself. Indeed, determination of membership is precisely the issue.

92. Pursuant to *Powley* then, an individual who claims any right to benefits accruing as a result of membership in an aboriginal community must bring evidence of a community capable of asserting communal rights and the individual's connection to that community. In such cases, membership cannot be presumed because it is a factor to be considered in the rights claim itself.

93. In *Powley*, this Honourable Court looked to three broad factors as indicia of Métis identity in cases where individuals assert Métis rights: self-identity, ancestral connection, and community acceptance.[71]

94. In the present case, the impugned membership provisions of the *MSA* constitute the community acceptance factor enunciated in *Powley*. Individuals who registered as Indians after November 1, 1990, do not meet current settlement membership criteria and so do not meet the *Powley* community acceptance factor.

95. It is submitted that the present situation is not analogous to the situations arising in *Dunmore* and *BC Health Services* because there are no pre-existing rights or benefits existing outside the statutory regime. The rights being claimed in this case are not analogous to the rights of trade union formation or collective bargaining:

a. Membership is not a fundamental freedom that preceded the *MSA*.

b. The Peavine community existing prior to the *MSA* did not have a collective right to receive the benefits now available under the *MSA* simply by virtue of their association.

c. There is no evidence that members of the Peavine community garnered any of the specific benefits analogous to the benefits now accruing under the statutory framework of the *MSA*, ie., no evidence of pre-existing rights .

d. There is no evidence that the present statutory framework is substantially interfering with any pre-existing rights.

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[71] Ibid., at para. 30.

B. Substantial Interference

96. It is submitted that the membership provisions of the *MSA* do not substantially interfere with the associational rights of Métis persons.

97. The *MSA* does not instantiate the ability of Métis persons to associate. There is a distinction to be made between the broad class of persons who meet the general definition of "Métis" under the *MSA* ("a person of aboriginal ancestry who identifies with Métis history and culture") and the sub-class of persons who meet the specific criteria for Métis settlement membership under the *MSA*.

98. The *MSA* merely provides certain statutory benefits to the sub-class of Métis persons in the province of Alberta who meet settlement membership criteria.

99. The *MSA* precludes Métis persons who choose to register as Indians from becoming settlement members at this time but this can be altered by way of General Council policy.

C. State Accountability

100. The present situation is distinguishable from *Dunmore* in that the *MSA* does not instantiate the ability of Métis persons to associate.

101. There is a broad class of Métis persons who do not meet the specific criteria for settlement membership. The *MSA* does not interfere with the ability of non-settlement Métis to associate. As such, there is no positive obligation upon government to include the general class of non-settlement Métis within the purview of the Act.

Section 7

102. In written submissions to the Court of Appeal the Attorney General essentially assumed that if the s. 7 liberty interest was engaged, any limitation upon s. 7 *Charter* rights of individuals who had registered as Indians would not be grossly disproportionate to the state interest of securing a Métis land base, preserving and enhancing Métis culture, and furthering Métis self-

governance. The provisions therefore are in accordance with the principles of fundamental justice.

103. The Attorney General now takes the position that the s. 7 liberty interest is not engaged.

104. Section 7 analysis has two stages:[72]

1. There must be a finding the claimant has been deprived of life, liberty, or security of the person.

2. The deprivation must be contrary to the principles of fundamental justice.

105. In the Courts below, the Respondents' claimed that an individual's choice of residence is protected under s. 7 of the *Charter* and that the deprivation in this case has been both arbitrary and grossly disproportionate to the state objectives.

106. The Attorney General says that choice of residence is not a protected right, that there is no evidence of an actual deprivation in this case, and that a potential loss of residence is not arbitrary or grossly disproportionate to the objectives of securing a Métis land base, preservation and enhancement of Métis culture, and furtherance of Métis self-governance.

A. Deprivation of Life, Liberty, or Security of the Person

107. With respect to the first stage of s. 7 analysis, it is submitted that choice of residence is not protected by s. 7 of the *Charter*. There is no case law that clearly supports such a proposition.

108. In *Godbout v. Longueuil (City)*[73] only three of the nine justices of this Court addressed the issue and agreed that s. 7 protects an individual's choice of residence (Laforest J. writing, L'Heureux Dube J. and McLachlin J. (as she was then) concurring). With respect, McLachlin C.J.C is the only member of that minority decision still sitting on this Court.

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[72] R v. Beare [1988] 2 S.C.R. 387 at para. 28.
[73] [1997] 3 S.C.R. 844.

109. While choice of residence may indeed be an important personal choice it cannot *prima facie* constitute a protected right because it is obviously subject to the various exigencies and practicalities of an individual's circumstances.

110. Pursuant to s. 92 *MSA* individuals who have lost settlement membership may still remain resident on the settlement. Moreover, there is no evidence that any of the Respondents have actually been forced to leave the settlement as a result of losing their membership.

B. Arbitrariness

111. As stated by this Court in *Chaoulli v. Quebec*[74], a law is arbitrary where it bears no relation to, or is inconsistent with, the objective that lies behind it.[75]

112. In order to establish that a law is arbitrary the onus is upon the claimant to demonstrate that there is no real relationship – either theoretical or factual- between the limitation imposed by the law and the legislative goal. [76]

113. In the present case then, the onus is upon the Respondents to establish that there is no real relation between the so-called "Indian prohibition" criteria and the stated legislative purpose of securing a Métis land base, preserving and enhancing Métis culture, and furthering Métis self-governance.

114. The provisions of the *MSA* are <u>not</u> arbitrary:

a. Section 90(1)(a) *MSA* provides for the <u>automatic</u> termination of settlement membership when an individual has voluntarily registered as an Indian after November 1, 1990.

b. Section 90(2) provides that the Minister <u>must</u> remove such individuals from the membership list upon notification from the settlement council and verification of the facts.

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[74] [2005] 1 S.C.R. 791.
[75] Ibid., at para 130.
[76] Ibid., at para 131.

c. The legislation does not preclude the ability of such individuals to remain settlement members: Section 222(1)(y) *MSA* allows the General Council to pass a policy negating both the effect of s. 90 and the Indian prohibition generally.

115. Any arbitrariness in the present matter is a result of human agency: Both the Appellants and Respondents agree that the present matter is purely the result of a political purge in which the local Peavine Settlement Council used the impugned legislation as a sword against the Respondents.

C. Gross Disproportionality

116. In R v. *Malmo-Levine*[77], this Court stated that where the state is pursuing a legitimate interest the onus is upon the claimant to demonstrate that the legislative measures in question are "grossly disproportionate" to that interest.[78]

117. It is submitted that the *MSA* was a partnered initiative intended to enable Métis self-governance, it enables General Council to nullify the effect of Indian registration, and it is aimed at Aboriginal adults. Given these mitigating factors, the so-called "Indian prohibition" is not *grossly* disproportionate to the purposes of the legislation.

Section 1 of the *Charter*

118. The applicability test, being the *Oakes* test as modified by subsequent decisions, was described by Iacobucci J. in *Egan*.[79]

A. Pressing and Substantial Objective

119. The impugned provisions, considered in the context of the *Act* as a whole, fulfill pressing and substantial objectives. These are: (1) providing Métis settlements with a means of controlling their membership, being an objective relating to the broader purpose underlying the *MSA* of

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[77] [2003] 3 S.C.R. 571.
[78] Ibid., at para. 143.
[79] *Egan v. Canada*, [1995] 2 S.C.R. 513 at para. 182.

enabling Métis settlements to attain self-governance and (2) to aid in protecting and distinguishing Métis culture and identity from First Nation culture and identity.

120. The two objectives operate in tandem. The evidence does show that the *MSA*, including the membership provisions, were worked out in partnership with the Métis leadership and through consultation and are an expression of self-governance. Enabling the Métis to attain self-governance considered in combination with the second objective, to aid in protecting and distinguishing Métis culture and identity, is pressing and substantial. The second objective is clear from a consideration of the history of the negotiations leading up to the *MSA* and the clear language of the impugned provisions.

121. The Court of Appeal considered that excluding individuals who identify as Métis from participating in a Métis settlement community is, arguably, antithetical to the objectives of the legislation as a whole.[80] This is denied. The objective of protecting and distinguishing Métis culture from First Nation culture is not met if a widespread movement toward acquiring Indian status occurs on the part of prospective and existing members. Alberta and the Métis settlements are entitled to take into account the potential for widespread movement in this regard and the inquiry should not focus only on the situation of the eight individuals.

122. The Court of Appeal found that the fact that other members who similarly registered as Indians are not currently excluded further undermines the legitimacy of this goal as a pressing and substantial objective. It is difficult to perceive why this should be so. The question of whether there is a pressing objective should not be resolved by examining what actions settlements have or have not taken. The evidence does not disclose how many such individuals there are nor the precise reasons why settlements have not requested administrative action by the Minister (and of her delegate the Registrar) to formalize the termination of membership occasioned by individuals who have registered as Indians.

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[80] Reasons for Judgment at para. 63, *supra.*

B. Proportionality

123. If one accepts the objectives outlined above, then the impugned provisions are indeed rationally connected to them. With respect to the objective of enabling self-governance and providing Métis settlements with a means of controlling membership, the impugned provisions, certainly operate to allow considerable scope for the settlements to develop policies respecting dual status. Given the lack of a policy at present which might limit or override the impugned provisions, it is evident that in exercising self-governance at the present time the settlements consider it important to exclude those who obtain Indian status in order to fulfill the objective of protecting and distinguishing Métis culture. It is submitted that a law preventing the settlements from excluding those who acquire Indian status would not be rationally connected to the objectives.

124. The impugned provisions impair the rights of the claimants no more than is reasonably necessary, given the likely consequences of removing from the settlements the power to exclude those who register as Indians.

125. There is a proportionality between the effect of the measure and its objective. The attainment of the legislative goal and its statutory effects is not outweighed by the abridgement of the right.[81] This is so given the concerns of this vulnerable and historically disadvantaged group to maintain its distinctiveness and cultural identity. Also, government should be entitled to take into account the fact that the claimants have chosen to attain a separate legal status entitling them to benefits under another regime.

PART IV – COSTS

126. The Appellants do not seek costs. In the event the Respondents seek costs, then the Appellants argue that the substantial sum of monies they have paid or agreed to pay to the Respondents for their fees and disbursements in relation to this appeal satisfies any requirement to pay costs. Therefore the Respondents should not have costs in this Court. Further, if any order is

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[81] For a recent consideration of this step, as well as the earlier steps in the modified *Oakes* test, see: *Alberta* v. *Hutterian Brethern of Wilson Colony* 2009 CarswellAlta. 1094 (S.C.C.) at paras. 75-85.

made, the Appellants request that the amounts they have paid or have agreed to pay to date should be deducted from amounts otherwise payable after taxation.

PART V – ORDER SOUGHT

127. The Crown in Right of Alberta asks that this appeal be allowed and the Order of the Alberta Court of Appeal be set aside. If the Respondents are successful, then the answers to the constitutional questions should be given that s. 75(2)(a) and s. 90(1)(a) infringe the *Canadian Charter of Rights and Freedoms* and that infringement is not a reasonable limit under s. 1 of the *Canadian Charter of Rights and Freedoms.*

ALL OF WHICH IS RESPECTFULLY SUBMITTED, this 21 day of July, 2010.

Per: _____
Robert Normey.
Counsel for the Appellants

Per: _____
David Kamal
Counsel for the Appellants

PART VI - LIST OF AUTHORITIES

A. CASES

PART VII – RELEVANT LEGISLATION

37. *Metis Settlements Act,* R.S.A. 2000, c. M-14